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GOVERNMENT BIRTH CONTROL: REPLY TO MR. SIRILLA, S. J.

WILLIAM B. BALL*

Background to a Controversy

As has been noted, divergent views have been taken by Father Hanley and myself on the interesting subject of government birth control. It is gratifying to note that in some ways the divergence has decreased: the position expressed by Father Hanley in his May 6, 1966 statement before the National Conference on Family Planning is closer in significant respects to my own position than was his original position on the subject, expressed in statements which he made August 9, 1965 before the Family Law Section of the American Bar Association and August 24, 1965 before the Gruening Committee.

Those earlier statements are of importance in the present controversy over government birth control in both its political and legal aspects. Their political importance derives from the fact that the controversy has arisen mainly out of objections raised by Roman Catholic spokesmen. For decades, moreover, public disputes over birth control have largely centered upon questions raised by Catholics. Until very recently these disputes have concerned not sponsorship by government of birth control programs but instead statutes penalizing private birth control activity, whether by individuals or by private clinics. Connecticut was long an arena of the most bitter controversy over such statutes.

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4 See Bromley, Catholics and Birth Control 139 (1965).
making criminal the sale or use of contraceptives was based upon the Catholic moral doctrine that contraception was morally evil. It was about this pivotal point of Catholic moral teaching on contraception that the whole Catholic public objection swung. Later, when in Chicago, New York City and at the federal level, birth control activity by government began to appear, precisely the same basis of objection was voiced by Catholics. The entry of government into the field, however, was also defended by Catholics, and most notable was the defense presented by Father Hanley before the ABA. Father Hanley's ABA statement included a statement signed by fifty-seven Catholic laymen and clergymen which asserted it to be legitimate public policy for government to "give information and medical assistance concerning medically accepted forms of family planning."\(^5\)

What was arresting both about the statement of the fifty-seven Catholics, as well as about the text of Father Hanley in which it was quoted, was the fact that both the laymen and Father Hanley—precisely like the aforementioned Catholic spokesmen on birth control legislation—saw the Catholic moral teaching on contraception as the sole issue involved. Neither of the two groups seemed able to resist the magnetic pull of this single point. This parochialism has dogged the government birth control question down to the present hour. Catholics upon both sides of the issue have seemed to be unable to think of it except in terms of the morality, under Catholic doctrine, of contraception. This narrow focus of concern upon a public issue, while understandable, scarcely comports with the spirit, now emerging in the Roman Catholic Church, of an increased interest in the common good going beyond the bounds of specifically Catholic doctrinal or institutional concerns. The statements of Father Hanley and the "57" indeed touched upon the problem of governmental coercion and of free choice, but they did so solely in terms of governmental coercion of the Catholic conscience, free choice for the Catholic. Father Hanley's ABA statement, for example, recites:

The sticky point for many is in the fact that, in so encouraging research and setting up programs the Government gives information and materials on methods which are deemed by many to be morally objectionable.\(^6\)

Again:

While the people of the United States may have a legitimate right to set up tax-supported programs for family planning, this does not mean that the program can be imposed willynilly on the public. There must be, for instance, a recognition of the rights of those who feel that certain practices are immoral.\(^7\)

The "57," on the subject of coercion and free choice, also limited themselves to considerations of the morality, under Catholic doctrine, of contraception. What is remarkable in all of this earlier careful comment upon government birth control is its failure to look beyond the moral

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\(^5\) Quoted by Hanley in *Hearings on S. 1676 Before a Subcommittee on Foreign Aid Expenditures of the Senate Committee on Government Operations*, 89th Cong., 1st Sess., 1273, 1275 (1965).

\(^6\) *Ibid.* (Emphasis added.)

\(^7\) *Id.* at 1276. (Emphasis added.)
position of the Roman Catholic who is on public assistance and to even so much as ask whether there might exist any other problem respecting government birth control for the poor generally. These statements said, in effect: “If only the Catholic is taken care of, government not merely can, but should, later enter into birth control programs for the poor.” And this meant at best relatively little because of the low percentage of Catholics on the public assistance rolls or living in target areas for anti-poverty programs. The statements were even more baffling in their insouciance respecting the poor and their total lack of awareness that any problem of invasion of privacy could conceivably be involved in government family-planning programs for the poor. To the “57” and to Father Hanley no problems whatever were posed by these considerations. More exactly, these were not considerations at all.

That they were not considerations at all seems most unfortunate in view of the special place which the poor occupy in the Christian tradition, and in view of the present mounting concern of the Catholic Church over the right of privacy, the sacredness of the right of generation, the dignity and individuality of persons in relation to the state, the integrity of the family. If serious thought were devoted to the topic of governmental family planning, it was at least conceivable that Catholic spokesmen, addressing themselves to the public upon an issue which they, at any rate, deemed so significant, would at least have speculated upon problems which the government programs might raise relating to the poor and their privacy. Since Father Hanley and several of the “57” were attorneys, they might also have pondered the propriety (or legality) of effectuating these programs by executive order rather than through legislative processes. And in their overall consideration of the programs, they might have done some public wondering over the advisability of the including of unmarried persons in them, the legal definition of the term “family planning” and the possible relationship of such programs to those ends of population control which their proponents so continually emphasize. Yet not a single one of these grave matters came into the scope of the statements.

Father Hanley’s address of May 6 before the National Conference of Family Planning, while failing to address itself to several of these fundamental questions, nevertheless had the merit of at last conceding that the coercion-privacy issue is a valid issue to be dealt with. His paper amounted, indeed, to a justification of government birth control in principle, while hedging that principle about with numerous concerns respecting coercion and rights of privacy. It was principally these issues with which my testimony before the Gruening Committee in August, 1965 had dealt. Those of us who originally argued that government birth control programs give rise to these issues can be gratified that such issues are now receiving attention.

It is clear that these issues, moreover, do not involve the problem now being considered by Pope Paul, relating to the deliberations of the Papal Commission on birth control. For the same reason, a position taken on these issues by churchmen, mitigating against adoption of given
government birth control programs, should not be subject to the charge that such position is an attempt to impose one particular religious group’s morality upon everyone.

Testimony Before Gruening Committee

My testimony before the Gruening Committee was that of an attorney representing one particular religious group, namely, the Pennsylvania Catholic Conference, an agency jointly created by the eight Catholic dioceses of Pennsylvania. I was at the same time officially authorized to state that my testimony “has been reviewed by the National Catholic Welfare Conference and is made with its express approval.” In the capacity of attorney I argued for a position taken unanimously, after much deliberation, by the Catholic bishops of Pennsylvania. The crux of that position is found in the following words in my testimony:

[W]e believe that if the power and prestige of government is placed behind programs aimed at providing birth control services for the poor, coercion necessarily results and violations of human privacy become inevitable. Mr. Sirilla, after examining reasons which I advanced on behalf of this position, goes on to present the position taken unanimously, after much deliberation, by the Catholic bishops of Pennsylvania. The crux of that position is found in the following words in my testimony:

[W]e believe that if the power and prestige of government is placed behind programs aimed at providing birth control services for the poor, coercion necessarily results and violations of human privacy become inevitable.

Mr. Sirilla, after examining reasons which I advanced on behalf of this position, goes on to present the position taken by Father Hanley at the same hearing on the same day. While he describes our testimony as “conflicting,” he fails to show that there was any real conflict between Father Hanley and myself upon that point. As I have pointed out, and as Mr. Sirilla points out, Father Hanley’s testimony dealt solely with the availability of free choice to persons whose moral principles rule out contraception—Catholics, in other words. Father Hanley’s testimony never touched upon the privacy issues raised in my testimony. That makes comparison of our respective testimonies largely impossible. Mr. Sirilla nevertheless attempts the impossible by examining my arguments respecting the right of privacy and comparing them with Father Hanley’s arguments about religious freedom. He precedes this, however, by a discussion of what is meant by coercion in the premises, beginning with an analogy to the school prayer cases which I employed. He is entirely correct in his statement that these cases were formally decided upon the basis of the establishment clause of the first amendment. I had described at considerable length this holding in a two-part series of articles in The Catholic Lawyer in 1962 and have recognized it in other articles since published.

Mr. Sirilla, however, stops at the surface of these decisions and fails to ask why it might be that the Court found “establishment” in the school situations it there examined. I think there can be no answer other than because it found children in these situations. It seems most unlikely that the Court would declare publicly sponsored praying in legislatures an unconstitutional practice. The federal chaplain-

9 Id. at 1300-01.
cies go constitutionally unchallenged. Who is affected and in what situation appears to be the key to the question of whether there is an establishment of religion. The school prayer decisions appear to tell us that even a breath of state sponsorship of religion, in the situation in which child and state (personalities vastly unequal in power) encounter one another, is to be categorized as invasive and forbidden, that is, as an establishment. No one, then, will be put to having to show coercion. The Court was undoubtedly aware that proof of coercion in such a situation is extremely difficult. It would not be a simple thing to get child witnesses to provide reliable answers (in relation to public school religious programs) to such questions as: "Were you coerced? Did you feel teacher made you or wanted you to recite the Bible verses?" The Court, with great practicality, avoided the problem, but achieved protection of the child, by declaring a ban, across the board, on all such practices. The Court, in Engel v. Vitale, in resting its decision upon the establishment clause, pointed out the "indirect coercive pressure" resulting "when the power, prestige and financial support of government is placed behind a particular religious belief." The Court in Abington School Dist. v. Schempp recited at length quotations from the expert testimony adduced at the trial showing psychological harm alleged to be done to children by the religious practices there in question. Stating its doctrine of "neutrality," it said:

And a further reason for this neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state.

Mr. Sirilla, on the contrary, gives us to understand that coercion would not be constitutionally significant in a case involving the state and children in relation to religion. Here I should commend to him the reading of Meyer v. Nebraska, Pierce v. Society of Sisters, and other cases expressive of the extreme sensitivity of our courts to child-state relationships.

Thus a comparison between the situation found in the school prayer cases and the public assistance-birth control situation appears both valid and useful.

Mr. Sirilla next reveals, however, his unfamiliarity with the right of privacy as my testimony had argued it. How widely he missed my point is seen in the following statement in his article:

If his [Mr. Ball's] reference to these cases implicitly meant that he felt government supported family-planning programs would be a violation of the establishment clause of the first amendment and thereby indirectly coerce the consciences of the minority, it would still be necessary to show how the activity in question, in its purpose and primary effect, is one that advances or inhibits religion.

This shows that Mr. Sirilla, too, is so magnetized by concerns over "Catholic rights," that he cannot see that some other rights (say, the right of privacy of non-Catholics) could possibly have entered into my head to discuss.

13 Id. at 222.
14 262 U.S. 390 (1923).
15 268 U.S. 510 (1925).
Mr. Sirilla similarly analyzes *Griswold v. Connecticut* primarily from the point of view of the Catholic moral doctrine of contraception. He points out that S.1676 "does not favor any particular method or methods as did the Connecticut statute. . . ." He thus misses not only the significance of the *Griswold* case but also of the argument which I derived from it. I had simply said that the Court in *Griswold* essayed at length upon the right of privacy and, in particular, this right in the conjugal relationship. The teaching of *Griswold* has the plainest relevance to governmental programs of birth control. On this, however, I am not sure where either Mr. Sirilla or Father Hanley stand. Do they say that this teaching is not of relevance to such programs?

I find myself in total disagreement with Mr. Sirilla's statement that, since "the poor, in recent years, are becoming more aware of their legal and constitutional rights," it may be questioned "whether a general practice of coercion and invasion of the right of privacy of the poor in birth control programs, as feared by Mr. Ball, would occur or whether it could continue without being effectively challenged." Here we differ deeply in our estimation of what may be fairly generalized as the psychological condition not merely of the poor, but, categorically, of those poor who are on public assistance. If one will admit that the person on public assistance has absolutely nothing with which to bargain, one must also admit as a fact that psychological factors of mental acuteness and personal confidence are often entirely lacking in these people. Father Hanley's statement of May 6, 1966, comes very close to my own, in this regard, when he says: "Great ingenuity and persistent efforts will be required to eliminate indirect coercion. . . ."17 Unhappily, neither he nor Mr. Sirilla give us any detailed statement of the administrative techniques whereby such indirect coercion will be avoided. I do not deny that here there is an area for searching discussion by lawyers, but I do remark that while there is much blithe reference to "adequate protections" there has been no spelling out of these by those who advocate government birth control programming.

Father Hanley and Mr. Sirilla both accept as a fact that there exists a population explosion necessitating population control. Respecting this assumption, two questions need to be raised so far as state or federal governmental birth control questions are concerned. The first question goes to the facts of the assumed explosion. Speculation concerning world population growth gives rise to many sorts of questions. The population density of India is less than that of West Germany (which is importing people). Some American states are losing population, while in many states open space is increasing as urban center populations increase. What density of population or rate of population increase furnishes a reason for governmental population control programs? Jurisdictionally, may density or growth in New Jersey (or in India or Switzerland) afford justification for a pop- 

13 381 U.S. 479 (1965).
ulation control policy in Missouri? Such questions are not idle. Pennsylvania's Department of Public Welfare embarked last December upon a broad birth control program for people on public assistance upon the stated justification of the "world-wide population explosion."¹⁸

Where, as in Pennsylvania, the public authority states that its program is aimed at reducing the population explosion, and where the total impact of that program is limited to the single group of the poor, are we not justified in resisting such a program? I should think that this would be a first essential. Where the proponents of such programs have manifested sufficient civic responsibility to attempt to include in the programs administrative protections, the latter should of course be carefully and fairly examined. Here I should remark that failure to examine specific programs is one of the singular failings of those who have been defending government birth control in principle. For the attorney, such examination means at least three things so far as government birth control programs are concerned: (a) to inquire whether the program is actually legally authorized; (b) to evaluate the provisions of the program; (c) to, in that connection, see whether the terms and standards set forth in the program are certain in meaning or whether, perchance, they possibly contain, by virtue of vagueness, grants of power unduly broad.

As to legal authorization, one of the more unsavory aspects of government birth control programs has been the fact that, with few exceptions,¹⁹ they have been bootlegged into public policy through the back door of executive order rather than through legislative deliberation and enactment. The programs have been variously justified as personal health,²⁰ societal "health,"²¹ welfare,²² and population control measures²³ under broad definitions of these terms or no definition of these terms.²⁴ S. 1676 has at least the merit of being a legislative proposal, Senator Gruening recognizing (as some agencies of the federal government have not) that anything so distinctive and significant in nature as a worldwide population control scheme ought, if adopted by the United States, first to pass legislative testing.

As to evaluation of programs, it is to be feared that a psychology is taking hold in the United States that government birth control programs, assumedly so completely in the good interests of humanity, should be immune to evaluative processes prior to adoption. That is to say, that

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²³ Ibid.

government birth control is a thing good in itself. The "57" qualified this by a plea for protection of Roman Catholics: beyond this they could apparently imagine no sort of objection to any sort of program. The recently adopted birth control program of Pennsylvania permits initiation of birth control discussion by a caseworker who subjectively determines that the public assistance recipient has a "serious problem of family functioning." Since traditionally in Pennsylvania, great significance had been attached to the power of the state to initiate such discussion (in view of concerns respecting governmental persuasion of the poor), the delegation of an unbounded power to determine "serious problems of family functioning" was not improperly a basis for legal concern.

As to definition of terms, it is apparent that no less care should be taken for certainty in terms in the field of government birth control than in the field, say, of industry regulation. Due precisely to the fact that families are involved in "family planning," I should think that the bar should insist upon a definition of that term in any statute or regulation employing it. As a simple legal fact, no one knows what it means, how much or how little it encompasses. Father Hanley never questions whether it may be, on the one hand, a palatable euphemism for birth control or, on the other, perhaps a prescription to a state agent to take upon himself the reordering of a series of personal (including sexual) relationships which fail, according to the caseworker's lights, of proper "functioning." Mr. Sirilla never once, in comment upon the Gruening Bill, asks himself or tells us what is meant by the term "population control" which it so prominently employs. If the answer of either is that we must repose trust in "the capabilities of men of good will," I would agree—after we have done our job as lawyers to see that the capabilities of both the good-willed and the bad-willed are reasonably confined in reasonably clear terminology.

These three points, I believe, represent the functions of law in relation to government birth control. The rest is policy. Law, however, can play a role in guiding policy. Insights and ideas borrowed from many areas of our constitutional jurisprudence may be useful in informing public policy. Such was the purpose of my allusions to various areas of our constitutional law where the weak and the distressed encountered the state. The legal problem chiefly posed by government birth control programs for the poor is not a problem in Bills and Notes to be straightjacketed in mechanical concepts of precedents. To urge that, in considering rights of privacy in these programs, one may not borrow from constitutional cases arising in other than government birth control cases—say, in criminal cases—is to exhibit unfamiliarity with the methods of constitutional adjudication long pursued by our courts. Look, indeed, to the

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GOVERNMENT BIRTH CONTROL

(Continued)

opinions of the Supreme Court justices in Griswold! The opinion of the Court, written by Mr. Justice Douglas, 27 ranged over the greatest variety of sources in the decided cases for its inspirations and concepts—cases involving private schools, 28 freedom of reading, 29 freedom to teach, 30 freedom of association, 31 search and seizure, 32 and self-incrimination. 33

At a lawyers' meeting at Washington, last February, I heard the right of privacy in government birth control programs described as having "no foundation in the law reviews." Neither did any of our now


recognized civil rights a half century ago. New developments require new legal thinking. The right of privacy in relation to government birth control has been little considered due to fears over population growth and (upon the part of some Catholics) due to fears that the Church be seeming to impose its particular views respecting the morality of contraception upon the whole of a religiously plural society at the dawn of an age of ecumenism and a time of a new awareness of the Secular City. I see no inconsistency between the spirit of one who wholeheartedly greets this dawn and of the lawyer whose task remains the law. I stress this because technological and social forces of our time mount threats to human privacy which law alone will suffice to counter. If we are to have government birth control in any stable form in the future, now is the time to be civilizing it and lawyers must be the conscience of the movement to do so.