GUIDING *GRISWOLD*: REEVALUATING NATIONAL ORGANIZATIONS' ROLE IN THE CONNECTICUT BIRTH CONTROL CASES

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INTRODUCTION

Two recent controversies have given *Griswold v. Connecticut*[1]—the Supreme Court case overturning Connecticut's statute prohibiting the use of contraceptives and establishing a constitutional right to privacy—a second life. First, *Griswold*'s

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[1] Griswold v. Connecticut, 381 U.S. 479 (1965).

legacy was revisited in *Burwell v. Hobby Lobby*,[2] the Supreme Court's recent case challenging the Patient Protection and Affordable Care Act ("ACA") provisions regarding access to birth control.[3] As *Hobby Lobby* reached the Supreme Court, some commentators felt they had entered a "time warp," incredulous that on the eve of *Griswold*'s fiftieth anniversary access to birth control faced renewed attacks.[4] In response to these attacks, the ACA's defenders highlighted the values at stake in the continued debate regarding access to birth control: the government's Supreme Court brief in *Hobby Lobby* focused on public health and healthcare costs,[5] and amicus briefs emphasized birth control's importance to women's equal citizenship,[6] liberty,[7] and autonomy.[8]

Second, *Griswold*'s words were revitalized by *Obergefell v. Hodges*,[9] the Supreme Court's recent decision holding that states are required to recognize same-

[2] Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014). For commentary remarking on *Hobby Lobby*'s timing, see, for example, Melissa Murray, *Overlooking Equality on the Road to* Griswold, 124 YALE L.J. F. 324 (2015), http://www.yalelawjournal.org/forum/overlooking-equality-on-the-road-to-griswold; Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. F. 349 (2015), http://www.yalelawjournal.org/forum/contraception-as-a-sex-equality-right; and Reva B. Siegel, *How Conflict Entrenched the Right to Privacy*, 124 YALE L.J. F. 316 (2015), http://www.yalelawjournal.org/forum/how-conflict-entrenched-the-right-to-privacy.

[3] 42 U.S.C. § 300gg-13(a)(4) (2012) (requiring employer's group health insurance to provide "preventative care and screenings" for women); Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8725, 8725 (Feb. 15, 2012) (to be codified at 45 C.F.R. pt. 147) (specifying that preventative care includes "contraceptive methods, sterilization procedures, and patient education and counseling").

[4] Jessie Hill, *The Contraceptives Coverage Controversy—What's Old Is New Again*, SCOTUSBLOG (Feb. 21, 2014, 5:10 PM), http://www.scotusblog.com/2014/02/symposium-the-contraceptives-coverage -controversy-whats-old-is-new-again.

[5] Brief for the Petitioners at 15, 49-51, Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014) (No. 13-354). *But see* Reply of Petitioner at 16, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354) (noting that "individual dignity and autonomy" is also at issue).

[6] Brief for the National Women's Law Center et al. as Amici Curiae Supporting Petitioners at 24, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354) (emphasizing that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives") (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992)); Brief for Foreign and Comparative Law Experts et al. as Amici Curiae Supporting Petitioners in No. 13-345 and Respondents in No. 13-356 at 8, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354); Brief of the Guttmacher Institute as Amici Curiae Supporting the Government at 8, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354); *see also* Walter Dellinger, *Contraception as a Test of Equality*, WASH. POST (Mar. 23, 2014), http://www.washingtonpost.com/opinions/contraception-as-a-test-of-equality/2014/03/23/b18fbaaa-b140-11e3-a49e-76adc9210f19_story.html (stating that *Hobby Lobby*, like *Griswold* before it, "implicate[s] equality of access to effective methods of family planning").

[7] Brief for Julian Bond, The American Civil Liberties Union et al. as Amici Curiae Supporting the Government at 33, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354) (noting that "[m]eaningful access to birth control is an essential element of women's constitutionally protected liberty") (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003)).

[8] Brief for the National Women's Law Center et al. as Amici Curiae Supporting the Government at 14, *Hobby Lobby*, 134 S. Ct. 2751 (No. 13-354) (noting that "contraception regulations ensure that women can choose the contraceptive methods that fits their needs depending upon their life stage, sexual practices, and health status" (internal quotation marks and citation omitted)). For an overview of the interests at issue in *Hobby Lobby*, see generally Neil S. Siegel & Reva B. Siegel, *Compelling Interests and Contraception*, 47 CONN. L. REV. 1025 (2015).

[9] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

sex marriages.[10] Justice Kennedy's majority opinion quotes *Griswold* at length[11] and cites *Griswold* as recognizing two important constitutional rights: a fundamental right to marriage,[12] and fundamental liberty interest which "extend[s] to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[13] In response, the dissenting Justices frame *Griswold* as a limited holding that cautions restraint in recognizing new rights based on a "'continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles [of] the doctrines of federalism and the separation of powers.'"[14]

As a result, as *Griswold* turns fifty, many scholars have revisited its history.[15] This article joins these scholars in reexamining *Griswold* and in doing so reveals a previously underexplored aspect of its history. Although there are a number of detailed historical narratives discussing the cases leading to *Griswold*, these accounts focus on the role Connecticut attorneys and birth control advocates played in bringing this case to the Supreme Court.[16] The heroes of these stories are Catherine Roraback, the Connecticut attorney who litigated *Griswold* in the lower courts; Professor Fowler Harper, the Yale Law School professor who argued *Poe v. Ullman* before the Supreme Court; and Professor Thomas Emerson, the Yale Law School professor who took control of the case after Harper's death in 1965 and presented *Griswold* to the Supreme Court.[17] While these accounts recognize that a peripheral group of attorneys and birth control advocates participated in *Griswold*, their involvement is often treated as an unimportant footnote to the history of *Griswold*.[18]

By focusing on Roraback, Harper, and Emerson, past historical accounts have

[10] *Id.* at 2608.

[11] *Id.* at 2599-600 (citing Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).

[12] *Id.* at 2598 (citing *Griswold*, 381 U.S. at 486).

[13] *Id.* at 2597-98 (citing *Griswold*, 381 U.S. at 484-86).

[14] *Id.* at 2618 (Roberts, C.J., dissenting) (quoting *Griswold*, 381 U.S. at 501 (Harlan, J., concurring)); *see also id.* at 2620 (citing Poe v. Ullman, 367 U.S. 497 (1961)).

[15] *See, e.g.*, Collection, Griswold *at 50*, 124 YALE L.J. F. 316 (2015); Symposium, *The 50th Anniversary of* Griswold v. Connecticut, *Privacy Laws Today*, 47 CONN. L. REV. 971 (2015).

[16] *See* Mary L. Dudziak, *Connecticut Supreme Court Before* Griswold v. Connecticut, 75 IOWA L. REV. 915 (1990); DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* (1994); JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT*: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY (2005); *but see* LEIGH ANN WHEELER, HOW SEX BECAME A CIVIL LIBERTY (2013) (describing the ACLU's role in the Connecticut birth control cases).

[17] *See* SUSAN WAWROSE, *GRISWOLD V. CONNECTICUT*: CONTRACEPTION AND THE RIGHT OF PRIVACY 67-76, 87-93 (1996); Poe v. Ullman, 367 U.S. 497 (1961).

[18] For example, although Garrow acknowledges PPFA and ACLU lawyers' participation in the events leading up to *Griswold*, he at times undervalues or dismisses their contributions. *See* GARROW, *supra* note 16, at 221 (describing the Connecticut attorneys as "fending off intrusive suggestions from PPLC's ostensible New York allies," PPFA and the ACLU); *id.* at 228 ("Perhaps Pilpel was simply seeking to avoid future criticism should something go wrong with *Griswold* in the Supreme Court. Or perhaps being in New York simply did make one superior and smarter . . . a phenomenon that the PPLCers had of course had many prior opportunities to ponder.").

overlooked the contributions made by another group: lawyers working for two national organizations, the Planned Parenthood Federation of America ("PPFA") and the American Civil Liberties Union ("ACLU"). For example, historian David Garrow's otherwise thorough account of efforts to overturn Connecticut's statute prohibiting the use of contraceptives often undervalues the PPFA and ACLU lawyers' participation in the events leading up to *Griswold*. Consider his treatment of Harriet Pilpel, one of the attorneys working with PPFA and the ACLU throughout the Connecticut birth control litigation.[19] In Garrow's telling of *State v. Nelson*[20] and *Tileston v. Ullman*[21]—two of the earliest cases challenging the Connecticut statute—Garrow presents Pilpel as a key player who advised the Connecticut attorneys litigating the cases in Connecticut court.[22] However, in his accounts of *Poe v. Ullman*[23] and *Griswold v. Connecticut*[24]—two later cases—Pilpel's contributions are portrayed as unremarkable[25] and she is described as an annoyance to the Connecticut attorneys.[26] Pilpel receives similar treatment from other historians, who either present Pilpel and the national organizations she represented as unwelcome intruders in the Connecticut cases,[27] as unimportant participants,[28] or make no mention of their involvement at all.[29]

As these examples indicate, lawyers like Harriet Pilpel working for PPFA and the ACLU are rarely given their due in historical accounts of *Griswold*. By reexamining letters, memoranda, and other original documents related to the Connecticut birth control cases, this article presents a new perspective on the role

[19] Harriet Fleischl Pilpel began her legal career in 1936 at Greenhaum, Wolff & Ernst, where she worked on First Amendment issues with Morris Ernst. *Pilpel, Harriet Fleischl*, NOTABLE AMERICAN WOMEN: A BIOGRAPHICAL DICTIONARY COMPLETING THE TWENTIETH CENTURY 518 (Susan Ware ed., 2004). In addition to her work in private practice, Pilpel served as general counsel to the Planned Parenthood Federation of America and was later appointed to the Executive Board of the ACLU. *Id.*; WHEELER, *supra* note 16, at 114. Over the course of her career, Pilpel participated in twenty-seven cases before the Supreme Court. NOTABLE AMERICAN WOMEN, *supra*, at 518.

[20] State v. Nelson, 7 Conn. Supp. 262 (Conn Super. Ct. 1939), *rev'd*, 11 A.2d 856 (Conn. 1940).

[21] Tileston v. Ullman, 26 A.2d 582 (Conn. 1942).

[22] *See, e.g.*, GARROW, *supra* note 16, at 68 (describing how Pilpel met with the Connecticut attorney responsible for *Nelson* to "discuss the arguments against the Connecticut law [he] should stress in filing his demurrer").

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

[24] Griswold v. Connecticut, 381 U.S. 479 (1965).

[25] *See, e.g.*, GARROW, *supra* note 16, at 234 (calling the amicus briefs in *Griswold*, including the PPFA written by Pilpel, "generally unremarkable").

[26] *See, e.g.*, *id.* at 155 (stating that Catherine Roraback attended a meeting with Fowler Harper, Ernst, and Pilpel "so as to be sure that warm-hearted Fowler would not allow the New Yorkers to insinuate themselves").

[27] *See, e.g.*, JOHNSON, *supra* note 16, at 41 (describing Pilpel and Ernst's "harsh critiques" of the Connecticut attorneys' briefs and attempts to "hijack" *Poe*).

[28] *See, e.g.*, *id.* at 45 (treating PPFA's brief in *Poe* with a one sentence summary, stating that it "provided 'a comprehensive documentation of the medical, legal, social and religious status of contraception in the United States' at the time").

[29] Dudziak, *supra* note 16. Alone amongst the historical accounts, Leigh Ann Wheeler recognizes Harriet Pilpel's important role in the birth control movement. *See generally* WHEELER, *supra* note 16. Specifically, Wheeler highlights the role Pilpel played in shaping the ACLU's view regarding access to birth control and the right to engage in consensual sexual conduct as civil liberties. *Id.* at 93-119.

Pilpel and other lawyers for PPFA and the ACLU played in the Connecticut birth control cases.

Part I of this article explains the hurdles national organizations had to overcome in order to effectively participate in the Connecticut birth control cases. These hurdles took two forms. The first was an external hurdle. In order to overturn the Connecticut birth control statute, the litigants had to deal with a doctrinal problem: how to overcome the Court's reluctance to invoke *Lochner*-style substantive due process review. The second was an internal hurdle. PPFA and the ACLU, although deeply involved in the birth control movement, were not in control of the Connecticut birth control cases that gave rise to *Griswold*. If PPFA and the ACLU wanted to participate, they had to find ways to collaborate with and indirectly influence the Connecticut attorneys.

Part II draws upon original archival research to demonstrate three ways in which lawyers from PPFA and the ACLU attempted to intervene in the Connecticut birth control cases. First, the national organizations advised the Connecticut attorneys as they searched for appropriate litigants, publicized the cases, and coordinated the efforts of other organizations interested in the Connecticut cases. Second, the national organizations provided medical information, survey data, and social science research for the Connecticut attorneys' briefs and through their own amicus briefs. Finally, the national organizations encouraged the Connecticut attorneys to consider alternative legal arguments for overturning the Connecticut statute prohibiting the use of contraceptives and ultimately presented these alternative arguments in their own amicus briefs.

Part III highlights the impact PPFA and the ACLU's interventions had on *Griswold*. By providing data and research, the national organizations encouraged the Supreme Court to discuss birth control as a commonly accepted part of American life. By presenting innovative legal arguments, the national organizations linked the demand for access to birth control to broader policy arguments about obscenity, decriminalizing private sexual conduct, and equality.

As *Griswold* turns fifty and its legacy continues to be debated, it is important to consider how the case reached its final form. This article provides new insight into an often-overlooked aspect of *Griswold*'s history. In doing so, this article seeks to accomplish two things. First, it provides a new historical perspective on *Griswold*. Second, it presents PPFA and the ACLU's participation in the Connecticut birth control cases as prime examples of effective lawyering on behalf of a social movement to be emulated by national organizations today.

I. CHALLENGES FACING NATIONAL ORGANIZATIONS IN *GRISWOLD*

Before discussing how Harriet Pilpel and other lawyers for PPFA and the ACLU participated in *Griswold*, it is important to understand how national organizations typically participate in litigation. A great deal has been written on the role national organizations and the individual "movement" or "cause" lawyers

involved in these organizations play in bringing about legal change.[30] Movement lawyers have been defined as lawyers who use their "legal skills to pursue ends and ideals that transcend client service"[31] or who seek to "change positive law and social norms."[32] But how do they accomplish this goal? Most often, they bring cases on behalf of their constituents as part of "litigation campaigns,"[33] such as the NAACP's efforts to end segregation and Lambda Legal's campaign for same-sex marriage.[34] As part of these litigation campaigns, movement lawyers often seek out sympathetic plaintiffs for creating test cases that best justify the legal policies they seek to advance.[35] This typical account presumes an ability to choose the litigants and present a favorable factual background and thus depends on national organizations maintaining direct control over the cases brought to the courts.

Increasingly, however, national organizations are not in control of the cases that raise the issues they care about. Scholars have recognized that when national organizations advance their goals through litigation rather than political advocacy, they run the risk that dissenting group members will initiate their own cases and through that litigation promote potentially competing visions for their movement.[36] This can give rise to intragroup conflict between individuals who wish to bring their own legal challenges and national organizations that seek to control the litigation strategy. One scholar exploring this phenomenon, Douglas NeJaime, calls this the "legal mobilization dilemma."[37]

NeJaime presents the conflict surrounding one of the gay-marriage cases, *Hollingsworth v. Perry*,[38] as a prime example of the legal mobilization dilemma.[39] In the period before *Perry* reached the Supreme Court, national organizations focused on advancing gay rights prioritized litigation in state courts and urged other advocacy groups to avoid bringing cases in federal court.[40] However, individuals and groups operating outside the national organizations' control initiated federal challenges to California's Proposition 8, which prohibited same-sex marriage in the state.[41] Although the national groups eventually initiated their own federal suits on

[30] *See, e.g.*, STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997).

[31] SCHEINGOLD & SARAT, *supra* note 30, at 3.

[32] Eskridge, *supra* note 30, at 2064-65.

[33] Rubenstein, *supra* note 30, at 1632.

[34] Eskridge, *supra* note 30, at 2195.

[35] *Id.* at 2194.

[36] Rubenstein, *supra* note 30, at 1624.

[37] Douglas NeJaime, *The Legal Mobilization Dilemma*, 61 EMORY L.J. 663, 665 (2012).

[38] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[39] NeJaime, *supra* note 37, at 664-65.

[40] *Id.* at 698.

[41] *Id.* at 698-701.

behalf of same-sex couples and intervened as amici in *Perry*,[42] the initial departure from their movement strategy created conflict within the movement.

Other scholars have recognized a similar conflict between national legal organizations and the Supreme Court Pro Bono Bar, a growing group of lawyers and law firm practices that offer free representation for cases likely to reach the Supreme Court.[43] The rise of the Supreme Court Pro Bono Bar has created "serious obstacles" for national organizations and affiliated movement lawyers trying to implement their political and legal strategies.[44] One such obstacle is the fact that the Supreme Court Pro Bono Bar, which brings cases to the Supreme Court that may interfere with or preempt the national organizations' litigation campaigns, increasingly outpaces national organizations.[45]

The same legal mobilization dilemma occurred in the Connecticut birth control cases. PPFA initiated and controlled the earliest cases challenging the Connecticut statute prohibiting the use of contraceptives.[46] In later cases, however, Connecticut attorneys were increasingly responsible for identifying plaintiffs and litigating their cases in the Connecticut courts and in the Supreme Court.[47] As a result, national organizations, which had previously been deeply involved in the Connecticut birth control cases, were unable to influence the course of the litigation. This shift in control of the litigation strategy created conflict between the Connecticut attorneys and the national organizations.[48]

A. Overview of the Connecticut Birth Control Cases

Before discussing the conflict between national organizations and the Connecticut attorneys in the Connecticut birth control cases, it is important to understand the history of the birth control movement that gave rise to these cases. Those critical of *Griswold* often deride the case as manufactured by "some Yale professors . . . because they like this kind of litigation."[49] However, the many detailed historical narratives chronicling *Griswold*'s history demonstrate that *Griswold* was the culmination of a longstanding birth control movement that was led not only by the Connecticut attorneys who litigated *Griswold v. Connecticut*, but also by a cast of supporting lawyers like Harriet Pilpel from PPFA and the

[42] *Id.* at 685-86.

[43] Nancy Morawetz, *Counterbalancing Distorted Incentives in Supreme Court Pro Bono Practice: Recommendations for the New Supreme Court Pro Bono Bar and Public Interest Practice Communities*, 86 N.Y.U. L. REV. 131, 133 (2011).

[44] *Id.* at 136.

[45] *Id.* at 201.

[46] *See infra* Part I.A.

[47] *See infra* Part I.B.1.

[48] *See infra* Part I.B.1-2.

[49] *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary of the United States Senate*, 100th Cong. 116 (1987); *see also* GARROW, *supra* note 16, at 265.

ACLU.[50]

Historical accounts of the Connecticut birth control cases typically begin in 1879 with the passage of Connecticut's statute prohibiting the use of birth control, which, at the time, was the "most restrictive birth control law in the country."[51] Initially, birth control advocates focused on legislative efforts to overturn this law and other "Comstock laws," which prohibited the sale or use of birth control at the federal and state level.[52] These legislative efforts to overturn the Connecticut statute were, however, unsuccessful.[53]

After many failed attempts to overturn the Connecticut statute through legislation, both national and Connecticut birth control advocates turned to litigation. The first legal challenge to the Connecticut birth control law reached the Connecticut Supreme Court in 1940. In *State v. Nelson*,[54] birth control advocates, led by Connecticut attorney J. Warren Upson and guided by PPFA lawyers Morris Ernst and Harriet Pilpel, defended doctors and nurses working at a Connecticut birth control clinic who were charged with violating the Connecticut statute.[55] At first, it appeared that the birth control advocates were going to succeed in overturning the statute: the Connecticut trial court held that the statute was unconstitutional.[56] On appeal, however, the Connecticut Supreme Court reversed the trial court's decision and upheld the statute.[57] The Connecticut Supreme Court concluded that "whatever may be our own opinion regarding the general subject, it is not for us to say that the Legislature might not reasonably hold that the artificial limitation of even legitimate child-bearing would be inimical to the public welfare."[58]

After the defendants in *Nelson* settled, short-circuiting any plans to appeal,[59] birth control advocates quickly began efforts to bring another case. In 1942, Connecticut attorneys Frederick H. Wiggin and John Q. Tilson, again in consultation with Ernst and Pilpel, filed *Tileston v. Ullman*,[60] a declaratory judgment action by a Connecticut doctor who sought to enjoin enforcement of the Connecticut statute against legitimate medical practices.[61] This time the case

[50] *See generally* GARROW, *supra* note 16; JOHNSON, *supra* note 16; WHEELER, *supra* note 16; Dudziak, *supra* note 16.

[51] Dudziak, *supra* note 16, at 920; CONN. GEN. STAT. § 53-32 (1958) ("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.").

[52] JOHNSON, *supra* note 16, at 15.

[53] *Id.* at 16-28.

[54] State v. Nelson, 7 Conn. Supp. 262 (Conn Super. Ct. 1939), *rev'd*, 11 A.2d 856 (Conn. 1940).

[55] For a general overview of *Nelson*, see GARROW, *supra* note 16, 61-78.

[56] *Nelson*, 7 Conn. Supp. at 264.

[57] *Nelson*, 11 A.2d at 862-63.

[58] *Id.* at 861.

[59] Dudziak, *supra* note 16, at 924.

[60] Tileston v. Ullman, 26 A.2d 582 (Conn. 1942).

[61] For a general overview of *Tileston*, see GARROW, *supra* note 16, at 94-105.

focused on raising an issue left undecided by *Nelson*: whether the Connecticut statute would be upheld if pregnancy would threaten a woman's life.[62] Ernst and Pilpel took over the appeal to the Supreme Court,[63] but the case was dismissed on standing grounds because the plaintiff, a doctor, asserted the rights of his patients rather than his own rights.[64]

After another period of legislative efforts to repeal the prohibition on the use of birth control, birth control advocates renewed their legal challenges in 1958.[65] This time Fowler Harper, a Yale Law School Professor and President of the Planned Parenthood League of Connecticut, and Catherine Roraback, a Connecticut attorney, led the litigation efforts.[66] Harper and Roraback initiated a series of declaratory judgment actions on behalf of Dr. Lee Buxton and several patients who sought to obtain a prescription for birth control.[67] These cases were eventually consolidated as *Buxton v. Ullman*[68] in the Connecticut courts and *Poe v. Ullman*[69] before the Supreme Court. Although Harper wrote the briefs and argued for the petitioner before the Supreme Court, Pilpel continued to be involved and in fact participated in the Supreme Court oral argument.[70] Once again, the Supreme Court dismissed *Poe*, this time because the Supreme Court believed that the Connecticut statute was not actually being enforced.[71]

Birth control advocates viewed the Supreme Court's dismissal as an invitation to open a new clinic, violate the Connecticut statute, and bring a concrete controversy to the courts.[72] Shortly after *Poe v. Ullman*, the Planned Parenthood League of Connecticut opened a birth control clinic, and shortly after opening the clinic's two leaders, Estelle Griswold, the Executive Director of the Planned Parenthood League of Connecticut, and Dr. Lee Buxton, a prominent New Haven doctor, were charged with violating the Connecticut birth control law.[73] Their arrests gave rise to *Griswold v. Connecticut*,[74] the case in which the Supreme Court finally struck down the Connecticut statute prohibiting the use of contraceptives.

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62 *See* GARROW, *supra* note 16, at 84; *Nelson*, 11 A.2d at 859 ("[T]here is no occasion to determine whether an implied exception might be recognized when 'pregnancy would jeopardize life' . . . similar to that usually expressly made in statutes concerning abortion.").

63 *See* GARROW, *supra* note 16, at 101.

64 Tileston v. Ullman, 318 U.S. 44, 46 (1943).

65 Dudziak, *supra* note 16, at 932.

66 *Id.*

67 *Id.* at 933.

68 Buxton v. Ullman, 156 A.2d 508 (Conn. 1959).

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

70 Oral Argument, Poe v. Ullman, 367 U.S. 497 (1961) (No. 60), http://www.oyez.org/cases/1960-1969/1960/1960_60 [hereinafter Oral Argument, *Poe*].

71 *Poe*, 367 U.S. at 508-09.

72 GARROW, *supra* note 16, at 196; Dudziak, *supra* note 16, at 936; Catherine G. Roraback, Griswold v. Connecticut*: A Brief Case History*, 16 OHIO N.U. L. REV. 395, 400 (1989).

73 GARROW, *supra* note 16, at 202-07; Dudziak, *supra* note 16, at 936.

74 Griswold v. Connecticut, 381 U.S. 479 (1965).

B. Specific Challenges in the Connecticut Birth Control Cases

1. Internal Hurdles: Control of Litigation Strategy

Beginning with *Buxton* and *Poe*, Connecticut attorneys Harper and Roraback controlled the Connecticut birth control cases. Although the Connecticut attorneys were involved in the Connecticut branch of Planned Parenthood and the Connecticut Civil Liberties Union, they acted largely independent of their national parent organizations.[75] They began to resist Harriet Pilpel, PPFA, and the ACLU's efforts to intervene, giving rise to conflicts characteristic of the "legal mobilization dilemma."[76]

The conflict between the Connecticut attorneys and the national organizations is alluded to in historical accounts of the Connecticut birth control cases. One account describes the conflict as "internecine warfare" between the Connecticut attorneys and Harriet Pilpel and Morris Ernst, and suggests that the Connecticut attorneys were "fending off intrusive suggestions" from their "ostensible New York allies," PPFA and the ACLU.[77] Another account refers to Pilpel's efforts to influence the cases as "pressure from the national organization" or "attempt[s] to hijack [Roraback's] case."[78]

The tension between the Connecticut attorneys and the national organizations is even more apparent from letters passed between the two groups. Harper at one point rebukes Pilpel's offers to assist with the litigants' briefs, stating that Catherine Roraback, the lead Connecticut attorney, "insists . . . that she cannot effectively collaborate with anyone else in the writing of a reply brief."[79] Similarly, much of Catherine Roraback's correspondence with the national organizations was focused on fending off their attempts to intervene,[80] or explaining why she did not integrate their proposals into her briefs.[81] And much of the correspondence between the PPFA and ACLU attorneys reflects frustration

[75] *See* Norman Dorsen & Susan N. Herman, *American Federalism and the American Civil Liberties Union*, *in* PAPERS FROM THE ELEVENTH ANNUAL LIMAN COLLOQUIUM AT YALE LAW SCHOOL: WHY THE LOCAL MATTERS: FEDERALISM, LOCALISM, AND PUBLIC INTEREST ADVOCACY 21, 33 (2008) (explaining that the "ACLU affiliates enjoy a great deal of autonomy to develop their own substantive civil liberties policies and interpretations, and to apply them within their own jurisdictions even when they diverge from policies adopted by the National Board").

[76] *See supra* notes 37-42.

[77] GARROW, *supra* note 16, at 162, 221.

[78] JOHNSON, *supra* note 16, at 41.

[79] Letter from Professor Fowler Harper to Harriet Pilpel (June 18, 1959) (on file with Smith College, Sophia Smith Collection, Planned Parenthood Federation of America Records [hereinafter Smith PPFA], Box 184, Folder 27); *see also* Letter from Professor Fowler Harper to Harriet Pilpel (May 7, 1959) (on file with Smith PPFA, Box 184, Folder 27) (discouraging PPFA and ACLU amicus participation and implicitly criticizing the use of "lobbyists" at the courts).

[80] Letter from Catherine Roraback to ACLU Executive Director John de J. Pemberton, Jr. (Apr. 22, 1963) (on file with Smith PPFA Box 184, Folder 25) (rejecting a proposed Catholic Council on Civil Liberties ("CCCL") or ACLU amicus brief in the Connecticut Supreme Court).

[81] Letter from Catherine Roraback to Harriet Pilpel (Aug. 23, 1963) (on file with Smith PPFA, Box 184, Folder 25).

with the contents of the Connecticut attorneys' briefs.[82] These documents reveal the extent of their disagreement and demonstrate that the kind of conflicts inherent in the "legal mobilization dilemma" were certainly present among the birth control advocates involved in the Connecticut birth control cases.

2. External Hurdles: The Doctrinal Problem

The source of the conflict between the Connecticut attorneys and the national organizations appears to have been the debate over how best to overcome the external hurdles standing in the way of successful litigation before the courts. In order to overturn the Connecticut statute prohibiting the use of contraceptives, birth control advocates had to overcome a doctrinal challenge: articulating appropriate constitutional grounds for striking down the Connecticut statute when the Supreme Court had disavowed judicial overreaching in the aftermath of the *Lochner* era.[83] As contemporary scholars note, the Justices in *Griswold* were "[a]nxious not to follow the logic of *Lochner*."[84]

The attorneys involved in the Connecticut birth control cases disagreed over how best to overcome this doctrinal hurdle. One scholar notes that "contemporary observers recognized the availability of other possible bases for the Court's decision" beyond recognizing a right to privacy.[85] As Thomas Emerson, the Connecticut attorney who argued *Griswold* before the Supreme Court, acknowledged, *Griswold* seemed like an easy case to laypeople: the Connecticut statute was "a hopelessly unsupportable piece of state legislation."[86] To lawyers, however, *Griswold* was more difficult: the case "did not readily fit into any existing legal pigeonhole" and any effort to strike down the law under existing doctrines would force the Supreme Court to "enter uncharted waters."[87] Emerson identified five possible avenues for attacking the Connecticut law: the Equal Protection

[82] Letter from Harriet Pilpel to Dr. Alan Guttmacher and Frederick Jaffe (Oct. 15, 1964) (on file with Smith PPFA, Box 184, Folder 25) ("[O]ur advice in most substantial respects has not been followed and we have been (and are) seriously concerned about a number of what may be serious defects in the cases now pending before the United States Supreme Court."); Letter from Harriet Pilpel to Frederick Jaffe (Oct. 9, 1962) (on file with Smith PPFA, Box 184, Folder 25) ("I found [Roraback], however, adamant—she said that the brief was 'more of the same thing' and that while she would send us a copy she didn't really see any need for us to go over it before it was filed. I kept trying but that's as far as I got."); Memorandum from Harriet Pilpel to Frederick Jaffe (Nov. 27, 1961) (on file with Smith PPFA, Box 184, Folder 26) ("As you also know, there are a number of weaknesses in these Connecticut cases.").

[83] *See* C. THOMAS DIENES, LAW, POLITICS, AND BIRTH CONTROL 178 (1972) (noting that the Justices "fear[ed] a relapse to the pre-New Deal days when the court stood as a super-legislature passing on the wisdom of legislatively fashioned policy").

[84] WHAT *ROE V. WADE* SHOULD HAVE SAID 8 (Jack M. Balkin ed., 2005).

[85] Ryan C. Williams, *The Paths to* Griswold, 89 NOTRE DAME L. REV. 2155, 2158 (2014) (citing Thomas I. Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 220-28 (1965)).

[86] Emerson, *supra* note 85, at 219; *see also* Anthony R. Blackshield, *Constitutionalism and Comstockery*, 14 KAN. L. REV. 403, 411 (1966) (arguing that "even judges fully sharing the modern impatience with 'Comstock' laws, and fully prepared to strike them down accordingly, might find no immediately obvious constitutional provision to which avoidance might be pinned").

[87] Emerson, *supra* note 85, at 219-20.

Clause, the First Amendment, substantive due process doctrine, a fundamental right of privacy, or the Ninth Amendment.[88] Each group involved in the Connecticut litigation favored certain arguments over others. Fowler Harper suggested arguments based on the Ninth Amendment and a right to privacy.[89] Catherine Roraback, the Connecticut attorney who litigated both *Poe* and *Griswold* in the lower courts, focused on arguments based on substantive due process and the right to life and liberty that was at stake in the case.[90] The national organizations preferred other legal arguments.[91] They wanted to analogize the statute at issue in *Griswold* to obscenity statutes,[92] to make broader arguments about the appropriate limits on government regulation of private conduct,[93] and to address issues of equality.[94] The debate over which legal arguments had the greatest likelihood of success was at the center of the conflict between the Connecticut attorneys and the national organizations.

C. Overcoming Conflict

Given that the Connecticut attorneys controlled the Connecticut birth control litigation, Harriet Pilpel, PPFA, and the ACLU had to find indirect ways to gain influence over the litigation. In an ideal world, at least from the national organizations' perspective, lawyers within a legal community would overcome internal conflict by implementing an "expertise" model through which individuals cede control to an experienced group of specialists who would determine the best strategy to achieve the community's goals.[95] This model has proven unrealistic and difficult to implement even within a single organization. For example, Professor Norman Dorsen, former ACLU President, and Susan Herman, current ACLU President, describe the tension between local ACLU affiliates, which initiate litigation, and the ACLU national office, which establishes the ACLU's national policy goals.[96] Although the ACLU national office retains control over

[88] *Id.* at 220.

[89] Roraback recounts a phone call from Fowler Harper where "he excitedly told [her] of the article by Normal Redlich" articulating a Ninth and Tenth Amendment argument for invalidating the Connecticut law. Roraback, *supra* note 72, at 401.

[90] Interview by Rhea Hirshman with Catherine Roraback at 50 (July 17, 1997) (on file with Catherine G. Roraback Papers, Emory University, Emory Law School Archives, Hugh F. MacMillan Law Library, Box 3, Folder 4). Roraback explained that she "could have imagined it as just a straight due process decision, that the statute itself was unreasonable and had no relationship to public purpose." *Id.*

[91] *See infra* Part II.C.

[92] *See infra* Part II.C.1.

[93] *See infra* Part II.C.2.

[94] *See infra* Part II.C.3.

[95] *See* Rubenstein, *supra* note 30, at 1662-67 (explaining how attorneys "could address disputes over the conduct of impact litigation by delegating decisionmaking authority to experts," but recognizing that this solution is unrealistic).

[96] Dorsen & Herman, *supra* note 75. For examples of conflicts between the ACLU National and its affiliates, see *id.* at 33-35.

which cases are appealed to the Supreme Court,[97] Professor Burt Neuborne, former National Legal Director for the ACLU, found that when conflicts between the national office and local affiliates did arise they were best addressed through "soft" or "indirect" influence over local affiliates rather than direct control.[98]

Scholars have begun to study the ways in which national organizations and legal communities overcome internal conflicts.[99] For example, NeJaime's article on the "legal mobilization dilemma" highlights one successful method the national groups used: amicus participation.[100] NeJaime notes that national organizations advocating for LGBT rights in *Perry*[101] used amicus briefs to advance their preferred legal arguments.[102] Similarly, other scholars have suggested that national organizations attempting to intervene can provide logistical support, such as coordinating amicus briefs,[103] participating in litigation strategy sessions, sharing early drafts, or engaging in other "collaborative" practices.[104] This article builds on these suggestions and presents *Griswold* as a new example of successful intervention by a national organization.

The national organizations' role in *Griswold*, which historical accounts previously derided as an unwelcome intrusion, is actually an example to be emulated. Letters, memoranda, and early drafts contained in archives related to the Connecticut birth control cases reveal three ways in which national organizations indirectly influenced the Connecticut litigation. First, the national organizations provided logistical support and guidance to the local attorneys;[105] second, they provided research and factual development;[106] and third, they presented innovative arguments that provided important alternative grounds for overturning the Connecticut statute prohibiting the use of contraceptives.[107] The remainder of this article explores the ways in which Harriet Pilpel and the national organizations in the Connecticut birth control cases implemented each of these intervention

[97] *Id.* at 34; ACLU LEGAL DEPARTMENT, GENERAL GUIDE TO ACLU LITIGATION PROCEDURES AND PRACTICE 5 (May 1966) (on file with Princeton University, Mudd Library, American Civil Liberties Union Records: Subgroup 2 [hereinafter Princeton ACLU], Box 347, Folder 2) (noting that for cases before the Supreme Court "all affiliates are required by the National Board of Directors to consult with the national legal office and are strongly urged to submit drafts of all briefs and pleadings before filing").

[98] Interview with Professor Burt Neuborne, N.Y. Univ. Sch. of Law, in New Haven, Conn. (Feb. 24, 2015).

[99] *See* Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 STAN. L. REV. 2027, 2049 (2008) (acknowledging the prevalence of intra-movement conflict and the dearth of "systematic information . . . available concerning the processes that public interest organizations use to . . . accommodate competing concerns").

[100] NeJaime, *supra* note 37, at 699.

[101] Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[102] NeJaime, *supra* note 37, at 734-35.

[103] Morawetz, *supra* note 43, at 136.

[104] *Id.* at 203.

[105] *See infra* Part II.A.

[106] *See infra* Part II.B.

[107] *See infra* Part II.C.

methods. In doing so, this article provides a deeper understanding of how national organizations intervened in the Connecticut birth control cases and the impact this intervention had on *Griswold*.

II. NATIONAL ORGANIZATIONS' ROLE IN *GRISWOLD*

Despite the conflict described above, PPFA and the ACLU were highly involved in the litigation efforts that finally brought *Griswold* to the Supreme Court. Harriet Pilpel, an attorney for both PPFA and the ACLU, played a central role in the Connecticut birth control cases from the late 1930's through the 1960s.[108] The sheer volume of correspondence between Harriet Pilpel and Fowler Harper, Thomas Emerson, and Catherine Roraback, indicates how deeply she, PPFA, and the ACLU were involved in planning the Connecticut litigation. Pilpel used her experience in the early Connecticut cases and her connections to other civil liberties movements to provide logistical support, research, and innovative legal arguments to the Connecticut attorneys. In doing so, she and the national organizations she worked with influenced the shape of *Griswold*, rallied public support behind *Griswold*, and ensured that *Griswold* could serve as the foundation for future civil rights movements.

A. Providing Logistical Support

One of the primary ways in which Pilpel, PPFA, and the ACLU participated in the Connecticut birth control cases was by providing logistical support. Pilpel was deeply involved in both the early Connecticut birth control cases and the ACLU's campaigns to protect freedom of expression. Given this involvement, she was able to act as a "conduit[] of information,"[109] providing institutional knowledge from past cases to the Connecticut attorneys, publicizing the cases, and coordinating the participation of other interested groups. In doing so, Pilpel helped the Connecticut attorneys who finally brought *Griswold* to the Supreme Court avoid the pitfalls that had derailed other cases in the past, such as the standing issues in *Tileston* and *Poe*,[110] and mobilize public support for overturning the Connecticut law.

The first form of logistical support Pilpel and her colleagues at PPFA and the

[108] Her deep involvement in this early stage of litigation is evident from letters with local attorneys. *See* Document Showing Time and Expenses for J. Warren Upson (Apr. 6, 1940) (on file with the New Haven Museum, Planned Parenthood League of Connecticut Records [hereinafter New Haven Museum PPLC], Box 2, Folder B) (showing Upson talked to Pilpel more than any other person leading up to *Nelson*). She continued to be heavily involved in later litigation, *see* Letter from Catherine Roraback to George N. Lindsay, Jr. (July 29, 1963) (on file with New Haven Museum PPLC, Box 7, Folder F) ("Needless to say, I was already well aware of the interest of PPFA, and I have in fact been in close touch throughout these cases with Harriet Pilpel concerning them and have received a good deal of support and help from her."), and was even given oral argument time in *Poe*, *see* Oral Argument, *Poe*, *supra* note 70, at 44:45.

[109] WHEELER, *supra* note 16, at 117.

[110] *See supra* notes 64, 71, and accompanying text.

ACLU provided was case development guidance. Over the twenty-five years between *State v. Nelson* and *Griswold v. Connecticut*, the Connecticut birth control movement experienced many failures.[111] As one of the few people continuously involved in the Connecticut cases since *Nelson*,[112] Pilpel had a unique perspective on these failures. Before *Nelson*, Pilpel and her colleague, Morris Ernst, advocated against continuing to pursue legislative efforts to overturn the prohibition on the use of birth control and pushed PPFA and the Planned Parenthood League of Connecticut to bring test cases in the Connecticut courts.[113] After early failures in *Nelson* and *Tileston*, the Connecticut birth control advocates turned back to legislative advocacy, while Pilpel and Ernst continued to push for bringing another test case.[114] Specifically, they urged the Connecticut attorneys to either instigate a criminal case,[115] or to seek a declaratory judgment and injunction in federal court.[116] Eventually, the Connecticut birth control advocates and attorneys agreed and began the process of initiating *Buxton* and *Poe*.[117] Although some of Pilpel and Ernst's suggestions regarding the form of the test case were not followed,[118] they appear to have had at least some role in the decision to pursue litigation rather than continuing legislative efforts.[119]

In addition, once the Connecticut attorneys decided to pursue a test case, Pilpel and the national organizations provided guidance on selecting the appropriate litigants for the case.[120] After the plaintiffs in *Nelson* accepted a *nolle prosequi*, short-circuiting the possibility to appeal,[121] and *Tileston* was dismissed

111 *See supra* Part I.B.1.

112 *See supra* note 108 and accompanying text.

113 GARROW, *supra* note 16, at 92.

114 *Id.* at 106; s*ee also* Letter from Bice Clemow to Mrs. William Darrach at 1 (Dec. 12, 1940) (on file with New Haven Museum PPLC, Box 3, Folder B).

115 Report of Conference with Morris Ernst, Harriet Pilpel, Mr. Rose, Mrs. McKinnon (Mar. 16, 1944) (on file with Yale University, Sterling Memorial Library, Planned Parenthood Federation of America Records, 1918-1974 [microform] [hereinafter Yale PPFA], Part I, Reel 10).

116 Letter from Morris Ernst to John Q. Tilson, Jr. (Feb. 3, 1943) (on file with Yale PPFA, Part I, Reel 10).

117 *See* Letter from Harriet Pilpel to Frederick Jaffe (Nov. 20, 1961) (on file with Smith PPFA, Box 184, Folder 26) (noting that "the people in Connecticut have decided that all things considered, it would be best to proceed by way of a trial in the State Court").

118 For example, Ernst at one point advocated a test case involving someone who distributed a medical publication on birth control rather than a doctor. Letter from Bice Clemow to Mrs. William Darrach at 2 (Dec. 12, 1940) (on file with New Haven Museum PPLC, Box 3, Folder B). Similarly, Pilpel noted that although she supported a state case, she thought "there would still be some advantage in an injunction action" in federal court. Letter from Harriet Pilpel to Frederick Jaffe (Nov. 20, 1961) (on file with Smith PPFA, Box 184, Folder 26).

119 Letter from Harriet Pilpel to Frederick Jaffe (Nov. 20, 1961) (on file with Smith PPFA, Box 184, Folder 26) (indicating that Pilpel is in a continuing dialogue with Harper regarding the form of a potential test case).

120 *See, e.g.*, GARROW, *supra* note 16, at 106 (noting that Ernst urged PPFA to bring a case on behalf of a patient and a doctor to resolve the standing issue that derailed *Tileston*); *id.* at 207-08 (noting that Pilpel warned Harper and Roraback that none of the patients involved in *Griswold* had actually used the contraceptives they were prescribed, creating a potential standing issue).

121 Dudziak, *supra* note 16, at 923-24; *see also* Letter from J. Warren Upson to Morris Ernst (Mar. 29, 1940) (on file with New Haven Museum PPLC, Box 2, Folder C) (noting that the defendants

on standing grounds,[122] Pilpel and PPFA focused on ensuring that willing parties with appropriate bases for standing were selected for the next cases.[123]

Pilpel was "a fanatic for standing," who had a particular sense for what kind of litigant would provide the best vehicle for a case.[124] Pilpel and her colleague Ernst thought "the best possible case would be to have a criminal case in which . . . a good fearless doctor who had prescribed contraceptives to one or more women who would be willing to admit in court having *used* the contraceptive because she had been advised that another pregnancy at the time would have endangered her life."[125] Although Fowler, Dr. Buxton, and Estelle Griswold ultimately determined who the plaintiffs would be in *Poe* and *Griswold*,[126] their decision conformed to Pilpel and Ernst's repeated recommendations, indicating that Pilpel and Ernst's efforts to provide institutional knowledge to the Connecticut attorneys were successful.

The second form of logistical support Pilpel and the national organizations provided was publicity. During the period between *Nelson* and *Griswold*, Pilpel published a number of books and articles about laws prohibiting private sexual conduct and other restrictions on birth control.[127] While some may quibble that these publications were merely part of her role as a movement lawyer representing PPFA, she viewed this publicity as important to success in the Connecticut birth control cases. In a memorandum to other PPFA attorneys, Pilpel argued that it was important to highlight "the enormous changes which have taken place since the Connecticut law was passed" and that if this could not be done in a brief it could be done in an article "pointing out the differences in regard to religion, [and] general public acceptance."[128] Pilpel felt that this article was "of vital importance" to

"show[ed] no indication of wanting to have any further contest made, and in the light of their point of view, regardless of what the Birth Control League desires").

122 Dudziak, *supra* note 16, at 926.

123 *See* Letter from Harriet Pilpel to Professor Fowler Harper (Nov. 10, 1958) (on file with Smith PPFA, Box 184, Folder 27) (noting that "because of the Tileston case" PPFA was "especially concerned" about the "possible lack of consistency" in the facts alleged "between the various complaints" in *Poe*); Letter from Harriet Pilpel to Dr. Alan Guttmacher and Frederick Jaffe at 2 (Oct. 15, 1964) (on file with Smith PPFA, Box 184, Folder 25) (raising concerns regarding the "serious deficiencies in these cases" and promising PPFA she would "continue to do everything we can to see that the cases are presented as we think they should be").

124 Interview with Professor Burt Neuborne, *supra* note 98.

125 Report of Conference with Morris Ernst, Harriet Pilpel, Mr. Rose, and Mrs. McKinnon (Mar. 16, 1944) (on file with Yale PPFA, Part I, Reel 10); *see also* Letter from Harriet Pilpel to Professor Fowler Harper (Nov. 10, 1958) (on file with Smith PPFA, Box 184, Folder 27) (emphasizing the importance of demonstrating "life, liberty and property" interests in the case in *Poe*); Letter from Harriet Pilpel to Professor Fowler Harper at 1 (Nov. 14, 1961) (on file with Smith PPFA, Box 184, Folder 26) (emphasizing the importance of showing the patients used the contraceptives in *Griswold*).

126 GARROW, *supra* note 16, at 152-53; Williams, *supra* note 85, at 2162 (noting that the Connecticut attorneys in *Griswold* were "careful" to include plaintiffs and allegations necessary to avoid past standing issues).

127 *See, e.g.*, HARRIET F. PILPEL & THEODORA ZAVIN, YOUR MARRIAGE AND THE LAW (1952); Abraham Stone & Harriet F. Pilpel, *The Social and Legal Status of Contraception*, 22 N.C. L. REV. 212 (1944); Harriet F. Pilpel, *Sex vs. the Law: A Study in Hypocrisy*, HARPER'S MAG. Jan. 1965, at 35.

128 Memorandum from Harriet Pilpel at 1 (Feb. 18, 1963) (on file with Smith PPFA, Box 184,

bolster the briefs filed in the Connecticut courts.[129] This, she argued, would demonstrate birth control's "present place in American life" and would convince the Connecticut courts that the law prohibiting any use of birth control was unreasonable and should be overturned.[130] Providing publicity, though a second best to participating in the litigation, was an important part of Pilpel's efforts to support the Connecticut birth control cases.

The final form of logistical support Pilpel and the national organizations provided was coordination between interested parties. Pilpel played a key role in coordinating between the Connecticut attorneys and other parties interested in participating in the litigation. The Connecticut attorneys, rather than welcoming amicus participation, often actively deterred outside participation.[131] As a result, Pilpel, PPFA, and the ACLU took on the role of recruiting and coordinating amicus participation.[132] For example, Pilpel and other attorneys at PPFA and the ACLU worked to recruit a lawyer to write an amicus brief on behalf of the Catholic Council of Civil Liberties.[133] In addition, they solicited advice from prominent academics such as Professor Norman Redlich,[134] who helped inspire the Ninth Amendment arguments incorporated into the *Griswold* briefs.[135] Pilpel then worked to coordinate the topics covered in each group's brief.[136] Although these efforts to intervene might lead some to view Pilpel as a "back seat driver,"[137] she

Folder 25); *see also* Letter from Harriet Pilpel to Catherine Roraback (Feb. 19, 1963) (on file with Smith PPFA, Box 184, Folder 25) (notifying Roraback that Pilpel was working with PPFA to publish an article in the Connecticut Bar Journal).

129 Letter from Harriet Pilpel to Frederick Jaffe (Apr. 24, 1963) (on file with Smith PPFA, Box 184, Folder 25) (describing Roraback's briefs as "skimpy legalistic document[s]").

130 Letter from Harriet Pilpel to Catherine Roraback at 1 (May 15, 1963) (on file with Smith PPFA, Box 184, Folder 25).

131 Letter from Professor Fowler Harper to Harriet Pilpel (June 18, 1959) (on file with Smith PPFA, Box 184, Folder 27) (rejecting a PPFA amicus in the Connecticut courts); Letter from Catherine Roraback to John de J. Pemberton, Jr., ACLU Executive Director (Apr. 22, 1963) (on file with Princeton ACLU, Box 1412) (rejecting an ACLU amicus in Connecticut courts).

132 *See* Letter from Harriet Pilpel to Professor Fowler Harper (June 30, 1960) (on file with Smith PPFA, Box 184, Folder 26) (showing coordination with other lawyers drafting a "doctors' brief").

133 Letter from Melvin L. Wulf, ACLU Legal Director, to Professor Robert B. Fleming (May 14, 1964) (on file with Princeton ACLU, Box 1412) (recruiting Fleming to write the CCCL brief); Letter from Morris Ernst to Professor Robert B. Fleming (May 15, 1964) (on file with Princeton ACLU, Box 1412) (same); Letter from Harriet Pilpel to Professor Fowler Harper at 1 (Oct. 14, 1964) (on file with Yale University, Sterling Memorial Library, Thomas I. Emerson Papers [hereinafter Yale Emerson], Box 28, Folder 413) (noting that she had spoken to the Dean of Boston College Law School about writing the CCCL brief).

134 Letter from Melvin Wulf, ACLU Legal Director, to Professor Norman Redlich (Jan. 15, 1963) (on file with Princeton ACLU, Box 1412); Letter from Harriet Pilpel to Professor Fowler Harper at 2 (Oct. 14, 1964) (on file with Yale Emerson, Box 28, Folder 413) (noting a discussion she had with Norman Redlich).

135 *See* GARROW, *supra* note 16, at 226 (noting the influence Redlich's article, Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962), had on the privacy arguments in *Poe*); Williams, *supra* note 85, at 2174 (same).

136 Letter from Harriet Pilpel to Professor Fowler Harper (June 30, 1960) (on file with Yale Emerson, Box 28, Folder 418) (discussing tasks to be assigned to each amicus brief); Memorandum from Harriet Pilpel (Feb. 18, 1963) (on file with Smith PPFA, Box 184, Folder 25) (same).

137 GARROW, *supra* note 16, at 207-08; *see also* JOHNSON, *supra* note 16, at 41.

should instead be seen as a helpful navigator who provided guidance based on experience and expertise.[138] By providing logistical support through case-development guidance, publicity, and coordination, Pilpel, PPFA, and the ACLU ensured the Connecticut attorneys would avoid the mistakes of the past and would have both public and private support for their case.

B. Providing Research

Another way in which Pilpel, PPFA, and the ACLU participated in the Connecticut birth control cases was to collect medical information, survey data, and social science research for the Connecticut attorneys' arguments and their own amicus briefs. As experts on birth control, Pilpel and other lawyers from PPFA were uniquely situated to compile this research. They used this research to support the Connecticut litigation in two ways. First, they provided research that the Connecticut attorneys directly integrated into the litigants' briefs. Second, they drafted their own "Brandeis briefs." Through these efforts, Pilpel and the national organizations both influenced the legal arguments the Connecticut attorneys made in their briefs and ensured that the courts would understand the full impact the Connecticut statute had on women and society more broadly.

1. Research for the Litigants' Briefs

One way in which Pilpel and PPFA sought to indirectly influence the Connecticut attorneys' legal strategy was by providing recent research and survey information to the Connecticut attorneys. Pilpel "consider[ed] it most important that all relevant factual information be presented to the Court" in the Connecticut birth control cases.[139] As a result, Pilpel and PPFA compiled a wide array of information on birth control ranging from data on the efficacy of pills and intrauterine devices as compared to alternatives to birth control to public opinion polls regarding birth control.[140]

One reason Pilpel and PPFA felt it was important to provide this data was to ensure that the parties could respond to counterarguments that had undermined birth control advocates' arguments in previous cases. For example, in *Tileston*, the Connecticut court emphasized the State's assertion that there were "viable alternatives" to birth control such as the rhythm method and abstention from sex.[141] The Connecticut court thereby avoided squarely facing the constitutional problems attendant with denying birth control to a woman whose life was

[138] *Cf.* Morawetz, *supra* note 43, at 203 (discussing importance of expertise for movement litigators); Rubenstein, *supra* note 30, at 1662 (same).

[139] Letter from Harriet Pilpel to Winfield Best at 1 (Feb. 7, 1963) (on file with Smith PPFA, Box 184, Folder 25).

[140] Memorandum from Frederick Jaffe, VP Planned Parenthood-World Population, to Professor Thomas Emerson (Jan. 26, 1965) (on file with Yale Emerson, Box 12, Folder 176) (discussing additional data to be added to Connecticut attorneys' brief).

[141] Tileston v. Ullman, 26 A.2d 582, 586 (Conn. 1942).

threatened if she became pregnant again.[142] In subsequent cases, Pilpel and PPFA stressed the importance of addressing these purported alternatives to birth control in their correspondence with the Connecticut attorneys. For example, as the Connecticut attorneys prepared for *Poe*, Pilpel reminded them that the court's belief that viable alternatives to birth control existed had been an important issue in past cases.[143] To respond to this issue, she suggested that PPFA include an appendix listing studies to show that abstinence was neither a "practical nor desirable" alternative to birth control.[144] The Connecticut attorneys followed her advice, and in *Poe* both the Connecticut attorneys' brief and PPFA's brief emphasized that abstinence was not an effective alternative to the use of birth control.[145] Similarly, in *Griswold*, both Emerson's brief for the petitioners and PPFA's amicus brief contained excerpts of medical opinions and studies about the negative impact of abstinence.[146] By encouraging the Connecticut attorneys to address this early counterargument, Pilpel helped the later litigants avoid yet another roadblock on the way to the Supreme Court.

There is evidence that Pilpel and PPFA also used their role providing research on birth control to indirectly encourage the Connecticut attorneys to adopt particular legal arguments.[147] Specifically, by supplying surveys of public opinion and statements by religious groups, Pilpel encouraged the Connecticut attorneys to invoke the standard for identifying obscenity based on "contemporary community standards" established in *Roth v. United States*[148] as a basis for overturning the Connecticut statute.[149] The Connecticut attorneys used the research provided by Pilpel and PPFA to make these arguments. For example, Harper invoked *Roth*'s "contemporary community standards"[150] before presenting public opinion polls

[142] *Id.*

[143] Memorandum from Harriet Pilpel to Dr. William Vogt, Dr. Mary Calderone, and Winfield Best (May 25, 1960) (on file with Yale Emerson, Box 28, Folder 418).

[144] *Id.*

[145] *See* Jurisdictional Statement at 12-14, Poe v. Ullman, 367 U.S. 497 (1961) (No. 60) [hereinafter Jurisdictional Statement, *Poe*] (citing studies showing the harms of abstinence); Brief for Appellants at 23-33, *Poe*, 367 U.S. 497 (No. 60) (citing studies showing the benefits of sex and the harm of abstinence between married couples); Motion for Leave to File a Brief and Appendices as Amicus Curiae for the Planned Parenthood Federation of America, Inc. at 22-24, *Poe*, 367 U.S. 497 (No. 60) [hereinafter PPFA Amicus Brief, *Poe*] (citing studies showing the benefits of sex and the harm of abstinence between married couples).

[146] Brief for Appellants at 32-33, 45, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) [hereinafter Brief for Appellants, *Griswold*] (citing medical research about the effect of abstinence to demonstrate that the Connecticut statute is arbitrary and capricious); *id.* at 41 n.20 (directing the reader to the appendices in PPFA's amicus brief); Motion for Leave to File a Brief with Brief and Appendices as Amicus Curiae for Planned Parenthood Federation of America, Inc. at 39b-48b, *Griswold*, 381 U.S. 479 (No. 496) [hereinafter PPFA Amicus Brief, *Griswold*].

[147] Professor Neuborne notes that providing research and factual analysis to local attorneys is a typical method for indirectly influencing, without directing, their arguments. Interview with Professor Neuborne, *supra* note 98.

[148] Roth v. United States, 354 U.S. 476 (1957).

[149] For more on the connection between the birth control and obscenity cases, see *infra* Part II.C.1.

[150] Jurisdictional Statement, *Poe*, *supra* note 145, at 15-16.

and religious groups' statements in his initial briefs in *Poe*.[151] Similarly, Emerson used survey data provided by PPFA in *Griswold* to argue that the law was out of touch with community morality.[152] By furnishing this data, PPFA not only supported the Connecticut attorneys' arguments, but also convinced them to incorporate the national organizations' preferred arguments into the litigants' briefs.

2. Writing Brandeis Briefs

Another way in which Pilpel and PPFA attempted to influence the outcome of the Connecticut birth control cases was to provide additional research in their own briefs. Despite claims by historians that the amicus briefs in *Griswold* "were generally unremarkable,"[153] PPFA's brief, written by Harriet Pilpel, served an important role as a "Brandeis brief."[154] Because the factual information PPFA presented was not likely to be the central grounds for the decision, but "might be picked up by one or more of the [J]ustices," the Connecticut attorneys and Pilpel agreed that it "belongs in [PPFA's brief] and not in [the Connecticut attorneys' brief]."[155]

PPFA's amicus brief in *Griswold* presents a multitude of information that aimed to demonstrate "the full development and present place of contraception in American life" and to highlight "the absence of any rational basis" for the Connecticut statue prohibiting the use of birth control.[156] Throughout the body of its amicus brief, PPFA cites to a wide variety of information, ranging from statistics on average fertility for married couples,[157] to studies showing that modern contraceptives are more effective than the "natural methods" of contraception permitted under the Connecticut statute,[158] and statements by federal and state

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151 *Id.* at 16-18.

152 Brief for Appellants, *Griswold*, *supra* note 146, at 48.

153 GARROW, *supra* note 16, at 233-34; *but see* DIENES, *supra* note 83, at 163 (calling the PPFA brief in *Griswold* an "excellent *amicus* brief"); JOHNSON, *supra* note 16, at 121-22 (recognizing PPFA's role as a "Brandeis brief").

154 *See* Memorandum from Harriet Pilpel to Dr. William Vogt, Dr. Mary Calderone & Winfield Best (May 25, 1960) (on file with Yale Emerson Papers, Box 28, Folder 418) ("[O]ur brief will be primarily a factual presentation."); Letter from Harriet Pilpel to Professor Fowler Harper (June 30, 1960) (on file with Yale Emerson Papers, Box 28, Folder 418) ("After going into the matter fully, we concluded that it will work out best if our brief does the whole 'Brandeis' factual job . . . ."). A "Brandeis brief" is named after Louis D. Brandeis' brief in *Muller v. Oregon*, 208 U.S. 412 (1908), and is used as a shorthand for a brief that "present[s] factual data to guide the Supreme Court's legal analysis," Allison Orr Larsen, *The Trouble With Amicus Facts*, 100 VA. L. REV. 1757, 1771 (2014), and "highlight[s] social and economic reality" in order to "suggest that the trouble with existing law [is] that it [is] out of touch with that reality," Noga Morag-Levine, *Facts, Formalism, and the Brandeis Brief: The Origins of a Myth*, 2013 U. ILL. L. REV. 59, 61 (2013) (quoting MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 209 (1992)).

155 Memorandum from Harriet Pilpel to Frederick Jaffe & Nancy F. Wechsler at 2 (Jan. 22, 1965) (on file with Smith PPFA, Box 184, Folder 23).

156 PPFA Amicus Brief, *Griswold*, *supra* note 146, at 5.

157 *Id.* at 9.

158 *Id.* at 17-19.

governments regarding the importance of birth control.[159] PPFA's brief also contained four appendices, which provided additional details regarding federal and state programs supporting birth control; federal and state laws regulating birth control; medical opinions regarding the necessity of birth control and the efficacy of various methods of birth control; religious opinions regarding birth control; and public opinion polls regarding birth control.[160]

PPFA's amicus briefs in *Griswold* and in prior cases did more than just present this information; the briefs used this information to advance two alternate legal arguments for overturning the Connecticut prohibition on birth control. Both arguments relied on Supreme Court decisions that had recently overturned laws in part because they were out of touch with present times. The first argument invoked *Brown v. Board of Education*, in which the Supreme Court emphasized that in order to determine whether segregation in public schools is constitutional it "must consider public education in the light of its full development and its present place in American life throughout the Nation."[161] PPFA used its amicus briefs to urge the Supreme Court to consider the Connecticut statute in the same way.[162] The briefs presented surveys, studies, and statistics about birth control and asked the Supreme Court to evaluate Connecticut's prohibition on the use of birth control in light of birth control's "present place in American life."[163]

The second argument relied on *Roth v. United States*, in which the Supreme Court overturned an obscenity conviction because the Court concluded the material at issue was not obscene in light of "contemporary community standards."[164] PPFA's amicus briefs argued that the Supreme Court should strike down the Connecticut statute on the same grounds.[165] The briefs offered statements from churches and medical organizations and public opinion polls to show that the Connecticut prohibition was out of touch with contemporary community standards.[166] In doing so, PPFA successfully transformed their fact-focused

159 *Id.* at 25-27.

160 *Id.* at iii (listing appendices).

161 Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 492-93 (1954).

162 Outline of Brief to Be Submitted on Behalf of PPFA in Connecticut Cases by Harriet Pilpel (Dec. 19, 1964) (on file with Yale Emerson, Box 28, Folder 418) (explaining that PPFA's brief will address whether it is reasonable for the state of Connecticut to prohibit the use of contraceptives given the "factual conditions today existing in the state, nation and world").

163 PPFA Amicus Brief, *Poe*, *supra* note 145, at 14; *see also* PPFA Amicus Brief, *Griswold*, *supra* note 146, at 5-6 ("Finally, this material presents facts showing that there is a national community consensus which not only accepts but recognizes the imperative need for responsible family planning in light of the social, economic and international facts of today.").

164 Roth v. United States, 354 U.S. 476, 489 (1957).

165 Letter from Harriet Pilpel to Professor Fowler Harper (Apr. 16, 1959) (on file with Smith PPFA, Box 184, Folder 27) ("We have in mind particularly the argument that these anti-contraceptive statutes derive from prohibitions against obscenity. The meaning of obscenity prohibitions was decisively and newly declared by the United States Supreme Court in the Roth case. . . . We would think a similar approach and treatment might be persuasive to your court.").

166 PPFA Amicus Brief, *Poe*, *supra* note 145, at 42 ("We have seen above what the mores are with respect to the questions herein presented in the field of medical practice, religious principles, and official state and local attitudes and activities. The views and opinions of the general public which constitutes

amicus briefs into opportunities to put forward alternative arguments for overturning the Connecticut statute.

C. Proposing Alternative Legal Arguments

The final way in which Pilpel, PPFA, and the ACLU contributed to the Connecticut birth control cases was by articulating alternative legal arguments for overturning the Connecticut statute prohibiting the use of birth control. They proposed alternative arguments both because they thought these arguments would succeed and because they hoped that, if adopted, the arguments would provide a foundation for future cases further expanding civil liberties. Although the Court ultimately decided *Griswold* based on a right to privacy, this outcome was not a foregone conclusion.[167] *Griswold* was a moment of constitutional creation during which the parties, PPFA, and the ACLU had the opportunity to present innovative arguments that could shape the future of civil liberties.

With *Griswold*'s potential for advancing civil liberties in mind, Pilpel, PPFA, and the ACLU favored three alternative legal arguments for overturning the Connecticut statute: arguments based on obscenity cases; arguments to decriminalize private sexual conduct; and arguments about equality. Throughout the Connecticut birth control cases, Pilpel, PPFA, and the ACLU adopted a number of strategies to push the Connecticut attorneys to adopt these arguments. For example, Pilpel's letters to Roraback and Fowler often contain suggestions about cases to look at or ideas to consider.[168] And these strategies seemed to work: the parties took note of the national organizations' arguments.[169] By persuading the Connecticut attorneys to adopt these arguments, the national organizations ensured their favored alternative arguments for overturning the Connecticut statute would be incorporated into the Connecticut litigation.

1. Arguments Based on Obscenity Cases

Pilpel championed arguments comparing the Connecticut statute prohibiting

the "community" may also be of interest."); PPFA Amicus Brief, *Griswold*, *supra* note 146, at 5-6 ("The factual and legal material in the Appendices to this brief demonstrates that today the Connecticut law—an archaic remnant of 'obscenity' legislation passed three-quarters of a century ago—is arbitrary and unreasonable in the light of relevant contemporary facts and contemporary moral judgment.").

[167] *See* Emerson, *supra* note 85, at 219-20.

[168] *See*, *e.g.*, Letter from Harriet Pilpel to Professor Fowler Harper (Nov. 14, 1958) (on file with Smith PPFA, Box 184, Folder 27) (showing that Pilpel sent Harper copies of the *Kinsey* case, an obscenity case litigated by Ernst and Pilpel). Professor Neuborne explained that during his time with the ACLU he often encouraged outside lawyers to adopt new arguments by suggesting they consider recently decided cases, law review articles, or research memoranda. Interview with Professor Burt Neuborne, *supra* note 98.

[169] For example, after the ACLU announced in 1959 that it was expanding its view on birth control from a pure First Amendment perspective focused on laws prohibiting speech about birth control to a broader civil liberties argument against birth control restriction, Memorandum from the Due Process Committee 1-2 (June 19, 1959) (on file with Princeton ACLU, Box 1626), Catherine Roraback wrote to the ACLU asking to see the new policy statement, Letter from Catherine Roraback to Rowland Watts, ACLU Staff Counsel (Sept. 24, 1959) (on file with Princeton ACLU, Box 1626).

the use of birth control to federal statutes prohibiting the distribution of information about birth control. Pilpel and her colleague Morris Ernst had successfully litigated a number of obscenity cases challenging federal prohibitions of mailing or importing information about birth control and contraceptive materials.[170] In these cases, Pilpel and Ernst relied on the reasoning from two Supreme Court cases. First, they relied on *Butler v. Michigan*,[171] which held that laws prohibiting the dissemination of information about contraceptives that did not include an implied exception for legitimate purposes, such as medical need, research, or education, are unconstitutional.[172] Second, they relied on *Roth v. United States*,[173] which held that the proper standard for determining whether otherwise protected speech is obscene, and, therefore, permissibly prohibited by law, is whether the "average person, applying contemporary community standards" would conclude that the "dominant theme of the material taken as a whole appeals to prurient interests."[174]

Although the Connecticut statute prohibited the use of contraceptives, rather than disseminating information about contraceptives, Pilpel and Ernst saw a clear connection between the Connecticut statute and their prior legal battles over laws prohibiting obscene materials.[175] In *Tileston v. Ullman*, Ernst argued that the Connecticut birth control statute was itself an obscenity statute and urged the Supreme Court to apply the legal standards developed in past obscenity cases.[176] And later, as the Connecticut attorneys prepared for *Poe v. Ullman*, Pilpel reminded the Connecticut attorneys that the Connecticut "anti-contraceptive statutes . . . derive from [the state's] prohibitions against obscenity."[177] Given this connection, Pilpel and Ernst tried to import obscenity-based legal arguments into the Connecticut birth control litigation.

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170 WHEELER, *supra* note 16, at 40-43, 56-57; *see, e.g.*, United States v. Dennet, 39 F.2d 564 (2d Cir. 1930) (holding for Mary Ware Dennet, represented by Morris Ernst, that a pamphlet providing "a truthful exposition for the sex side of life, evidently calculated for instruction and for the explanation of relevant facts" was not obscene); United States v. One Obscene Book Entitled "Married Love," 48 F.2d 821 (S.D.N.Y. 1931) (holding for Dr. Mary C. Stopes, represented by Morris Ernst, that her book was not obscene); United States v. One Package, 86 F.2d 737 (2d Cir. 1936) (holding for Dr. Hannah M. Stone, represented by Morris Ernst, that a package of pessaries, which could be used as contraceptives, fell within an implied medical exception to a law prohibiting importing immoral devices); United States v. 31 Photographs, 156 F. Supp. 350 (S.D.N.Y. 1957) (holding for Alfred Kinsey's Institute for Sex Research, represented by Morris Ernst and Harriet Pilpel, that a similar exception for research applied to the law prohibiting importation of obscene materials).

171 Butler v. Michigan, 352 U.S. 380 (1957).

172 *Id.* at 383-84.

173 Roth v. United States, 354 U.S. 476 (1957).

174 *Id.* at 489.

175 Contemporary scholars also recognize this connection. *See* Eskridge, *supra* note 30, at 2120-21 (recognizing that the earliest cases involving the birth control movement were obscenity cases).

176 Jurisdictional Statement at 10-13, Tileston v. Ullman, 26 A.2d 582 (Conn. 1942) (No. 420).

177 Letter from Harriet Pilpel to Professor Fowler Harper at 2 (July 6, 1959) (on file with Smith PPFA, Box 184, Folder 26). The birth control law was, in fact, "originally enacted as part of a broader obscenity statute," Dudziak, *supra* note 16, at 920 n.41, and was modeled on the federal "An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use" more commonly known as the Comstock Act, ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA 13-24 (2002).

In the early birth control cases, obscenity-based arguments were central to the parties' arguments. For example, in *State v. Nelson*, the defendants' briefs cited two obscenity cases, *United States v. One Obscene Book Entitled Married Love*[178] and *United States v. One Package*,[179] to support the claim that there is a general principle of statutory construction which cautions against interpretations that would interfere with the "legitimate" practice of medicine.[180] In support of this argument, the Connecticut attorneys representing Nelson and the other defendants included a series of appendices detailing medical opinions on the use and important health benefits of contraceptives.[181]

In later cases, Pilpel continued to encourage the Connecticut attorneys to incorporate obscenity-based arguments into their briefs. For example, Pilpel attempted to convince Catherine Roraback to incorporate *Butler* into her briefs in *Poe*.[182] Pilpel urged Roraback to argue that medical use of contraceptives was legitimate and that the Connecticut law could not outlaw legitimate use, as prescribed by a doctor, to prevent illegitimate use by unmarried individuals.[183] Pilpel's efforts were successful: Roraback integrated claims based on *Butler* into one of her briefs in *Buxton*, a companion case to *Poe* brought by a doctor.[184] There she argued that the Connecticut statute is unconstitutional because "it is not narrowly drawn to meet and deal with the problem of immorality and illicit intercourse."[185] She conceded that "regulation to prohibit illicit intercourse and immorality would be permissible," but that this statute, which interferes with "the legitimate rights" of doctors violates due process.[186] *Butler* also made an appearance in Fowler Harper's briefs in *Poe*. In *Poe*, he noted that the Connecticut statute was "not restricted to [its] presumed purpose," to prohibit immoral uses of birth control, and instead impedes legitimate medical practice.[187] The law, he argued, "thus come[s] within the rule of *Butler v. Michigan*."[188] This assertion was echoed in both Harper and Pilpel's oral argument in *Poe*. Harper explained that, as in *Butler*, the law was impermissible because it "burn[s] down the house to roast the pig," a direct quote from *Butler*, insofar as it "prevents a woman who is likely to die with another pregnancy from following standard medical advice in obtaining

178 United States v. One Obscene Book Entitled "Married Love," 48 F.2d 821 (S.D.N.Y. 1931).

179 United States v. One Package, 86 F.2d 737 (2d Cir. 1936).

180 Brief for Defendants at 21, 25, State v. Nelson, 11 A.2d 856 (Conn. 1940) [hereinafter Brief for Defendants, *Nelson*].

181 *Id.* at 67-75.

182 Letter from Harriet Pilpel to Catherine Roraback (May 14, 1959) (on file with Smith PPFA, Box 184, Folder 27).

183 *Id.*

184 *See, e.g.*, Reply Brief of Plaintiff-Appellant at 9, Buxton v. Ullman, 367 U.S. 497 (1961) [hereinafter Reply Brief, *Buxton*].

185 *Id.*

186 *Id.* at 10.

187 Jurisdictional Statement, *Poe*, *supra* note 145, at 11.

188 *Id.*; *see also* Brief for Appellants at 8, 18, Poe v. Ullman, 367 U.S. 497 (1961) (No. 60) [hereinafter Brief for Appellants, *Poe*].

standard medical treatment."[189] Pilpel echoed this sentiment and also noted that "aspects of these cases touch[] upon freedom of expression and freedom of religious worship which tie in to the untroubled unreasonableness."[190]

Pilpel also urged the Connecticut attorneys to incorporate arguments based on the "contemporary community standards" test from *Roth*. Pilpel emphasized that "most of society and most medical specialists concur [that] the foundation for legislative proscription [of contraceptives] is dubious."[191] To convince the Connecticut attorneys that this strategy could work, Pilpel highlighted PPFA's successful use of this argument in a case challenging a New Jersey birth control restriction.[192] In the New Jersey case, she explained, PPFA had invoked the *Roth* standard by presenting statements by religious and medical groups that "recognized the necessity of limiting birth in the interest of health, economics, etc."[193] She argued that a similar approach might be persuasive in the Connecticut cases.[194]

The Connecticut attorneys responded to Pilpel's suggestions and incorporated ideas from *Roth* into their arguments throughout the litigation. For example, in her briefs in *Buxton*, Roraback emphasized that "the overwhelming majority of the community" regard the use of birth control by married persons "as desirable, decent and moral."[195] In his Supreme Court briefs in *Poe*, Harper cited to *Roth*'s "contemporary community standards" test and argued that there is "[n]o reason . . . why a different standard should be applied as a test for other immoral practices."[196] He argued, "[i]f this standard is applied to the practice of contraception proscribed by the Connecticut statutes, it will be seen that the overwhelming majority of the community regards [birth control] as desirable, decent and moral."[197] At oral argument, Harper emphasized that "contemporary community standards [have] come a long way since the Victorian prudery of 1879."[198] Emerson raised this issue again in the oral arguments for *Griswold*, stating that a moral principle should not be enforced as law unless it "conforms to current community standards."[199] These claims were then supported by public opinion polls, studies, and other research presented in PPFA's amicus briefs in both *Poe* and *Griswold*.[200]

The Connecticut attorneys' use of *Butler* and *Roth* in their briefs

189 Oral Argument, *Poe*, *supra* note 70, at 37:22, 38:30-39:10.

190 *Id.* at 46:32-52.

191 Letter from Harriet Pilpel to Professor Fowler Harper at 2 (July 6, 1959) (on file with Smith PPFA, Box 184, Folder 26).

192 Letter from Harriet Pilpel to Professor Fowler Harper at 2 (Apr. 16, 1959) (on file with Smith PPFA, Box 184, Folder 27).

193 *Id.*

194 *Id.*

195 Reply Brief, *Buxton*, *supra* note 184, at 8.

196 Brief for Appellants, *Poe*, *supra* note 188, at 21.

197 *Id.* at 21-22.

198 Oral Argument, *Poe*, *supra* note 70, at 35:16.

199 Oral Argument at 43:15, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496), http://www.oyez.org/cases/1960-1969/1964/1964_496 [hereinafter Oral Argument, *Griswold*].

200 *See supra* Part II.B.

demonstrates that Pilpel's efforts to convince the Connecticut attorneys to incorporate obscenity-based arguments into their briefs and oral arguments were successful. By suggesting cases to the Connecticut attorneys and outlining the arguments they could make using those cases, Pilpel influenced the shape their arguments would take. She ensured that arguments she had used successfully in the past would be presented in the Connecticut birth control cases. She also ensured that legal doctrines with a possibility for expanding civil liberties in the future were articulated to the Court. If the Supreme Court had accepted an argument striking down the Connecticut birth control statute on the basis of an implied medical exception and the First Amendment rights of doctors, perhaps similar arguments could have been raised in later cases challenging laws prohibiting abortion. Chief Justice Warren appeared to recognize this potential during the *Griswold* conference, rejecting arguments based on the First Amendment rights of doctors because this argument could apply to abortion laws.[201] If the Supreme Court had accepted an argument striking down the Connecticut statute on the basis of contemporary community standards, perhaps similar arguments could have been used to expand civil liberties as community mores changed over time. Pilpel's efforts were therefore a success, preserving the possibility that future cases would expand the civil liberties established in *Griswold* using obscenity-based arguments.

2. Arguments About Decriminalizing Private Sexual Conduct

Pilpel also championed an argument that all laws criminalizing private, consensual sexual conduct, including the use of birth control, were unconstitutional. Throughout her involvement in the Connecticut birth control cases, Pilpel advocated for the decriminalization of all aspects of sexual relations between consenting adults, ranging from birth control to abortion and homosexual sex.[202] She characterized laws prohibiting sex as "[a]rchaic and inhuman,"[203] and argued that the right to privacy encompassed a right "to be unregulated by government in our personal lives, to be 'let alone' if we are not harming others."[204] In 1944, Pilpel stated that "[n]owhere is the lag between the law on the books and the mores of the American people more obvious than in the field of the legal restrictions touching on birth control."[205] Her refrain that the Connecticut statute prohibiting the use of contraceptives was out of touch with reality gradually

[201] GARROW, *supra* note 16, at 241.

[202] Wheeler presents Pilpel as a key advocate within the ACLU and describes her efforts to expand the ACLU's policy on birth control beyond advocacy for the dissemination of information about birth control to advocacy for the sale and use of birth control. *See* WHEELER, *supra* note 16, at 93-97.

[203] Pilpel, *supra* note 127, at 35.

[204] Biennial Conference of the American Civil Liberties Union, June 21-24, 1964: Paper Presented by Harriet F. Pilpel at Workshop and Plenary Session on "Civil Liberties and the War on Crime" at 4 [hereinafter ACLU Biennial Conference] (on file with Princeton ACLU, Box 409, Folder 15).

[205] Stone & Pilpel, *supra* note 127, at 219.

expanded to all laws regulating sex. By 1952, she had broadened this critique to all laws regulating consensual sex, warning that "[t]he chances are nine out of ten that you are a sex criminal"[206] and suggesting that "[o]ur sex laws no longer represent our contemporary sense of moral and social values."[207]

Pilpel was on the forefront of the movement to decriminalize private sexual conduct. She argued that criminalizing private sexual conduct was irrational before the American Law Institute ("ALI") popularized this argument in its draft Model Penal Code, which contained provisions relating to sexual conduct.[208] In the commentary attached to these provisions, the ALI argued that the government should not "attempt to control behavior that has no substantial significance except as to the morality of the actor."[209] The ALI stated that sexual conduct is an "area of private morals," not subject to public regulation, because "[n]o harm to the secular interest of the community is involved in atypical sex practice in private between consenting adult partners."[210] Similar arguments were later raised in the United Kingdom by the Wolfenden Commission, which also concluded that it is not "proper for the law to concern itself with what a man does in private unless it can be shown to be so contrary to the public good that the law ought to intervene in its function as the guardian of public good."[211] As Nadine Strossen, the ACLU's first female president, and Burt Neuborne recognize, Pilpel was one of the earliest advocates of these views within the ACLU and "prodded the ACLU into taking an early stand" on the criminalization of abortion and homosexual relationships.[212]

Pilpel advanced the idea that the birth control movement was part of a broader movement to decriminalize private sexual conduct. In a speech to the ACLU, Pilpel urged the ACLU "to meet the civil liberties problem posed by the variety of laws, state and federal, touching on behavior between consenting adults in private—specifically, the laws relating to birth control, abortion, compulsory sterilization, prostitution, miscegenation, homosexuality, fornication and

206 PILPEL & ZAVIN, *supra* note 127, at 213.

207 *Id.* at 213-14.

208 MODEL PENAL CODE § 207 (AM. LAW INST., Draft No. 8, 1955); MODEL PENAL CODE § 207 (AM. LAW INST., Draft No. 4, 1955). For evidence that these were the first drafts to discuss this provision, see *Model Penal Code Selected Bibliography*, 4 BUFF. CRIM. L. REV. 627 (2000); *American Law Institute Library, Model Penal Code Collection*, HEINONLINE.ORG, http://heinonline.org/HOL/Index?index=ali/aliguide_65&collection=ali (last visited Jan. 21, 2015).

209 MODEL PENAL CODE § 207, at 207 (AM. LAW INST., Draft No. 4, 1955).

210 *Id.* § 207.5 cmt. at 277.

211 THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 43 (Stein & Day 1963).

212 Nadine Strossen, *The American Civil Liberties Union and Women's Rights*, 66 N.Y.U. L. REV. 1940, 1949 n.54 (1991) (citing SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU 301-02 (1990)). Professor Neuborne confirmed that Pilpel was one of the earliest advocates of this view, stating that Pilpel was one of the first people to advance the broader view that the law should not regulate sexuality. Interview with Professor Burt Neuborne, *supra* note 98. *See also* WHEELER, *supra* note 16, at 93 (noting that Pilpel advocated for the repeal of "[l]aws against common sexual practice . . . as early as 1944, several years before her client, noted sex researcher Alfred Kinsey, made the same case").

adultery."[213] In a later article, Pilpel continued to emphasize the connection between birth control restrictions and other laws regulating sexual conduct.[214] She argued that laws prohibiting contraceptives and other laws regulating sex violate individual's "right to be let alone if we are not harming others"[215] and "challenge[] a fundamental human right of privacy."[216]

Pilpel's advocacy for decriminalizing consensual sex can be seen throughout the Connecticut birth control litigation. The brief for the defendants in *State v. Nelson* invoked the reasoning later adopted by the ALI, stating that "[t]he State . . . has no right to govern or to attempt to govern the conduct of a citizen of a State if his conduct does not in any degree impinge upon a similar freedom of conduct of other citizens of the State."[217] Later in *Poe*, Harper emphasized that the Connecticut statute prohibits "practices performed in the privacy of the home which affect no person except the spouses who freely indulge them."[218] Before *Griswold*, Pilpel proposed that the Connecticut attorneys integrate references to the ALI's proposal and broader arguments about decriminalizing consensual sex into the sections of their briefs discussing the right to privacy.[219] The Connecticut attorneys responded that they did "not wish to take this on" in their briefs "but would be delighted if [PPFA] mentioned it since . . . a number of the judges might find it persuasive."[220] Although PPFA's brief did not end up making this argument,[221] the Connecticut attorneys did invoke arguments about decriminalizing private conduct in their briefs in *Griswold*. The section of the appellants' brief in *Griswold* arguing that the Connecticut prohibition violates the Due Process Clause contains many references to the idea that private sexual conduct that does not harm others should not be criminalized.[222] For example, the appellants' brief argued that the use of contraceptives "[has] no effect whatever upon other persons" and emphasized that "no objective facts indicating harm to individuals or to society have been advanced in support of the Connecticut statutes as moral prohibitions."[223] Emerson articulated this argument even more forcefully in an article published after *Griswold*, stating that "if the legislature cannot establish that the law promotes the public welfare in a material sense, it cannot enforce the morality of a minority group upon other members of the

213 ACLU Biennial Conference, *supra* note 204, at 1; *see also id.* at 5 ("As a free society, we should renounce the right to punish anything which does not have adverse secular consequences to society.").

214 *See* Pilpel, *supra* note 127, at 40 (criticizing laws prohibiting the use of birth control and other private sexual conduct as "at variance with the realities, and even the ethics, of our lives today").

215 *Id.* at 37.

216 *Id.* at 40.

217 Brief for Defendants, *Nelson*, *supra* note 180, at 46.

218 Brief for Appellants, *Poe*, *supra* note 188, at 28.

219 Memorandum from Harriet Pilpel to Frederick Jaffe and Nancy Wechsler at 3 (Jan. 22, 1965) (on file with Smith PPFA, Box 184, Folder 23).

220 *Id.*

221 PPFA Amicus Brief, *Griswold*, *supra* note 146.

222 *See* Brief for Appellants, *Griswold*, *supra* note 146, at 39, 42, 47.

223 *Id.* at 42.

community."[224]

As with arguments based on obscenity cases, Pilpel's efforts to encourage the Connecticut attorneys to make broader arguments about decriminalizing private sexual conduct were at least partially successful. She convinced the Connecticut attorneys to incorporate decriminalization arguments into *Griswold*, setting the stage for the next set of civil liberties cases. Pilpel's efforts to integrate these arguments demonstrate that she and the organizations she represented saw the connection between the birth control movement and future civil liberties battles on abortion and homosexual sex.[225] After *Griswold*, Emerson recognized that the right to privacy established in that case seemed likely to "embrace[] the multitude of existing laws relating to sexual conduct outside the marital relation," so that "as mores change and knowledge of the problem grows, all sexual activities of two consenting adults in private will be brought within the right of privacy."[226] Although it took "thirty-eight years for this prediction [to] be borne out" in *Lawrence v. Texas*,[227] Emerson's prediction ultimately came true.[228] As with the obscenity arguments, if the Court had struck down the Connecticut statute as part of a broader principle decriminalizing private, consensual, sexual conduct, it could have provided a much clearer path from the birth control cases to the other sexual rights that eventually grew out of *Griswold*'s right to privacy in the marital bedroom.

3. Arguments About Equality

Finally, in addition to arguments based on obscenity cases and decriminalizing private sexual conduct, Pilpel and the national organizations advanced arguments based on equality. They encouraged the Connecticut attorneys to argue that the Connecticut statute prohibiting the use of contraceptives violated principles of equality because it was unequally enforced and had an unequal impact on low-income individuals and women. Although the Connecticut attorneys did not ultimately rely on these arguments in their briefs, glimpses of these equality arguments can be seen throughout the Connecticut birth control litigation.

As part of PPFA's early efforts to overturn the Connecticut prohibition on the use of birth control, Pilpel publicized the inequalities the statute created. For example, she highlighted that the Connecticut statute was unequally enforced, insofar as it eliminated sales of certain products like diaphragms while other

224 Emerson, *supra* note 85, at 226-27.

225 *See* WHEELER, *supra* note 16, at 114 (noting that "ACLU's top leaders anticipated that the ongoing effort to overturn laws against birth control in Connecticut could, if successful in the Supreme Court, lead the ACLU to expand its defense of homosexual rights . . . [and] recast their entire approach to sexual issues").

226 Emerson, *supra* note 85, at 232.

227 Lawrence v. Texas, 539 U.S. 558 (2003).

228 JOHNSON, *supra* note 16, at 197.

products like condoms continued to be sold.[229] She also emphasized that the statute placed an unequal burden on low-income women who could not afford to visit a private physician or leave the state to obtain birth control, as was common practice among wealthier women.[230] After *Griswold*, she continued to advance equality-based arguments to advance her belief that the government should be required to provide birth control to individuals who cannot afford it.[231]

Pilpel and the national organizations continued to advance arguments based on equality throughout the Connecticut litigation. As part of preparations for *Griswold*, Pilpel suggested that the parties should introduce evidence that the law was not being equally enforced, insofar as drug stores could sell condoms for the prevention of disease but not contraceptives used by women and private physicians often prescribed contraceptives while public clinics could not.[232] This evidence, she felt, would "lay[] the groundwork for an equal protection point" which she believed "should be made forcibly in this action or actions."[233] In addition to recommending evidence that could be used by the parties, Pilpel drafted a brief argument on equal protection issues for Catherine Roraback to use in her oral arguments before the Connecticut courts.[234]

In the end, arguments about equality appeared throughout the Connecticut birth control cases. For example, the Connecticut attorneys' initial Supreme Court brief in *Buxton* emphasized the Connecticut statute's unequal enforcement, noting that while doctors in Connecticut cannot prescribe contraceptives to save the lives of women whose health would be affected by pregnancy, they can prescribe similar devices to protect individuals engaged in "illicit intercourse" from venereal disease.[235] Similarly, the Connecticut attorneys' initial brief in *Poe* gestured at issues of gender equality, suggesting that unwanted pregnancy might disrupt a woman's ability to complete her education.[236] Finally, during oral argument in *Poe*, Fowler Harper highlighted the unequal burden the Connecticut statute placed on low-income women, stating that as a result of the law "[t]he people in Connecticut who need contraceptive advice from doctors most, the people in lower income brackets and the lower education brackets, . . . do not get it because there

[229] Stone & Pilpel, *supra* note 127, at 224 (noting that "in Massachusetts today a doctor fits or prescribes a diaphragm at his peril, while condoms, vaginal jellies, douches, etc., of far less efficacy are sold with impunity").

[230] Pilpel, *supra* note 127, at 37 (noting that "[w]ell-to-do citizens of all states including Connecticut and Massachusetts can get contraceptives without difficulty from their private physicians" but that "[t]he poor are not so fortunate").

[231] *See* Harriet F. Pilpel, *Birth Control and a New Birth of Freedom*, 27 OHIO ST. L.J. 679, 688-89 (1965).

[232] Letter from Harriet Pilpel to Professor Fowler Harper at 1 (Nov. 14, 1961) (on file with Smith PPFA, Box 184, Folder 26).

[233] *Id.*

[234] Memorandum from Harriet Pilpel to Cass Canfield et al. (Dec. 8, 1961) (on file with PPFA Smith, Box 184, Folder 26).

[235] Jurisdictional Statement at 8, Buxton v. Ullman, 367 U.S. 497 (1961) (No. 61).

[236] Jurisdictional Statement at 23, Poe v. Ullman, 367 U.S. 497 (1961) (No. 60).

are no clinics available."[237]

Although the Connecticut attorneys continued to note issues of inequality in their briefs in *Griswold*,[238] the primary task of presenting equality arguments in *Griswold* was left to the national organizations. For example, PPFA's amicus brief in *Griswold* emphasized that the Connecticut statute is not enforced against "less effective products" such as condoms, which are "freely sold 'for the prevention of disease.'"[239] PPFA's brief also noted that "the real impact" of the Connecticut statute is on "those most in need of family planning service[s], i.e. the indigent and under-educated, whose medical help must come from public clinics."[240] As a result, PPFA argued, "the effect of the law is not only arbitrary but grossly discriminatory."[241]

The ACLU's amicus brief highlighted the Connecticut statute's implications for gender equality. The ACLU's amicus brief explicitly invoked equal protection concerns, quoting at length *Yick Wo v. Hopkins*,[242] an early Supreme Court case interpreting the Equal Protection Clause, to support the Court's assertion that the law although "fair on its face and impartial in appearance" is enforced with an "unequal hand."[243] Specifically, the ACLU emphasized that the Connecticut statute had an unequal impact on women's right "to engage in any of the common occupations."[244] The ACLU argued that access to birth control was important to women's ability "to order her childbearing according to her financial and emotional needs, her abilities, and her achievements," such that "effective means of contraception rank equally with the Nineteenth Amendment in enhancing the opportunities of women who wish to work in industry, business, the arts, and the professions."[245] Therefore, the ACLU concluded, "the equal protection clause protects the class of women who wish to delay or regulate child-bearing effectively."[246]

As with obscenity and decriminalization arguments, Pilpel, PPFA, and the ACLU succeeded in their efforts to integrate equality arguments into the Connecticut birth control litigation. Pilpel overcame the internal hurdles to the national organizations' participation in the Connecticut cases by suggesting examples of unequal enforcement and outlining potential legal arguments for the

237 Oral Argument, *Poe*, *supra* note 70, at 44:00.

238 *See* Brief for Appellants, *Griswold*, *supra* note 146, at 70-71 (noting inequality in enforcement and income inequality to show that the Connecticut statute "operate[s] in an irrational manner").

239 PPFA Amicus Brief, *Griswold*, *supra* note 146, at 18.

240 *Id.* at 21.

241 *Id.*

242 Yick Wo v. Hopkins, 118 U.S. 356 (1885).

243 Motion for Leave to File Brief for the American Civil Liberties Union and the Connecticut Civil Liberties Union as Amici Curiae and Brief Amici Curiae at 14-15, Griswold v. Connecticut, 381 U.S. 479 (1965) (No. 496) (quoting *Yick Wo*, 118 U.S. at 375).

244 *Id.* at 15.

245 *Id.* at 16 (citing Trubek v. Ullman, 147 Conn. 633 (1960)).

246 *Id.*

Connecticut attorneys. There is evidence from the briefs and arguments in *Poe* that these suggestions were adopted by Connecticut attorneys. In addition, PPFA and the ACLU articulated equality arguments in their own briefs in *Griswold*. Pilpel, PPFA, and the ACLU thereby promoted a key policy goal of the Connecticut birth control cases: ensuring widespread access to contraceptives that expanded beyond married individuals. Although this goal was not realized until the Court decided *Eisenstadt v. Baird*, which extended the right to birth control to unmarried individuals,[247] Pilpel and the ACLU's efforts were successful in presenting a potentially broader legal argument and preserving this argument for future litigation.

III. NATIONAL ORGANIZATIONS' IMPACT ON *GRISWOLD*

Echoes of Pilpel, PPFA, and the ACLU's influence can be seen throughout the Supreme Court's deliberations and decision in the Connecticut birth control cases. Although the Supreme Court ultimately decided *Griswold* based on the Connecticut attorneys' articulation of the right to privacy,[248] the facts and alternative arguments the national organizations encouraged the Connecticut attorneys to present did not go unnoticed.

A. Impact of National Organizations' Research

The facts Pilpel and PPFA compiled for the Connecticut attorneys and for their own amicus briefs influenced the Supreme Court Justices' portrayal of the Connecticut statute in *Griswold*. Pilpel and PPFA hoped the studies, surveys, and other data they presented would convince the Supreme Court to overturn the Connecticut prohibition on the use of birth control based on social realities and contemporary community norms.[249] Although *Griswold* ultimately was not decided on these grounds,[250] the Justices' opinions in *Poe* and *Griswold* did invoke the facts the national organizations presented in their amicus briefs.[251] The Justices used these facts to support their conclusion that Connecticut's purported

[247] Eisenstadt v. Baird, 405 U.S. 438 (1972). *See* Siegel & Siegel, *supra* note 2, at 356-57 (noting that *Eisenstadt* "perhaps reflect[s] a dawning recognition that equality values were at stake" with regards to access to contraceptives).

[248] *Griswold*, 381 U.S. at 485-86.

[249] *See supra* Part II.B.

[250] *See, e.g.*, *Griswold*, 381 U.S. at 481-82 ("Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. State of New York* should be our guide. But we decline that invitation . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); Poe v. Ullman, 367 U.S. 497, 519 (1961) (Douglas, J., dissenting) (rejecting the parties' substantive due process arguments and saying that although "[h]ealth, religious, and moral arguments might be marshalled pro and con" that "it is not for judges to weigh the evidence").

[251] *See, e.g.*, *Griswold*, 381 U.S. at 519 n.13 (Black, J., dissenting) (noting that "one cannot be oblivious to the fact that Mr. Gallup has already published the results of a poll which he says show that 46% of the people in this country believe schools should teach about birth control").

justification for the statute was insufficient to overcome the right to privacy.[252] The Justices also used these facts to support their belief that the Connecticut law was "an uncommonly silly law."[253] As one historian notes, the "continual references in the opinions to social behavior and values tend to lend a credence to a belief that social variables played a vital role in the judicial decision process."[254] By providing this factual information, Pilpel and PPFA succeeded in prompting the Supreme Court to take notice of the changing times.

B. Impact of National Organizations' Alternative Arguments

The alternative arguments the national organizations championed also drew the Supreme Court Justices' attention. There is evidence that the Justices seriously considered the obscenity-based arguments promoted by the national organizations during their deliberations in *Poe* and *Griswold*. Before *Poe*'s oral arguments, Chief Justice Warren's clerk, John Hart Ely, who was particularly critical of the marital privacy argument ultimately adopted by the Court, wrote a memorandum to the other Justices indicating that he "saw merit in the First Amendment arguments of the appellants."[255] During the Court's conference after the oral argument in *Poe*, Justice Black indicated that he could be convinced to overturn the statute if the opinion was "based on protecting the free expression rights of physicians to render advice to their patients about birth control."[256] The Justices continued to take obscenity-based arguments seriously during their deliberations in *Griswold*. Justice Stewart, for example, appeared to be concerned that a First Amendment argument would succeed and correspondence from his law clerks indicates that he wanted to find an argument that would allow him to decide the case without relying on the First Amendment.[257] His preoccupation with obscenity-based arguments is

[252] *See, e.g.*, *id.* at 498 (Goldberg, J., concurring) ("The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. . . . The rationality of this justification is dubious particularly in light of the admitted widespread availability to all persons in the State of Connecticut . . . ."); *Poe*, 367 U.S. at 554-55 (Harlan, J., dissenting) ("But conclusive, in my view, is the utter novelty of this enactment. Although the Federal Government and many States have at one time or other had on their books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the use of contraceptives a crime. Indeed, a diligent search has revealed that no nation, including several which quite evidently share Connecticut's moral policy, has seen fit to effectuate that policy by the means presented here.").

[253] *See, e.g.*, *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting); *see also id.* at 507 (Black, J., dissenting) (stating that "the law is every bit as offensive to me as it is my Brethren of the majority" and noting that "[t]here is no single one of the graphic and eloquent strictures and criticism fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe").

[254] DIENES, *supra* note 83, at 182-83.

[255] JOHNSON, *supra* note 16, at 138.

[256] *Id.* at 155.

[257] *Cf.* Possible Rationale in the Birth Control Cases, Memorandum from Jerod H. Israel to Justice Potter Stewart (undated) (on file with Yale University, Sterling Memorial Library, Potter Stewart Papers, Box 11, Folder 102) (stating that an argument he was providing "gets you where you need to go without the 1A").

ultimately reflected in his opinion, in which he notes, but ultimately rejects, both the medical exception[258] and the community standards arguments.[259]

Although the Supreme Court did not adopt a medical exception or invalidate the law under the *Roth* standard, First Amendment "overtones" were present in Justice Douglas's opinion for the Court.[260] For example, Justice Douglas begins his discussion of the right to privacy with a reminder that "the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge."[261] Justice White echoes these same concerns, highlighting the fact that the Connecticut statute prohibits doctors from advising patients on effective methods of birth control and deprives the "disadvantaged citizens of Connecticut" of information regarding these methods of birth control.[262] The dissenters' opinions also acknowledge the connection between the Connecticut birth control statute and past obscenity cases. For example, Justice Black's dissenting opinion rejects the medical exception argument, stating that "[h]ad the doctor defendant here . . . been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices . . . or for telling people how devices could be used" there would be a First Amendment problem.[263] However, he rejects that there is any First Amendment issue here, concluding that "[m]erely because some speech was used in carrying out the conduct—just as in ordinary life some speech accompanies most kinds of conduct—we are not in my view justified in holding that the First Amendment forbids the State to punish their conduct."[264] Justice Stewart's dissenting opinion similarly rejects the community standards argument, stating that "it is not the function of this Court to decide cases on the basis of community standards."[265] These references indicate that even though the national organizations' obscenity-based arguments failed to convince the Supreme Court, they did not go unnoticed.

There is also evidence that the Justices considered the national organizations'

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[258] *Griswold*, 381 U.S. at 529 n.3 (1965) (Stewart, J., dissenting) ("If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials.").

[259] *Id.* at 530 (Stewart, J., dissenting) ("At the oral argument in this case we were told that the Connecticut law does not 'conform to current community standards.' But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases 'agreeably to the Constitution and laws of the United States.'").

[260] Emerson, *supra* note 85, at 222.

[261] *Griswold*, 381 U.S. at 482.

[262] *Id.* at 503 (White, J., concurring) (noting that the Connecticut statute "prohibits doctors from affording advice to married persons on proper and effective methods of birth control" and stating that this prohibition "den[ies] disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control").

[263] *Id.* at 507-08 (Black, J., dissenting).

[264] *Id.* at 508.

[265] *Id.* at 530 (Stewart, J., dissenting).

arguments regarding decriminalizing private sexual conduct. For example, Justice Douglas's dissent in *Poe* invokes the decriminalization argument as part of his articulation of the right to privacy. He quotes "a noted theologian" as saying that "the Connecticut statute confuses the moral and legal, in that it transposes without further ado a private sin into a public crime."[266] More often, however, the Justices treated this argument as a dangerous slippery slope. As Emerson noted after *Griswold*, the Supreme Court was unwilling "to venture into [this] delicate area"[267] and, as a result, the Justices limited their arguments based on privacy to the marital bedroom.[268] In his dissent in *Poe*, for example, Justice Harlan acknowledges the potentially expansive reach of the decriminalization argument and explicitly limited the reach of any argument distinguishing between "private sin" and "public crime" to the marital bedroom, reaffirming the state's right to prohibit adultery, homosexuality, and other "traditional offenses against good morals."[269] Justice Goldberg's concurring opinion in *Griswold* similarly emphasizes that Connecticut's laws prohibiting adultery and fornication remain "beyond doubt" even after *Griswold*[270] and states that the Court's holding "in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."[271] Justice Stewart's dissenting opinion also warily notes that "[t]he Court does not say how far the new constitutional right of privacy announced today extends," but concludes that, even after *Griswold*, states "can constitutionally still punish at least some offenses which are not committed in public."[272] Once again, although the Supreme Court did not adopt the national organizations' proposed arguments to decriminalize private sexual conduct, these references indicate that the national organizations' arguments had an impact on the Justices.

Finally, there is evidence that the Supreme Court Justices were also influenced by the national organizations' arguments based on equality. For example, during the *Griswold* oral arguments, Justice Brennan and others repeatedly questioned Thomas Emerson regarding whether he was making an equal protection argument in light of the evidence that the law was not equally enforced.[273] The Justices themselves also remarked on evidence that the law was unequally enforced[274] and placed an unequal burden on low-income individuals.[275]

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[266] Poe v. Ullman, 367 U.S. 497, 521 (1961) (Douglas, J., dissenting) (quoting MURRAY, WE HOLD THESE TRUTHS 157-58 (1960)).

[267] Emerson, *supra* note 85, at 227; *see also* Blackshield, *supra* note 856, at 441 (noting that "[j]udges in Washington, D.C., in 1965 were no more likely than those in New York in 1916," when similar arguments had been raised by Margaret Sanger, "to accept the demand for open approval of widespread sexual license").

[268] Emerson, *supra* note 85, at 231-32.

[269] *Poe*, 367 U.S. at 552-53 (Harlan, J., dissenting).

[270] *Griswold*, 381 U.S. at 498 (Goldberg, J., concurring).

[271] *Id.* at 498-99 (citing *Poe*, 367 U.S. at 554 (Harlan, J., dissenting)).

[272] *Id.* at 530 n.7.

[273] Oral Argument, *Griswold*, *supra* note 199, at 4:39; *see also id*. at 4:07 (Black, J.); *id*. at 41:48 (White, J.).

[274] *Id.* at 4:39 (Brennan, J.) (remarking on the inequality in enforcement between disease preventive

The Justices continued to consider the national organizations' equality-based arguments as an alternative to resolving the Connecticut birth control cases on privacy grounds during their deliberations.[276] At the Supreme Court's conference to discuss *Poe*, for example, Chief Justice Warren indicated that while he was unable to accept other justifications for invalidating the law, he might accept a "*Yick Wo* theory" based on unequal enforcement of the law.[277] Ultimately, only Justice White's concurring opinion in *Griswold* raised the equality issue. He emphasized the income inequality argument, noting that "the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control" in violation of the Fourteenth Amendment.[278] Although the Supreme Court did not ultimately rely on the national organizations' equality-based arguments to overturn the Connecticut statute prohibiting the use of birth control, these references, as with the other references to the arguments advanced by Pilpel, PPFA, and the ACLU, indicate that the national organizations succeeded in bringing these alternative legal arguments to the attention of the Justices.

CONCLUSION

As *Griswold* turns fifty, many have revisited *Griswold*'s history.[279] In doing so, the contributions Harriet Pilpel and the national organizations she represented made to *Griswold* should not be neglected. Although Pilpel has been portrayed as a "back seat driver,"[280] the directions she gave to the attorneys controlling the Connecticut-based litigation had an important impact on *Griswold*.

Pilpel and the national organizations she represented contributed to *Griswold* by supporting the Connecticut attorneys' litigation efforts. Pilpel helped the Connecticut attorneys avoid mistakes made in past cases by suggesting case development strategy. Pilpel and PPFA connected the case to real issues and public opinion by providing research to the litigants and supplementing that research in PPFA's own amicus briefs.

Pilpel and the national organizations she represented also contributed to *Griswold* by indirectly influencing the Connecticut attorneys' legal arguments. Pilpel, PPFA, and the ACLU presented three alternative legal arguments to support

devices, i.e. condoms, and contraceptives, like diaphragms or the pill).

275 *Id.* at 41:12 (Warren, C.J.) (remarking that while a "person with means could go to a doctor and get this information . . . a poor person could not do it").

276 GARROW, *supra* note 16, at 237 (describing Ely's influential memorandum, which urged the Justices to consider equal protection arguments); *id.* at 241 (noting that Chief Justice Warren considered relying upon *Yick Wo*).

277 JOHNSON, *supra* note 16, at 154.

278 Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (White, J., concurring) (citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

279 *See supra* note 15.

280 GARROW, *supra* note 16, at 207-08.

overturning the Connecticut statute prohibition on the use of birth control, each of which would lay a foundation for expanding civil liberties. First, Pilpel and fellow attorneys affiliated with PPFA the ACLU promoted arguments based on obscenity cases, which would have allowed civil liberties to expand with changing community mores. Second, Pilpel advocated for arguments based on decriminalizing consensual sex, which could have invalidated a wide swath of laws enforcing a particular view of morality. Finally, Pilpel, PPFA, and the ACLU advanced arguments based on principles of equality, which could have quickly expanded access to birth control. Although the Supreme Court did not adopt these alternative arguments, the Justices did acknowledge them in their deliberations and opinions, thereby preserving the possibilities that future civil liberties cases would be decided on these grounds.

Through her efforts to support and influence the Connecticut attorneys, Pilpel helped the national organizations she represented overcome the hurdles to their participation in the Connecticut cases. Rather than leaving the future of the birth control movement to the Connecticut attorneys who had initiated *Griswold*, she intervened on behalf of the national organizations she represented. In doing so, she ensured that the national organizations' goals for the birth control movement and the broader civil liberties movement were not overshadowed by the Connecticut attorneys' focus on overturning the particular law at issue in *Griswold*. Although Pilpel's efforts have received little attention in the past, her interventions should be viewed as a prime example of successful intervention by national organizations in litigation outside their control.

During the most recent Supreme Court term, access to birth control and issues of reproductive rights were once again before the Court.[281] As national organizations and advocates for civil liberties await the Supreme Court's decisions and prepare for future challenges to reproductive rights, they should continue to look back to *Griswold* for guidance and inspiration. In particular, they should consider the ways in which Harriet Pilpel, PPFA, and the ACLU guided *Griswold* to its current place in American law, and the ways in which they can guide their own movements to success.

[281] Zubik v. Burwell, 778 F.3d 422 (3d Cir. 2015), *cert. granted*, 136 S. Ct. 444 (2015); Whole Woman's Health v. Cole, 790 F.3d 563 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 499 (2015).