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PRECEDENT. An adjudged case or decision of a court of justice, considered as furnishing an example or authority for an identical or similar case afterwards arising or a similar question of law.

It means that a principle of law actually presented to a court of authority for consideration and determination has, after due consideration, been declared to serve as a rule for future guidance in the same or analogous cases, but matters which merely lurk in the record and are not directly advanced or expressly decided are not precedents.

Black's Law Dictionary

PRECEDENT, n. In Law, a previous decision, rule or practice which, in the absence of a definite statute, has whatever force and authority a Judge may choose to give it, thereby greatly simplifying his task of doing as he pleases. As there are precedents for everything, he has only to ignore those that make against his interest and accentuate those in the line of his desire. Invention of the precedent elevates the trial-at-law from the low estate of a fortuitous ordeal to the noble attitude of a dirigible arbitrament.

Ambrose Bierce, *The Devil's Dictionary*

INTRODUCTION

The problems and dilemmas of one period often become the follies of another. Governmental action is often slow to start, becomes entrenched and is even more difficult to amend. Any system, therefore, is usually left with a residue of antiquated precedents and obsolete statutes. The need to modify or change an old and often rigid framework to accomodate contemporary demands is one of the most difficult tasks of government. There is a continual tension between the need for modernization and the desire for stability. A pluralistic society only adds to the problem, since it becomes less certain what values are paramount. It is not surprising, then, that the role of the courts is a much debated subject. Not only is there a problem in determining what change is best, but whether the court has the right to make the decision in the first place.

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The goal of this article is in no way to resolve this issue, or even to try to simplify it. Rather, it is to spotlight the history and change in attitudes and legal policies of several related areas—contraception, abortion and population control. During the nineteenth and early part of the twentieth century, contraception was the only one of these areas viable enough to warrant much attention. Gradually, growth, along with medical, social, moral and psychological change, necessitated a greater consideration of both abortion and the possibility of population control.

All these issues present complex and often conflicting values. Ideally the legislature is supposed to pass and repeal laws, balancing the individual's and society's goals. Many question the efficacy of the legislature and feel that changes are often "legislated" by the courts. This article, in fact assumes that this is inevitable. What is not inevitable, however, is that courts decide cases for unarticulated and perhaps unconscious reasons. If, as I believe, almost all controversies are basically balancing tests, one obligation of the courts is to honestly enunciate the competing values being weighed. I do not believe courts (even the Supreme Court) do this frequently enough to insure integrity for the system.

This article begins with a discussion of the history of the Comstock Act (and related birth control regulations) from passage to repeal. This section is intended to lay the groundwork for the three cases analyzed in the next three sections. The first two cases, *Griswold v. Connecticut*[1] and *Eisenstadt v. Baird*,[2] are essentially part of the Comstock picture. The latter cases, *Roe v. Wade*[3] and *Doe v. Bolton*,[4] deal with the Supreme Court's handling of the abortion issue. In each, I have tried to suggest that what was really involved was a complicated balancing test. The importance of recognizing this is, hopefully, demonstrated in the brief discussion of population control which concludes the paper.

I. A Survey of Comstockery

In 1873, Anthony J. Comstock, a fanatical Puritan reformer, went to Washington to lobby for reform in the postal laws.[5] Backed by such groups as the New York Young Men's Christian Association and its

1. 381 U.S. 479 (1965).
2. 405 U.S. 438 (1972).
3. 410 U.S. 113 (1973).
4. 410 U.S. 179 (1973).
5. For a detailed account of the life of this zealous reformer see H. Broun, and M. Leech, *Anthony Comstock: Houndsman of the Lord* (1927).

Committee for the Suppression of Vice,[6] Comstock displayed to whomever would listen a mass of pornographic literature and postcards, contraceptive and abortifacient devices, and a variety of other "vile" materials. It was through this effort, coupled with an unsubstantiated argument on the relationship between pornographic literature, increasing availability of "rubber articles for masturbation," and social decay that Congress became "informed."[7]

No serious debate was needed. "What Comstock offered . . . was completely consistent with moral consensus. A lawmaker did not feel he needed prolonged debate to know that he and his constituents were against sin and vice of any kind . . . "[8] It is not surprising, then, that only twenty days after being introduced in the Senate, on March 3, 1873, the United States Congress passed "An Act for Suppression of Trade In, and Circulation of, Obscene Literature and Articles for Immoral Use" known as the Comstock Act.[9]

"Although the argument for passage was couched in terms of protecting youth and frustrating organized vice, it seems more likely that the legislation was an imposition of a dominant morality seeking to implement 'morality as such.' It was an attempt to support the moral taboo with a legal prohibition."[10] Viewed in such light, it is not surprising that there was no attempt to empirically demonstrate the negative effects of contraceptives on society or that the proffered legislation would be effective in combatting the supposed "evil." Congress was not voting on merely a law, but a way of life and all that was decent and worthwhile.[11] Such affirmations are rarely concerned with rational and thoughtful debate and the comments of Senator Conkling at the time adumbrate much of the future controversy. "And if I were to be questioned now as to what the bill contains, I could not aver anything certain in regard to it. The indignation and disgust which everybody feels in reference to the acts which are here aimed at may possibly lead us to

6. On the activities of the anti-vice societies see P. Boyer, *Purity in Print: The Vice Society Movement and Book Censorship in America* (1968).

7. C.T. Dienes, *Law, Politics, and Birth Control* 37 (1972), [hereinafter referred to as Dienes, *Law*].

8. Dienes, *Moral Beliefs and Legal Norms, Perspectives on Birth Control*, 11 ST. LOUIS L.J. 543 (1967), [hereinafter referred to as Dienes, *Moral Beliefs*].

9. 18 U.S.C. §§ 1461-62 (1964), 19 U.S.C. § 1305 (1964), as amended Pub. L. No. 91-962, 84 Stat. 1973 (1971).

10. Dienes, *Moral Beliefs, supra* note 8.

11. A characteristic product of this thinking can be found in A. Powell, *The President's Opening Address*, in *The National Purity Congress* 1 (1896) as quoted in Dienes, Law at 37.

> "Purity is fundamental in its importance to the individual, to the home and to the nation. There can be no true womanhood except as based upon the law of Purity. There can be no true prosperity, there can be no perpetuation of a nation except as its life is based upon the Law of Purity. Inpurity is destructive alike to the individual character, of the home, and of the nation."

do something which, when we come to see it in print, will not be the thing we would have done if we had understood it and were more deliberate about it."[12]

It should be further noted that an amendment to exempt physicians from the statute's prohibitions was explicitly rejected,[13] and thus, by implication, the use of contraceptives on orders of a physician was prohibited. Although the law was to be used in support of public morality, no attempt was made to demonstrate the corruption of youth by the availability of contraceptives. No consideration was given to the consequences of passage and while it may have been possible in the nineteenth century to justify the law on health grounds, no such justification was offered. Within the given social context, the motive behind the law seemed sufficient to assuage all possible criticisms.

In fact, the law was vigorously enforced. Anthony Comstock, far from disappearing with his legislative triumph, was appointed special agent to the Post Office Department to enforce the new federal laws.[14] While some of his tactics may have been offensive (agent provocateur would be a polite word for his activity), Comstock brushed aside all criticism for he saw the true importance of his campaign.

> We are locating worse than masked batteries, sunken mines and ambuscades. We are contending against dangers and foes worse, a thousand fold worse, than any foe that simply destroys life or blows the body into fragments. We are assailing foes more to be dreaded and shunned than any contagion that ever arose from sewer pipe to stagnant pool. We are camped upon the trail of an insidious and deadly foe: one that not only wrecks the physical but infects the moral nature, opening the door to spiritual degradation and death. Corrupt publications are pestilential blasts from the infernal region that wither and sere holy aspirations in the soul. They are precursors of evil, and only evil. They are practically the devil's kindling wood with which he lights the fires of remorseless hell in the soul.[15]

While the rhetoric may have been unique to Comstock, the attitude and feelings seem generally consonant with the prevailing moral climate. Later, additions to the law in 1897[16] and 1909[17] forbade the importation of contraceptives of all types and sought to strengthen the prohibition against depositing any article designed and intended for the prevention of conception at the offices of a freight carrier for shipment

12. U.S. Congressional Globe, 42nd Cong., 3rd Sess. 1873. II, 1525.
13. *Id.*
14. Dienes, *Law supra* note 7, at 50.
15. A. Comstock, *Demoralizing Literature*, in *The National Purity Congress*, 420 (A.M. Powell ed. 1896).
16. 29 Stat. 512 (1897).
17. 35 Stat. 1129 (1909).

in interstate commerce. Inevitably, a number of minor court actions arose contesting the ban on contraceptives of information relating to contraception from being mailed. Until 1930 the courts almost consistently upheld the all-inclusiveness of the Comstock Act and its subsequent revisions and additions.[18]

From 1930, however, substantial changes were "legislated" in national laws on contraceptives by the federal courts. In a 1930 trademark case, *Young's Rubber Co. v. C.I. Lee and Co.*,[19] significant dictum discussed the Comstock Act:

> There is no federal statute forbidding the manufacture or sale of contraceptives. The articles which the plaintiff sells may be used for either legal or illegal purposes. If, for example, they are prescribed by a physician for the prevention of disease or for the prevention of conception where that is not forbidden by local law, their use may be legitimate; but if they are used to promote illicit sexual intercourse, the reverse is true.
>
> The intention to prevent a proper medical use of drugs or other articles merely because they are capable of illegal use is not lightly to be ascribed to Congress. . . . It would seem reasonable . . . to construe the whole phrase, 'designed, adapted, or intended' as requiring an intention on the part of the sender that the article mailed or shipped by common carrier be used for illegal contraception or abortion or for indecent or immoral purposes. . . .[20]

Since the Young Corporation sold the contraceptive devices to druggists for legal purposes, it was entitled to trademark protection under the law.

Although the Senate explicitly rejected an amendment which would have codified the above distinction, this dictum was to provide the groundwork for subsequent federal court decisions modifying the Comstock Act. In *Davis v. United States*,[21] involving a registered pharmacist and another who attempted to ship information and contraceptives with an express company through interstate commerce, the dictum became law. The court held that the intent behind the sale was an important factor to be considered. Here, the pharmacists merely sold the devices. What was done with them afterward was beyond their control.[22]

The reasoning of the *Davis* case was reaffirmed in *United States v.*

18. United States v. Bott, 24 Fed. Cas. 1204 (C.C.S.D.N.Y. 1873); United States v. Foote, 25 Fed. Cas. 1140 (C.C.S.D.N.Y. 1876); Bates v. United States, 10 Fed. 92 (7th Cir. 1881); Ackley v. United States, 200 Fed. 217 (8th Cir. 1912); United States v. Currey, 206 Fed. 322 (D.C. Ore. 1913).
19. 45 F.2d 103 (2d Cir. 1930).
20. *Id.* at 107, 108.
21. 62 F.2d 473 (6th Cir. 1933).
22. *Id.* at 474-75.

One Package,[23] where a physician in Japan sent a package of vaginal pessaries to Dr. Hannah Stone, a respected gynecologist, for clinical observation and testing. New York Port Authority officials seized the package under the authority of the Comstock Act and the Tariff Act of 1930,[24] a descendent of the Comstock Act which forbade the importation of articles which could prevent conception or cause unlawful abortion. The court held the statute covered only "such articles as Congress would have denounced as immoral if it had understood all the conditions under which they were used."[25] Its purpose, the court said, "was not to prevent the import, sale or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well-being of the patients."[26] Since New York State allowed the use of contraceptives for medical purposes, and since federal law was not designed to stop all traffic in contraceptives, the devices could enter New York harbor.

The court's dilemma in this case seems best expressed in a concurrence by Judge Learned Hand:

> There seems to me substantial reason for saying that contraceptives were meant to be forbidden, whether or not prescribed by physicians, and that no lawful use of them was contemplated. Many people have changed their minds about such matters in sixty years, but the act forbids the same conduct now as then: a statute stands until public feeling gets enough momentum to change it, which may be long after a majority would repeal it, if a poll were taken. Nevertheless, I am not prepared to dissent.[27]

This portion of Judge Hand's opinion is more than just an excellent expression of the sociological base of legal change. The case had been a carefully planned test case by Margaret Sanger, founder of the National Committee on Federal Legislation for Birth Control.[28] After repeated failures to influence Congress to alter the law, Sanger's birth control organization wisely decided to secure judicial decision recognizing a "physician's exemption" from the federal prohibitions.

Further erosions of the anachronistic Comstock doctrine were forthcoming. In *United States v. 31 Photographs*,[29] a case also involving the Tariff Act, certain photographs and books were confiscated which the Institute for Sex Research, Inc. at Indiana University had sought

23. 86 F.2d 737 (2d Cir. 1936).
24. 19 U.S.C.A. § 1305a (1930).
25. 86 F.2d 737, 739 (2d Cir. 1936).
26. *Id.*
27. *Id.* at 740.
28. See generally L. LADER, THE MARGARET SANGER STORY (1955).
29. 156 F. Supp. 350 (S.D.N.Y. 1957).

to import into the United States. The libel was based upon the allegation that the material was obscene and immoral. The issue was whether § 305 of the Tariff Act, in prohibiting the importation of "obscene" material, prohibited the importation of material which may be assumed to appeal to the prurient interest of the "average person" if the only persons having access to the material would study it for purposes of scientific research and if as to those who would have access to the material there was no reasonable probability it would appeal to their prurient interests.

The court analogized the case to cases upholding the importation of contraceptives and books dealing with contraception when brought into the country for purposes of scientific research. It indicated that the statute is interpreted as excluding or permitting material depending upon conditions of its use.[30] This case held on analogy to 18 U.S.C. § 1461 that only contraceptives intended for "unlawful" use were banned; the circumstances of use, therefore, were highly relevant. The intent of the importer is relevant to contraceptive cases only because "unlawful" use alone was proscribed and is relevant to obscenity cases because of the nature of the determination which must be made before an article may be deemed obscene. Thus, material for sex research which was not available to the general public and had no probability of appealing to the prurient interest of those doing the research was not obscene material.[31]

In *United States v. H.L. Blake Co., Inc.*,[32] the defendant was charged with using the mails for sending literature and sample packages of prophylactics to persons whom defendants believed to be wholesalers. The court held that the defendants should not be convicted unless it was established beyond a reasonable doubt that at the time they mailed the sample packages they intended them "to be used for illegal contraception."[33] No federal statute prohibited the manufacture or sale of contraceptives. The defendants had a right as brokers to sell in good faith the contraceptives for medical use to druggists or other reputable dealers for distribution to such trade. The court found the defendants were making an effort to acquire more jobbers who would legally sell the contraceptives and, therefore, they did not violate the law as charged.[34]

In *United States v. One Obscene Book, Entitled "Married Love,"*[35]

30. *Id.* at 357.
31. *Id.* at 359.
32. 189 F. Supp. 930 (W.D. Ark. 1960).
33. *Id.* at 935.
34. *Id.* at 937.
35. 48 F.2d 821 (S.D.N.Y. 1931).

based on the finding that the book was not obscene, the court allowed information on contraceptives to enter the country despite the ban in the Comstock Act. This decison was reaffirmed in *United States v. One Book, Entitled "Contraception"*[36] where it was held that the book was written primarily for the medical profession. The book's main purpose was to give information regarding the operation of birth control clinics and the devices used to prevent conception, while expressing opinions as to those which are preferable from the point of view of efficacy and of the health of the user.

Further emasculation of the Comstock Act was effected by a 1963 administrative decision of the Post Office Department. The Postmaster of St. Louis, upon reading the Act, refused to deliver samples of contraceptives and literature on family planning owned by the Emko Company despite requests for the shipments by the intended recipients. On October 23, 1963, counsel for Emko was informed that the St. Louis Postmaster had been advised to dispatch the items on the ground that there was no evidence that the items were being distributed for unlawful purposes.[37] This ruling, while probably thoroughly confusing the St. Louis Postmaster, appeared to legalize the shipment through the mails of contraceptive devices to persons other than physicians.

The criterion for restriction then—unlawful usage—seemed unenforceable. Yet, it took *Griswold* and then six more years before the essential federal Comstock provisions regarding contraception were removed from the statute books. On January 8, 1971, President Nixon signed Public Law 91-662[38] and a law that had effectively died many years earlier was finally interred.

Comstockery was by no means only a federal phenomenon. Following the passage of the 1873 Act, a campaign was launched to obtain similar legislation in the states. The same "wisdom" that produced the federal statute proliferated itself as more than one half of the states enacted obscenity legislation specifically dealing with contraceptives, while all but two already had obscenity laws which could be interpreted to encompass birth control.[39] In fact, it was the state laws and resultant activity that provided much of the momentum for change. This is particularly so in states like Massachusetts and Connecticut whose laws were (or became) manifestly out of step with social reality.

The Connecticut statute of 1879 outlawed not only the distribution, sale, and prescription of contraceptives, but also the use of, or assist-

36. 51 F.2d 525 (E.D. Ky. 1931).
37. 49 CORN. L.Q. 275, 284, n.62 (1964).
38. Public Law 91-662, 84 Stat. 1973 (1971).
39. Dienes, *The Progeny of Comstockery—Birth Control Laws Return to Court*, 21 AM. U.L. REV. 1, 9 (1971), [hereinafter referred to as Dienes, *Progeny*].

ance to use, contraceptives.[40] After a host of unsuccessful attempts to repeal or modify the law in the legislature from July, 1935 to June, 1939,[41] the Planned Parenthood League of Connecticut opened and operated a group of free birth control clinics for married women unable to afford private treatment. The police raided one of these clinics in June, 1939, and charged two physicians and a registered nurse with operating a birth control clinic and distributing information and devices in violation of the 1879 law. The court in *State v. Nelson*[42] concluded that there were to be no exceptions from the coverage of the statute.[43] In reply to Nelson's claim that he was entitled to protection under the Due Process Clause of the Fourteenth Amendment, the court said the standard in the law was not arbitrary or unreasonable.[44] The court based its decision on the fact that the legislature failed to change this law over the years and that the United States Supreme Court denied certiorari to a Massachusetts case, *Commonwealth v. Gardner*[45] for lack of a substantial federal question—a case with whose reasoning the *Nelson* court agreed.[46] The court suggested the proper forum for change was the legislature, not the courts. However, the courts left open for future decison whether an exception to the law would be granted to women whose health might be endangered by another pregnancy.[47]

Two years later, in *Tileston v. Ullman*,[48] the Connecticut court found by a 3-2 decision that the statute was all-encompassing and constitutional. As in *Nelson* extra-legal information was provided, and as in *Nelson* it was ignored.[49] In this case, Dr. Wilder Tileston, a New Haven physician, requested a declaratory judgment on the legality of administering birth control information and devices to three married women whose health would be seriously endangered by another pregnancy. The court noted that contraception was an accepted medical practice to prevent conception but held that "absolute abstention," a means "positive and certain in result" was a valid alternative.[50] If this means were too severe, the court, as in *Nelson*, suggested that relief

40. CONN. GEN. STAT. REV. § 6246 (1930).
41. H. Abraham, and L. Hazelwood, *Comstockery at the Bar of Justice: Birth Control Legislation in the Federal, Connecticut, and Massachusetts Courts*, 4 LAW IN TRANSITION QUARTERLY 220, Appendix A.
42. 126 Conn. 412, 11 A.2d 856 (1940).
43. *Id.* at 416-17.
44. *Id.* at 421-22.
45. 300 Mass. 372, 15 N.E.2d 222 (1938), *appeal dismissed*, 305 U.S. 559 (1938).
46. 126 Conn. 412 *supra* at 419-22.
47. *Id.* at 418.
48. 129 Conn. 84, 26 A.2d 582 (1942).
49. Dienes, *Law, supra* note 7, at 140.
50. 129 Conn. 84, 91-95 (1942).

be sought from the legislature. The United States Supreme Court dismissed Tileston's appeal for lack of standing; since it was not his life which was in danger, he could not seek relief.[51]

Meanwhile, back in the legislatures, efforts to amend the law met with varying degrees of failure. While the Planned Parenthood League of Connecticut, Inc., (PPLC) was gradually increasing its strength, membership and prestige, the influence of the Catholic Church was too strong. "The Legislator's hesitancy to challenge the religious establishment precluded the need for organized pressure."[52] Starting in 1941, there were seventeen bills introduced during the next twelve sessions; all were to die at some point in the legislative process.[53] A breakdown of legislative voting according to religion suggests the influence of personal religious identification predominating over party affiliation. "A very definte Roman Catholic orientation was operative."[54]

At the same time as the 1959 H.B. 3497 was killed in committee, the court remained intransigent. In four cases involving Dr. C. Lee Buxton, the Chairman of the Department of Obstetrics and Gynecology at Yale University Medical School and three of his patients, the court again noted the unambiguous language in the statute which explicitly excluded any exemptions and that abstention existed as a viable alternative.[55] In *Trubeck v. Ullman*,[56] Mr. and Mrs. David Trubeck, law students at Yale, requested a declaratory judgment claiming that a pregnancy would interrupt their education and bring economic and psychological hardship to them and, therefore, they were deprived of life and liberty guaranteed them in the Due Process Clause of the Fourteenth Amendment. The court rejected their request for information on contraceptives because of an absence of a valid health issue.[57]

While *Trubeck*[58] was on appeal, *Poe v. Ullman*[59] (the appeal of one of Dr. Buxton's four cases) was argued before the United States Supreme Court. Arguments were advanced that the law violated due process, constituted an invasion of privacy of the home, and was an unreasonable interference with Dr. Buxton's practice. In addition, medical data was presented on the propriety of the unrestricted use of contraceptives. It was conceded, however, that the devices could be obtained surreptitiously in Connecticut with little difficulty. This sug-

51. 318 U.S. 44 (1943).
52. Dienes, *Law, supra* note 7, at 147.
53. *Id.* at 142-43, n.67.
54. *Id.* at 147.
55. Buxton v. Ullman, 147 Conn. 48, 156 A.2d 508 (1959).
56. 147 Conn. 633, 165 A.2d 158 (1960).
57. *Id.* at 637.
58. *Cert. denied*, 367 U.S. 907 (1961).
59. 367 U.S. 497 (1961).

gests that the lack of adjudication and enforcement in Connecticut was the real reason the Court did not bother to strike down the law on the basis of the arguments advanced. Justice Frankfurter for the Court refused to grant a declaratory judgement reasoning that neither a case nor controversy nor an immediate threat existed.[60] Justice Brennan concurred, arguing that the real issue involved birth control clinics.[61]

While Brennan's opinion accurately foreshadowed *Griswold*, Harlan's long and excellent dissent helped form the basis for much of his later opinion.[62] He felt it was pure conjecture to assume that open defiance of the law would not result in prosecution and stated that as to the merits, "Precisely what is involved here is this: the State is asserting the right to enforce its moral judgment by intruding upon the most intimate details of the marriage relation with the full power of the criminal law[63] . . . . I consider that this Connecticut legislation, as construed to apply to these appellants, violates the Fourteenth Amendment."[64]

The origin of Massachusetts' policy against contraceptives can be traced to Anthony Comstock.[65] The Massachusetts legislation, "An Act Concerning Offenses Against Chastity, Morality and Decency"[66] was enacted probably without any discussion or dissent in 1879. "Like its federal counterpart, it was sweeping in character and passed with maximum dispatch."[67] The first case of note challenging the statute was *Commonwealth v. Allison*[68] in which the defendant published and distributed pamphlets concerning birth control. The court upheld the statute and concluded that even scientific literature could be found by a jury to be obscene. It said the statute's clear purpose was "to protect purity, preserve chastity, to encourage continence and self-restraint, to defend the sancity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women. The court added that the subject matter is well within one of the most obvious and necessary branches of the police power of the State.[69] As in the contemporary New York birth control cases,[70] the language illustrates the extent to which the prevailing Puritanical moral value system

60. *Id.* at 508.
61. *Id.* at 509.
62. *Id.* at 522-555.
63. *Id.* at 548.
64. *Id.* at 539.
65. Dienes, *Progeny, supra* note 39, at 9.
66. MASS. ANN. LAWS ch. 272, §§ 20, 21 (1956) (see Appendix B).
67. Dienes, *Progeny, supra* note 39, at 10.
68. 227 Mass. 57, 116 N.E. 265 (1917).
69. *Id.* at 62.
70. People v. Byrne, 99 Misc. 1, 163 N.Y.S. 682 (1917); People v. Sanger, 222 N.Y. 192, 118 N.E. 637 (1918).

guiding the court left little room for thoughtful consideration of the extensive data offered by the defendant.

At this time in other parts of the United States, judicial exemptions, legislative reform and lack of enforcement were keeping pace with the advance of the birth control movement. Even in Massachusetts the law was not actively enforced, but the statute reflected the unfavorable public opinion felt concerning the establishment of birth control clinics. The poor, dependent upon free medical services, were the real victims, being denied de facto access in the state. This uneven inpact was further exemplified in the treatment of physicians. While the legal status of physicians was uncertain, the law was not used to interfere with the exercise of their practice. Once a physician became more open and public about his practice, however, opposition was sure to follow.

From 1932 to 1937, seven clinics were established throughout the state, but Roman Catholic protest led to a raid at a center in Salem.[71] A physician, nurse, and two social workers were arrested and tried in *Commonwealth v. Gardner*.[72] The defense, using the same approach as in *Allison*, tried to interpret the statute to exclude physicians and presented social, religious, and medical data to the court. Again, the court rejected the claim for exemption to prescribe contraceptives to safeguard the life and health of married women and upheld the statute as constitutional. Relief, the court added, must be obtained from the legislature, not the court.[73] The court also dismissed as irrelevant attempts to analogize judicial exemptions in the federal courts.[74] An appeal was taken to the Supreme Court, but the higher court dismissed the appeal for want of a substantial federal question.[75]

Two years later though, in *Commonwealth v. Corbett*,[76] the court reversed its previous position. The case involved a registered pharmacist who was convicted of selling a package of condoms marked "sold for the prevention of disease." A loophole was fashioned by the court stating that if the article was for the prevention of disease, it could be legally sold for *that* purpose. A prosecution would fail unless the state could prove intent to sell for contraceptive purposes.[77] While it still was possible to show intent (as demonstrated in *Commonwealth v. Goldberg*,[78] in which the court held that a safe inference from the to-

71. Dienes, *Progeny, supra* note 39, at 14-15.
72. 300 Mass. 372, 15 N.E.2d 222 (1938).
73. *Id.* at 373-75.
74. *Id.* at 375.
75. Gardner v. Massachusetts, 305 U.S. 559 (1938).
76. 307 Mass. 7, 29 N.E.2d 251 (1940).
77. *Id.* at 9-11.
78. 316 Mass. 563, 55 N.E.2d 951 (1944).

tality of the circumstances was that the devices were sold primarily to prevent conception rather than disease)[79], the practical effect of such a burden did substantially weaken the law.[80] Contraceptives for the prevention of disease or for female hygiene were to be sold freely without prescription, but other contraceptives were available only to those who could afford a private doctor (and not even legally), and were forbidden in clinics. Hardly a workable standard!

During this period there were numerous attempts to amend the statute in the legislature. Each of these attempts[81] was unsuccessful, despite growing opposition to the discriminatory, unworkable, and outdated law. As in Connecticut, the power of the Catholic Church was formidable, inexorably crushing any serious opposition. As one commentator has suggested:

> It is pointless to attend to specific instances of actual pressure on . . . legislators, when the important point is the pressure which exists in the minds of such people without having any specific stimuli. The Church is what it is; it exists; and it has shown in the past that it is capable of concerted political action. In this context, it does not need to actively pressure politicians; they come to it, so to speak, with deference, respect, and sugar plums to curry its favor; they do not need to be told that they had better oppose a measure that the Catholic bishops of Massachusetts have united in publicly condemning.[82]

In other words, it was politically dangerous to vote against Church morality. How many legislators have lost their seat by voting with the Church, even if legislation is not carefully tailored to modern needs?

Finally, after a long series of unsuccessful attempts, increased organization among reformists, the social climate,[83] and the *Griswold* opinion, led to an amendment in the law in 1966.[84] Yet, the 1966 revision was far from a total rejection of original policies. Sections 20 and 21 still remained and section 21A limited the exception to married persons. The Amendment did permit a registered physician and a registered pharmacist on receiving a prescription to give contraceptives to a married person. Also, a public health agency, a registered nurse,

79. *Id.* at 565.

80. Dienes, *Law, supra* note 7, at 122.

81. 1930, 1940, 1942, 1948.

82. J.R. Rodman, *Trying to Reform the Birth Control Law: A Study in Massachusetts Politics* (1955), unpublished thesis, Government 225, Harvard Unviersity. As quoted in Dienes, *Law, supra* note 7, at 130.

83. Gallup polls have recorded a generally constant increase in the number of individuals expressing a favorable attitude toward wider availability of birth control services, rising to over 80 per cent Roman Catholics interviewed. As quoted in Dienes, *Law, supra* note 7, at 151.

84. MASS. ANN. LAWS chap. 272, § 21 (1956). By the time of this amendment, Massachusetts remained the only state with effective prohibitive laws (see Appendix B).

and a maternity health clinic operated by an accredited hospital could give information to any married person as to where he or she could obtain professional advice.

As meager a change as was instituted, it was widely felt that even this would not have been possible with any opposition from Richard Cardinal Cushing. A quote of his exemplifies a change in some Church thinking. "It is important to note that Catholics do not need the support of civil law to be faithful to their religious convictions, and they do not seek to impose by law their moral views on other members of society."[85] How typical this is of modern Catholic thinking is debatable. Still, the 1966 Amendment covered only married persons and was, therefore, ripe for the judicial review culminating in the Supreme Court decision of *Eisenstadt v. Baird*.[86]

II. GRISWOLD V. CONNECTICUT

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be left alone —the most comprehensive of rights and the right most valued by civilized men.
>
> Justice Brandeis dissenting in
>
> *United States v. Olmstead*

Shortly after the decision in *Poe v. Ullman*,[87] on November 1, 1961, the Planned Parenthood League of Connecticut opened a public clinic providing family planning services to married women. Such open defiance of the law seemed to be the only way to force another confrontation after the Supreme Court's acknowledgement of the unenforceability of the Connecticut statutes.[88] On November 18, 1961, Estelle T. Griswold, the Executive Director of the Connecticut Planned Parenthood Federation and Director of the clinic, and Dr. C. Lee Buxton, its Medical Director, were arrested and the clinic was closed. They were convicted under the general accessory statute for abetting the violation of the anti-use statute by married couples.[89] (Note that

85. Quoted in *U.S. Congress, Subcommittee on Foreign Aid Expenditures of the Committee on Government Operations, Hearings on S. 1676, Population Crisis*, 89th Cong., 1st Sess., 1965 pt. I, p. a7.

86. 405 U.S. 438 (1972).

87. 367 U.S. 497 (1967).

88. CONN. GEN. STAT. REV. § 53-32 (1958); CONN. GEN. STAT. REV. § 54-196 (1958) (see Appendix A).

89. State v. Griswold, 151 Conn. 544 (1964).

the Connecticut statute was unique in that it banned use: the laws of of many states were aimed at sales).[90]

The Supreme Court, in *Griswold v. Connecticut*,[91] reversed the convictions. For the first time the Court reached the merits of a constitutional attack on state birth control legislation, striking down the Connecticut statute prohibiting the use of contraceptives. While it is clear *Griswold* declared the Connecticut statute unconstitutional, the rational for this holding is somewhat enigmatic. Both for this reason and as an exercise in how the Court examines the legality of fundamental moral and ethical problems, it will be necessary to scrutinize the six separate opinions.

Justice Douglas, writing for the Court,[92] first found standing for the appellants, distinguishing *Tileston v. Ullman*.[93] In that case the plaintiff was seeking a declaratory judgment, while here there had already been a criminal conviction for serving married couples in violation of the aiding and abetting statute.[94] "Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime."[95]

Establishing standing, Douglas then moved to the merits, declaring that the statute prohibiting use a violation of the right of marital and familial privacy embodied in the Due Process Clause as encompassing the guarantees in the Bill of Rights, but not solely limited to the specific words in the Constitution. " . . . (S)pecific guarantees in the Bill of Rights have penumbras, formed by emanations from these guarantees that help give them life and substance."[96] The First, Third, Fourth, Fifth, and Ninth Amendments create "zones of privacy"[97] and Douglas placed marital privacy in the realm of fundamental constitutional guarantees which were applicable to the states through the Fourteenth Amendment Due Process Clause. Since the state could achieve its declared purpose of deterring illicit sexual behavior by means that would not infringe on a protected right, *e.g.* by regulating the manufacture or sale of contraceptives, the law could not stand.[98] Thus, Douglas' opinion, regardless of the merits, can be read very narrowly. At bottom, he holds a statute prohibiting *use* of contraceptives overly

90. Griswold v. Connecticut, 381 U.S. 479, *noted in* 79 HARV. L. REV. 162 (1965).
91. 381 U.S. 479 (1965).
92. Of the three members of the Court who did not voice separate opinions, both the Chief Justice and Justice Brennan joined in Justice Goldberg's opinion. This means that only Justice Clark wholly subscribed to Douglas' opinion.
93. 318 U.S. 44 (1943).
94. CONN. GEN. STAT. REV .§ 54-196 (1958).
95. Griswold v. Connecticut, 381 U.S. 479, 481 (1965).
96. *Id.* at 484.
97. *Id.* at 484.
98. *Id.* at 485.

broad in accomplishing state objectives.

This "penumbra" approach was acceptable to Justice Goldberg, but apparently not sufficient. "I agree with the Court that Connecticut's birth control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment."[99] Nevertheless, he adds that the language and history of the Ninth Amendment are relevant to the Court's holding.[100] One may question why the Ninth Amendment[101] is necessary considering the importance Goldberg places on marital privacy as fundamental to ordered liberty.[102] In fact, he states that the Ninth Amendment does not constitute an independent source of rights protected from infringement by either the States or the Federal Government.[103]

Still, the Ninth Amendment was relied on by five Justices including adherents of both the "ordered liberty" and the "penumbra" views.[104] Joined by Chief Justice Warren and Justice Brennan, Goldberg rejected total incorporation of the Bill of Rights into the Fourteenth Amendment in favor of selective incorporation of only those rights which are fundamental to ordered liberty.[105] Fundamental rights exist that are not expressly enumerated in the first eight Amendments and the list of rights included is not exhaustive. In order to determine which rights are fundamental the Court looks to traditions and the collective conscience of the people.[106] In rejecting Douglas' theory of analogizing penumbral rights with the specifics of the first eight Amendments, Goldberg's opinion affords more credibility to Black's charge in his dissent that a "natural justice" is serving as the guide to ascertaining constitutional principles.[107] It could be argued that Goldberg's use of the Ninth Amendment injects a random decision making process into the Constitution in contrast to Douglas' view which affords a more ordered, yet still flexible, process to accommodate stated constitutional guarantees to new social developments.[108]

This criticism, however, seems overstated. While acceptance of Goldberg's use of the Ninth Amendment would completely undercut

99. *Id.* at 486.
100. *Id.* at 487.
101. For a more general discussion of the Ninth Amendment see Paterson, *The Forgotten Ninth Amendment* (1955); Redlich, *Are There Certain Rights . . . Retained by the People?*, 37 N.Y.U.L. REV. 787 (1962); and Kelsey, *The Ninth Amendment of the Federal Constitution*, 11 IND. L.J. 309 (1936).
102. See specifically Dienes, *Law, supra* note 7, at 175.
103. Griswold v. Connecticut, 381 U.S. 479, 492 (1965).
104. Dienes, *Law* at 163.
105. Griswold v. Connecticut, 381 U.S. 479, 486 (1965).
106. *Id.* at 493.
107. *Id.* at 511-12.
108. See Dienes, *Progeny, supra* note 39, at 68.

the basis of both Justices Black's and Stewart's dissents, this use may merely be a vehicle to forever extirpate the facile process of inquiring whether a right is actually written into a specific constitutional provision as the *sine qua non* of its constitutionality. Viewed as such, Goldberg's legerdemain seems less extraordinary and even begins to look a bit like the more traditional Harlan approach. "While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom."[109]

For the reasons stated in his dissenting opinion in *Poe v. Ullman*,[110] Harlan believed that the Connecticut statute infringed on the Due Process Clause.[111] While the "bottom" of the Fourteenth Amendment may have been too arbitrary for Justice Black, Harlan felt that a case by case determination with "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms"[112] was the surest method to vouchsafe our system from capricious judicial decisions. "Continual recognition [of these principles] will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the constitution of an artificial and largely illusory restriction on the content of the Due Process Clause."[113]

Justice White's separate concurrence agrees with Justice Harlan's grounding of the privacy guarantee, but stresses the balancing of a constitutional guarantee with the alleged interest of the state. The statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal."[114] White then adds that he fails to see how a ban on the use of contraceptives by married couples would effectuate this goal in any way.[115] "I find nothing in the record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore concluded that it deprives such persons of liberty without due process of law."[116]

While the Connecticut courts had offered a number of possible jus-

109. Griswold v. Connecticut, 381 U.S. 479, 500 (1965).
110. 367 U.S. 497 at 532-555.
111. Griswold v. Connecticut, 381 U.S. 479, 500 (1965).
112. *Id.* at 501.
113. *Id.* at 502.
114. *Id.* at 505.
115. *Id.* at 505.
116. *Id.* at 507.

tifications for the statute,[117] White reduced all claims to an attack against illicit sexual relationships.[118] In doing this, White may have foreshadowed the approach later taken in *Baird* and the abortion cases. The danger of formulating a balancing test between a constitutional right and a state interest is the possibility of understating the strength or importance of one of the sides. By reducing the state's interest to one goal, White made his task of defending the freedoms of married persons that much easier.

While this criticism of the dissenting opinion is not applicable, a more serious one of complete rigidity is. Justice Black concludes his opinion, "So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm."[119] Earlier in his opinion, he lumps both the Ninth and Fourteenth Amendment arguments together. "I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive."[120]

In all fairness to Justice Black, the danger he fears—substitution of judicial wisdom for that of the legislature based solely on natural law—is real. Yet, his method of looking solely at the wording of the constitution, may in reality substitute judicial abstention for judicial restraint. While any formula as lucid and clear as Justice Black's may be easy to apply, it lacks the flexibility necessary to decide between competing and often complex considerations. The late Professor Sutherland in discussing the Due Process Clause stated, ". . . whereas a great outrage perpetuated by a state violates the due process clause of the fourteenth amendment, a small outrage does not, and the Supreme Court of the United States decides when too little becomes too much. Since the difference between too much and not too much is no more definite than the difference between the just and the unjust, pursuit of synonyms for 'injustice' is elusive.' "[121] If Sutherland is right, a case like *Griswold* would represent the nadir of the blanket applicability of Black's approach.

117. Five possible "legislative purposes" were cited by appellants for attack: (1) danger to health or life; (2) population control; (3) to restrict sexual intercourse to the propagation of (legitimate) children; (4) to promote public morals by preventing the use of extrinsic contraceptive aids; (5) to discourage extramarital relations. Brief for Appellants, p. 25, Griswold v. Connecticut, 381 U.S. 479 (1965).

118. Dienes, *Law, supra* note 7, at 177.

119. Griswold v. Connecticut, 381 U.S. 479, 527 (1965).

120. *Id.* at 511.

121. Sutherland, *Privacy in Connecticut,* 64 MICH. L. REV. 283, 287-88 (1966).

In any event, putting judicial process aside, what did *Griswold* really mean? The opinion itself only held that a statute prohibiting the *use* of contraceptives by married couples is invalid as an invasion of the right of marital privacy protected by the Fourteenth Amendment. It did not say that the state could not prohibit manufacture and sale nor suggest anything about questioning the validity of laws dealing with illicit sexual relations. But it did stress two rights: rights associated with marriage, family and the home, and the right of privacy incident to constitutionally protected activities and relations.[122] The burgeoning of both these rights, but especially the latter, should be noted in considering both *Baird* and the abortion decisions.

III. EISENSTADT v. BAIRD

The death knell of Massachusetts' Comstock laws was finally sounded with the efforts of William R. Baird, a thirty-four year old zealot of the birth control movement. Baird's actions in Massachusetts were hardly his first connection with the Comstock laws.[123] He had been arrested in both New York and New Jersey for driving around in a van and stopping occasionally to demonstrate various birth control devices.[124] It was in Massachusetts, however, that Baird would have his greatest impact.

On April 6, 1967, pursuant to an invitation, Baird addressed approximately 2,000 students in Hayden Auditorium at Boston University on the relative merits and limitations of various birth control devices.[125] During his address he used diagrams and a demonstration board to illustrate some of the contraceptives, and generally criticized legal prohibitions. After telling students to come on stage to get some contraceptives, he handed a package of contraceptive foam to a coed. As he did this, he was arrested and charged with violation of §21 by exhibiting and giving away articles for the prevention of conception. It is clear that Baird was not merely the victim of antiquated laws. He had sought arrest in order to test the constitutionality of Massachusetts laws.

It is not surprising that Baird chose the route he did (instead of bringing a declaratory judgment), considering the fate of *Poe v. Ullman*.[126] In fact, during Baird's case a declaratory judgment brought

122. Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 248 (1966).

123. Dienes, *Progeny, supra* note 39, at 45-46.

124. In New York revision of the statute following *Sanger* prevented judicial martyrdom. In New Jersey his conduct was found not "without just cause" in State v. Baird, 50 N.J. 376, 335 A.2d 673 (1967).

125. Dienes, *Law, supra* note 7, at 211.

126. 367 U.S. 497 (1961).

by doctors failed to overturn the laws. In *Sturgis v. Attorney General*,[127] the Massachusetts Supreme Court rejected plaintiffs' arguments that the prohibitions against treating unmarried persons violated a physician's due process right to practice his profession and that limitations on access to contraceptives denied equal protection to the poor. Rather, the law was held to serve as a rational means for the state to protect public health and morals and relief was directed to the legislature.

In the state courts, Baird met the same fate. He was found guilty, and his conviction was affirmed by the state Supreme Court in *Commonwealth v. Baird*.[128] The court overruled unanimously that the part of §21 prohibiting exhibition was unconstitutional as applied to Baird. His exhibition "was incidental to, and part of, the lecture and thereby within the protection of the First Amendment. The display of those articles was essential to a graphic representation of his subject."[129] Nonetheless, on the distribution the court held by a 4 to 3 vote that the conviction was a valid exercise of police power. It stated the distribution added nothing to understanding the lecture, and was, therefore, not protected under the First Amendment. The court concluded the state has an interest in preventing distribution by indiscriminate persons—that the legitimacy depends upon the distributor, not the marital status of the recipient.[130]

Baird was further thwarted when his petition for certiorari to the United States Supreme Court was denied.[131] Baird then appealed to the federal courts by a writ of habeas corpus. Although the Federal District Court sustained the conviction,[132] the Court of Appeals reversed.[133] The court felt the real issue was "whether the statute bears a real and substantial relation to the public health, safety, morals or some other phase of the general welfare."[134] While it agreed with the state court that Massachusetts could enact a law protecting the public health, it was unable to find such a purpose in the statute in question. Rather, the court found the statute arbitrary and discriminatory because of the statute's total exclusion of unmarried persons, and agreed with the dissent in *Commonwealth v. Baird*, "If there is need to have a physician prescribe (and a pharmacist dispense) contracep-

127. 358 Mass. 37, 260 N.E.2d 687 (1970).
128. 355 Mass. 746, 247 N.E.2d 574 (1969).
129. *Id.* at 752.
130. *Id.* at 653-4.
131. 396 U.S. 1029 (1970).
132. Baird v. Eisenstadt, 301 F. Supp. 951 (1970).
133. 429 F.2d 1398 (1970).
134. *Id.* at 1400.

tives, that need is as great for unmarried persons as for married persons."[135]

The court also felt that it must take cognizance of the legislature's failure to distinguish between dangerous or possibly dangerous articles and those which were medically harmless. This fact led the court to feel the 1966 revision of the statute was not really for public health purposes, but merely the "accomodation necessary to escape the *Griswold* ruling."[136] The court also rejected the validity of the statute as a means of controlling sexual activity by comparing the statute with the fornication laws. The statute Baird violated was a felony punishable by five years in prison, while the fornication law was only a misdemeanor punishable by 90 days in prison.[137] The court found it hard to believe that the state would utilize a statute carrying a five year penalty to enforce a misdemeanor which was itself unenforceable.[138] "If the prevention of fornication was the true statutory aim there was never a reason to deny access to contraceptive materials to married persons."[139] The court concluded by saying that if deterrence of fornication was desired, the legislature could not do this "by making the penalty a personally, and socially, undesired pregnancy."[140]

The court, therefore, held the Massachusetts statute unconstitutional and ordered the district court to issue a writ discharging Baird.[141] It is in this context that the United States Supreme Court agreed to hear the case.[142] Remember, when Baird petitioned for certiorari from the state court ruling, he was seeking relief from a little used statute. Furthermore, he could not demonstrate extensive negative impact from the existence of the law especially in light of *Griswold*, legislative reform and lack of enforcement. But when the Court of Appeals reversed, a state statute had been declared unconstitutional and review was by appeal (supposedly mandatory), not by certiorari. In addition, the decision ran counter to previous decisions in both the highest state court and federal district court.

On March 22, 1972, the United States Supreme Court delivered its opinion in *Eisenstadt v. Baird*.[143] Since much of the plurality's reasoning is derived from the Court of Appeal's opinion, it would seem somewhat repetitious to analyze closely the Court's ratiocination. Neverthe-

135. 355 Mass. 746, 748, 247 N.E.2d 574 (1969).
136. 429 F.2d 1398, 1401 (1st Cir. 1970).
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.* at 1402.
141. *Id.* at 1402-03.
142. *Probable jurisdiction noted*, 401 U.S. 934 (1971).
143. 405 U.S. 438 (1972).

less, examination of the four opinions reveals some interesting divergencies, despite a 6 to 1 majority.[144]

Justice Brennan, writing for the Court,[145] first tackled the appellants contention that Baird had no standing to assert the right of unmarried persons.[146] Brennan noted that if the Court of Appeals was correct in finding the Massachusetts statute not a health measure, Baird would not be precluded from his challenge because he was not a physician or pharmacist.[147] More important than this was the effect of the proceedings on third party interests. The plurality felt that this case presented an even stronger basis of standing than did *Griswold*: enforcement of the Massachusetts statute would significantly hinder unmarried persons in obtaining contraceptives. Since these individuals, unlike users in Connecticut, were not subject to prosecution, they were, in effect, denied a forum to assert their rights.[148]

Brennan then proceeded to the merits and examined the state's possible justification for the statute. In essence, he divided the possible state interests into three areas: (1) morality; (2) public health; and (3) prohibition of contraception per se. Finding no valid state interest in any of these three spheres, he concluded that the statute violated the Equal Protection Clause of the Fourteenth Amendment by providing dissimilar treatment for married and unmarried persons who were similarly situated.[149]

First, Brennan stated that deterrence of premarital sex could not be regarded as the purpose for the Massachusetts law. "It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication . . ."[150] Furthermore he stated, "We find it hard to believe that the legislature adopted a statute carrying a five year penalty for its possible, obviously by no means effective, deterrence of the commission of a ninety day misdemeanor."[151] Since the statute was riddled with exceptions making contraceptives freely available for use in premarital sexual relations, the statute's scope and penalty structure were thought to be inconsistent with that purpose.

Second, Brennan argued that health could not be the rationale of

144. Justices Powell and Rhenquist took no part in the consideration or decision of the case.

145. Justice Brennan's opinion was joined by Justices Douglas, Stewart, and Marshall. In addition, Justice Douglas filed a concurring opinion.

146. 405 U.S. 438, 443-446 (1972).

147. *Id.* at 444.

148. *Id.* at 445-46.

149. *Id.* at 446-455.

150. *Id.* at 448.

151. *Id.* at 449 (quoting Eisenstadt v. Baird, 429 F.2d 1398, 1401 (1970)).

§21A because the prohibitions would then be both discriminatory and overbroad.[152] Brennan added that further "evidence" that the statute was not concerned with health was the fact that federal and state laws already regulated the distribution of potentially unsafe drugs. This point, probably correctly, was challenged by Burger in his dissent, stating, "I know of no rule that all enactments relating to a particular purpose must be neatly consolidated in one package in the statute books . . ."[153]

Third, Brennan, although refusing to rule on whether contraceptives were immoral as such, concluded that whatever the rights of an individual to access to contraceptives may have been they must have been the same for unmarried and married alike. "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. . . . On the other hand, if *Griswold* is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried but not to married persons."[154] This seems like a neat little prestidigitation. Without committing the court to a stand on the morality of contraceptives, he attempted to draw an Equal Protection conclusion. It is perhaps this feat that gave Justice Blackmun the inspiration to skirt the right of life issue in the abortion decisions.

It has been suggested that the type of analysis relied on by Justice Brennan may be fundamentally unsound.[155] "An example of the plurality opinion . . . suggests that the decisive question is how courts formulate the legislative purpose against which the rationality of the statutory classification is to be tested."[156] Brennan's approach was viewed as tantamount to a " divide and conquer"[157] strategy. " . . . if the plurality had defined the over all legislative purpose as consisting of the partial achievement of several sub-purposes, the determination that the statute was not rational would not have been so easy."[158] It is not implied that a different formulation would have changed the result, but that the rationality test is "invariably an empty requirement and a misleading analytic device."[159]

Courts do not in fact use the rationality requirement to strike down

152. *Id.* at 450.
153. *Id.* at 468.
154. *Id.* at 453-54.
155. Note, *Legislative Purpose, Rationality, and Equal Protection,* 82 YALE L.J. 123 (1972).
156. *Id.* at 124.
157. *Id.* at 127.
158. *Id.*
159. *Id.* at 128.

> statutes, because it is impossible to do so. Instead, courts sometimes ignore the clear import of a statute's terms to formulate a fictional statutory goal to which the terms are not rationally related. . . . Because the disputes that arise under the rubric of the Equal Protection Clause have to do with the relative merits of competing public policies, judicial decisions obscure the central issues in such cases to the extent that they are based on discussions of a statute's rationality.[160]

While this criticism pertains to the Equal Protection rationality test, it is, if anything, more telling in examining the ratiocination in the later abortion decisions.

In any event, following the crystal clear categories of Justice Brennan, Justice Douglas gave an expansive reading of the First Amendment and claimed the state failed to prove Baird intended to give the vaginal foam to the young lady.[161] This was either a curious reading of the facts, or an attempt to expand the First Amendment protection to the distribution of all articles not inherently dangerous when distribution is coupled with some form of speech. The former interpretation clearly flew in the face of Baird's obvious intention, while I will have to leave discussion of the latter interpretation to someone else since it goes beyond the scope of this paper.[162]

The excessive breadth of the Massachusetts prohibition was the focus of the concurring opinion of Justice White, joined by Justice Blackmun.[163] White felt the gravamen of the offense charged was that Baird had no license and therefore no authority to distribute to anyone.[164] Since no proof was offered as to the marital status of the recipient and since Baird *could* have been convicted for distributing nonhazardous contraceptives to married persons, his conviction could not stand. White's opinion, then, although limited solely to the law treated as a health measure, implicitly recognized that the privacy right of individuals affords a degree of constitutional protection to a distributor of contraceptives to married couples.[165]

Like Justice White, Chief Justice Burger's dissent was concerned with the statute as a health measure. Unlike White, however, this fact seemed to end the matter. Even though it was conceded that the vaginal foam was not dangerous in any respect, Burger wrote, "It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading authorities. The commands of the Constitution cannot fluctuate with the shifting tides of

160. *Id.* at 154.
161. 405 U.S. 438, 455-60 (1972).
162. See Justice Burger's comments on this. *Id.* at 466-67.
163. Dienes, *Law, supra* note 7, at 248.
164. 405 U.S. 438, 462 (1972).
165. Dienes, *Law, supra* note 7, at 249.

scientific opinion."[166] Surely the Chief Justice did not intend to immunize a legislature from judicial inspection merely by passing a law concerning public health, regardless of the law's ramifications on protected constitutional rights. Burger seemed to have set up his balancing test without considering one of the sides. As one commentator stated, "By avoiding issues relating to the impact of the law on the rights of married and unmarried persons, and focusing instead solely on the state regulation of the distributor, Burger's opinion conveys a greater sense of credibility than it deserves—the effect of the law on personal rights is the essence of the issue."[167]

Still, the impact of the decision is not as clear as the 6 to 1 majority might initially indicate. As with *Griswold*, the language and issues may seem more momentus than the actual legal change. The opinions only struck down an overinclusive Massachusetts statute, but did not clearly establish a general due process or equal protection right to receive contraceptives. Two important questions remained: (1) Would a statute with a smaller criminal sanction be acceptable as a valid exercise of police power protecting morals? (2) Could a state more narrowly construct a statute so that it would appear to resemble a valid health regulation?

While only four justices even addressed the Massachusetts statute as an invalid state control over morals, this loophole seems less important following the abortion decisions. "Such 'morals legislation' may do much to damage the integrity of the legal system by inviting widespread disregard for the law. And these statutes can only be enforced by extensive and repellant invasion of privacy."[168] As for the latter question, White stated, "Had Baird distributed a supply of the so-called 'pill,' I would sustain his conviction under this statute."[169] This may merely mean that potentially dangerous drugs or devices which are already regulated may have to continue to be regulated. The future import of *Baird* may focus not on defining the state's right to regulate harmless contraceptive devices, but on defining the individual's (especially the indigent individual's) right to receive or demand access to and information about contraceptives. This issue seems to have become more pregnant, especially in light of the Court's decision in *Roe* and *Doe*.

IV. *Roe v. Wade* and *Doe v. Bolton*

Within the past few years there has been an increasing amount of

166. 405 U.S. 438, 470 (1972).
167. Dienes, *Law, supra* note 7, at 251-52.
168. Eisenstadt v. Baird, 405 U.S. 438, note in 84 HARV. L. REV. 1525, 1535 (1970).
169. 405 U.S. 438, 463 (1972).

medical and psychological evidence pointing toward the legalization of abortion. A recent Scandinavian survey showed that children born after their mothers were refused abortions were worse off in every respect measured, *e.g.* delinquincy, intelligence, psychopathology.[170] There has been evidence that both legal and illegal abortions have greatly increased and both are gaining acceptance.[171] Spokesmen such as Dr. Thomas Szasz have argued that the use of contraceptives and early abortion is, in essence, a moral decision for the individual involved.[172] While others have voiced concern about the ramifications to society, "On the individual level, the forced arrival of an unwanted, unloved child because of archaic abortion laws creates grave consequences for the unwanted child, the unloving mother, the fragmented family, and ultimately for society itself. When contraception fails, preventive psychiatry requires the abortion be a matter between the woman and her physician."[173]

A study of the reaction to legal abortions in New York showed that the patients demographically reflected the community at large, and, consistent with the literature, experienced few psychological difficulties.[174] In addition, support for decriminalization of abortion by various groups has been growing. The Group for the Advancement of Psychiatry (GAP) concluded:

> . . . we recommend that abortion, when performed by a licensed physician, be entirely removed from the domain of criminal law. We believe that a woman should have the right to abort or not, just as she has the right to marry or not. This position is shared by a number of other groups, notably the President's Task Force.[175]

GAP cited many reasons for this conclusion. These include: (1) the obligations of motherhood may become destructive to the child if the child is unwanted;[176] (2) dire predictions of dangerous after effects have not been fulfilled;[177] (3) our statutes stand four square against a woman's right to control her own reproductive life—a position inconsistent with the basic tenets of a democratic society;[178] (4) the laws

170. Forssman, and Thuve, *One Hundred and twenty children born after application for therapeutic abortion refused,* 42 ACTA PSYCHIAT. SCAND. 11 (1966).

171. Dietze, C., cited in *Abortion Gaining Favor Across the U.S.*, New York Times, Nov. 29, 1970, p. 1.

172. Szasz, *The Ethics of Abortion,* Humanist, Sept.-Oct., 147-48 (1966).

173. Lebensohn, *Abortion, psychiatry, and the quality of life,* 128 AM. JOUR. OF PSYCHIATRY 946 (1972).

174. Osofsky and Osofsky, *The psychological reaction of patients to legalized abortion,* 42 AM. JOUR. OF ORTHOPSYCHIATRY 48 (1972).

175. Group for the Advancement of Psychiatry, *The Right to Abortion: A Psychiatric View,* 49 (1970).

176. *Id.* at 19.

177. *Id.* at 36.

178. *Id.* at 26.

do not deter the affluent from procuring a "therapeutic" abortion; and [179] (5) since the moral issues (on both sides) present an insoluble dilemma, the choice should be left to the individual.[180]

In general, a great deal of ferment and activity had been directed toward changing the state abortion laws, often the product of nineteenth century legislation. Not all the change was directed toward liberalization. After New York legalized abortion, there was a counter-movement to help repeal the law. In fact, in Pennsylvania in 1972 there was an effort to stop all legal abortion, even in instances of rape or incest. It is not surprising, then, that the Supreme Court would be called upon to help clarify the situation, and on January 23, 1973 the Court handed down its decision in *Roe v. Wade*[181] and its companion case, *Doe v. Bolton.*[182] The surprise, however, was in the decisions themselves. Unlike *Griswold* or *Baird*, the Court's holdings were quite clear;[183] the questions involved the justifications.

Justice Blackmun, writing for the Court in both opinions, first tackled the standing issue. In *Roe*, the case revolved around a Texas statute proscribing abortion except to save the mother's life. Blackmun was faced with finding standing after Jane Roe's pregnancy had already terminated. "Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition, yet evading review,' "[184] He agreed then with the District Court[185] that there was a justiciable controversy, which had not been muted by the termination of pregnancy.

Blackmun then presented the reader with a panorama of historical feelings, attitudes and laws concerning abortion.[186] The effort may have been undertaken in order to illustrate that abortion had not always been legally proscribed, but had its vicissitudes. He then offered three possible reasons to explain the historical enactment of criminal abortion laws: (1) the laws were the product of a Victorian social concern to discourage illicit sexual conduct; (2) the State had a valid interest in protecting the health of the mother; and (3) the State had a duty to protect prenatal life.[187] While Blackmun dismissed the first argument, the latter two formed an important part of the holding, qualifying the woman's right to terminate her pregnancy.

179. *Id.* at 26.
180. *Id.* at 48.
181. 410 U.S. 113 (1973), [hereinafter referred to as *Roe*].
182. 410 U.S. 179 (1973), [hereinafter referred to as *Doe*].
183. This is not to say that all issues have been settled. In n.67 in *Roe* at 165, the Court specifically leaves open the issue of the father's rights.
184. *Roe* at 125 (citations omitted).
185. Roe v. Wade, 314 F. Supp. 1217 (N.D. Tex. 1970).
186. *Id.* at 129-47.
187. *Id.* at 147-152.

The right to terminate the pregnancy was discovered in the right of privacy. "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[188] Since this right was deemed "fundamental" or "implicit in the concept of ordered liberty," any limitation could only be justified by a "compelling state interest."[189]

In the case of a pregnant woman, Blackmun felt that the different State interests became compelling at different times. During the first trimester, no State interest was compelling. The abortion decision and effectuation were to be left to the judgment of the pregnant woman and her attending physician. During the second trimester, the State's interest in the woman's health became "compelling." "This is so because of the now established medical fact . . . that until the end of the first trimester mortality in abortion is less than mortality in normal childbirth."[190] During this period, the State could regulate the abortion procedure in ways that were reasonably related to maternal health.[191] Finally, during the third trimester, the State's legitimate interest in potential life became "compelling." The State could then regulate or proscribe abortion, except where necessary to preserve the life or health of the mother. Since the Texas statute "[swept] too broadly . . . it [could] not survive constitutional attack. . . ."[192]

In order to justify this holding, Blackmun early took pains to show that the fetus had never been fully considered in the law to be a "person" in the whole sense.[193] Part of this proof was the statement, "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[194] Despite this, Blackmun seems to have had no problem in weighing rights which he admittedly could not define.

Justice Stewart's concurrence stood in stark contrast to his *Griswold* dissent. In repudiating his earlier opinion he stated:

> So it was clear to me then, and it is clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Con-

188. *Id.* at 153.
189. *Id.* at 155 (citations omitted).
190. *Id.* at 163.
191. *Id.*
192. *Id.* at 164.
193. *Id.* at 156-164.
194. *Id.* at 159.

> necticut statute substantially invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. As so understood, *Griswold* stands as one in a long line of pre-*Skrupa*[195] cases decided under the doctrine of substantive due process, and I now accept it as such.[196]

Stewart then defined this doctrine and concluded, "Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment."[197] (One may wonder where "clearly" and "therefore"' came from).

Justice Rhenquist's dissent found little "clearly right" with the majority opinion. He criticized finding standing and could not see where the Court concluded the right to privacy was applicable. He was further upset with the Court's use of the "compelling interest" test in a case arising under the Due Process Clause of the Fourteenth Amendment.[198] He would seem to have preferred the Court merely assessing whether the law had a rational relation to a valid state objective.[199] He concluded his opinion by questioning the necessity for striking down the Texas statute *in toto*.[200]

The companion *Doe* case examined the validity of a modern Georgia statute.[201] The statute was less restrictive, allowing abortion if continued pregnancy would endanger a pregnant woman's life or injure her health, if the fetus would likely be born with serious defects, or if the pregnancy resulted from rape. Nevertheless, the three procedural conditions in §26-1202(b) were held to violate the Fourteenth Amendment.[202] The case was important as an assurance that the holdings in *Roe* would be implemented, without interference by a rigid hospital hierarchy. In essence, then, it could be viewed as the remainder of the "legislation not passed" in *Roe*. While *Roe* and *Doe* taken together clearly enunciate the Court's position on abortion, it would be fanciful to pretend Blackmun adhered to one of his initial goals, "Our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection."[203]

In fact, this is hardly the only criticism that has or will be made concerning these decisions. Considering the importance of the social

195. See Ferguson v. Skrupa, 372 U.S. 726 (1963).
196. *Roe, supra* note 181, at 167-68.
197. *Id.* at 170.
198. *Id.* at 172-177.
199. *Id.* at 173.
200. *Id.* at 177-78.
201. GA. CRIM. CODE §§ 26-1201 through 26-1203 (1968).
202. *Doe, supra* note 182, at 187-89.
203. *Roe, supra* note 181, at 116.

policies involved and emotions stirred up on both sides, one can anticipate much future commentary. The remainder of this section, however, will focus more directly on comments made by Professor John Ely of Yale.[204] The main thrust of his discussion appears to be that the decision is not found in the Constitution. A narrower holding of vagueness is possible; the precedent cited is not very convincing; the Court's rationale for this right to privacy is somewhat contrived and the Court misstates the right to life issue. In sum, it is a return to the discredited *Lochner* substantive due process approach.

Ely's initial criticism about the breadth of the decision is certainly correct. The Court, by holding the statute unconstitutionally vague, would have effected a narrower holding. "The Court's theory seems to be that narrow grounds need not be considered when there is a broad one that will do the trick. . . ."[205] This same complaint was voiced by Justice Rhenquist's dissent. "In deciding such a hypothetical lawsuit the Court departs from the longstanding admonition that it should 'never formulate a rule of constitutional law broader than is required by the precise facts to which it is applied.' "[206] Nevertheless, where would the state of the law be if the Court had merely done this? One answer would be that wherever the law was, the legislature would be the correct institution from which to seek redress. While this is arguably true, the argument begins to sound exactly like one discussing the role of the Court and substantive due process, and therefore, will be discussed later.

Ely's attempts to question the precedents used and the validity of the right to privacy can be characterized as concerned with the same issue. None of the precedents cited support the "quantum jump" taken in *Roe*.[207] Concerning privacy, Ely states, ". . . having thus rejected the amici's attempt to define the bounds of the general constitutional right of which the right to an abortion is part, on the theory that the general right described has little to do with privacy, the Court provides neither an alternative definition nor an account of why *it* thinks privacy is involved."[208] This is not quite accurate. What the Court does do is simply announce that the right of privacy, as derived from the Fourteenth Amendment's concept of personal liberty and restrictions on state action, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[209] At bottom, then, these criticisms

204. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973) [hereinafter referred to as *Ely*].
205. *Id.* at 922, n.20.
206. *Roe, supra* note 181, at 172.
207. *Ely, supra* note 204, at 928-30.
208. *Id.* at 931 (footnotes omitted).
209. *Roe, supra* note 181, at 153.

are different articulations of Ely's main thesis, "[This decision] is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."[210]

Ely sees the decision as a return to the philosophy of *Lochner v. New York*.[211] This philosophy was responsible for many of the decisions striking down a good part of the New Deal legislation in the 1930's. "According to the dissenters at the time and virtually all commentators since, the Court simply manufactured a constitutional right of whole cloth and used it to superimpose its own view of wise social policy on those of the legislatures."[212] The test *Lochner* purported to apply was whether a plausible argument could be made that the legislative action furthered some permissible government goal. In striking down legislation, the Court used two vehicles: (1) to declare the goals of legislative actions impermissible; or (2) to deny the plausibility of the legislature's empirical judgment that its action would *promote* that goal.[213] In *Roe*, however, the Court concedes a valid governmental goal, but finds its justification not "compelling" enough to override a woman's right of privacy. Ely characterizes this as "the substitution of one nonrational judgment for another. . . ."[214] "The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business."[215] Thus, Ely feels that *Roe* may turn out to be a more dangerous precedent.[216]

It would be unfair to summarily dismiss Ely's criticism. Nevertheless, it is this author's belief that the problems of substantive due process are ineluctable. The appropriate boundaries of judicial review are by no means exact. In discussing the meaning of due process, Professor Sutherland stated, ". . . the subjective reactions of long-dead constitution makers are not now significant. What is important is the use which the Supreme Court has made of these words."[217] It is reassuring to think that the words in the Constitution are inherently clear. But this simply is not true. Look at the trouble the Court had in dealing with the meaning of "person" in *Roe*. To pretend that complex

210. *Ely, supra* note 204, at 947.
211. 198 U.S. 45 (1905).
212. *Ely, supra* note 204, at 937.
213. *Id.* at 941.
214. *Id.* at 943.
215. *Id.* at 943.
216. *Id.* at 940. It is interesting to note that Ely's article concludes with a discussion of the necessity of the Court's tracing its premises to the Constitution. Since this has not been articulated often enough. ". . . we must share in the blame for this decision." *Id.* at 949. It appears, then, that Ely is willing to accept the blame, but not the responsibility.
217. Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 286-87 (1966).

and fundamental concepts such as "freedom," "general welfare," or "health" are more exact is naive, to say the least.

Learned Hand once wrote, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can ever do much to help it."[218] This is hardly a workable standard for judicial review, but probably a more accurate description of why liberty is a fundamental tenet of our society. The real danger is to platonize the role of the Court, to believe that the Constitution itself is protection from the humans and hopefully humanity that interprets it. Maybe it is an overstatement to say that all controversies involve a balancing test, but certainly most do. Thus, the real task of a Justice becomes the most careful and honest articulation of the criteria used in deciding a case, not a strained effort to pigeonhole all values in the Bill of Rights.

The dangers of this approach are both obvious and terrifying. Yet, I see no safe way to vouchsafe our system from them. To say that a "strict" or "narrow" interpretation of the Constitution is necessary, merely leaves the effectiveness of our system to another branch of government. While this may be preferable to some, there is little comfort in it. Judicial decisions that recommend redress in the legislature, may just be a less honest way of a Justice revealing which considerations he included in his balancing test.

In considering *Roe*, therefore, this writer is not offended by the Court's rather nebulous founding of the right to have an abortion in the Due Process Clause of the Fourteenth Amendment. What is bothersome is the way the Court avoided the right to life issue. The Court, with chimerical clarity, weighed the pregnant woman's right of privacy against the State's interest in protecting potential life and concluded that the State's interest only became compelling after the second trimester. Part of the rationale seemed to be that: (1) fetuses were not "persons" within the meaning of the Fourteenth Amendment; and (2) only after viability or around six months does the fetus have the potential to live outside the mother's body. But as Ely protests, ". . . the argument that fetuses lack constitutional rights is simply irrelevant."[219] What is relevant is the State's interest in protecting the sancity of or sensitivity to life.

If the Court really means, when it says it need not decide when life begins, that it need not recognize the State's valid interest in instilling respect for life, then *Roe* is, indeed, a dangerous precedent. The quintessence of a balancing test is the formulation of the rights and interests on both sides. If one side is ignored or slighted, the judicial process

218. L. Hand, *The Spirit of Liberty* 190 (1952).
219. *Ely, supra* note 204, at 926.

becomes a mere exercise in sophistry. If *Roe* ultimately is used to countenance decisions excluding this consideration, the sanctity of our lives must inevitably suffer.

V. Population Control—The Ultimate Balancing Test?

> The Biblical exhortation to "be fruitful and multiply" may have been constructive in an agrarian society with a high mortality rate, but it is becoming destructive in today's world. To take this text out of context and to turn it into an everlasting moral injunction is a pernicious form of fundamentalism, pernicious not only because of disastrous consequences, but also because it fails to come to grips with the moral issue involved in self-duplication. That issue is no longer whether I can survive in my offspring, whether my family or tribe or nation can survive, but whether mankind can survive. The solution of this will require, among other things, an entirely new theology of propagation, based upon a fresh assessment of the relations between the individual and other species, and the role of the man in the whole order of creation.

Paul Pruyser, "A Psychological
view of religion in the 1970's"

By the middle of the nineteenth century the world's population had surpassed one billion people.[220] It took another eighty years for the population to double.[221] Today's population is around three and one half billion people and is expected to double within the next four decades.[222] This, in a nutshell, presents the problem. The world has a finite amount of space and eventually there must be a stoppage in absolute growth. Just what this limit is has been the subject of much speculation. But, wherever the exact point is, there has been an increased awareness of the importance of population policy to the quality of life. "For the grim and relentless process of population growth cuts across all the basic needs of mankind and perhaps more than any other single factor, frustrates man's achievement of his higher needs."[223]

Still, the key question seems to be how one views the magnitude of the problem. For those who see the problem as an imminent world crisis, the necessity for action and the *means* chosen are far different than those who believe the United States has managed to escape the problem.[224] The difference in definition of the problem, therefore,

220. R. Cook, *World Population Growth in Population Control* 5 (M. Shimm ed. 1961).

221. H. Dorn, *World Population Growth* in *The Population Dilemma* 10 (P. Hauser ed. 1963).

222. Id. at 11.

223. American Association for the United Nations. *World Population—A Challenge To the United Nations and Its System of Agencies* 54 (1969).

224. Contrast the views in *The Role of Law in Population Planning* (D.T. Fox ed. 1972), [hereinafter referred to as *Fox*].

may be at the heart of much of the controversy over goals and policies. Once the threshold of the need for concern is reached, however, there exists a continuum of solutions ranging from the most voluntary to the strictest regulation.[225] "For purposes of simplification these solutions can be broken up into two categories; (1) Voluntarism and (2) Regulation.[226] Efforts to increase information and implementation of family planning[227] may be viewed as the former, while proposals such as compulsory abortion of pregnant unwed mothers[228] may be viewed as the latter.

Some of the more recurrent proposals are worth noting. Along voluntaristic lines, proposals have included: (1) cease taxing single people more heavily; (2) stop giving parents special tax incentives; (3) reduce paid maternity leaves; (4) reduce family allowances; (5) stop awarding public housing on the basis of family size; (6) stop granting fellowships and other educational aids to married students;[229] (7) pay a bonus for childlessness; and (9) give special social security benefits for the childless couple.[230] Along more coercive lines, suggestions have included: (1) payment for voluntary sterilization; (2) a substantial fee to get married; (3) a head tax on children; (4) a requirement of abortions for pregnant unwed mothers;[231] (5) the mandatory adoption of illegitimate babies; and (6) involuntary fertility controls.[232] Furthermore, there have been proposals for implementation of broad policies. Stycos has suggested: (1) more attention devoted to males; (2) more resources put into non-clinical systems of educations; (3) more use of the mass media; (4) a greater effort to reach couples at an earlier age; (5) a greater stress on the social and economic disadvantages of excessive child bearing; and (6) sterilization facilities for men and women who have had all the children they want.[233]

While many proposals have elements of both categories, "The important distinction between *family planning* and *population control* must be recognized and given emphasis in all birth control programs."[234]

225. Note, *Population Control*, 84 HARV. L. REV. 1856, 1879 (1970).

226. This division is somewhat arbitrary since any proposal is somewhat coercive, hoping to effect a change in our society's pro-natal bias.

227. Sycos, *Obstacles to Programs of Population-Facts and Fancies*, 25 MARRIAGE AND FAMILY LIVING 5 (1963).

228. P.R. Erlich and A.H. Erlich *Population/Resources/Environment—Issues in Human Ecology*, 254 (1970) [hereinafter referred to as *Erlich*].

229. Davis, *Population policy: Will current programs succeed?* 158 SCIENCE 730 (1967) [hereinafter referred to as *Davis*].

230. *Erlich, supra* note 228, at 252-53.

231. *Davis, supra* note 229, at 736-738.

232. *Erlich, supra* note 228, at 253.

233. Stycos, *Obstacles to Programs of Population—Facts and Fancies*, 25 MARRIAGE AND FAMILY LIVING 5 (1963).

234. *Erlich, supra* note 228, at 252.

The tendency to blur the difference may reflect the desire to simplify the grave and consequential problems inherent in this area, by both opponents and advocates. "The unthinking identification of family planning with population control is an ostrich-like approach in that it permits people to hide from themselves the enormity and unconventionality of the task."[235]

Yet, the salience of the task can be easily identified. "The true and fullest dimension of the population problem involves nothing less than the quality of human life on this planet."[236] Even the sanctity of life is predicated on the assumption that there are enough resources to sustain life. "The sickness of mankind is too many people. Like any other natural product, they too lose their value when present in excess."[237] If there is only enough food to feed half the world, the morality of deciding who shall eat is far different than a discussion of allocating radio airwaves. In the past, punishing the crimes of war has always been contingent upon a return to peace. If a constant state of war existed, one would learn to "live" with atrocities and act accordingly. For the 10 to 20 million people who starve to death each year,[238] the proposition is not merely hypothetical. The same applies to infanticide.

> We know that there is a certain amount of infanticide [in Latin America], but we do not know and we cannot put into numbers what I like to call the unconscious infanticide. There are certain facts that prove to me that such a condition exists. For instance, in the poorer district of the City (sic) of Santiago, we have found that in families with two children, the infant mortality was 60 per thousand. In families of similar social and economic conditions that have ten children, the infant mortality was 300 per thousanl, or five times greater . . . . the so-called maternal instinct . . . declines according to the number of children.[239]

Fortunately, the last two problems (mass starvation and infanticide) seem far removed from the United States. Nevertheless, examination of what is happening is somewhat disquieting. While it cannot be gainsaid that family planning has gained a greater acceptance and fertility has dropped,[240] the recent Nixon cutbacks may indicate a shift in priorities away from this area. Poverty programs are out of vogue, and the

235. *Davis, supra* note 229, at 739.
236. American Association for the United Nations, *World Population—A Challenge to the United Nations and Its System of Agencies* 54 (1969).
237. Leyhausen, *The Dilemma of Social Man*, 5A Science Journal 55, 61 (1969).
238. *Erlich, supra* note 228, at 321.
239. *Fox, supra* note 224, at 50.
240. In fact, it is reported that during the last year the growth was *below* replacement level. While this is encouraging it should not end concern.

poor's greater need for information and services may go unrequited.[241] On the positive side, however, there have been some important legal changes. While both *Griswold* and *Baird* may be viewed as the culmination of an effort to update antediluvian legislation, the *Roe* and *Doe* decisions may do much to help preserve the quality of life. Despite the shaky legal foundations, the right to have an unwanted child aborted should bring us closer to the goal of "every child a wanted child."[242] (To this I would add enough available resources to sustain every child born).

All these decisions illuminate the judicial system's dilemma in dealing with population control. The lesson of Comstockery is the bind the legal system finds itself in when legislation speaks to morality of another era. The courts face the task of deciding not only cases and controversies arising from the law, but in ministering to laws that cannot be fairly enforced.

Whatever the merits of the Comstock legislation in 1873, by the time of *Griswold* it would be unthinkable to try to prohibit uniformly the use of contraceptives by married couples. The only enforcement possible would be against blatant violations such as by Estelle Griswold and Dr. C. Lee Buxton. What about the remainder of the public? When does the morality of one period cease to bind the citizens of another? It seems at some point the system starts quietly to condone the disregard for such legislation, perhaps with a caveat toward public disavowal. The judicial system then finds itself deciding cases about laws that are only sporadically enforced and making pronouncements which are untrue or irrelevant for the vast majority of the citizenry.

As with most moral issues, changing the law is no simple task. In the late nineteenth century prohibition of contraception may have been satisfactory to most, just as tolerance of contraception would seem justified today. Nevertheless, those citizens and groups that find themselves on the wrong end of the Zeitgeist create pressures for change (or preservation) that ineluctably find their way to court. The legislation that led to *Baird* was an attempt to reimpose a standard of morality by those dissatisfied with the results in *Griswold.* Similarly, the plethora of social changes concerning abortion led to the efforts toward legalization through the courts. The results are clearly different. *Baird* really announces the end of an era, while *Roe* and *Doe* may be heralding in another. Yet, in each, pressures were brought to bear upon the courts.

241. For a connection between the poor and overpopulation see *Erlich* at 246. See also Osborn, *Excess and Unwanted Fertility* 10 EUGENICS QUARTERLY 59 (1963).

242. Group for the Advancement of Psychiatry, *The Right to Abortion: A Psychiatric View* (1970).

It would seem inevitable that eventually the judicial system will be summoned to balance the competing sides concerning population control. As with contraception and abortion, there will be competing moralities; and as with contraception and abortion, the courts will be called to decide issues far greater than an individual case. Needed clarification of our situation is often not forthcoming from the legislature.

The balancing of fundamental rights may, therefore, be bequeathed *de facto* to the judiciary. This is an enormous responsibility, necessitating only the most honest articulation of the competing values. An example of this can be seen in *Dandridge v. Williams.*[243] The case upheld the validity of a Maryland statute which placed an absolute limit on the amount of welfare granted to a family. Is not the Court saying that the State does not have to subsidize children that cannot be afforded above a maximum of five or six?[244] While this message in itself arguably has a great deal of merit, the penalty of the parent's incontinence is borne by the child.

> We have a child who is born and is sixth now and is unwanted and we tell his parents that they have to pay some kind of financial penalty. The child . . . already gets an inadequate education and probably is abused by his parents psychologically and otherwise because he was unwanted. Now they have to pay a penalty on top and that certainly wouldn't make him any more welcome.[245]

The danger in *Dandridge* is the subtle discrimination. It is certainly rational for the Court to decide that there was only a finite amount of resources to be divided among all the families, and why penalize smaller families.

Perhaps an analogy to seat belts is applicable. After it had been conclusively demonstrated that seat belts could substantially reduce injury from accidents, they became mandatory. Gradually shoulder harnesses also became mandatory, and recently an alarm was sounded if the car was started without engaging the safety belt. This year new cars will not start unless the seat belt is engaged. However, in the effort to reduce the *impact* of accidents, the *cause* of at least half of all traffic fatalities—drunken driving— has largely been ignored. Wearing safety belts is hardly *de minimus*, but continued emphasis on external change (safety belts, safer cars) may obscure the need to change our attitudes and tolerance of the causes.

The main point is to demonstrate once again the dangers of misap-

243. 397 U.S. 471 (1970).

244. For a more extended analysis of *Dandridge* with emphasis on population effects *see* 84 HARV. L. REV. 1856 (1971).

245. *Fox, supra* note 224, at 44.

plying a balancing test. The *Dandridge* rationale makes sense only as long as the assumption about finite resources is not questioned. When the issue of the propriety of such a priority is raised, the decision becomes less clear. This is not to claim that the Court would necessarily decide differently or to claim *Dandridge* is a bad decision. *Dandridge* is an ambiguous decision—or at least the criteria for judging it are ambiguous. In a real sense most of the controversies decided by the Court are; certainly most of the future decisions concerning population control will be. The issues are so large and the stakes so high, only the most careful and honest balancing test must be used. It would hardly be surprising for those with power and influence to attempt to distribute any future costs or blame to other segments of our society. To the extent we do not want to squarely face our responsibility for these problems, we will aid this discrimination. The seductive simplicity of a small change in the tax code or welfare structure must not be substituted for a cogent delineation of the issues involved. We cannot expect technology to save us and we cannot afford to adhere rigidly to any platitudinous *ipse dixit*, such as "the sanctity of life is inviolate." We must first realize that our failure to recognize the gravity of the problem and, therefore, to adjust our reproduction are fundamental causes of our dilemma. This means a clear disavowal of the all too common present attitudes of ignorance, indifference, ambivalence, and hostility. Only then is it reasonable to expect to focus clearly on balancing the individual's right to be left alone against society's need for order and stability. Our entire way and quality of life may depend on the choices we make or abstain from making in the next few decades.

APPENDIX A

Connecticut Legislation Relating to Birth Control (prior to *Griswold*)

Conn. Gen. Stat. (1958 revision)

Tit. 53 Crimes

Ch. 939 Offenses against the Person

Section 53-32. Use of drugs or instruments to prevent conception.

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 imimprisoned not less than sixty days nor more than one year or be both fined and imprisoned.

Tit. 54 Criminal Procedure

Ch. 959 Jurisdiction and Powers of Courts

Section 54-196. Accessories.

Any person who assists, abets, counsels, causes, hires, or commands another to commit any offense may be prosecuted as if he were the principal offender.

APPENDIX B

Massachusetts Legislation Relating to Birth Control

Mass. Ann. Laws (1956)
(prior to 1966 revision)

Tit. 1. Crimes and Punishments

Ch. 272, Crimes against Chastity, Morality, Decency and Good Order

Section 20. Penalty for advertising, etc., notices, etc., of means to procure abortion.

Whoever knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper, notice, advertisement or reference, containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictious, from whom, or to any place, house, shop or office where, any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, or any advice, direction, information or knowledge, may be obtained for the purpose of causing or procuring a miscarriage of a woman pregnant with child or of preventing, or which is represented as intended to

prevent, pregnancy, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two and one half years or by a fine of not more than one thousand dollars.

Section 21. Other offenses against decency.

Whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away any instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception of, for causing unlawful abortion, or advertises the same, or writes, prints or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article, shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one-half years or by a fine not less than one hundred nor more than one thousand dollars.

Legislative revision in 1966 added section 21A.

A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception, nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device.