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Constitutional Law--Right of Privacy--Access to Contraceptive Information [*Griswold v. Connecticut*, 381 U.S. 479 (1965)]

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Recent Decisions

CONSTITUTIONAL LAW — RIGHT OF PRIVACY — ACCESS TO CONTRACEPTIVE INFORMATION

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

Legal restrictions on birth control demonstrate the discord between present state statutes and present American mores.¹ As early as the 1940's, the majority of married couples in the nation employed some type of contraceptive techniques;² yet now, more than two decades later, legislative restrictions on the distribution of contraceptives and the dissemination of information still exist.³

The United States Supreme Court, in the recent decision in *Griswold v. Connecticut*,⁴ held, by a seven-to-two vote, that two Connecticut criminal statutes, one prohibiting the use of contraceptives,⁵ the other prohibiting anyone from counseling another in the use of birth control methods,⁶ were unconstitutional.

Appellant Griswold was the executive director of a non-commercial birth control clinic⁷ which actively distributed contraceptive information and instructions to *married persons*. Both appellant and co-appellant, a licensed physician who was the medical director of the clinic, were accused of violating the two Connecticut statutes.

¹ A survey in 1960 demonstrated that 80% of married women with some high school education and 60% of those with a grammar school education have performed or plan to perform in the future various acts designed to limit conception. A breakdown by religious affiliation established that: among Protestants and Jews, 80% of women with a grammar school education and 90% of those with more education have used an appliance method (condom, diaphragm, pill, douche) of contraception; among Catholics, 67% of women with some college education, 52% with a high school education, 34% with some high school exposure, and 38% with a grammar school education have used rhythm and withdrawal to prevent conception. RAINWATER, AND THE POOR GET CHILDREN 26-27 (1960).

² "Gynecologists well know that most American couples use one or another form of contraception. Eastman quotes Pearl as demonstrating that 55% of the married population of the United States practices contraception; Himes' figure is higher — 60 to 75%. My experience with both clinic and private patients is that the incidence . . . of contraception, not including complete abstinence, is of the order of 90%. I include the practice of coitus interruptus, as well as the exercise of periodic continence." Rock, *Medical and Biological Aspects of Contraception*, 1 CLINICS 1598 (1943). (Footnotes omitted.)

³ See text accompanying notes 32-39 *infra*.

⁴ 381 U.S. 479 (1965).

⁵ CONN. GEN. STAT. REV. § 53-32 (1958).

⁶ CONN. GEN. STAT. REV. § 54-196 (1958). For a discussion of these statutes, see Comment, 49 CORNELL L.Q. 275, 279 (1964).

⁷ Planned Parenthood League of Connecticut.

Appellants were found guilty as accessories who assisted and counseled another person in the use of drugs or instruments to prevent conception.⁸ Following affirmation of the conviction by the Connecticut Supreme Court of Errors,⁹ the case was appealed to the United States Supreme Court.¹⁰

The Court, speaking through Mr. Justice Douglas, struck down the Connecticut statutes as unconstitutional, establishing that the intimate relation of husband and wife and their physician's role in one aspect of that relation involve a right of privacy which must be protected from unwarranted intrusion by the government.¹¹ The Court held that the Constitution protects, without specific enumeration, certain essential freedoms of the individual.¹² Labeled peripheral rights, these freedoms are derived from the penumbra or total scope of the constitutional amendments. The penumbral approach incorporates rights not explicitly included in any amendment, with the rationale that their existence is vital "in making the express guarantees [of the various amendments] fully meaningful."¹³ Without these peripheral rights the enumerated rights would be vulnerable. Guidelines for judicial interpretation of the due process clause of the fourteenth amendment are not defined as the Court subjectively determines which peripheral rights are necessary to implement the express guarantees of the Constitution.

Judicial interpretation has construed the first amendment to include: the right to educate a child in a school of the parents'

⁸ *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

⁹ *State v. Griswold*, 151 Conn. 544, 200 A.2d 479 (1965).

¹⁰ Before reaching the merits of the case, the Court held that appellants had standing to raise the constitutional rights of the married couples with whom they dealt. Accessories, convicted under an aiding-and-abetting statute, have standing to assert that the offense which they are charged with assisting cannot constitutionally be classified as a crime. *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965). The case of *Tileston v. Ullman*, 318 U.S. 44 (1943), was distinguished because, there, the plaintiff sought to represent others who had their constitutional rights infringed. In the instant case, appellants, themselves, were convicted under the aiding-and-abetting statute. The court held that they have a valid "case or controversy" and standing to demonstrate that the act they were charged with assisting was not in fact a crime.

¹¹ The Court relied on *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944), which recognized the existence of a private realm of family life which the state cannot enter. The intimacy of a husband and wife's marital relation must be incorporated into that private realm. The physician's service to married couples (*i.e.*, instruction and consultation in birth control) is similarly protected. The Court primarily discussed the rights of married clients, but since their conduct is not criminal, appellant physicians cannot be guilty of aiding and abetting. Further the Court stated that "the rights of husband and wife . . . are . . . adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them." *Id.* at 481.

¹² *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965).

¹³ *Id.* at 483.

choice, whether public, private, or parochial;¹⁴ the right to the entire spectrum of available knowledge in school;¹⁵ and the freedom to associate in privacy.¹⁶ The Court reasoned that the first amendment has a penumbra where privacy is immune from governmental invasion and that all forms of "association" — social, legal, and economic — are to be equally protected.¹⁷ Thus, although the Constitution does not expressly mention the term "right of privacy," it is a fundamental right that "emanates from the totality of the constitutional scheme under which we live."¹⁸

Zones of privacy were thus created from the various guarantees found in and implied by the Constitution: freedom of association provided by the first amendment;¹⁹ freedom from governmental invasion of the "sanctity of a man's home and the privacies of life"²⁰ granted by the fourth and fifth amendments;²¹ assurance that the enumeration of certain rights in the Constitution shall not be construed to deny others retained by the people, set forth in the ninth amendment;²² and protection of basic values "implicit in the concept of ordered liberty,"²³ established through the due process clause of the fourteenth amendment.²⁴

Marriage is within this realm of fundamental guarantees; therefore, it is an association which demands constitutional protection equal to that accorded those guarantees impliedly incorporated in the protected zone of privacy through the penumbral theory.²⁵ The

¹⁴ *Pierce v. Society of Sisters*, 268 U.S. 510, 515 (1925).

¹⁵ *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

¹⁶ *NAACP v. Alabama*, 357 U.S. 449 (1958).

¹⁷ *NAACP v. Button*, 371 U.S. 415, 430-31 (1963).

¹⁸ *Poe v. Ullman*, 367 U.S. 497, 521 (1961) (dissenting opinion).

¹⁹ See text accompanying notes 14-17 *supra*.

²⁰ *Boyd v. United States*, 116 U.S. 616, 630 (1886).

²¹ *Ibid.* See *Mapp v. Ohio*, 367 U.S. 643, 656 (1961).

²² U.S. CONST. amend. IX.

²³ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²⁴ *Id.* at 324-25. Mr. Justice Harlan advocated this point in his concurring opinion, based solely on the fourteenth amendment. He disagreed with the court's opinion which implied that the due process clause did not touch the Connecticut statutes unless the enactment violated some right assured by the letter or penumbra of the Bill of Rights. This "incorporation" doctrine was employed to restrict the reach of the fourteenth amendment, and was totally unacceptable to the Justice, who interpreted the due process clause to stand on its own "bottom," independent of the Bill of Rights. *Griswold v. Connecticut*, 381 U.S. 479, 499-500 (1965).

²⁵ *Id.* at 486-87 (concurring opinion). Mr. Justice Goldberg based his concurring opinion, joined by the Chief Justice and Mr. Justice Brennan, on the ninth and fourteenth amendments, as interpreted by *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923): "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration. Without doubt, it denotes not merely free-

Connecticut statutes, by forbidding the use of contraceptives rather than by regulating their sale, were an unwarranted and unjustified legislative invasion of this privacy.²⁶ The Court held that the laws thus swept too broadly into the area of protected freedom — marital rights — and, as such, could not stand.²⁷

The concurring opinion of Mr. Justice Goldberg,²⁸ joined by The Chief Justice and Mr. Justice Brennan, adopted the reasoning of the Court's opinion, but relied on the ninth amendment which similarly recognizes that fundamental personal rights, even though not specifically enumerated in the Constitution, are protected from abridgement by a government. The language and history of this amendment establish that other "unmentioned" rights must exist and be lawfully protected if the sovereignty and dignity of the individual are to be preserved.²⁹

Although the modern birth control movement achieved full growth in England as early as 1877,³⁰ prevailing laws in the United States prohibited not only the use of birth control but also the right . . . to marry, establish a home and bring up children. . . ." The concurring opinion stated that the concept of liberty protects those personal rights including marital privacy, that are fundamental even if not guaranteed by name in the Constitution.

²⁶ *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

²⁷ *Ibid.* The Court cited *NAACP v. Alabama*, 377 U.S. 288, 307 (1964), as exemplifying the application of the principle that if the purpose of the government was to control or prevent activities constitutionally subject to state regulation, it could not be achieved by means which swept unnecessarily broadly and invaded protected freedoms. Mr. Justice White in his concurring opinion asserted that Connecticut's two statutes bore a substantial burden of justification and would prevail only if the state's interest was compelling. The statutes were enacted to prevent pre-marital and extra-marital relations, but in the process also affected those engaged in marital relations. He concluded that less drastic measures for achieving the same purpose were available and must be employed. *Griswold v. Connecticut*, 381 U.S. 479, 503-04 (1965).

²⁸ *Id.* at 486 (concurring opinion). This opinion actually represents the plurality of the Court as six separate opinions were written.

The two dissenting opinions asserted that the majority and concurring opinions incorporated provisions, not previously existing, into the various amendments merely to confer upon the court power to invalidate any legislative act which was believed to be irrational, unreasonable, or offensive. *Id.* at 520-21. Mr. Justice Black feared that such broad "judicial control . . . would . . . jeopardize the separation of governmental powers . . . and . . . threaten to take away much of the power of States to govern themselves. . . ." *Id.* at 521. The dissent further visualized the deprivation of legislative power to make laws based on their own wisdom, if the Supreme Court usurped the power of veto or ultimate determination. *Id.* at 513. Mr. Justice Stewart could find no general right of privacy in the Bill of Rights or elsewhere in the Constitution which rendered the Connecticut statutes invalid. *Id.* at 530. The dissent further stated that the essence of judicial duty is to subordinate any personal view of the wisdom of a particular law. The constitutional method of repealing a law is through the state legislature, not the judiciary. *Id.* at 530-31.

²⁹ PATTERSON, *THE FORGOTTEN NINTH AMBENDMENT* 4 (1955).

³⁰ Free distribution of contraceptive information was legalized, mainly through the efforts of T. R. Malthus, British minister and economist. See Comment, 9 *CLEVE.-MAR. L. REV.* 245, 246 (1960).

States have prohibited the use and distribution of contraceptive methods since the Federal Comstock Law of 1873.³¹ This law prohibited interstate distribution of birth control devices and information, but the courts, by permitting certain exceptions to exist,³² have in essence negated any effective restriction. The one remaining enforceable federal requirement, as established by *United States v. Nicholas*,³³ is that the instruments and information be used only by married couples.

The majority of state legislatures originally patterned their morality statutes after the rigid federal law. State courts and legislatures, with few exceptions,³⁴ have incorporated provisions in statutes on contraceptives to exempt physicians and licensed pharmacists from prosecution.³⁵ The justification for the statutory prohibition on the dissemination of information is derived through the rationale of the inherent police power of the state to protect the public wel-

³¹ 18 U.S.C. §§ 1461-62 (1964); 38 Stat. 194 (1913), 19 U.S.C. § 1305 (1964). The act provided in part that no obscene book or other publication of an indecent character, or any article designated or intended for the prevention of conception should be carried in the mails; the importation of all such articles was also proscribed, customs officials being required to confiscate them.

³² In *Youngs Rubber Corp. v. C. I. Lee & Co.*, 45 F.2d 103 (2d Cir. 1930), the court held that violation of the Comstock Act did not preclude maintenance of suit under the Trademark Act since the latter act barred a remedy only when the trademark was used in an unlawful business, plaintiff's business not being unlawful under the New York statute. Of lasting significance was the court's dictum that, "The intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal uses is not lightly to be ascribed to Congress." *Id.* at 108. Some years later, the same court decided *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936), making the Comstock law virtually obsolete. The defendant physician had imported contraceptive devices for a lawful purpose, but she was nevertheless charged with violating the importation provision of the Comstock Act. Judge Augustus Hand, approving the reasoning in the *Youngs Rubber Corp.* case, excepted physicians from the purview of the Comstock Act: "we are satisfied that this statute . . . embraced only such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were to be used." *Id.* at 739.

³³ 97 F.2d 510, 512 (2d Cir. 1938). It was held that the mailing of a book describing contraceptives was legal; the volume should not be confiscated, but neither should it be delivered. Rather, the book should be sent to the Dead Letter Office, and the addressee has the burden of going forward with the evidence to prove that he is privileged to receive the book.

³⁴ NEB. REV. STAT. § 28-423 (1956) and MO. REV. STAT. § 563.300 (1959), prohibit sale, but permit publication and sale of standard medical books as well as teaching in regularly chartered medical schools. N.Y. PEN. LAW §§ 1142-43, 1145 and MINN. STAT. §§ 617.25-.26 (1961), allow exceptions to physicians only to cure and prevent disease.

³⁵ See note 38 *infra* for the listing of the seven states which have express provisions and the sixteen states which allow the exception by judicial interpretation. Mississippi sponsors a voluntary birth control clinic, and New Jersey prohibits sale by vending machines. N.J. REV. STAT. § 2A:170-76 (Supp. 1953).

fare, safety, and morals.³⁶ Although at the present time only Massachusetts severely restricts legal means of obtaining contraceptives,³⁷ twenty-nine other jurisdictions have retained stringent control of the sale or advertisement of such methods, or both.³⁸

Birth control clinics have been subjected to stringent control from their inception.³⁹ As late as 1962 in *Planned Parenthood Comm. v. Maricopa County*,⁴⁰ these clinics were impeded, although not outlawed, in the distribution of non-commercial information to married persons. The *Griswold* decision substantially protects from state intervention the clinical instruction of patients. Current statutory bans on dissemination of information, however, severely limit the effectiveness of the clinics in reaching the segment of Americans who are misinformed and apprehensive of modern, inexpensive birth control methods.⁴¹

Perhaps the most significant element of the *Griswold* decision,

³⁶ See, e.g., *Commonwealth v. Allison*, 227 Mass. 57, 116 N.E. 265 (1917); *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918); *Barretta v. Barretta*, 182 Misc. 852, 46 N.Y.S.2d 261 (Sup. Ct. 1944); *People v. Byrne*, 99 Misc. 1, 163 N.Y. Supp. 682 (Sup. Ct. 1917).

³⁷ MASS. GEN. LAWS ANN. ch. 272, §§ 20-21 (1956).

³⁸ Sixteen states hold that dissemination of information is subject to advertising regulations and/or provisions dealing with sale by vending machines: ARIZ. REV. STAT. ANN. § 13-213 (1956) (Arizona allows Planned Parenthood Clinics to distribute literature only when the advisee seeks the clinic out); CAL. BUS. & PROF. CODE § 4301-25; COLO. REV. STAT. ANN. § 40-9-17 (Supp. 1961); HAWAII REV. LAWS §§ 155-73, 302A-1 to -3 (1955); IND. ANN. STAT. § 9-601 (Supp. 1963); KY. REV. STAT. § 214.190-270 (1960); LA. REV. STAT. § 14:88 (1950); ME. REV. STAT. ANN. tit. 17, § 53 (1954); MD. ANN. CODE art. 27, § 41 (1957); MICH. COMP. LAWS §§ 329.251-255, 340.782, 750.40 (Supp. 1956); NEV. REV. STAT. §§ 202.190, 202.210-230 (1957); PA. STAT. ANN. tit. 18, § 4525 (1954); S.D. CODE § 13.1726 (Supp. 1960); UTAH CODE ANN. §§ 58-19-1 to -10 (1953); WASH. REV. CODE §§ 9.68.030, 18.81.010-080 (1961); WYO. STAT. ANN. § 6-105 (1957).

Seven states generally prohibit the sale of contraceptives, but an express exception is made for physicians and/or pharmacists: ARK. STAT. ANN. §§ 82-944 to -954 (1947); DEL. CODE ANN. tit. 16, §§ 2501-04 (1953); IDAHO CODE ANN. §§ 18-603, 39-801 to -810 (1947); IOWA CODE §§ 725-.7, 725.9-.10 (1962); MONT. REV. CODES ANN. §§ 94-3609, 94-3616 to -3619 (1947); ORE. REV. STAT. §§ 435.010-990 (1955); WIS. STAT. § 151.15 (1961).

Five states have special prohibitions: New York, Minnesota, Nebraska, Missouri and New Jersey. See notes 34, 35 *supra*. For an exhaustive study of state and federal birth control legislation, see Comment, *The History and Future of the Legal Battle Over Birth Control*, 49 CORNELL L.Q. 275-82 (1964).

³⁹ The operation of organized, permanent institutions dedicated to the dissemination of birth control information had been universally held subject to regulation under the police power. See, e.g., *People v. Dever*, 236 Ill. App. 135 (1925); *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).

⁴⁰ 92 Ariz. 231, 375 P.2d 719 (1962). The court construed ARIZ. REV. STAT. § 13-213 (1956) to allow medical personnel to see patients who had requested aid, but if the clinic canvassed or solicited, its activity would be illegal.

⁴¹ See RAINWATER, AND THE POOR GET CHILDREN 169-70 (1960); TRUXAL & MERRILL, MARRIAGE AND THE FAMILY IN AMERICAN CULTURE 225 (1953).

although it concerned birth control statutes on the surface, is the enunciation by two justices of the penumbral approach to Bill of Rights questions.⁴² Through this approach to Constitutional interpretation, unmentioned rights are incorporated into the Bill of Rights with a subjective look toward the "spirit" of the amendments. The scope of this article precludes a discussion of the future ramifications of such an approach to the interpretation of the Constitution.⁴³

The interests that states have in controlling the indiscriminate distribution of birth control information — to prevent pre-marital and extra-marital relations — will still be served, although access to information will be considerably easier. State welfare and health officials' anxieties, fostered by unrestricted dissemination of information, can be alleviated if precautions followed in the actual procurement of the contraceptive (*i.e.*, that proof of marriage is a prerequisite to obtaining the device) are enforced by the physicians, pharmacists, and clinical personnel who distribute them, as well as by the law.⁴⁴

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⁴² See text accompanying notes 11-27 *supra*.

⁴³ For an excellent and extensive analysis of the penumbra theory and other elements of the case, see *Symposium on the Griswold Case and the Right of Privacy*, 64 MICH. L. REV. 197 (1965).

⁴⁴ In the same month as the *Griswold* decision, the Ohio Legislature amended its statutes on contraceptives, OHIO REV. CODE §§ 2905.32-34, to permit the unconditional sale and advertisement of birth control devices. Amended H.R. 120, 106th Gen. Assembly, 1965 Regular Sess. This amendment was passed June 23, 1965, approved June 29, 1965, and went into effect September 28, 1965. The previous statutes, included in the chapter entitled "Offenses Against Chastity," OHIO REV. CODE §§ 2905.01-44, and dealing equally with dissemination of drugs and information to procure abortions, induce miscarriages, and prevent conception, were rephrased to delete any reference to contraceptives. Thus, Ohio may no longer ban or even control the sale of devices or the dissemination of related information.

Unfortunately, the Ohio Legislature may have been too liberal in removing unequivocally the contraceptive ban. The amendment provides that anyone may now sell or advertise contraceptives; previously only responsible professional people were intrusted with dissemination. The potential danger of the new Ohio law was envisioned in *Sanitary Vendors, Inc. v. Byrne*, 40 N.J. 157, 190 A.2d 876 (1963), which judged contraceptive dispensation through vending machines illegal in New Jersey. Reasoning that the sale of contraceptives must be regulated to guard against an illegal use in pre-marital or extra-marital relations, the court held that promiscuous and indiscriminate sale through vending machines in public places removes all measure of control. See, *e.g.*, *People v. Pennock*, 294 Mich. 578, 293 N.W. 759 (1940); *Howell v. Bryant*, 99 Ohio App. 49, 130 N.E.2d 837 (1954).

A more practical amendment than Ohio's would permit uninhibited, noncommercial advertisement and would restrict the actual sale to professional agencies where only legal demand would be supplied and pre-marital relations controlled. This statute would best implement the growing needs of the people in light of the restraining mores of the nation. Ohio's amendment has not provided for such regulation and must, if it is to prove beneficial to the State's interest, incorporate restrictions against commercial advertising and indiscriminate sale.