AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Individual Rights/Personal Freedom and Public Morality

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Poe v. Ullman, 367 U.S. 497 (1961)

The constitutional law of standing provides a good mirror for observing changing notions of judicial power during the New Deal/Great Society Era. Many liberal justices were at first reluctant to open the door too widely for constitutional litigation. By the late 1960s, however, many traditional hurdles to constitutional litigation had been removed. Birth control, in addition to reapportionment, was an area in which courts began to actively make substantive rulings on matters that had formerly been resolved on procedural grounds.

Connecticut in 1879 passed a law banning the use of contraception and punishing any "person who assists, abets, [or] counsels" the use of birth control. As the popularity of birth control increased, doctors and patients sought to test the constitutionality of this restriction. In State v. Nelson *(1940), the Supreme Court of Connecticut sustained the state law. Immediately after that decision, the state prosecutor agreed to drop all charges against persons running a birth control clinic in Waterbury if they agreed to close the clinic. The agreement was made. The Waterbury clinic closed, as did every other birth control clinic in the state. Private physicians continued to prescribe birth control for their private patients without suffering legal consequences. Several forms of birth control were sold in drug stores.*

Shortly after Nelson *was decided, Dr. Wilder Tileston asked Connecticut courts to declare that bans on birth control were constitutionally required to have an exception in cases when pregnancy threatened life or health. The Supreme Court of Connecticut in* Tileston v. Ullman *(1943) rejected this claim on the ground that "there is another method, positive and certain in result" for protecting maternal health: "abstention from intercourse." The Supreme Court of the United States refused to adjudicate Tileson's appeal on the merits. The unanimous per curiam opinion of the justices asserted that Tileston lacked "standing to secure an adjudication of his patients' constitutional right to life." In short, because his life was not in jeopardy, he had no standing to bring a lawsuit concerning the lack of a health exception in the Connecticut contraception statute.*

Proponents of birth control in the late 1950s began another effort to challenge the constitutionality of the Connecticut ban on the use of birth control. Dr. C. Lee Buxton of the Yale Medical School and Professor Fowler Harper of the Yale Law School sought to construct a test case that would overcome the standing hurdle announcing in Tileson. *To do so, Buxton recruiting several women as plaintiffs, all of whom would personally suffer injuries if not allowed access to birth control. One had medical reasons to fear death if she again became pregnant, two had medical reasons to believe that their children would suffer from severe medical disorders likely to be fatal almost immediately, and one had economic reasons for avoiding pregnancy. The Supreme Court of Connecticut again rejected their request for a declaratory judgment forbidding their prosecution for using contraception. The women immediately appealed that decision to the U.S. Supreme Court. As their health was personally at stake, they thought they met the procedural requirements of* Tileston.

The Supreme Court by a 5-4 vote ruled that the plaintiffs lacked standing to challenge the ban on birth control. Justice Frankfurter's opinion maintained that, in the absence of an actual threat of prosecution, the plaintiffs could not demonstrate the threat of actual injury necessary for standing. Why does Frankfurter believe the threat of prosecution necessary if the law was on the books? Was this a strategic means for ducking a decision or a legitimate use of longstanding standing doctrine? Justice Brennan provided the crucial fifth vote to reject standing. Was this also a strategic choice? Given that Brennan voted far more liberally than Frankfurter, might he have had different strategic reasons for denying standing?

Four years later, in Griswold v. Connecticut *(1965), the justices ruled that married couples had a right to use birth control. The case was brought after Estelle Griswold, the director of Planned Parenthood in Connecticut, was convicted for prescribing birth control. No justice raised any standing issue. As you read the opinion below,*

consider whether any good reason existed for requiring proponents of birth control to construct a case that would satisfy the standing requirement. You might also consider whether Justice Frankfurter, who left the Court in 1962, would have found a standing barrier in Griswold *on either legal principle or because he did not want the Court to be making this constitutional decision.*

JUSTICE FRANKFURTER announced the judgment of the Court and delivered an opinion, with which THE CHIEF JUSTICE, JUSTICE CLARK and JUSTICE WHITTAKER join.

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Appellants' complaints in these declaratory judgment proceedings do not clearly, and certainly do not in terms, allege that appellee Ullman threatens to prosecute them for use of, or for giving advice concerning, contraceptive devices. The allegations are merely that, in the course of his public duty, he intends to prosecute any offenses against Connecticut law, and that he claims that use of and advice concerning contraceptives would constitute offenses. The lack of immediacy of the threat described by these allegations might alone raise serious questions of non-justiciability of appellants' claims. . . . But even were we to read the allegations to convey a clear threat of imminent prosecutions, we are not bound to accept as true all that is alleged on the face of the complaint and admitted, technically, by demurrer, any more than the Court is bound by stipulation of the parties. . . . Formal agreement between parties that collides with plausibility is too fragile a foundation for indulging in constitutional adjudication.

The Connecticut law prohibiting the use of contraceptives has been on the State's books since 1879. During the more than three-quarters of a century since its enactment, a prosecution for its violation seems never to have been initiated, save in *State v. Nelson* (CT 1940). . . . The circumstances of that case, decided in 1940, only prove the abstract character of what is before us. . . . Neither counsel nor our own researches have discovered any other attempt to enforce the prohibition of distribution or use of contraceptive devices by criminal process. The unreality of these law suits is illumined by another circumstance. We were advised by counsel for appellants that contraceptives are commonly and notoriously sold in Connecticut drug stores. Yet no prosecutions are recorded; and certainly such ubiquitous, open, public sales would more quickly invite the attention of enforcement officials than the conduct in which the present appellants wish to engage—the giving of private medical advice by a doctor to his individual patients, and their private use of the devices prescribed. The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis. What was said in another context is relevant here. "Deeply embedded traditional ways of carrying out state policy . . ."—or not carrying it out—"are often tougher and truer law than the dead words of the written text." . . .

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. . . It is clear that the mere existence of a state penal statute would constitute insufficient grounds to support a federal court's adjudication of its constitutionality in proceedings brought against the State's prosecuting officials if real threat of enforcement is wanting. . . . If the prosecutor expressly agrees not to prosecute, a suit against him for declaratory and injunctive relief is not such an adversary case as will be reviewed here. . . . Eighty years of Connecticut history demonstrate a similar, albeit tacit agreement. The fact that Connecticut has not chosen to press the enforcement of this statute deprives these controversies of the immediacy which is an indispensable condition of constitutional adjudication. This Court cannot be umpire to debates concerning harmless, empty shadows. To find it necessary to pass on these statutes now, in order to protect appellants from the hazards of prosecution, would be to close our eyes to reality.

. . . We cannot agree that if Dr. Buxton's compliance with these statutes is uncoerced by the risk of their enforcement, his patients are entitled to a declaratory judgment concerning the statutes' validity. And, with due regard to Dr. Buxton's standing as a physician and to his personal sensitiveness, we cannot accept, as the basis of constitutional adjudication, other than as chimerical the fear of enforcement of provisions that have during so many years gone uniformly and without exception unenforced.

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JUSTICE BRENNAN, concurring.

I agree that this appeal must be dismissed for failure to present a real and substantial controversy which unequivocally calls for adjudication of the rights claimed in advance of any attempt by the State to curtail them by criminal prosecution. I am not convinced, on this skimpy record, that these appellants as individuals are truly caught in an inescapable dilemma. The true controversy in this case is over the opening of birth-control clinics on a large scale; it is that which the State has prevented in the past, not the use of contraceptives by isolated and individual married couples. It will be time enough to decide the constitutional questions urged upon us when, if ever, that real controversy flares up again. Until it does, or until the State makes a definite and concrete threat to enforce these laws against individual married couples—a threat which it has never made in the past except under the provocation of litigation—this Court may not be compelled to exercise its most delicate power of constitutional adjudication.

JUSTICE DOUGLAS, dissenting.

These cases are dismissed because a majority of the members of this Court conclude, for varying reasons, that this controversy does not present a justiciable question. That conclusion is too transparent to require an extended reply. The device of the declaratory judgment is an honored one. Its use in the federal system is restricted to "cases" or "controversies" within the meaning of Article III. . . . The need for this remedy in the federal field was summarized in a Senate Report as follows:

> ". . . it is often necessary, in the absence of the declaratory judgment procedure, to violate or purport to violate a statute in order to obtain a judicial determination of its meaning or validity."

If there is a case where the need for this remedy in the shadow of a criminal prosecution is shown, it is this one. . . . [I]t is alleged—and admitted by the State—that the State's Attorney intends to enforce the law by prosecuting offenses under the laws.

A public clinic dispensing birth-control information has indeed been closed by the State. Doctors and a nurse working in that clinic were arrested by the police and charged with advising married women on the use of contraceptives. That litigation produced *State* v. *Nelson* . . . which upheld these statutes. . . .

The Court refers to the *Nelson* prosecution as a "test case" and implies that it had little impact. Yet its impact was described differently by a contemporary observer who concluded his comment with this sentence: "This serious setback to the birth control movement [the *Nelson* case] led to the closing of all the clinics in the state, just as they had been previously closed in the state of Massachusetts." At oral argument, counsel for appellants confirmed that the clinics are still closed. In response to a question from the bench, he affirmed that "no public or private clinic" has dared give birth-control advice since the decision in the *Nelson* case.

These, then, are the circumstances in which the Court feels that it can, contrary to every principle of American or English common law, go outside the record to conclude that there exists a "tacit agreement" that these statutes will not be enforced. No lawyer, I think, would advise his clients to rely on that "tacit agreement." No police official, I think, would feel himself bound by that "tacit agreement." After our national experience during the prohibition era, it would be absurd to pretend that all criminal statutes are adequately enforced. But that does not mean that bootlegging was the less a crime. . . . In fact, an arbitrary administrative pattern of non-enforcement may increase the hardships of those subject to the law. . . .

When the Court goes outside the record to determine that Connecticut has adopted "The undeviating policy of nullification . . . of its anti-contraceptive laws," it selects a particularly poor case in which to exercise such a novel power. This is not a law which is a dead letter. Twice since 1940, Connecticut has re-enacted these laws as part of general statutory revisions. Consistently, bills to remove

the statutes from the books have been rejected by the legislature. In short, the statutes—far from being the accidental left-overs of another era—are the center of a continuing controversy in the State.

. . . [O]n oral argument, counsel for the appellee stated on his own knowledge that several proprietors had been prosecuted in the "minor police courts of Connecticut" after they had been "picked up" for selling contraceptives. The enforcement of criminal laws in minor courts has just as much impact as in those cases where appellate courts are resorted to. The need of the protection of constitutional guarantees, and the right to them, are not less because the matter is small or the court lowly. . . .

What are these people—doctor and patients—to do? Flout the law and go to prison? Violate the law surreptitiously and hope they will not get caught? By today's decision we leave them no other alternatives. It is not the choice they need have under the regime of the declaratory judgment and our constitutional system. It is not the choice worthy of a civilized society. A sick wife, a concerned husband, a conscientious doctor seek a dignified, discrete, orderly answer to the critical problem confronting them. We should not turn them away and make them flout the law and get arrested to have their constitutional rights determined. . . .

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JUSTICE HARLAN, dissenting.

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The policy referred to [on justiciability] is one to which I unreservedly subscribe. Without undertaking to be definitive, I would suppose it is a policy the wisdom of which is woven of several strands: (1) Due regard for the fact that the source of the Court's power lies ultimately in its duty to decide, in conformity with the Constitution, the particular controversies which come to it, and does not arise from some generalized power of supervision over state and national legislatures; (2) therefore it should insist that litigants bring to the Court interests and rights which require present recognition and controversies demanding immediate resolution; (3) also it follows that the controversy must be one which is in truth and fact the litigant's own, so that the clash of adversary contest which is needed to sharpen and illuminate issues is present and gives that aid on which our adjudicatory system has come to rely; (4) finally, it is required that other means of redress for the particular right claimed be unavailable, so that the process of the Court may not become overburdened and conflicts with other courts or departments of government may not needlessly be created, which might come about if either those truly affected are not the ones demanding relief, or if the relief we can give is not truly needed.

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First: It should by now be abundantly clear that the fact that only Constitutional claims are presented in proceedings seeking *anticipatory* relief against state criminal statutes does not for that reason alone make the claims premature. . . .

Second: I do not think these appeals may be dismissed for want of "ripeness" as that concept has been understood in its "varied applications." . . . [T]here is no circumstance besides that of detection or prosecution to make remote the particular controversy. . . .

Third: This is not a feigned, hypothetical, friendly or colorable suit such as discloses "a want of a truly adversary contest." . . .

In the present appeals no more is alleged or conceded than is consistent with undisputed facts and with ordinary practice in deciding a case for anticipatory relief on demurrer. I think it is unjustifiably stretching things to assume that appellants are not deterred by the threat of prosecution from engaging in the conduct in which they assert a right to engage, or to assume that appellee's demurrer to the proposition that he asserts the right to enforce the statute against appellants at any time he chooses is anything but a candid one.

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As far as the record is concerned, I think it is pure conjecture, and indeed conjecture which to me seems contrary to realities, that an open violation of the statute by a doctor (or more obviously still by a birth-control clinic) would not result in a substantial threat of prosecution. . . .

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. . . I fear that the Court has indulged in a bit of sleight of hand to be rid of this case. It has treated the significance of the absence of prosecutions during the twenty years since *Nelson* as identical with that of the absence of prosecutions during the years before *Nelson*. It has ignored the fact that the very purpose of the *Nelson* prosecution was to change defiance into compliance. It has ignored the very possibility that this purpose may have been successful. The result is to postulate a security from prosecution for open defiance of the statute which I do not believe the record supports.

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. . . Despite the suggestion of a "tougher and truer law" of immunity from criminal prosecution and despite speculation as to a "tacit agreement" that this law will not be enforced, there is, of course, no suggestion of an estoppel against the State if it should attempt to prosecute appellants. Neither the plurality nor the concurring opinion suggests that appellants have some legally cognizable right not to be prosecuted if the statute is Constitutional. What is meant is simply that the appellants are more or less free to act without fear of prosecution because the prosecuting authorities of the State, in their discretion and at their whim, are, as a matter of prediction, unlikely to decide to prosecute.

Here is the core of my disagreement with the present disposition. . . . I cannot agree that [the married couple's] enjoyment of this privacy is not substantially impinged upon, when they are told that if they use contraceptives, indeed whether they do so or not, the only thing which stands between them and being forced to render criminal account of their marital privacy is the whim of the prosecutor. . . . All that stands between the appellants and jail is the legally unfettered whim of the prosecutor and the Constitutional issue this Court today refuses to decide.

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