

Constitutionality of State Statutes Prohibiting the Dissemination of Birth Control Information

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Repository Citation

Kenneth D. McCoy Jr., *Constitutionality of State Statutes Prohibiting the Dissemination of Birth Control Information*, 23 La. L. Rev. (1963)
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a timely *action en desaveu*.⁹¹ The suggested interpretation would make Articles 184 and 197 complementary instead of contradictory, and allow a reasonable disposition of extreme cases in which the husband in all probability never learned of the child's birth,⁹² instead of making them monuments to the intransigence of the law.

Karl W. Cavanaugh

CONSTITUTIONALITY OF STATE STATUTES PROHIBITING THE DISSEMINATION OF BIRTH CONTROL INFORMATION

The current widespread attention given the continuing population growth by news media¹ and a growing interest among a large segment of the married population in spacing family development has lent new impetus to examination of the controversial subject of birth control. Current state statutory provisions on the subject of contraceptives stem mainly from the influence of the Federal Comstock Act of 1873,² the first important legislative effort in this area.³ The federal provisions seem absolute in their prohibitions on interstate distribution of contraceptive devices,⁴ but judicial interpretation has created many exceptions in favor of certain activities.⁵ A ma-

91. LA CIVIL CODE art. 209(3) may be the basis of another exception to Article 184 in cases in which the wife is living in open concubinage with a third party at the time of the child's conception.

92. *E.g.*, *Ellis v. Henderson*, 204 F.2d 173 (5th Cir. 1953); *Succession of Ledet*, 122 La. 220, 47 So. 506 (1908); *Succession of Saloy*, 44 La. Ann. 433, 10 So. 872 (1892). If the husband in fact never learns of the child's birth, his heirs should be permitted to bring a regular *action en desaveu*. See LA. CIVIL CODE art. 192 (1870).

1. *E.g.*, *United States News & World Report*, p. 68 (May 6, 1963).

2. 18 U.S.C. §§ 1461-1462 (1958).

3. See Stone & Pilpel, *The Social and Legal Status of Contraception*, 22 N.C.L. Rev. 212, 219-20 (1944), wherein the authors contend the Comstock Act was archaic when passed, but that Congress was influenced by claims that the nation was falling into the clutches of organized vice.

4. 18 U.S.C. § 1461 (1958): ". . . Every article or thing designed . . . for preventing conception . . . [and] every description calculated to induce or incite a person to so use or apply any such article . . . is declared to be nonmailable matter. . . ." *Id.* § 1462: "Whoever . . . knowingly uses any . . . common carrier, for [carriage in interstate commerce any article for preventing conception]."

5. See Stone & Pilpel, *The Social and Legal Status of Contraception*, 22 N.C.L. Rev. 212, 221 (1944). When the Comstock Act was introduced it contained exceptions for articles of contraception when prescribed by a physician. The law as passed, however, did not contain this exception. Judicial interpretation has read many exceptions back into the law. *E.g.*, *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936) (physicians allowed to import or ship by

majority of states have enacted statutes dealing with contraceptives⁶—ranging from Connecticut's anti-use statute⁷ to mere licensing statutes⁸—usually found under general titles of obscenity and abortion. The inclusion of contraceptive regulation within statutes directed against obscenity reflects a Victorian attitude which equates the two subjects simply because of their common relationship to sex; this holdover from a by-gone era appears to have little basis of support in a modern world.⁹

The United States Supreme Court has yet to pass on the constitutional validity of state statutes regulating the dissemination of birth control information.¹⁰ Several early state court decisions upheld statutes limiting distribution of such information on the rationale regulation was within the states' police power for the protection of health and morals.¹¹ Litigation has been noticeably lacking, however, under most of the state statutes, indicating state officials are reluctant to enforce these provisions.

In one recent Arizona case¹² a nonprofit corporation was engaged in the business of placing information about contraceptive devices on public display and distributing leaflets and pamphlets discussing "methods of contraception . . . in rather specific detail."¹³ The corporation sought a judgment declaring unconstitutional¹⁴ under the first and fourteenth amendments

mail); *Davis v. United States*, 62 F.2d 473 (6th Cir. 1933) (druggists not within the bar of the statute); *Youngs Rubber Co. v. Lee*, 45 F.2d 103 (2d Cir. 1930) (act applies only to shipment for purposes of "illegal contraception"). Today it does not appear that federal laws contain any effective prohibitions on the dissemination of birth control devices or information.

6. For a collection of state legislation on the subject, see generally Comment, 70 *YALE L.J.* 322, 333 (1960). See also Note, 6 *U. CHI. L. REV.* 260, 263 (1939).

7. *CONN. GEN. STAT.* § 53-32 (1958).

8. *E.g.*, *ARK. STAT.* § 82-944 (1947).

9. See generally Sulloway, *The Legal and Political Aspects of Population Control in the United States*, 25 *LAW & CONTEMP. PROB.* 593, 600 (1960); Comment, 9 *CLEV.-MAR. L. REV.* 245, 257 (1960).

10. Although two cases concerning the Connecticut anti-use statute came before the Court, it did not reach the merits of either. *Poe v. Ullman*, 367 U.S. 44 (1960); *Tileston v. Ullman*, 318 U.S. 44 (1943). Further, it would appear that a decision on this particular statute would not necessarily solve the problem of restriction on dissemination of information about contraceptives.

11. *Commonwealth v. Allison*, 227 Mass. 57, 116 N.E. 265 (1917); *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918); *People v. Byrne*, 99 Misc. 1, 163 N.Y. Supp. 682, 35 N.Y. Crim. 406 (1917); *cf. McConnel v. Knoxville*, 172 Tenn. 190, 110 S.W.2d 478 (1937).

12. *Planned Parenthood Committee v. Maricopa County*, 92 Ariz. 231, 375 P.2d 719 (1962).

13. 375 P.2d at 724.

14. Both parties stipulated the corporation's activities were in direct contravention of the state's statute on contraceptives. 375 P.2d at 720.

of the Federal Constitution a state statute¹⁵ prescribing criminal punishment for advertising or offering services for the prevention of conception. The state court upheld the constitutionality of the statute, but limited its application to brand-name advertising;¹⁶ the corporation's activities were therefore outside its prohibitions. Although the result seems desirable, it seems clear that the statute was directed toward preventing the very activity in which the corporation was engaged, and that the Arizona court resorted to tortured construction in order to avoid constitutional issues raised by its clear words.¹⁷

Louisiana, in company with a number of states, has laws impliedly or expressly prohibiting birth control¹⁸ that have never, and in all likelihood will never, be enforced. Although Louisiana's statute has never been judicially interpreted, opinions of the Attorney General indicate the provision was designed to prevent birth control in any form.¹⁹ The intent of this statute being uncertain, it is impossible to determine whether it could be used to combat noncommercial distribution of birth control information; however, it is doubtful whether the broad interpretation of the Attorney General would stand today. Despite strong criticism by one of the reporters, these provisions were retained in the Louisiana Criminal Code of 1942,²⁰ possibly to avoid controversy in the legislative consideration of the Code.²¹

State regulation of noncommercial dissemination of birth

15. ARIZ. REV. STAT. § 13-213 (1956): "A person who willfully writes, composes or publishes a notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for prevention of conception, or who offers his services by a notice, advertisement or otherwise, to assist in the accomplishment of any such purpose, is guilty of a misdemeanor."

16. The authority of a state is much broader in reference to restrictions on commercial advertising than with respect to other types of speech. *Valentine v. Chrestensen*, 316 U.S. 52 (1942).

17. It is generally held that this is not a legitimate method of statutory construction. See *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933); *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930); *Commissioner of Immigration v. Gottlieb*, 265 U.S. 310, 313 (1924); *Folsom v. United States*, 160 U.S. 121, 127 (1895).

18. LA. R.S. 14:88 (1950): "Distribution of abortifacients is the intentional: (1) Distribution or advertisement for distribution of any drug, potion, instrument, or article for the purpose of producing an abortion; or (2) Publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females, for preventing conception or producing abortion or miscarriage."

19. OPS. ATT'Y GEN. OF LA. 73 (1954-36); OPS. ATT'Y GEN. OF LA. 128 (1932-34).

20. MORROW, *The Louisiana Criminal Code of 1942—Opportunities Lost and Challenges Yet Unanswered*, 17 TUL. L. REV. 1, 22 (1942).

21. *Ibid.*

control information may be vulnerable to federal constitutional attack on two theories, both under the due process clause: first, that the due process clause of the fourteenth amendment, incorporating the principle of the first amendment, protects such dissemination of information as an aspect of personal "liberty" against deprivation by a state; and, second, that such regulation cannot reasonably be said to bear any rational relationship to any purpose the legislature might legitimately seek to achieve and therefore violates the due process clause of the fourteenth amendment.²²

Whether the Federal Constitution prohibits states from excluding dissemination of birth control information remains essentially unanswered;²³ however, by upholding prior enactments state courts seem to have recognized an evil and have assumed the power to regulate exists.²⁴ The underlying rationale of these holdings is that restriction on information concerning contraceptives represses unhealthy or immoral influences on the public.²⁵

Aside from states' self-imposed limitations on the exercise of the police power, the due process clause of the fourteenth amendment, borrowing from the first amendment,²⁶ places certain limitations on the exercise of the police power; the line, however, between valid exercise and unconstitutional infringement has not been clearly drawn.²⁷ It seems clear the states and the federal government alike are severely limited in restraining free speech,²⁸ yet freedom of speech is not an absolute.²⁹ The thrust of Supreme Court opinions appears to be that a state may not use its police power as a guise to suppress unpopular ideas.³⁰ The trend is toward protecting the dissemination of all ideas, at least so long as they have some social value.³¹ Generally, the

22. See generally FORKOSCH, CONSTITUTIONAL LAW §§ 285-299 (1963).

23. See note 10 *supra*, and accompanying text.

24. See note 11 *supra*, and accompanying text.

25. See note 11 *supra*, and accompanying text.

26. *E.g.*, *Burstyn v. Wilson*, 343 U.S. 495 (1952), and cases cited therein at 500.

27. See *Speiser v. Randall*, 357 U.S. 513 (1958). See also Mehler, *Constitutional Free Speech v. State Police Power*, 33 *DICTA* 145, 146 (1956).

28. *Roth v. United States*, 354 U.S. 476, 492 (1957).

29. *Id.* at 485.

30. *Martin v. Strauthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938). See generally Mehler, *Constitutional Free Speech v. State Police Power*, 33 *DICTA* 145 (1956).

31. *Roth v. United States*, 354 U.S. 476, 484 (1957). In *Winters v. United States*, 354 U.S. 507, 510 (1948), the Court indicated that it was not even essential that the information have any social value at all.

constitutional protection is not extended, however, to expression of ideas that infringe upon "the limited area of more important interests."³² To date these "more important interests" have been found only in such things as preservation of the government from violent overthrow.³³ The Court has repeatedly refused to recognize overriding interests of the state in dissemination of information cases.³⁴

Recently, the protection of the first and fourteenth amendments has been extended to protect even the activities of an association in encouraging litigation in state courts.³⁵ Little extension of the Court's present tendencies would appear necessary to find distribution of information on birth control a constitutionally protected activity, and thus beyond regulation by the state police power.

Whether or not noncommercial dissemination of birth control information is protected against state regulation as within the realm of constitutionally protected free expression, the fourteenth amendment due process clause still might afford it protection as an element of personal liberty by the more general requirement of that clause that there be an at least arguably rational nexus between the means employed by state regulation and a purpose within the legislature's power to pursue.³⁶ It is not enough in itself that this nexus exist, for in addition, states will not be allowed to reach a legitimate end in an unreasonable fashion.³⁷

The end sought by states in restricting noncommercial distribution of birth control information appears to be elimination of what a legislature has deemed unhealthy and immoral in-

32. *Roth v. United States*, 354 U.S. 476, 484 (1957).

33. *Dennis v. United States*, 341 U.S. 494 (1951). Even considering cases decided prior to the "balancing test" of the *Dennis* case, the interests that were found to justify restrictions were of substantial magnitude, and typically involved national security or internal security of a state. *E.g.*, *Schenck v. United States*, 249 U.S. 47 (1919) (interference with wartime conscription program). Even under earlier standards, there seems to be little reason to believe that birth control information would involve such a danger to put it outside the realm of constitutionally protected expression.

34. See generally Mehler, *Constitutional Free Speech v. State Police Power*, 33 *DICTA* 145 (1956).

35. *N.A.A.C.P. v. Button*, 83 Sup. Ct. 328 (1963).

36. In some cases the Supreme Court has looked behind legislative findings and held that the state action did not have a reasonable relation to the admitted end which the state was seeking to attain. *E.g.*, *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *cf.* *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

37. *Schneider v. State*, 308 U.S. 147 (1939).

fluences;³⁸ the means, criminal sanctions for distributing such information. In clear contradiction to the legislative finding the majority of the medical profession profess health would be better served by removing restrictions on birth control information.³⁹ Since birth control may be medically expedient for some women, restricting procurement of information about birth control is obviously inconsistent with protection of their health.⁴⁰ At best, the moral argument appears tenuous as it is yet to be proved that banning information on birth control tends to preserve morality or that lifting a ban would have any adverse effect on the morality of the population.⁴¹ It seems a court might well find the statutes under consideration to lack the necessary nexus and thus beyond the general police power of the states.

The mere existence of such statutes on the books, whether enforced or not, tends to stifle the spread of information apparently no longer considered undesirable by a majority of the population.⁴² It is submitted that anti-birth control statutes are of little present value and remain only as a possible source of future difficulty to the public and the courts. In addition, the prevalence of statutes regulating the use or dissemination of birth control information in many states, coupled with the improbability of legislative action to modernize the law in this area,⁴³ dictates the conclusion that the constitutionality of such statutes will be determined in the near future. Since it appears the only real value of these statutes is protection against the dangers of indiscriminate commercial advertising — a danger which is adequately shielded by existing obscenity statutes — it is urged that courts face the clear constitutional issues raised and declare these statutes violative of the Federal Constitution.

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38. See note 11 *supra*, and accompanying text.

39. See *Report of Committee To Study Contraceptive Practices and Related Problems*, 108 J. AM. MEDICAL ASS'N 2217 (1937).

40. *Ibid.*

41. John-Stevas, *A Roman Catholic View of Population Control*, 25 LAW & CONTEMP. PROB. 445, 456 (1960).

42. *Cf.* Stone & Pilpel, *The Social and Legal Status of Contraceptives*, 22 N.C.L. REV. 212, 219 (1944) (indicates over 90 percent of American people use contraceptive techniques without regard for the applicable laws).

43. *Id.* at 221. It should be noted, however, that Colorado has recently amended its obscenity statutes to remove any reference to contraceptives. COLO. REV. STAT. § 40-9-17 (1961).