PRELUDE TO THE GRISWOLD DECISION
PART ONE --- THE TILESTON CASE

Excerpt from
Just Say No: Birth Control in the Connecticut Supreme Court Before Griswold v. Connecticut (75 IOWA LAW REV. 915 (1990))

Mary L. Dudziak

Tileston V Ullman 1943
In 1879, the Connecticut State Legislature passed a statute that would prove to be the most restrictive birth control law in the country.4° Whereas most states with birth control statutes regulated sales and advertising, Connecticut forbade the *use* of contraceptives.41 Standing alone, a statute restricting the *use* of birth control would obviously be difficult to enforce. But Connecticut had another statute that would prove to be crucial in its effort to restrict birth control usage: a general accessory statute. Under Connecticut law "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."42

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Dr. Wilder Tileston, a professor at the Yale Medical School, brought a declaratory judgment action to determine [these questions]*:* first, whether the state statute had an implied exception when pregnancy would endanger a woman's life or health, and second, if there was no exception, whether the statute was constitutional.

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[The Connecticut state Supreme Court understood the statute] to ban all uses of contraceptives, even when pregnancy endangered a woman's life, the court then turned to the question of whether such a statute violated the state and federal constitutions. The court noted that the state argued that contraceptives were "not the only method open to the physician for preventing conception." The consensus of medical opinion was that the safest way for doctors to aid patients for whom pregnancy was life-threatening was to prescribe contraceptives . However,

[t]he state claims that there is another method , positive and certain in result. It is abstention from intercourse in the broadest sense-that is, absolute abstention . If there is one remedy, rea- sonable, efficacious and practicable , it cannot fairly be said that the failure of the legislature to include another reasonable remedy is so absurd or unreasonable that it must be presumed to have intended the other remedy also."

The case came down to the question of "whether abstinence from intercourse is a

reasonable and practicable method of preventing the unfortunate consequences . .. . Do the frailties of human nature and the uncertainties of human passions render it impracticable?" The court believed that "[t]hat is a question for the legislature , and we cannot say it could not believe that the husband and wife would and should refrain when they both knew that intercourse would very likely result in a pregnancy which might bring about the death of the wife ."72 In framing the issue this way, the court implied that the unreasonable behavior was on the part of married couples who had sex when pregnancy would be harmful to the woman, rather than on the part of the state legislature . A result of the court's ruling was that Connecticut law on contraceptives was more restrictive than Connecticut law on abortion, which allowed abortion when it was necessary to preserve a woman's life.73

Justices Christopher Avery and Newell Jennings dissented from the court's ruling. Justice Avery wrote that

[i]t is argued that in all cases it is possible for a married woman to avoid conception by a policy of continence and abstention from marital intercourse . Even if it be conceded , that such a course of conduct is reasonably practicable, taking into consideration the propensities of human nature, the resort to such a practice would frustrate a fundamental of the marriage state. The alternative suggested would tend in many cases to cause unhappiness and discontent between parties lawfully married, would stimulate unlawful intercourse, promote prostitution, and increase divorce.74

The dissenters believed that "[a] proper respect for the legislature forbids an interpretation [of the statute] which would . . be so contrary to human nature."

Tileston appealed to the United States Supreme Court , but the case was dismissed on standing grounds. Tileston had not alleged that his own liberty, or property rights were infringed by the statutes. "The sole constitutional attack ... is confined to their deprivation of life-obviously not appellant's but his patients.' The doctor's patients were not parties to the suit, however, and there was "no basis on which we can say that he has standing to secure an adjudication of his patients ' constitutional right to life, which they do not assert in their own behalf."76

With the Supreme Court's dismissal of *Tileston,* the Connecticut court's interpretation of the state law remained in force. This did not mean that all uses of birth control in Connecticut were halted. The effects of the ban were more subtle but still pernicious. Some forms of contraceptives were easy to purchase in drugstores. If sold "for the prevention of disease" or for "feminine hygiene," and not for contraceptive purposes, condoms, douches, suppositories and spermicide were not illegal." Condoms could be used to prevent venereal disease, but diaphragms, which were more effective for contraception, could not, so the restrictions meant that only less effective forms of birth control were readily available. As Planned Parenthood General Counsel Harriet Pilpel put it, "the chief result of the most restrictive laws has been to put a premium on the use of inferior methods free from the supervision of the medical profession."

PRELUDE TO THE GRISWOLD DECISION
PART TWO --- THE ULLMAN CASE

An excerpt from the
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Short Essay: From Immutable to Existential
Author: Aaron J. Shuler

Poe v. Ullman: a revival starts

The Poe decision, handed down in 1961, involved ...actions that were brought in state court in Connecticut challenging statutes that prohibited giving advice with regard to contraception and its use. The statutes were attacked by different married couples, one of which consisted of a wife who had had three consecutive pregnancies terminate with the child dying shortly after birth due to [*250] congenital abnormalities. Additional plaintiffs in the declaratory suits included another married couple that had faced egregious physical, psychological and emotional trauma due to complicated pregnancies, and a doctor that sought to counsel the use of contraception.

The challenged Connecticut law had been in effect since 1879, yet prosecutions pursuant to the law were unknown but for one instance that was adjudicated as a test case in 1940. The State of Connecticut dismissed the complaint and no criminal prosecution had been undertaken since. Seizing on what the Court referred to as "the unreality of these lawsuits," Justice Frankfurter refused to address the merits of Poe and instead dismissed the suits based on lack of justiciability. A majority of the Court agreed that there was no "case or controversy" within the meaning of Article III of the Constitution due to the implausibility of anyone actually being prosecuted in Connecticut for using contraception or recommending its use.

Justice Douglas, however, felt that the implausibility of prosecution was not as strong as the majority indicated, n171 and the subject matter and attendant consequences were too grave to require the plaintiffs to break the law to challenge its legitimacy. n172 He used his dissenting opinion to articulate that there was indeed a justiciable question, and it concerned the Connecticut law depriving plaintiffs of "liberty without due process of law, as [the] concept is used in the Fourteenth Amendment." n173 More importantly, Justice Douglas announced what would become a variation of one of the standards used to determine whether an unenumerated right concerning liberty as guaranteed by substantive due process exists. Justice Douglas' was a broad, organic, conceptual standard. He stated that substantive due process removed from state regulation those matters "implicit in the concept of ordered liberty." n174

Further, this concept was "a living one that guaranteed basic rights, not because they had become petrified as of any one time, but because due process follows the advancing standards of a free society as to what is deemed reasonable and right." n175 It is to be

applied, according to this view, "to facts and circumstances as they arise, the cases falling on one side of the line or the other as a majority of nine justices appraise conduct as either implicit in the concept or ordered [*251] liberty or as lying within the confines of that vague concept." n176

Applying this standard that he himself considered to be vague, Justice Douglas noted that the Connecticut law's aim at use of contraception as opposed to mere sale or manufacture of it implicated the intrusion into the relationship between man and wife. Further, "it reached the intimacies of the marriage relationship." n177 What offended Justice Douglas most was the practical requisite in enforcing such a law. He warned that we could "reach the point where search warrants issued and officers appeared in bedrooms to find out what went on." n178 Making use a crime meant the intolerable to Justice Douglas: that "the State had entered the innermost sanctum of the home," and "if it could make the law, it could enforce it," because proof of its violation necessarily involved an inquiry into the relations between man and wife." Such actions by the State constituted "an invasion of the privacy that is implicit in a free society." n179

Justice Harlan dissented separately yet similarly and much more extensively to emphasize the gravity of the matter ..... He too wrote that the Connecticut legislation violated the Fourteenth Amendment as an invasion of the most "intimate concerns of an individual's personal life" (emphasis added) despite there being "no explicit language [in] the Constitution" announcing as such. n180 Nevertheless, Justice Harlan agreed with Justice Douglas that substantive due process was a broad, flexible concept that protected individuals from otherwise democratic legislation that deprived them of life, liberty or property no matter the procedural fairness involved. Procedural due process, with its roots in the Magna Carta's per legem terrae, "had in the [United States] become bulwarks also against arbitrary legislation," thus establishing substantive due process. n181

Justice Harlan continued to expand the notion that substantive due process in the Fourteenth Amendment is related to the rights found in the [*252] first eight amendments. Further, Justice Harlan argued that the Court had a history of stating that the Fourteenth Amendment did not merely enforce the enumerated rights in the first eight amendments against the States. n182 Aside from making those expressly articulated rights applicable against the States, an extra component consisting of liberty, however ambiguously expressed, was enshrined.

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[Harlan] was certain that the Connecticut statute deprived the plaintiffs of substantial liberty "in carrying on the most intimate of all personal relationships, and that it [did] so arbitrarily and without any rational, justifying purpose" n190 (emphasis added).