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THE CONNECTICUT BIRTH CONTROL BAN AND PUBLIC MORALS

RICHARD J. REGAN, S.J.*

ON MAY 23, 1960, the United States Supreme Court agreed to review on appeal the constitutionality of the Connecticut legislation which bans the sale, prescription or use of contraceptives.¹ Not since 1952, when the Court resolved the explosive problem of released time for the religious instruction of public school pupils,² has the Court considered an issue so emotion-packed for Americans of different religious and ethical persuasions. Just how this case reached the Supreme Court and what central issues are raised by the appeal will be described here.

Two years ago, Dr. C. Lee Buxton and several of his patients, residents of New Haven, petitioned the courts of Connecticut to declare the birth control ban void. When the case reached the Supreme Court of Connecticut, Chief Justice Raymond E. Baldwin, speaking for a unanimous court on December 8, 1959, rejected the plea of Dr. Buxton and his patients.³ Immediately following this decision, the plaintiffs appealed to the United States Supreme Court, and this spring the Supreme Court agreed to review the case.

Dr. Buxton, a specialist in obstetrics and gynecology and Chairman of the Department of Obstetrics and Gynecology at the Yale University School of Medicine, claims that the general statutes of Connecticut prevent him from giving his patients counsel on contraceptives. Specifically, the pertinent statute provides:

Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned.⁴

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¹ *Buxton v. Ullman*, 362 U.S. 987 (1960).

² *Zorach v. Clauson*, 343 U.S. 306 (1952).

³ *Buxton v. Ullman*, 147 Conn. 48, 156 A.2d 508 (1959).

⁴ CONN. GEN. STAT. §53-32 (1958).

Another section adds:

Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender.⁵

These statutes, Dr. Buxton avers, keep him from fulfilling his professional duty of giving his patients the safest and best founded prescriptions of medical science. Sixty-six deans and doctors from the nation's medical schools have filed a brief in support of Dr. Buxton's plea.

Joined with Dr. Buxton in the action before the Supreme Court are several of his patients, who for the sake of anonymity have employed fictitious names. Mrs. Jane Doe, twenty-five years old, barely survived a difficult pregnancy. The result was a still-born child and partial paralysis for Mrs. Doe, who now seeks from Dr. Buxton advice on how to lead a "normal married life" without seriously endangering her health. Since, in her view, Dr. Buxton can give this advice but is prevented from doing so by the Connecticut law, she claims that the law unreasonably abridges her right to marital relations without serious risk to life.

Another patient, Mrs. Pauline Poe, twenty-six years old, has given birth to three abnormal children. Although the underlying mechanism is as yet unclear, Dr. Buxton and other consultant specialists suspect a genetic cause. Mr. and Mrs. Poe are upset at their prospects of future children and now seek advice from Dr. Buxton on how to enjoy marital relations without fear of conceiving abnormal children. As a result of the Connecticut law, Mr. and Mrs. Poe claim, Dr. Buxton is prevented from giving this advice and thus the law unrea-

sonably restricts their right to marital intercourse without fear of conceiving abnormal children.

On the one hand, Dr. Buxton claims the right under certain circumstances to give professional counsel on contraceptives and, on the other hand, his patients claim the right under the same conditions to receive and follow this counsel. Yet, as Chief Justice Baldwin observed, there is essentially no real difference in the nature of the rights claimed by doctor and patients. The doctor's right to give counsel on contraceptives is clearly dependent on the patient's right to follow the counsel.

Whether the Connecticut legislation completely circumscribes the advice of doctors to their patients on contraceptives is quite doubtful. Resident doctors who simply disclose the findings of medical science on contraceptives as a matter of information, rather than counsel their use as a matter of prescription, cannot be considered accessories to subsequent violations of the law on their patient's own initiative. Nor is it clear just how many residents find the Connecticut legislation a barrier to the practice of birth control. As a matter of common knowledge, the dominant pattern of contemporary American sexual mores does not change abruptly at the borders of the state of Connecticut. There is no indication that Connecticut enforces, or even could enforce, the ban on the use of contraceptives. Couples who practice artificial birth control may purchase contraceptives in or from neighboring states. Thus, the observer cannot avoid the conclusion that the significance of this plea of Dr. Buxton and his patients is in large measure symbolic.

Yet, controversies over symbols very often are fought more bitterly than controversies over realities. Despite almost yearly

⁵ CONN. GEN. STAT. §54-196 (1958).

attempts in the last twenty years to induce the legislature to modify the ban, the practice of artificial birth control in Connecticut by married couples remains a criminal act. Those who believe the practice morally justified resent the criminal stigma attached to the practice by the Connecticut law, even though actually unenforced. Frustrated by the legislature's repeated refusal to modify the law, they have turned to the courts in the hope of relief. With this test case now before the Supreme Court, the climax is at hand.

The question put before the Court by this case is whether the Connecticut birth control legislation is a reasonable exercise of the state police power over the health, safety, morals and welfare of citizens. Does the Connecticut legislation unreasonably restrict the rights of Mrs. Doe and Mrs. Poe to marital relations and the professional right of Dr. Buxton to counsel his patients? The key words, of course, are "reasonable" and "unreasonable."

Dr. Buxton's patients claim that the right to marry, including the right to marital relations, is a fundamental human right protected by the Fourteenth Amendment against arbitrary state action. The Connecticut legislation, the patients further contend, does arbitrarily restrict their rights to marital relations. No doubt, strictly speaking, Connecticut does not deny the right of marital relations to Mrs. Doe and Mrs. Poe. Rather, Connecticut prohibits one mode of sexual relations to the married and the unmarried alike. As Chief Justice Baldwin pointed out, the law gives Mrs. Doe and Mrs. Poe the alternatives of marital intercourse with risks or sexual abstinence. Nonetheless, given the physical condition of Mrs. Doe and Mrs. Poe, they have little real alternative to at

least partial sexual abstinence, if they wish to obey the law.

What reasonable basis, then, can Connecticut assign to this restriction on the marital relations of Dr. Buxton's patients? Attorneys for the plaintiffs contend that the birth control legislation cannot reasonably claim to combat promiscuity when the state permits the prescription, sale and use of contraceptive instruments to prevent disease. In fact, by a curious bit of legal legerdemain, Connecticut does permit as prophylaxis what the state prohibits as contraception. Yet, it is not contradictory for the state to permit contraceptive practices specifically in order to prevent disease and to prohibit the same practices under all other conditions in order to combat promiscuity. Connecticut permits the prescription, sale and use of contraceptive instruments only as prophylactics. The state may still seek to discourage sexual relations outside of marriage by prohibiting contraception under all other conditions.

But if the purpose of the law is to discourage sexual relations outside of marriage or to insure a stable or expanding population, then plaintiffs' attorneys further argue that with respect to Mrs. Doe and Mrs. Poe the Connecticut law has "cast its net too indiscriminately" and, to mix metaphors, "burnt the house to roast the pig." For, if the legislation is designed to discourage sexual relations outside marriage, why should Connecticut forbid the practice of artificial birth control to married couples? And if the legislation is designed to insure a stable or expanding population, why should Connecticut forbid the practice of artificial birth control to Mrs. Doe and Mrs. Poe, who have no apparent possibility of normal pregnancy or normal children?

Of necessity, legislators preparing remedies for dangers to the commonwealth must look to the general and typical instance rather than the particular and the unique. Perhaps, then, Connecticut universally forbids the practice of contraception as a means to prevent those evils which will be the general and typical results from the practice, namely, the encouragement of promiscuity and the threat to a stable population. If this be the case, then Connecticut forbids the practice of artificial birth control to Mrs. Doe and Mrs. Poe simply because the general prohibition facilitates enforcement against more typical abuses. Still, Mrs. Doe and Mrs. Poe may wonder exactly how application of the birth control ban to them helps enforce the law against the main evils attributed to the practice of contraception.

But there is another more all-inclusive reason for the Connecticut legislation which is directly applicable to the cases of Mrs. Doe and Mrs. Poe. The universality of the ban on contraceptives clearly suggests that the State of Connecticut seeks not only to discourage illicit relations outside marriage but to regulate sexual morals within marriage as well. Connecticut declares that the practice of contraception as such, whether outside marriage or not, constitutes a violation of public morals. In short, Connecticut simply aims to exercise the general power of a state to safeguard public, including domestic, morals.

Mrs. Doe and Mrs. Poe, of course, dispute the judgment of the legislature of Connecticut that their practice of contraception would violate public morals. But here the plaintiffs face the difficult task of persuading the Court to overrule the judgment of Connecticut on the nature and extent of legislative protection of public morals. The plaintiffs do not suggest that the Court rely

on its own determination of the public morality of birth control in order to set aside the Connecticut law as unreasonable. Legislatures and not courts, after all, are primarily entrusted with determining what violates and how best to protect public morals. Rather, the plaintiffs contend that the Court should test the reasonableness of legislative prescriptions of public morals by contemporary community standards. Hence, the plaintiffs ask the Court to declare the Connecticut legislation unreasonable because the most current religious and ethical opinion accepts the morality of birth control by married couples and because medical opinion today generally recommends the practice of birth control as physically safe and psychologically sound.

And yet, why should not the Court, even following the test proposed by the plaintiffs, accept the judgment of the legislature rather than a survey of religious, ethical and medical opinion as the expression of contemporary community standards on this question of public morals? And if, as the plaintiffs assert, the community approves the morality of birth control by married couples, then why should not the legislature rather than the Court take the measure of this popular sentiment?

The plaintiffs further intimate that the Connecticut birth control ban is incompatible with the pluralistic principles of American democracy. For the Connecticut legislation imposes the code of morality of a particular belief on citizens of other religious and ethical persuasions. Catholics, almost alone among religious and ethical groups today, condemn contraception as an immoral means of family planning and, in the main, appear to support the present legislation. Yet, ironically enough, while many Protestants currently seek to modify the

birth control ban, the law owes its origin in 1879 to their own great-grandparents. In any case, however, the Connecticut birth control law is an expression of the popular will by a legislative majority, not a minority. Nor is it easy to see how any legislation on a question of public morals, whether wise or unwise for a pluralistic society, could fail to impose the code of morality of some in the community on others.

The issue between Dr. Buxton and his patients on the one hand and the State of Connecticut on the other is joined. Undoubtedly, the plaintiffs might have an easier time persuading the Court of the unreasonableness of the Connecticut legislation if the plaintiffs could show some circumscription of freedom of conscience. First Amendment rights, in fact if not in theory, have a preferential status in our democracy. Undoubtedly, too, the State of Connecticut might have an easier time persuading the Court of the reasonableness of its legislation if the state could show some socio-economic basis for the birth control ban in this case.

But the fundamental issue as related to Dr. Buxton and his patients directly involves neither the freedom of conscience of the plaintiffs nor the economic good of society. The fundamental issue here is the nature and extent of the power of a state over public morals. The implications of this issue are far reaching. If the plaintiffs are successful here in persuading the Court that a state has no power to prohibit the practice of contraception by Mrs. Doe and Mrs. Poe, then it is difficult to see how a state could regulate other areas of public morals. Is the legislative prohibition of acts by freely consenting adults reasonable only when the acts prohibited as immoral invade the vested rights of others or threaten society with serious physical evil? If so, then could a

state prohibit homosexuality between consenting adults or even voluntary euthanasia to incurably ill patients?

In essence, the question raised by this case is whether a state may prohibit actions simply because they seriously and adversely affect community *morals* independently of any injury to another, and of any threat of physical evil to society. Aristotle expressed the position of classical philosophy on the formative function of legislation in the moral education of citizens thusly:

Lawgivers make citizens good by developing in them habits of right action — this is the goal of all legislation, and if it fails to do this it is a failure. . . .⁶

But for the modern libertarian heirs of Locke, Hobbes and Rousseau, political freedom means the absolute freedom of the autonomous individual, save what the individual must surrender to the state in order to substitute peace for the “war of all against all.” Thus, law becomes simply the power to insure peace, not virtue. Political freedom becomes divorced from moral virtue and political liberty from moral rectitude. There is no room in this scheme of things for legislative participation in the moral formation of citizens.

Of course, no state may legislate private morality; whether seeking to protect health, safety, welfare or morals, the area of the state’s legitimate competency is restricted to what affects the community as a whole. Yet, human activities are so interwoven that scarcely any are without some measure of social significance. We live in a human beehive and by our behavior each of us affects others and the whole. The really difficult problem is to determine to what degree and with what result individual activities affect

⁶ ARISTOTLE, NICHOMACHEAN ETHICS, 1103b, 3-5.

the public interest. This in turn depends on how widespread the activity and how bad the effect.

The Connecticut birth control legislation, so one objection runs, invades the privacy of the marital bedroom. But this objection is irrelevant to the proper question of how the practice of contraception by individuals affects the community. However privately enacted, an activity may still adversely affect the public interest. Connecticut has judged that the danger to community morals from the widespread practice of birth control is sufficient to justify the present legislation.⁷ Again, the Supreme Court confronts the legislative evaluation of a factual situation.

Dr. Buxton and his patients contest the power of a state to prohibit as a matter of public morals the practice of artificial birth control. But it is another question whether the Connecticut birth control ban is wise legislation. Not every legislative prescription of public morals within the power of a state is a wise exercise of that power. "Human law," as St. Thomas Aquinas acknowledged seven centuries ago, "cannot

⁷ An apposite case on this point is *Mugler v. Kansas*, 123 U.S. 623 (1887). The Constitution of Kansas, adopted in 1880, prohibited the manufacture and sale of intoxicating liquors. Mugler was convicted of manufacturing and selling beer. On writ of error to the United States Supreme Court, the appellant claimed in part that the legislature had no right to prohibit any citizen from manufacturing for his own use any article not affecting the rights of others. Mr. Justice Harlan, speaking for the Court, rejected this claim. The entire scheme of prohibition might fail if the right of each citizen to manufacture intoxicating liquors for his own use were recognized. In other words, Mugler's activity, if imitated, would affect the community's standards and practices. According to Mr. Justice Harlan, the Kansas legislature might reasonably conclude that total prohibition was necessary to prevent the evils of excessive drink.

prohibit everything which the natural law prohibits."⁸ Rather, human law is a determination of practical reason which should take full measure of the conditions of possibility, the weakness of human nature and the living traditions of a people.

One practical difficulty with the Connecticut birth control ban is the impossibility of enforcement. Since neighboring states permit the sale of contraceptives, Connecticut cannot hope to prevent their use by married couples. At best, the Connecticut legislation serves only as a declaration of public policy; at worst, legislation so widely disobeyed encourages disrespect for all law. In this matter, Americans have only to recall the legacy of national prohibition.

A second major objection to the wisdom of the Connecticut birth control legislation stems from the pluralistic character of the American polity. Some accommodation among citizens of different religious and ethical beliefs on the legislative protection of public morals is a necessary part of political wisdom. Harmony among citizens is required for the common good. Of course, such accommodation by the nature of things is relative to time, place and subject matter. Yet, in the case of artificial birth control, practical reason may suggest that Connecticut modify its legislation. The minds of many moderns, unaided by the authoritative instruction of the Church, do not conclude that artificial birth control in all circumstances is immoral. So many conscientious non-Catholics believe the practice of birth control morally licit that the present legislation, without any compensating hope of enforcement, may unjustifiably

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⁸ *SUMMA THEOLOGICA*, I-II, q. 96, art. 2, ad 3.