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Essay

Griswold's Criminal Law

MELISSA MURRAY

This Symposium commemorates the fiftieth anniversary of Griswold v. Connecticut. *In the fifty years since it was announced,* Griswold*'s logic has underwritten a broader commitment to reproductive rights—one that has expanded the right to contraception and secured a woman's right to choose an abortion. Amidst these developments it is easy to overlook another aspect of* Griswold*'s history.* Griswold *also was part of a criminal law reform effort that sought to reimagine the state's authority in the intimate lives of citizens and limit the use of criminal law as a means of enforcing moral conformity. In this regard,* Griswold *shares roots with the Model Penal Code, the Wolfenden Report, and the Hart-Devlin Debates—all of which arose in a social and legal milieu in which the question of whether the state could—or should—police intimate conduct through the criminal law was a subject of considerable debate. In overlooking this aspect of* Griswold*, we have obscured its historical context and, perhaps more troublingly, limited its impact in defining the extent of the state's power to regulate sex and sexuality. This brief Essay recovers this overlooked aspect of* Griswold*'s history. In so doing, it situates* Griswold *in this historical debate about the scope and limits of the state's authority to police intimate life through the criminal law. As importantly, it considers the implications of this history for our contemporary efforts to expand sexual liberty.*

ESSAY CONTENTS

GRISWOLD'S CRIMINAL LAW

MELISSA MURRAY*

I. INTRODUCTION

This Symposium commemorates the fiftieth anniversary of *Griswold v. Connecticut*,[1] the United States Supreme Court decision that famously articulated a right to privacy.[2] In the fifty years since it was announced, *Griswold*'s logic has underwritten a broader commitment to reproductive rights—one that has expanded the right to contraception[3] and secured a woman's right to choose an abortion.[4] Amidst all of these developments it is easy to overlook another aspect of *Griswold*'s history. Although *Griswold* was part of a larger campaign to expand access to birth control,[5] it was also part of another historical moment, one that sought to reimagine the state's authority in the intimate lives of citizens and limit the use of criminal law as a means of enforcing moral conformity. In this regard, *Griswold* arose in a social and legal milieu in which the question of whether the state could—or should—police intimate conduct through the criminal law was a subject of considerable debate.

Few have explored the criminal law aspect of *Griswold*. This oversight is unfortunate. In overlooking this part of *Griswold*, we have obscured its historical context and, perhaps more troublingly, limited its impact in defining the extent of the state's power to regulate sex and sexuality. This brief Essay recovers this overlooked aspect of *Griswold*'s history. In so doing, it situates *Griswold* in this historical debate about the scope and limits of the state's authority to police intimate life through the criminal

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[1] 381 U.S. 479 (1965).

[2] *Id*. at 486 ("We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.").

[3] Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible.").

[4] Roe v. Wade, 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the right of personal privacy includes the abortion decision . . . .").

[5] *See generally* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1998) (offering a detailed account of the campaign against prohibitions on contraception).

law. As importantly, it considers the implications of this history for our contemporary efforts to expand sexual liberty.

This Essay proceeds in four parts. Part II begins in the 1940s and 1950s and documents the debate over the state's use of the criminal law to police morality and the resulting effort to liberalize the criminal laws that regulated various aspects of intimate life. Part III then shifts to the 1960s to recover connections between *Griswold* and this criminal law reform effort. As it explains, although we regard *Griswold* as part of the Sexual Revolution and the liberalization of norms regarding sex and sexuality, the case was also part of a related effort to modernize and reform the criminal law and limit the state's ability to regulate intimate life. Part IV considers why this aspect of *Griswold* has been overlooked. It suggests that *Griswold*'s emphasis on privacy—and specifically, the privacy rights of married couples—had the effect of subordinating the broader debate about the use of criminal law to police and enforce majoritarian moral values about sex and sexuality. Indeed, it would be almost forty years before the principles and values that animated the criminal law reform effort would be fully reflected in the Supreme Court's privacy jurisprudence. In the 2003 case *Lawrence v. Texas*,[6] a majority of the Court not only elaborated *Griswold*'s understanding of privacy to include the unmarried, it squarely confronted the debate over the state's use of criminal law to police and enforce moral conformity.[7]

Part IV also considers the implications of this reclaimed history. As it explains, recovering *Griswold*'s criminal law antecedents not only provides a more complete historical narrative for locating the case and assessing its legacy, it also underscores the continued relevancy of the normative question at the heart of the criminal law reform debate and *Griswold*: Should the state use its authority to enforce moral conformity among its citizens? Although *Lawrence* built upon *Griswold* to limit the state's ability to use the criminal law to regulate sexual morality, the state continues to rely on *civil* means to accomplish many of these ends. The civil regulation of sex and sexuality, however, has gone largely unnoticed. In this regard, the broader debate over state authority to regulate sex and sexuality, of which *Griswold* was a crucial part, persists in contemporary legal culture. Recovering *Griswold*'s place in the debate over the state's regulation of sexual morality provides an important opportunity to consider how and why state regulation of sex and sexuality has persisted in the face of constitutional protections for privacy in intimate life.

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[6] 539 U.S. 558 (2003).

[7] *Id*. at 571, 578–79.

II. BEFORE *GRISWOLD*: MORALS LEGISLATION AND CRIMINAL LAW REFORM

Since the founding, American jurisdictions relied on the criminal law to regulate sex and sexuality.[8] In many states, sex outside of marriage was punished under laws prohibiting fornication or adultery.[9] Sodomy—the infamous "crime against nature"—was subject to a prison term.[10] Even efforts to control reproduction through contraception or abortion were routinely criminalized in order to deter promiscuity and channel sex into marriage.[11]

The state's ability to regulate intimate life in this manner was widely acknowledged to be within the scope of its police power to promote the health, safety, and general welfare of its citizens.[12] But by the 1940s and 1950s, this traditional authority was being called into question. In two ground-breaking sex studies, *Sexual Behavior in the Human Male*[13] and *Sexual Behavior in the Human Female*,[14] Indiana University's Alfred Kinsey drew back the curtain on the intimate lives of everyday Americans. According to Kinsey, Americans routinely engaged in sexual acts and practices that violated the criminal laws of most jurisdictions.[15] The

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[8] *See* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 15–32 (1988) (describing such "morals offenses"); LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 127–32 (1993) (detailing moral crimes).

[9] *See* FRIEDMAN, *supra* note 8, at 128–31 (discussing punishment of fornication and adultery); BARBARA MEIL HOBSON, UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION 31–33 (1987) (describing various punishments for fornication and adultery).

[10] *See* Bowers v. Hardwick, 478 U.S. 186, 193–94 (1986) (discussing the history of anti-sodomy laws in the United States); *see also* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003 17, 19–20, 53–54 (2008) (describing the history of anti-sodomy laws in the U.S.).

[11] *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 159–78 (1985) (discussing the criminalization of abortion and contraception); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1271–72 (2009) (discussing the ways in which criminal law historically has been used to enforce intimate norms); *see generally* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973 (1997) (discussing the criminalization of abortion).

[12] *See* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 596 (1868) (arguing that the protection of public morals was a legitimate use of the state's police power); ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 9 (1904) (contending that the "cultivation of moral, intellectual and aesthetic forces and interests which advance civilisation and benefit the community . . . cannot be a matter of indifference to the state.").

[13] ALFRED. C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

[14] ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

[15] ESKRIDGE JR., *supra*, note 10, at 109 (discussing Kinsey's presentation of a discussion paper entitled "Biological Aspects of Some Social Problems," which argued that the law was divorced from the reality of intimate life and calling for law reform); *see also* Michael Kirby, *Sexuality and Global Forces: Dr. Alfred Kinsey and the Supreme Court of the United States*, 14 IND. J. GLOBAL LEGAL

problem was not the acts themselves, which, in Kinsey's view, were commonplace and therefore "normal," but rather a religiously-inflected legal regime that criminalized these acts in the name of preserving morality.[16]

But it was not just that Kinsey revealed the "incredibly wide gap between the law's expectations and the people's actual practices as to sexual conduct;"[17] it was that the existence of the laws on the books seemed at odds with law enforcement priorities. In most cases, moral offenses went unenforced. If they were enforced, it was done selectively, often targeting vulnerable populations.[18] In this regard, the laws' existence, coupled with their frequent violation and uneven enforcement, "instilled cynicism toward the law," diminishing respect for the legal system.[19] Not content simply to note the disjunction between law's expectations and the reality of quotidian life, Kinsey began advocating for legal reform.[20] Private, consensual sexual acts, Kinsey argued, should be beyond the purview of the criminal law.[21]

Critically, Kinsey's was not the only voice calling for criminal law reform. In 1954, in the United Kingdom, Parliament convened the Wolfenden Committee in the wake of a series of controversial prosecutions of prominent Londoners on charges of homosexual sodomy.[22] Tasked with considering the ongoing efficacy of laws criminalizing homosexual sodomy and prostitution, the Wolfenden Committee issued a report to the British Parliament recommending the decriminalization of consensual same-sex sodomy.[23] In calling for these reforms, the Wolfenden Report emphasized limits on the state's authority to criminalize private, consensual conduct, noting that "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[24]

The Wolfenden Report prompted a series of debates between the legal

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STUD. 485, 493 (2007) (noting that the Kinsey Reports "challenged assumptions that were generally accepted throughout the world concerning human sexual experience") (footnotes omitted).

[16] *Id*.

[17] GERHARD O.W. MUELLER, LEGAL REGULATION OF SEXUAL CONDUCT 17 (1961).

[18] Louis B. Schwartz, *Morals Offense and the Model Penal Code*, 63 COLUM. L. REV. 669, 671 (1963) ("[O]ne can examine side effects of the effort to enforce morality by penal law. . . . Are police forces, prosecution resources, and court time being wastefully diverted from the central insecurities of our metropolitan life—robbery, burglary, rape, assault, and governmental corruption?").

[19] LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY 106 (2013).

[20] *Id.* at 105.

[21] *Id.*

[22] *See* JOHN FREDERICK WOLFENDEN, TURNING POINTS: THE MEMOIRS OF LORD WOLFENDEN 129–46 (1976) (discussing the origins of the Wolfenden Committee).

[23] THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION ¶ 62, at 48 (Authorized American ed., Stein & Day 1963).

[24] *Id.* at ¶ 61, at 48.

philosopher H.L.A. Hart and Lord Patrick Devlin, a prominent conservative on Britain's High Court, on the role that majoritarian social mores should play in the criminal law.[25] Devlin argued that irrespective of harm or injury to persons or property, the criminal law legitimately could be used to discourage deviations from commonly-held notions of morality.[26] In response, Hart argued that although the criminal law could be used to address immoral acts that posed harm to third parties or property (like murder or theft), it should not be used to criminalize *all* departures from majoritarian mores, including departures from commonly-held mores regarding out-of-wedlock sex.[27]

On the other side of the Atlantic, the American Law Institute (ALI), a group of prominent lawyers, judges, and legal scholars charged with clarifying and simplifying the American common law, was also launching its own effort to reform and modernize American criminal law.[28] Led by Columbia Law School professor Herbert Wechsler, the ALI's Model Penal Code (MPC) project sought to draft a modern criminal code that could be adopted in whole or in part by individual states.[29] Although the MPC's drafters would consider a wide range of reforms, they took particular interest in the reform of the laws governing sexual offenses. In this aspect of the reform project, the drafters were influenced by Kinsey's research[30] and the Wolfenden Report.[31] Like the Wolfenden Committee, the MPC drafters worried that laws criminalizing private sexual conduct between consenting adults intruded too far into private life.[32] As importantly, the drafters were sensitive to concerns that enforcing victimless sex offenses diverted scarce public resources from more pressing criminal justice issues,

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[25] *See* Mary Ann Case, *Of "This" and "That" in* Lawrence v. Texas, 2003 SUP. CT. REV. 75, 123–24 (noting that the Hart-Devlin debates were a response to the Wolfenden Report); David Alan Sklansky, *"One Train May Hide Another": Katz, Stonewall, and the Secret Subtext of Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 914 (2008) (noting that "[t]he Hart-Devlin debate . . . was an outgrowth" of the Wolfenden Committee Report).

[26] *See* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 2–3 (1965) (discussing the role that criminal law should play in safeguarding society).

[27] *See* H. L. A. HART, LAW, LIBERTY AND MORALITY 57 (1963) (arguing that "where there is no harm to be prevented and no potential victim to be protected"—as is the case with "conventional sexual morality"—there is little value in pursuing legal punishment).

[28] ESKRIDGE, JR., *supra* note 10, at 121.

[29] *Id*.

[30] WHEELER, *supra* note 19, at 105. Not coincidentally the ALI and Kinsey shared a prominent funder—the Rockefeller Foundation. *Id*. at 107. Kinsey himself became a forceful advocate for criminal law reform. In 1949, he attended an all-day forum for the Study and Prevention of Crime convened at Columbia University, where he advocated for changes to the laws governing sexual offenses. *Penal Codes Seen in Need of Change*, N.Y. TIMES, May 8, 1949, at 59. As he explained, "[n]ot more than 5 per cent of persons who pass through the courts are involved in sexual behavior which damages other individuals." *Id.* The other 95 per cent "are involved in sexual behavior that transgresses laws that have no function other than to preserve custom." *Id.*

[31] WHEELER, *supra* note 19, at 110–12.

[32] ESKRIDGE, JR., *supra* note 10, at 121–22.

like rising rates of violent crime.[33]

At the ALI's annual meeting in 1962, a draft of the MPC was presented to the membership for approval.[34] The draft's provisions relating to sexual offenses reflected the sentiments of a prominent member of the MPC's advisory committee, the late Judge Learned Hand. In 1955, at the inauguration of the MPC project, Judge Hand made clear his views of the state's use of criminal law as a vehicle for enforcing morality.[35] As he explained, "I think [the criminal regulation of sex] is a matter of morals, a matter largely of taste, and it is not a matter that people should be put in prison about."[36] The final draft of the MPC concurred, urging substantial changes in the laws governing adultery, fornication, prostitution, abortion, contraception, and private acts of sodomy between consenting adults.[37] Under the MPC, fornication and adultery were no longer criminalized.[38] State regulation of abortion was liberalized to permit "therapeutic" abortions in cases of rape, incest, and harm—broadly conceived—to the mother.[39] Criminalization of sodomy was reserved for circumstances involving force and/or public conduct.[40]

The draft was eventually approved by a vote of the ALI's membership.[41] And, as the MPC drafters hoped, the ALI's effort to reform sexual offenses spawned similar legislative reform efforts in other jurisdictions, including Illinois and New York.[42]

In seeking legislative reform of extant criminal laws regulating sex and sexuality, the MPC, the Wolfenden Report, and many of the state legislative reform efforts emphasized a sphere of private, intimate life secluded from the state and insulated from criminal regulation.[43] By the 1950s and 1960s, the concept of a zone of privacy beyond the state's regulatory ambit began to coalesce in two Supreme Court decisions concerning the scope of constitutional protections for criminal defendants.

In *Rochin v. California*,[44] the Supreme Court reversed a criminal

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[33] *See id.* at 122 ("[S]carce enforcement resources are better deployed against activities that cause serious harm."); Schwartz, *supra* note 18, at 671 (arguing that one side effect of the effort to enforce morality by penal law is that "police forces, prosecution resources, and court time" are wastefully diverted from more "central" concerns, such as "robbery, burglary, rape, assault, and government corruption").

[34] ESKRIDGE, JR., *supra* note 10, at 124.

[35] Anthony Lewis, *Morals Issue: Crime or Not?*, N.Y. TIMES, Nov. 29, 1964, at E10.

[36] *Id.*

[37] ESKRIDGE, JR., *supra* note 10, at 123–24.

[38] *Id.*

[39] MODEL PENAL CODE § 213 (1962).

[40] ESKRIDGE, JR., *supra* note 10, at 124.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 137 (noting the "liberal discourse of privacy that undergirded the Model Penal Code and the Wolfenden Report . . . ." (italics omitted)).

[44] 342 U.S. 165 (1952).

conviction that was based upon evidence obtained when police officers forcibly entered the bedroom of a suspect and his wife.[45] According to the Court, the officers' efforts to obtain evidence of criminal wrongdoing, which included "[i]llegally breaking into the privacy of the petitioner," forcibly opening his mouth to remove recently-swallowed materials, and ordering the "forcible extraction of his stomach's contents," "shock[ed] the conscience."[46] Evidence obtained through such "brutal conduct" was akin to a coerced confession, and as such, violated the Due Process Clause.[47]

Nearly a decade later, *Mapp v. Ohio*[48] offered the Court an opportunity to elaborate the contours of these constitutional protections. Like *Rochin*, *Mapp* involved an intrusive search of an individual's home. Brandishing a fabricated warrant, Cleveland police officers initiated a thorough search of Dollree Mapp's home, including her bedroom, her "child's bedroom, the living room, the kitchen and a dinette."[49] They ultimately discovered a cache of pornographic material in a trunk in the basement.[50] Although she disclaimed ownership of the trunk and its contents,[51] Mapp was arrested, prosecuted, and found guilty of "knowingly having had in her possession and under her control certain lewd and lascivious books, pictures, and photographs" in violation of state law.[52]

Despite the fact that it was nominally an obscenity case,[53] Mapp's lawyers emphasized the state's intrusion into the private sphere.[54] In overturning Mapp's conviction, the Court seemed to agree that the police search had gone too far.[55] Referencing *Rochin*, the *Mapp* Court articulated a "freedom from unconscionable invasions of privacy" rooted in the Fourth and Fifth Amendments.[56]

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[45] *Id.* at 165.

[46] *Id.* at 172.

[47] *Id.* at 173.

[48] 367 U.S. 643 (1961).

[49] *Id.* at 645.

[50] *Id.* at 645; *see* Transcript of Record at 22, Mapp v. Ohio, 367 U.S. 643 (1961) (No. 236) (containing Officer Delau's testimony that his partner, Officer Dever, found a "foot locker" in the basement containing "policy paraphernalia").

[51] Brief of Appellant on the Merits at 6, State v. Mapp, 166 N.E.2d 387 (Ohio 1960) (No. 236) [hereinafter Brief of Appellant].

[52] *Mapp*, 367 U.S. at 643.

[53] *See* Brief of Appellant on the Merits at 1, Mapp v. Ohio, 367 U.S. 643 (1961) (No. 236) ("The Appellant was convicted of the crime that she 'unlawfully and knowingly had in her possession and under her control, certain lewd and lascivious books, pictures and photographs, being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed on the records thereof' . . . in violation of Sec. 2905.34, Ohio Revised Code.").

[54] *See id.* at 18 (arguing that the officer's conduct "portray[ed] a shocking disregard of human rights" and referencing the *Rochin* Court's observations that "[i]llegally breaking into the privacy of the petitioner . . . offends even hardened sensibilities" and "shock[s] the conscience").

[55] *Mapp*, 367 U.S. at 660.

[56] *Id*. at 657.

Although *Rochin* and *Mapp* were principally concerned with *procedural* protections for criminal defendants, criminal law reformers[57] interested in *substantive* limits on the state's use of the criminal law saw great promise in the Court's assertion that "the security of one's privacy against arbitrary intrusion by the police is implicit in the concept of ordered liberty."[58] And indeed, they built upon the logic of these criminal procedure cases in their efforts to challenge morals legislation in the courts.

III. SEX, CRIME, AND BIRTH CONTROL: LITIGATING A RIGHT TO PRIVACY IN *GRISWOLD V. CONNECTICUT*

As Part II detailed, the 1940s and 1950s witnessed the emergence of a robust debate about whether and how to draw limits on the state's authority to criminalize private consensual sex between adults. This Part explores the connections between this criminal reform debate and the battle over access to contraception that led to 1965's *Griswold v. Connecticut.* As it explains, in the period preceding *Griswold*, the American Civil Liberties Union (ACLU) and birth control activists came together to harness the logic of the criminal reform effort—and the underlying interest in privacy as a bulwark against the state—in challenging prohibitions on contraception. In doing so, these groups crafted a more expansive vision of civil liberties—one that went beyond the traditional understanding of protections for First Amendment rights to encompass protections against state regulation of sexual morality, including bans on contraception. In this regard, *Griswold*, and the ongoing effort to invalidate Connecticut's ban on contraception, was not simply about reproductive freedom and marital privacy; it was also about the larger question of constitutional protection against state encroachment into intimate life.

The ACLU's interest in privacy as a means of protecting civil liberties was evident in their litigation efforts in *Rochin* and *Mapp*.[59] Critically, the ACLU's emphasis on a right to privacy in these cases reflected a shift in the organization's understanding of civil liberties. For much of its history, the ACLU had focused on bringing First Amendment challenges to censorship laws and laws prohibiting speech and the dissemination of

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[57] *See infra* Part III (discussing the ways in which reformers leveraged these decisions to challenge prohibitions on contraception).

[58] *Mapp*, 367 U.S. at 650 (internal citations and quotations omitted).

[59] *See* Brief of Am. Civil Liberties Union as *Amicus Curiae* at 1, Rochin v. California, 342 U.S. 165 (1952) (No. 83) ("We believe that California denied petitioner the minimum of respect for the dignity and privacy of the individual required by the democratic concept of the individual's status in the State, and that his conviction was a violation of the due process of law guaranteed by the Constitution."); Brief Amici Curiae on Behalf of Am. Civil Liberties Union and Ohio Civil Liberties Union at 11–16, State v. Mapp, 166 N.E.2d 387 (Ohio 1960) (No. 236) (arguing that the Ohio obscenity statute violated the constitutional right to privacy).

knowledge.[60] *Rochin* and *Mapp*, however, reflected a more expansive view of civil liberties—one that went beyond the First Amendment and the dissemination of ideas to include limits on other exercises of state authority.

The ACLU's emphasis on privacy and limits on state authority was deeply informed by the "penal law reform movement that aimed to decriminalize sexual activities between consenting adults."[61] ACLU lawyers were aware of, and indeed, at times contributed to the ALI's Model Penal Code project and its reform of sexual offenses.[62] Sexologist Alfred Kinsey, who had been an early voice in the effort to liberalize the criminal regulation of private consensual sex, also served as a conduit for the exchange of ideas between the ACLU and the criminal law reform movement.[63] Kinsey's research routinely drew the attention of government officials. Accordingly, in a number of legal matters, including a federal obscenity challenge in *United States v. 31 Photographs*,[64] ACLU lawyers Harriet Pilpel and Morris Ernst represented Kinsey against the government.[65] Pilpel and Ernst came to agree with Kinsey that the criminalization of private, consensual sexual conduct allowed the state too much authority over intimate life, and in so doing, imposed severe constraints on individual rights and liberties.[66]

The ACLU was not the only organization to view the criminal regulation of sex as an imposition on individual rights and liberties—or to borrow from the criminal law reform movement in challenging these laws. The birth control movement also began to perceive its mission to legalize contraception as part of a larger effort to preserve the exercise of individual rights and liberties against the state's use of the criminal law. In a 1955 advertisement, the Planned Parenthood League of Connecticut (PPLC) expressed this sentiment in graphic detail. Calling attention to the state's use of the criminal law to police contraceptive use, the advertisement warned, "[a] policeman in every home is the only way to enforce this law."[67] To visually impart the law's intrusion into the lives of citizens, the

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[60] *See* WHEELER, *supra* note 19, at 93 ("By the 1940s, the ACLU had made a name for itself defending the First Amendment rights of birth control activists, authors, nudists, playwrights, and even consumers. With the exception of nudists, however—which remained a special but still peripheral issue for the ACLU—sexual conduct seemed another matter entirely.").

[61] *See id.* at 103–04.

[62] *See id.* at 104–08 (discussing the cross-fertilization of ideas between the ACLU and the ALI).

[63] *See id.* at 105–07 (discussing Kinsey's interactions with ACLU lawyers).

[64] 156 F. Supp. 350, 352–53, 359 (S.D.N.Y. 1957) (holding that articles deemed obscene for use by the general public may be exempt from obscenity laws when used solely for bona fide scientific research). For a discussion of the case, see Kenneth R. Stevens, United States v. 31 Photographs*: Dr. Alfred C. Kinsey and Obscenity Law*, 71 IND. MAG. HIST. 299 (1975).

[65] *See* WHEELER, *supra* note 19, at 105.

[66] *See id.* at 105–07.

[67] *Id.* at 97–98 (internal quotation marks omitted).

advertisement depicted police officers hiding under beds, eager to document conjugal activities.[68] The advertisement was a chilling reminder to affluent women—who could obtain birth control easily from their physicians rather than relying on birth control clinics like their poorer sisters[69]—that Connecticut's ban on contraceptive use nonetheless presented a serious imposition on their own rights and liberties.

With their interests more closely aligned, the ACLU joined forces with the birth control movement to launch a challenge to Connecticut's ban on contraceptive use.[70] The ban was actually composed of two distinct criminal statutes. Initially passed in 1879, Section 53-32[71] prohibited the "[u]se of drugs or instruments to prevent conception," punishing violators with a fine of "not less than fifty dollars" and/or a term of imprisonment of "not less than sixty days nor more than one year."[72] Enforcement of the "use" statute was complemented by Section 54-196,[73] Connecticut's complicity statute, which provided that "[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."[74] The case, *Poe v. Ullman*,[75] initially was brought by three Connecticut married couples and their doctor, C. Lee Buxton.[76] According to the plaintiffs, the Connecticut contraceptive ban violated their due process rights under the Fourteenth Amendment.[77] In making this claim, the appellants elaborated the privacy arguments glimpsed in *Rochin* and *Mapp*, contending that the Connecticut law posed a significant intrusion into intimate life.[78] The argument sparked by the criminal law reform movement, and tested in the

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[68] *See id.* at 98 (providing a graphic of the advertisement).

[69] For a discussion of the socio-economic consequences of the contraception ban, see Cary Franklin, Griswold *and the Public Dimension of the Right to Privacy*, 124 YALE L.J. F. 332 (2015); *see also* Brief for Planned Parenthood as Amicus Curiae Supporting Appellants at *21, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) (arguing that the Connecticut contraception ban was "grossly discriminatory," because its "real impact is on those most in need of family planning service, *i.e.*, the indigent and under-educated, whose medical help must come from public clinics").

[70] GARROW, *supra* note 5, at 147–60 (discussing the circumstances leading to *Poe v. Ullman*).

[71] CONN. GEN. STAT. § 53-32 (1958).

[72] *Id.*

[73] CONN. GEN. STAT. § 54-196 (1958).

[74] *Id.*

[75] 367 U.S. 497 (1961).

[76] *Id.* at 498–500. Critically, the *Poe* lawyers also filed a companion case, *Trubek v. Ullman*, 367 U.S. 907 (1961). Like *Poe*, *Trubek* was also dismissed without a ruling on the merits. *See id*. For a discussion of *Trubek*, see Melissa Murray, *Overlooking Equality on the Road to* Griswold, 124 YALE L.J. F. 324 (2015).

[77] Brief for Appellants at 10, Poe v. Ullman, 367 U.S. 497 (1961) (No. 60), 1960 WL 98679 at *10.

[78] *See id*. at *28 ("When the long arm of the law reaches into the bedroom and regulates the most sacred relations between a man and his wife, it is going too far. There must be a limit to the extent to which the moral scruples, of a substantial minority or, for that matter, of a majority, can be enacted into laws which regulate the private sex life of all married people.").

context of procedural protections for criminal defendants, was now deployed to challenge a substantive criminal law.

Ultimately, the Court dismissed *Poe v. Ullman* on jurisdictional grounds.[79] Nevertheless, the privacy argument resonated with Associate Justices William O. Douglas and John Marshall Harlan. In considering the Connecticut ban, Douglas imagined a world where "full enforcement of the law . . . would reach the point where search warrants issued and officers appeared in bedrooms to find out what went on."[80] Such an invasion of "the innermost sanctum of the home," in Douglas's view, constituted "an invasion of the privacy that is implicit in a free society."[81]

Although Harlan agreed that the Connecticut ban presented an imposition on privacy rights,[82] his dissent also engaged the question of the state's authority to legislate morality.[83] Critically, Harlan did not dispute the state's authority to legislate in order to promote its "people's moral welfare,"[84] including laws that prohibited "adultery, homosexuality, fornication and incest."[85] But the Connecticut ban, which "determined that the use of contraceptives is as iniquitous as any act of extra-marital sexual immorality" was "surely a very different thing indeed from punishing those who establish intimacies which the law has always forbidden and which can have no claim to social protection."[86]

In this way, both Douglas and Harlan echoed aspects of the broader criminal law reform debate that had raged over the last fifteen years. Should the state use the criminal law to police morality? And if the state *could* use the criminal law to police morals, how far could it go to do so? Did the Constitution impose *any* restraints on the exercise of state police power in intimate life? For Harlan, state regulation of sexual morality was

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[79] 367 U.S. at 508 ("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.").

[80] *Id.* at 519–20 (Douglas, J., dissenting).

[81] *Id.* at 521.

[82] *See id.* at 553 (Harlan, J., dissenting) (rejecting "the intrusion of the whole machinery of the criminal law into the very heart of marital privacy, requiring husband and wife to render account before a criminal tribunal of their uses of that intimacy . . . .").

[83] *See id.* at 539 ("In reviewing state legislation, whether considered to be in the exercise of the State's police powers, or in provision for the health, safety, morals or welfare of its people, it is clear that what is concerned are 'the powers of government inherent in every sovereignty.' Only to the extent that the Constitution so requires may this Court interfere with the exercise of this plenary power of government.") (internal citations omitted).

[84] *Id.* at 553.

[85] *Id*. at 552. Critically, Justice Harlan understood laws prohibiting adultery and homosexuality to "foster[] and protect[]" marriage by "regulat[ing] by means of the criminal law the details of that intimacy." *Id.* at 553.

[86] *Id.*

permissible, but the state's authority was not unfettered.[87] The state could not go so far as to intrude upon an institution that the state valued, protected, and promoted, as it did marriage and the family.[88] Although he did not endorse state regulation of adultery and fornication, Douglas also appeared convinced that state intervention into the home to police contraceptive use among married couples violated the Constitution.[89]

Because it dismissed *Poe v. Ullman* on jurisdictional grounds,[90] the Court did not have the opportunity to consider these questions against the backdrop of the federal Constitution. However, soon after the Court's decision in *Poe*, the PPLC opened a birth control clinic in New Haven.[91] As expected, the birth control clinic drew law enforcement attention.[92] Soon after the clinic's opening, its Executive Director, Estelle Griswold, and its physician, C. Lee Buxton, were arrested and charged under Sections 53-32 and 54-196,[93] setting the stage for *Griswold v. Connecticut*.[94]

Like the plaintiffs in *Poe v. Ullman*, Griswold and Buxton emphasized a right to privacy as a limit on the state's authority.[95] Critically, however, Griswold, Buxton, and their amici proffered other arguments that, like the privacy argument, were rooted in the larger debate about criminal law reform and state enforcement of morals.[96] In their brief, the appellants,

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[87] *See id*. at 552–53 (weighing the state's interest in regulating morality against the individual's right to privacy).

[88] *See id.* at 553 ("[T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected.").

[89] *See id*. at 519–21 (Douglas, J., dissenting) (contending that the contraceptive ban impermissibly intruded on the privacy of married couples).

[90] *Id*. at 508–09.

[91] *See* Mary L. Dudziak, *Just Say No: Birth Control in the Connecticut Supreme Court Before* Griswold v. Connecticut, 75 IOWA L. REV. 915, 936 (1990) ("The Planned Parenthood League of Connecticut opened a birth control clinic on November 1, 1961, at its Trumbull Street headquarters in New Haven.").

[92] *Id*. at 936–37.

[93] *See* CONN. GEN. STAT. § 53-32 (1958) (repealed 1969) ("Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned"); *see also* CONN. GEN. STAT § 54-196 (1958) (repealed 1969) ("Any 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).

[94] Dudziak, *supra* note 91, at 937.

[95] Brief for Appellants at 67, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) ("[W]e simply note, as one of the major costs that must be weighed against any possible gain, the unparalleled invasion of privacy which the law and its enforcement would entail.").

[96] For example, the appellants' brief in *Griswold* discussed at great length whether the Connecticut statutes were an accurate expression of majoritarian sexual values, and if so, whether they were an appropriate use of the state's police power. *See id.* at 35–37, 48–49 ("The objective of the Connecticut statues—according to the premise we are now indulging—is to promote public morality by making it a criminal offense to prevent conception by some of the methods set forth above, but not others. . . . [T]he precise issue is whether the prohibition of those methods selected by the Connecticut

represented by Yale Law professor Thomas Emerson and Connecticut civil rights lawyer Catherine Roraback, with assistance from the ACLU and the Planned Parenthood Federation of America (PPFA),[97] went beyond privacy to explain that morals legislation, like the Connecticut laws at issue, were prone to arbitrary and discriminatory enforcement.[98] The concern with selective and discriminatory enforcement was one that figured prominently in the ALI's efforts to reform sexual offenses in the MPC.[99] Indeed, Emerson and Roraback seemed to be parroting the MPC's concerns about the abuse of sexual offenses laws when they noted that the challenged Connecticut statutes could be used "for blackmail, or for paying off a grudge, or for harassment of an unpopular citizen. It is not capable of rational administration."[100]

In addition to concerns about arbitrary enforcement, Emerson and Roraback argued that the challenged Connecticut statutes had the perverse effect of encouraging other criminal behavior. As they explained in their brief on behalf of Griswold and Buxton, "[t]he statutes tend to produce an increase in the number of illegal abortions."[101] In its amicus brief, the PPFA elaborated this concern about cultivating other criminal behavior by reviving an argument first ventilated in *Poe v. Ullman*.[102] In *Poe*, the appellants argued that because Connecticut prohibited married couples

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legislature, viewed as a regulation to promote the public morality, conforms to the standard of due process of law. . . . Certainly the court cannot take the position that the simple claim of a moral aim by the legislature satisfies the requirements of due process. . . . It would allow the legislature to impose restraints upon individual liberties solely on the ground that some insignificant fraction of the community regarded the issue as a moral one. . . . Our concern here is with the current views of the community as to the moral basis for prohibiting the use of extrinsic aids in avoiding conception. . . . We submit that the overwhelming opinion of today does not regard the use of extrinsic aids by married couples in avoiding conception as morally reprehensible, or at least does not regard the use of such aids by other persons as affording moral grounds for absolute prohibition by government decree.").

[97] Both the ACLU and the PPFA filed amicus briefs in support of Griswold and Buxton. *See* Brief for Am. Civil Liberties Union and the Conn. Civil Liberties Union as Amici Curiae at 3, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496); Brief and Appendices for Planned Parenthood Fed'n of Am. as Amici Curiae, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496).

[98] *See* Brief for Appellants at 70–71, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) ("The Connecticut statutes operate in an irrational manner in . . . important respects. . . . The statutes . . . would always be applicable to married persons and seldom applicable to unmarried persons engaging in sexual relations. . . . The statutes operate to discriminate against low-income groups. . . . Since the statutes are not generally enforced or enforceable, they can only be applied to individuals in an arbitrary fashion.").

[99] MODEL PENAL CODE § 207 comments on sexual offenses, at 12 (Council Draft No. 8, 1955) ("There is some indication that these laws, like other dead letter statutes, may lend themselves to discriminatory enforcement . . . .").

[100] Brief for Appellants at 71–72, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496).

[101] *Id.*

[102] *See* Brief and Appendices for Planned Parenthood Fed'n of Am. as Amici Curiae at 10, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) ("The consequences of the human sexual drive are made clear also in the research findings that there are an estimated 1,000,000 unlawful abortions in the United States each year . . . and in other social problems too numerous to detail.").

from using contraception, abstinence was the only means available to avoid pregnancy. As an alternative to contraception for married couples, abstinence, the *Poe* appellants maintained, was unrealistic and undesirable.[103] Abstinence, they argued, required suppressing a natural sexual urge that, by law, could only be expressed in marriage: "To demand prolonged continence as the only method of contraception from anyone who is not stoutly bulwarked by the strongest spiritual sanction is to drive that individual to what society has judged criminal."[104]

In its amicus brief in *Griswold*, the PPFA reiterated these connections between abstinence and criminal sex. In a lengthy appendix, the PPFA cited numerous scholars, all of whom were skeptical of abstinence as a plausible alternative to contraception.[105] According to one scholar, abstinence could be successful only "[i]f men were angels."[106] More often, abstinence resulted in physiological and psychological anxieties that could render both spouses susceptible "to outside sex temptations."[107] Indeed, one scholar blamed abstinence for "driving the husband into the arms of prostitutes,"[108] while another scholar mused that the unavailability of contraception (and the concomitant reliance on abstinence as a method of family planning) was directly correlated with the increased incidence of illegal abortions.[109]

Importantly, all of these arguments had been raised earlier in *Poe* and in the criminal law reform debate. As the criminal law reformers explained, the state could not justify the criminal regulation of sex and sexuality on the ground that doing so promoted morals and the public welfare, if in fact such laws actually prompted more offensive conduct. Likewise, the *Poe* and *Griswold* appellants relied on these arguments to cast doubt on the efficacy of the state's justifications for the contraceptive ban. How could this imposition on individual liberty be justified if criminal bans on contraception actually *encouraged* more pernicious forms of sexual immorality that undermined marriage and the marital family?

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[103] *See id.* at 13 ("So far as abstinence is concerned, as a limitation of births, it should be enough to state that it is common knowledge that for all societies in all ages, it has not worked . . . ."); Brief and Appendices of Planned Parenthood Fed'n of Am. as *Amicus Curiae*, at 9–10, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) ("[F]or most humans [abstinence] does not work.").

[104] *Id.* at 30–31 (internal citations omitted).

[105] *See id.* app. at 39b–48b (compiling numerous quotations from medical authorities on the topic of abstinence as an alternative to contraception).

[106] *Id.* app. at 45b (quoting J. Whitridge Williams, *Indications for Therapeutic Sterilization in Obstetrics*, 91 JAMA 1239, 1241 (1928)).

[107] *Id.* app. at 47b (quoting LORD DAWSON, MEDICAL ASPECTS OF CONTRACEPTION 175 (1927)).

[108] *Id.* app. at 44b–45b (quoting WILLIAM J. ROBINSON, FEWER AND BETTER BABIES: BIRTH CONTROL OR THE LIMITATION OF OFFSPRING BY PREVENCEPTION 36–38 (46th ed. 1931)).

[109] *See id.* at 10 ("The consequences of the human sexual drive are made clear also in the research findings that there are an estimated 1,000,000 unlawful abortions in the United States each year . . . ." (citing MARY CALDERONE, ABORTION IN THE UNITED STATES 180 (1958))).

These arguments, which situated the contraceptive ban within the broader criminal law reform debate, were aired in the briefs, but they never eclipsed the privacy argument in the *Griswold* Court's decision-making.[110] Although the Court invalidated the Connecticut ban, its analysis focused on a right to privacy that inhered in the marital relationship.[111] On this account, the Connecticut ban was offensive not because it relied on the criminal law to demand conformity with particular sexual mores, but because it "operate[d] directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation."[112]

Still, shades of the broader criminal law reform concerns could be glimpsed in *Griswold*. Toward the opinion's conclusion, Justice Douglas gestured toward the criminal reform debate, musing "[w]ould we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?"[113] "The very idea [wa]s repulsive."[114] But critically, the revulsion that the prospect of jackbooted police officers hiding under beds produced was not framed as a broad concern about the prospect of unfettered state authority in the lives of citizens. Instead, any limits on state power were expressly tethered to "the notions of privacy surrounding the marital relationship."[115] With marriage and the marital couple in the foreground, more general concerns about limiting state authority and reforming the criminal law slipped beneath *Griswold*'s surface.

IV. RECOVERING *GRISWOLD*'S CRIMINAL LAW

When *Griswold* was litigated, there was no mistaking its criminal posture. Newspaper accounts referred to the criminal prosecution and the resulting fines that Griswold and Buxton paid as a result of their convictions.[116] The media also noted that the Connecticut statutes

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[110] At oral argument, the justices focused on the privacy argument and a latent equal protection argument. Transcript of Oral Argument at 2–3, 6–8, 10–12, 17, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496). There was no discussion of the criminal law reform debate. *Id.*

[111] *Griswold*, 381 U.S. at 485 ("The present case, then, concerns a relationship lying within the *zone of privacy* created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship." (emphasis added)).

[112] *Id.* at 482.

[113] *Id*. at 486.

[114] *Id.*

[115] *Id.* at 486.

[116] *See Free Speech Argued in Birth Clinic Case*, N.Y. TIMES, Dec. 9, 1961 (referring to Griswold and Buxton as "defendants" and noting that the pair "ha[d] pleaded not guilty of charges of being an accessory to the use of contraceptives") (internal quotation marks omitted); *New Haven Police Shut Birth Clinic*, N.Y. TIMES, Nov. 11, 1961 (noting that Griswold and Buxton were "arrested" and "released in $100 cash bond"); Richard H. Parke, *2 Deny Violating Birth-Clinic Ban*, N.Y. TIMES, Nov. 25, 1961 (discussing Griswold and Buxton's arrests and arraignments).

presented classic criminal law issues regarding the likelihood of enforcement.[117] Likewise, the litigation materials referred to the litigants as "defendants" and described the arraignment, trial, sanctions, and subsequent appeals in detail.[118] Yet, despite these acknowledgments of the case's criminal law provenance, we more often think of *Griswold* as a constitutional law case,[119] a reproductive rights case,[120] or even as a family law case.[121] It is rarely characterized as a criminal law case.[122]

This is perhaps surprising. When *Griswold* was announced, many scholars and advocates assumed that the decision would underwrite a broader campaign to scale back the criminal regulation of sex and sexuality, particularly laws prohibiting homosexual sodomy and fornication.[123] Indeed, in *Griswold*'s wake, there were a number of challenges to state laws prohibiting sodomy and fornication. In *Smayda v. United States*,[124] two men charged with engaging in homosexual acts in a public restroom relied on *Griswold* to challenge clandestine police

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[117] *See* Richard H. Parke, *Birth Clinic Tests Connecticut Law*, N.Y. TIMES, Nov. 3, 1961 (quoting Fowler V. Harper, a Yale Law professor and one of the attorneys in the *Poe* litigation, as saying "I think citizens and doctors alike are entitled to know if they are violating the law" (internal quotation marks omitted)).

[118] *See* Brief for Appellee at 1–2, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) (discussing, in the context of appellee's jurisdictional statement, the issuing of warrants, as well as the subsequent arrests and arraignments of Griswold and Buxton); Brief for Appellants at 2, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) (discussing, in the context of appellants' jurisdictional statement, the arrests, arraignments, and criminal trial of Griswold and Buxton).

[119] *Griswold* is a staple in Constitutional Law casebooks. *E.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 331 (6th ed. 2014); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 970 (4th ed. 2013).

[120] *Griswold* is often presented as a core part of the reproductive rights canon. *E.g.*, MELISSA MURRAY & KRISTIN LUKER, CASES AND MATERIALS ON REPRODUCTIVE RIGHTS AND JUSTICE 536 (2014).

[121] *Griswold* is often featured in family law casebooks. *E.g.*, AREEN ET AL., FAMILY LAW: CASES AND MATERIALS 255 (6th ed. 2012); KELLY WEISBERG & SUSAN APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 1 (4th ed. 2010).

[122] None of the leading criminal law casebooks excerpts *Griswold*. *E.g.*, JOSHUA DRESSLER & STEPHEN P. GARVEY, CASES AND MATERIALS ON CRIMINAL LAW (6th ed. 2012); SANFORD KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS (9th ed. 2012); JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS (6th ed. 2008). Notably, one casebook does discuss *Griswold* in a footnote to *Bowers v. Hardwick*. *See* CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 578 n.a (2005).

[123] Indeed, in 1967, just two years after *Griswold* was announced, the ACLU issued a national policy statement asserting that the criminalization of private, consensual sexual activities between adults, constituted an impermissible infringement on the fundamental right to privacy. *See* JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 213 (1983). Litigators also took note of the perceived vulnerability of sodomy statutes, relying on *Griswold* to challenge such laws in a number of jurisdictions. *See, e.g.*, Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968); Buchanan v. Batchelor, 308 F. Supp. 729 (N.D. Tex. 1970); Towler v. Peyton, 303 F. Supp. 581 (W.D. Va. 1969); Palmer v. Jones, 296 F. Supp. 291 (N.D. Ind. 1969); State v. Rheinhart, 424 P.2d 906 (Wash. 1967), *cert. denied*, 389 U.S. 832 (1967); People v. Hurd, 5 Cal. App. 3d 865 (1970).

[124] 352 F.2d 251 (9th Cir. 1965).

surveillance practices. In this context, *Griswold* proved unavailing. Although the Ninth Circuit was "as uncomfortable as the next man by the thought that our own legitimate activities in such a place may be spied upon by the police," it nonetheless held that "the right of the public to expect that the police will put a stop to its use as a resort for crime all join to require a reasonable limitation upon the right of privacy involved."[125] Similarly, in *Buchanan v. Batchelor*,[126] a litigant relied on *Griswold* to challenge a Texas ban on sodomy. There, the Northern District of Texas concluded that *Griswold* protected acts of sodomy between married couples, but avoided the question of whether *Griswold*'s protections extended to homosexual sodomy.[127]

Instead, *Griswold* fueled the expansion of reproductive rights and autonomy. In *Eisenstadt v. Baird*, *Griswold*'s articulation of a right to privacy was elaborated to permit unmarried persons access to contraception.[128] In 1973, *Roe v. Wade* concluded that the right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[129]

Griswold's focus on marriage, the marital couple, and the home may help explain why its logic never achieved much traction in the broader debate over the criminal regulation of sex and sexuality, and why its roots in the larger criminal law reform debate remain obscured today. Although the majority acknowledged *Griswold*'s criminal character, it did not directly confront or reference the underlying debate over criminal law reform and liberalization. Instead, the *Griswold* majority devoted most of its attention to tethering the newly articulated right to privacy to marriage and the marital couple.[130] As the right to privacy became inextricably bound to marriage, it became unmoored from the broader conversation about the criminal regulation of morals.

Griswold's association with marriage and "a fundamental individual right to decide whether or not to beget or bear a child," rather than a broader notion of sexual liberty and restraint on state authority, was evident in the Court's discussion in *Bowers v. Hardwick*, a 1986 challenge

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[125] *Id.* at 257.

[126] 308 F. Supp. 729 (N.D. Tex. 1970).

[127] *Id.* at 733 (concluding that traditional moral disapproval of sodomy was "not sufficient reason for the State to encroach upon the liberty of married persons in their private conduct"); *see also* Cotner v. Henry, 394 F.2d 873, 875 (7th Cir. 1968) (concluding, in the context of a habeas corpus proceeding, that a statute punishing acts of sodomy between married persons might well be unconstitutional after *Griswold*); Doe v. City of Richmond, 403 F. Supp. 1199, 1202 (E.D. Va. 1975) (refusing to extend *Griswold*'s protections to same-sex sodomy).

[128] 405 U.S. 438, 453 (1972).

[129] 410 U.S. 113, 153 (1973).

[130] *See* Griswold v. Connecticut, 381 U.S. 497, 485–86 (1965) (explaining that marriage is "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees" and is protected by "a right of privacy older than the Bill of Rights").

to a Georgia sodomy prohibition.[131] Although Michael Hardwick claimed that *Griswold* and its progeny conferred a right to engage in private consensual same-sex sodomy, the *Bowers* majority disagreed.[132] As the Court explained, there was "[n]o connection between family, marriage, or procreation . . . and homosexual activity."[133] Moreover, "any claim that [*Griswold* and its progeny] nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable."[134]

In this way, the *Griswold* decision, with its concern for the "sacred precincts of [the] marital bedroom"[135] transformed the case from one about limits on state intervention in intimate life into one that was almost exclusively about preventing state interference with marriage and procreation. Indeed, it was this more limited framing that allowed *Griswold*, and its articulation of a protected zone of privacy, to coexist alongside *Bowers*' repudiation of that zone for those deemed ineligible for marriage and incompatible with procreation.

It would take almost forty years for the criminal law reform concerns subordinated in *Griswold* to come to the fore in the Court's jurisprudence and its conception of the right to privacy. In 2003's *Lawrence v. Texas*,[136] the Court confronted a challenge to a Texas statute criminalizing same-sex sodomy. The case, like *Griswold* before it, prompted arguments debating the state's use of the criminal law to police and enforce traditional sexual mores.

In the briefs, the litigants and their amici proffered arguments that directly referenced the MPC, the Hart-Devlin debates, and the years-earlier debate over criminal law reform.[137] Advocates for the state of Texas emphasized the long-standing support for the state's authority to regulate

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[131] 478 U.S. 186, 190 (1986).

[132] *See id.* at 189–90 ("We first register our disagreement with the Court of Appeals and with [Hardwick] that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy. . . .").

[133] *Id.* at 191.

[134] *Id.*

[135] *Griswold*, 381 U.S. at 485.

[136] 539 U.S. 558 (2003).

[137] *See, e.g.*, Brief of the CATO Inst. as *Amicus Curiae* in Support of Petitioners at 16, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152342, at *16 ("Popular support for the consensual sodomy laws was also waning. Between 1969 and 1976, eighteen states decriminalized consensual sodomy, consistent with the ALI's Model Penal Code ("MPC").."); Brief of Petitioners at 6, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352, at *6 ("The Homosexual Conduct Law was substituted for a facially nondiscriminatory law at a time when many States, prompted by changing views about the proper limits of government power that were reflected in the American Law Institute's Model Penal Code, were revising their criminal codes and completely abandoning offenses like fornication and sodomy.").

public morality.[138] As they explained, morals offenses, like the challenged sodomy ban, were rarely prosecuted.[139] On this account, the law was not an impermissible intrusion into intimate life; rather, it simply served to express a societal consensus regarding normative sex and sexuality.[140]

Predictably, the petitioners and their amici underscored the right to privacy as a limit on state interference in intimate life; however, in so doing, they decoupled the right to privacy from *Griswold*'s emphasis on marriage and the marital couple. According to the petitioners, "the Constitution imposes substantive limits on the power of government to compel, forbid, or regulate the intimate details of private sexual relations between two consenting adults."[141] Privacy's protections, they insisted, did not begin and end at the altar: "Since *Griswold*, the Court has recognized that all adults, regardless of marital status or other facets of their relationship, have the same interest in making their own intimate choices in" the area of sex and relationships.[142]

But even as the petitioners and their amici emphasized privacy as a protection for private, consensual adult sex and sexuality, they also raised other arguments that recalled the earlier criminal law reform debate. As an initial matter, they noted that, as a result of the MPC and the broader law reform debate, most laws legislating traditional sexual mores had been repealed by judicial or legislative fiat.[143] The persistence of sodomy bans therefore reflected impermissible anti-gay animus, rather than an appropriate exercise of state police power.[144] Further, even if rarely prosecuted, criminal sodomy laws raised concerns about discriminatory enforcement, as well as concerns about the collateral *civil* consequences of criminal convictions.[145] Meaningfully, both of these issues—discriminatory enforcement and collateral civil consequences—had surfaced years earlier in the ALI debates over the MPC, as well as in the larger discussion of criminal law reform.[146]

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[138] Respondent's Brief at 42, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470184, at *42 ("The promotion of morality has long been recognized as a lawful function of government.").

[139] *Id.* at *48 (maintaining that the application of sodomy statutes "is not common").

[140] *Id.* ("[T]he statutes . . . express a baseline standard expressing the core moral beliefs of the people of the State.").

[141] *Id.*

[142] *Id.* at *12.

[143] *Id.* at *22 (canvassing these trends and noting that "bans on private sexual conduct between consenting adults have been rejected in contemporary times").

[144] *See id.* at *4–6 (arguing that the challenged sodomy ban discriminated against gay men and women by criminalizing "non-commercial, consensual, private sexual conduct" that would otherwise be lawful if performed by "heterosexual adult couples, married or unmarried").

[145] *See, e.g.*, *id.* at *27–29 (describing the various civil consequences arising from criminal convictions due to homosexual conduct).

[146] *See supra* Part II (detailing the earlier effort to modernize and reform the criminal law and limit the state's ability to regulate intimate life).

In invalidating the Texas anti-sodomy statute, the *Lawrence* majority appeared to expand *Griswold*'s notion of marital privacy to include adult relationships, whether married or not.[147] But critically, in overruling *Bowers v. Hardwick*,[148] the 1986 decision upholding a similar sodomy statute, the majority went beyond *Griswold* to explicitly delineate limits on the state's use of criminal law as a means of policing sex and enforcing morals.[149] In upholding Georgia's criminal ban on sodomy, the *Bowers* Court made clear that the state could use the criminal law for the preservation and enforcement of majoritarian sexual mores. As the *Bowers* Court explained, "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[150] By contrast, in concluding that *Bowers* "should be and now is overruled,"[151] the *Lawrence* majority framed the issue as "whether the majority may use the power of the State to enforce [majoritarian sexual mores] on the whole society through operation of the criminal law."[152]

For the *Lawrence* majority, that issue seemed well-settled. According to the majority, socio-legal developments over "the past half century" reflected "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[153] As evidence of this "emerging awareness," the majority cited, among other developments, the MPC, which "made clear that it did not recommend or provide for 'criminal penalties for consensual sexual relations conducted in private.'"[154]

As importantly, both the majority and concurring opinions in *Lawrence* expressed concern for the collateral civil consequences of criminal laws—even if those laws went unenforced. According to the majority, "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual

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[147] *Lawrence*, 539 U.S. at 578–79. *Lawrence*'s effort to expand *Griswold*ian privacy to unmarried couples built upon 1972's *Eisenstadt v. Baird*, in which the Court invalidated a Massachusetts statute that prohibited contraceptive use among unmarried persons. Eisenstadt v. Baird, 405 U.S. 438, 438 (1972). Critically, the *Eisenstadt* Court decided the issue on Equal Protection grounds, concluding that there was no rational justification for permitting contraceptive use among married couples, while prohibiting the unmarried from doing so. *Id.* at 453–55. Referencing both *Griswold* and *Eisenstadt*, *Lawrence* invalidated the anti-sodomy statute at issue on liberty grounds, concluding that the right to privacy allowed unmarried adult couples the right to engage in private, consensual sex. *Lawrence*, 539 U.S. at 558, 562, 564–65, 578–79.

[148] 478 U.S. 186 (1986).

[149] *Lawrence*, 539 U.S. at 578.

[150] *Id.* at 196.

[151] *Lawrence*, 539 U.S. at 578.

[152] *Id.* at 571.

[153] *Id.* at 571–72.

[154] *Id.* at 572 (quoting MODEL PENAL CODE § 213.2 cmt. 2 (1980)).

persons to discrimination both in the public and in the private spheres."[155] In her concurrence to the majority opinion, Justice O'Connor elaborated the point. Although sodomy prosecutions were rare, "[t]his case shows . . . that [they] . . . *do* occur."[156] In addition to the stigma of being labeled convicted criminals, those convicted under criminal sodomy bans could encounter other long-standing impediments in their daily lives, including restrictions "in the areas of employment, family issues, and housing."[157]

It was not just the majority and concurring opinions that framed *Lawrence* as a case about limits on the state's use of criminal law as a mechanism for enforcing majoritarian sexual mores. In a stinging dissent, Justice Scalia criticized the majority opinion on the ground that it licensed the decriminalization of a wide range of extant sexual offenses, all of which previously had been justified by the state's authority to police and enforce morals.[158] In *Lawrence*'s wake, Justice Scalia predicted that "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity" would be "called into question."[159] With its decision, Justice Scalia warned, "the Court has taken sides in the culture war."[160] Although Justice Scalia imagined this culture war to be confined to attitudes regarding homosexuality,[161] in truth, the culture war he imagined actually was part of the larger debate about the state's efforts to police morality and enforce sexual conformity in intimate life. In other words, it was part of the very same culture war that had raged since the 1950s.

In this way, *Lawrence* was the apotheosis of the criminal law reform effort that anticipated (and helped produce) *Griswold*. Unlike *Griswold*, which avoided directly engaging the question of legal reform of laws regulating sex and sexuality more generally, *Lawrence* squarely confronted this issue and determined that state criminal regulation of private, consensual sex was inappropriate. With this in mind, it is unsurprising that today, *Lawrence* is not known simply as a sexuality case, but also as a

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[155] *Id.* at 575.

[156] *Id.* at 581 (O'Connor, J., concurring) (emphasis in original).

[157] *Id.* at 582 (citing State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992)).

[158] *Id.* at 589 (Scalia, J., dissenting) ("Countless judicial decisions and legislative enactments have relied on the ancient proposition that a governing majority's belief that certain sexual behavior is 'immoral and unacceptable' constitutes a rational basis for regulation.").

[159] *Id.*

[160] *Id.* at 602.

[161] In an earlier case concerning the civil rights of LGBT people, *Romer v. Evans*, 517 U.S. 620 (1996), Justice Scalia dissented, opining that the majority "ha[d] mistaken a Kulturkampf for a fit of spite." *Id.* at 636 (Scalia, J., dissenting). On this account, in invalidating a Colorado referendum that severely curtailed civil protections against sexual orientation discrimination, the majority, in Justice Scalia's view, had "mistaken" a genuine (and legitimate) struggle over the meaning and application of public morals for base animus and rancor against LGBT persons. *Id.*

criminal law case[162]—one that endorses John Stuart Mill's view that the state may only limit the actions of individuals when doing so would prevent harm to others.[163] Under this logic, the preservation and enforcement of public morals would no longer suffice as a justification for the state's use of the criminal law to police intimate life. As such, *Lawrence* was not merely a decision that invalidated sodomy laws; it constitutionalized a consensus about limits on state authority to regulate intimate life that had first surfaced in the criminal law reform debate of the 1950s.

V. RECLAIMING HISTORY AND ENFORCING MORALITY

As the preceding Parts make clear, *Griswold*, *Lawrence*, and the line of cases articulating a right to privacy are rooted in the debate over criminal law reform that arose in the 1950s. Although the Court's decision in *Lawrence* explicitly drew upon these roots, *Griswold*'s relationship to this debate and the issues it surfaced has been less studied and explored.

But there is much to be gained from reflecting on the criminal law reform debate, and its connections to *Griswold* and the birth of a constitutionally-protected right to privacy. Recovering *Griswold*'s criminal law antecedents provides a more complete historical narrative for understanding the case and assessing its impact on the development of the right to privacy. A more accurate historical narrative not only makes clear that *Griswold* is not exclusively about reproductive rights; it reminds us that the interest in state control over reproduction was not—and does not have to be—exclusively about the rights of privileged women. In this regard, this history extends *Griswold*'s scope beyond reproductive rights to include a larger discussion about the state's authority to impose sexual values and mores on *all* of its citizens.

As importantly, focusing on this aspect of *Griswold*'s history may also help surface contemporary challenges to the rights and liberties of citizens—challenges that have gone largely unnoticed. The criminal law reform debate of the 1950s focused on the state's use of the criminal law to police morality because the criminal law was the primary means by which

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[162] *Lawrence* is featured in a number of leading criminal law casebooks. *See, e.g.*, BONNIE ET AL., CRIMINAL LAW 34 (2d ed. 2004) (excerpting *Lawrence*); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 121 (8th ed. 2007) (excerpting *Lawrence*); SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 281 (9th ed. 2012) (discussing *Lawrence*); CYNTHIA LEE & ANGELA HARRIS, CRIMINAL LAW: CASES AND MATERIALS 589 (1st ed. 2005) (excerpting *Lawrence*); FRANKLIN E. ZIMRING & BERNARD E. HARCOURT, CRIMINAL LAW AND THE REGULATION OF VICE 138 (2007) (excerpting *Lawrence*).

[163] JOHN STUART MILL, ON LIBERTY (1859) ("[T]he sole end for which mankind is warranted . . . in interfering with the liberty action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.").

the state marked and punished non-normative sex and sexuality. But even as reformers focused on criminal law as the predominant engine of sexual regulation, they made clear that their concerns were more generally directed toward the exercise of state power in the lives of individual citizens.[164]

Today, in the wake of *Griswold*, *Lawrence*, and the decriminalization effort they reflect, criminal law does not pack the same punch as it did a generation ago. But just because the criminal law regime of sexual regulation has been (largely) dismantled does not mean that the state has completely divested its interests in regulating sexual morality. Although it has gone largely unremarked upon, for many years, a parallel *civil* regime of sexual regulation existed alongside the criminal regime.[165] And, as Justice O'Connor observed in her concurrence in *Lawrence*, this system of *civil* regulation frequently was exercised with reference to the extant (but often unenforced) system of criminal regulation.[166] For example,[167] a police officer could be fired from his job for having an extramarital affair.[168] Under the police department's administrative code of conduct, the offending conduct would be charged under a provision prohibiting "conduct unbecoming an officer."[169] Critically, however, these administrative disciplinary charges were predicated on the fact that the underlying conduct was not just "unbecoming," but actually a criminal act.[170] As one court noted, "a[n administrative] rule prohibiting the commission of [a] crime" was a sensible measure that a jurisdiction could take to ensure that an officer did not engage in conduct that would "diminish his respect in the eyes of the community, arouse cynicism, discourage public cooperation, and perhaps encourage crime by others."[171]

Today, in our post-*Lawrence* world, the regime of criminal sexual regulation does not exist to provide a predicate for civil sexual

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[164] *See supra* text accompanying notes 20–43 (describing the reform movement's interest in limiting the state's authority to intrude into the intimate lives of individuals).

[165] *See* Melissa Murray, *Rights and Regulation:* Lawrence v. Texas *and the Evolution of Sexual Regulation*, 114 COLUM. L. REV. (forthcoming 2016) (discussing this parallel regime of civil sexual regulation).

[166] Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring) ("Texas' invocation of moral disapproval as a legitimate state interest proves nothing more than Texas' desire to criminalize homosexual sodomy . . . . [T]he law serves more as a statement of dislike and disapproval . . . than as a tool to stop criminal behavior."); *see also* Murray, *Rights and Regulation*, *supra* note 165 ("[C]ivil state regulation of sex and sexuality often occurred in the shadow of extant criminal laws . . . these criminal laws were never enforced . . . .").

[167] Murray, *Rights and Regulation*, *supra* note 165.

[168] *See, e.g.*, Andrade v. City of Phx., 692 F.2d 557, 559 (9th Cir. 1982).

[169] *Id.*

[170] *Id.*

[171] *Id*. at 559.

regulation.[172] Instead, these civil means of regulating sex and enforcing morality exist—and are exercised—independent of any criminal law antecedent.[173] And critically, these civil means of state regulation of sex and sexuality may communicate moral disapprobation and compel conformity with sexual norms as effectively as their criminal law counterparts.[174]

Consider the facts of *Anderson v. City of Lavergne*.[175] There, a police officer began a romantic relationship with an administrative assistant in his unit.[176] A supervisor, professing an interest in avoiding sexual harassment claims, ordered the couple to "'cease all contact with each other' outside of the workplace."[177] When they refused, the officer was terminated for failing to follow a superior's order—a violation of the department's code of conduct.[178] The officer filed suit challenging his termination, and at trial he was awarded damages; however, on appeal, the court ruled in favor of the City.[179] Although the appellate court acknowledged constitutional protections for association and privacy, and suggested that these protections extended to "nonmarital romantic relationships,"[180] it determined that the supervisor's order—and the policy prohibiting inter-office relationships that animated it—did not constitute a "direct and substantial interference" with the officer's "intimate associations."[181] The officer "continued to enjoy the ability to form intimate associations with anyone other than fellow police department employees of differing rank."[182] Reviewing the order and policy under rational basis review, the appellate court determined that the policy was rationally related to the city's professed interest in avoiding sexual harassment suits.[183]

Likewise, in *Seegmiller v. LaVerkin City*,[184] a police department reprimanded a female police officer for her off-duty sexual conduct. The officer, who was separated from her husband, had engaged in extramarital sex with an officer from a neighboring jurisdiction while attending an out-

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[172] *See* Murray, *Rights and Regulation*, *supra* note 165 (noting that criminal law has receded as an agent of sexual regulation, and in so doing, has eliminated the criminal predicate on which the parallel system of civil regulation once depended).

[173] *See* Murray, *Rights and Regulation*, *supra* note 165 (arguing that in the absence of criminal law, civil modalities continue to intervene into intimate life to regulate sex and sexuality).

[174] *See id.* (noting that, even after *Lawrence*, the state continues to use law to demand compliance with majoritarian sexual norms and mores).

[175] 371 F.3d 879 (6th Cir. 2004).

[176] *Id.* at 880.

[177] *Id.*

[178] *Id.*

[179] *Id.* at 880–83.

[180] *Id.* at 882.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] 528 F.3d 762, 765 (10th Cir. 2008).

of-town training session.[185] The officer challenged the department's actions on the ground that they violated her right to privacy.[186] At trial and on appeal, the officer lost.[187] The Tenth Circuit interpreted *Lawrence* narrowly, concluding that it did not confer a broadly defined fundamental "right to private sexual activity."[188] According to the court, the department's sanction of private, consensual sex was a reasonable effort to "further internal discipline [and] the public's respect for its police officers and the department they represent."[189]

Together, *Anderson* and *Seegmiller* reveal the flaw in *Griswold*'s (and *Lawrence*'s) progress narrative. As the facts of *Griswold* and *Lawrence* make clear, the burdens of criminalization often are highly visible and obviously recognizable[190]—an arrest, a criminal conviction, incarceration, police surveillance, and, as the mid-century reformers noted, the unwelcomed presence of the police officer under the bed.[191] In this regard, it is unsurprising that the initial efforts to draw limits on the state's ability to regulate sex and sexuality focused on these very visible forms of state interference.

Griswold and its progeny are testament to the reform movement's success in limiting the state's visible presence in intimate life. When we assess the trajectory from *Griswold* to *Lawrence*, it is clear that the right to privacy has become entrenched,[192] and in so doing, has sequestered the most intimate aspects of our quotidian lives from state intrusion.

But even as the right to privacy has become entrenched as a constitutional norm, *Griswold* and its articulation of the right to privacy was never closely associated with the broader effort to limit the state's use of the criminal law as a means of regulating intimate life. Instead, *Griswold*, and the right it introduced, has come to represent a profound shift in social and cultural values regarding sex.[193]

Prior to *Griswold*, sex was confined to marriage, and marriage was

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[185] *Id.* at 765.

[186] *Id.* at 766.

[187] *Id.* at 764.

[188] *Id.* at 770–71.

[189] *Id.* at 772.

[190] George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 287 (1998) (describing the application of criminal law and the punishment that flows from it as "the most elementary and obvious expression of the state's sovereign power" over the individual).

[191] *See supra* notes 67–69 and accompanying text.

[192] *See* Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J. F. 316, 319–21 (2015) (discussing the entrenchment of *Griswold* and the right to privacy).

[193] Michael Compitello, *Parental Rights and Family Integrity: Forgotten Victims in the Battle Against Child Abuse***,** 18 PACE L. REV. 135, 159 (1997) ("There is no doubt that *Griswold* was part of an overall sexual revolution that was occurring in America and that its effects in protecting the privacy of the marriage relationship extended not just to the family in general, but far beyond.").

understood as a procreative, heterosexual institution.[194] In rejecting this vision (and increasing access to contraception), *Griswold* has been understood as fueling the Sexual Revolution and a more permissive and individualized sexual culture. On this account, *Griswold* is credited with helping to transform society from one in which the state demanded compliance with majoritarian sexual norms to one in which the state respected some degree of sexual autonomy.[195]

Today, *Griswold*'s achievement is facilitating this profound change in social values, rather than in limiting state authority. This perception of *Griswold*, as much as the decision's emphasis on marriage and the marital couple, helps to explain why its role in the criminal law reform debate has been obscured. In venerating *Griswold*'s role in transforming our culture, we have overlooked its place in the effort to design limitations on the state.

Cases like *Seegmiller* and *Anderson* suggest the consequences of this neglect. Because we have overlooked *Griswold*'s role in articulating limits on the state's regulatory authority, we have failed to think seriously about all of the ways in which the state may curtail or impede the exercise of individual autonomy in intimate life. Although *Griswold* and *Lawrence* draw attention to the state's use of *criminal law* to limit the exercise of individual autonomy, cases like *Seegmiller* and *Anderson* suggest that state interference in intimate life may take other forms.

In this regard, focusing on *Griswold*'s relationship to the criminal law is important not because criminal law is categorically distinct from other forms of state regulation, but because, as perhaps the most visible and obvious form of state authority, criminal law draws our attention to *the state* itself. In reminding us of the state's thick role in shaping and enforcing sexual norms, *Griswold*'s criminal law helps to illuminate and contextualize the subtler, non-criminal forms of state sexual regulation that have survived *Griswold* and *Lawrence*.

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[194] Murray, *Strange Bedfellows*, *supra* note 11, at 1265 ("Until the twentieth century, [procedural rules and restrictions on entry into marriage] made clear that marriage was an intraracial, monogamous, exogamous, and heterosexual union between consenting adults.").

[195] *See* Robert A. Sedler, *Abortion, Physician-Assisted Suicide and the Constitution: The View From Without and Within*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 529, 531 (1998) (arguing that the sexual revolution of the 1960s was "facilitated by the Supreme Court's recognition of a so-called constitutional 'right of privacy' in *Griswold v. Connecticut*"); George Weigel, *The Sixties, Again and Again*, FIRST THINGS, Apr. 2008, at 22, http://www.firstthings.com/article/2008/03/004-the-sixties-again-and-again-36 (arguing that in *Griswold*, "the Supreme Court began to set in legal concrete the notion that sexual morals and patterns of family life are matters of private choice or taste, not matters of public concern in which the state has a legitimate interest").

VI. CONCLUSION

As we reflect on *Griswold*'s legacy, it is worth remembering that *Griswold* was not solely about married couples' access to birth control. Instead, it was also part of a larger effort to think about the law's place in regulating intimate life. With this in mind, our approach to this storied anniversary is perhaps more muted when we consider *Griswold*'s criminal law antecedents and the decision's underlying conservatism. By recuperating the debate over criminal law reform, and *Griswold*'s place in it, we also recover the fundamental question at the heart of that debate—and at the heart *Griswold*: whether the state may use its authority to censure and condemn private, consensual adult sex and sexuality?

When we focus on that question, it becomes clear that although much has been achieved since *Griswold*, the effort to reform the relationship between state regulation and individual liberty remains incomplete. Although *Griswold* and *Lawrence* succeeded in flushing the police from our bedrooms, the state remains a persistent presence in intimate life. In this regard, recovering *Griswold*'s criminal law suggests how much progress has been made, as well as the work left to do.