FAMILY PLANNING AND THE RIGHTS OF THE POOR

GEORGE M. SIRILLA, S.J. *

Introduction

THE 89th CONGRESS will long be remembered for its numerous and progressive enactments aimed at carrying out President Johnson's "Great Society" programs to help the poor and disadvantaged of this country enter into the mainstream of American life and make their own contributions to it. One of the proposed bills considered, though not enacted by this Congress, and at least partially contemplating the poor as its beneficiaries, was a bill that was criticized for the reason, among others, that in its administration it would infringe the rights of the poor. This bill was S. 1676, submitted by Senator Gruening of Alaska on April 1, 1965, and directed at population problems in this country and in the world.

In testifying on this bill before Senator Gruening's subcommittee, on August 24, 1965, Mr. William B. Ball, representing the Pennsylvania Catholic Conference, stated that it was "plainly and simply, a bill for the establishing of a domestic and international birth control program," 1 and that "the public power and public funds should not be used for the providing of birth control services." 2 He stated his belief that "if the power and prestige of government is placed behind programs aimed at providing birth control services to the poor, coercion necessarily results and violations of human privacy become inevitable." 3


1 Hearings on S. 1676 Before a Subcommittee on Foreign Aid Expenditures of the Senate Committee on Government Operations, 89th Cong., 1st Sess., 1300 (1965) [hereinafter cited as Senate Hearings].

2 Ibid.

3 Id. at 1300-01.
Earlier on the same day, Dexter L. Hanley, S.J., also testified on S. 1676 before Senator Gruening's subcommittee. Fr. Hanley's testimony likewise recognized the important rights of the poor that must be considered in programs of this type, but he concluded that if these rights are properly protected (and he felt they could be properly protected), and if certain other conditions are satisfied, the government could properly act in the area of family planning, with the support of Catholics, and public funds could be used for this purpose. The testimony of Fr. Hanley and Mr. Ball have been previously considered and reviewed by this writer, and Mr. Ball has replied to that review.

On November 14, 1966, the National Catholic Welfare Conference, with the unanimous approval of the United States Bishops assembled for their meeting in Washington, issued a statement on government and birth control. This statement, referred to hereafter as the "Bishops' Statement," has been criticized for alleging that there are government activities seeking to coerce the underprivileged to practice birth control and invading their rights of human privacy in the intimate details of married life.

In this paper, the "Bishops' Statement" will be considered along with a re-examination of Mr. Ball's coercion-privacy theory insofar as domestic programs are involved, and comments will be offered in response to the reply of Mr. Ball to my earlier article. In addition, state and federal activity in family-planning programs will be examined.

While family-planning programs supported by the federal government may be argued to be extendable to all and not just the poor, for example, on the ground of being a legitimate concern of the federal government, I will be concerned, in this paper, mainly with the rights of the poor and underprivileged. Reference will be made to the question of whether or not the poor have the right, and not just the privilege, to receive public assistance in matters essential to their existence and well-being, as was mentioned in my earlier article in reference to the question of whether or not the poor may have a right to receive public assistance as to matters of family planning. This latter question did not receive any particular attention either in the "Bishops' Statement" or in Mr. Ball's position.

Evidently, there would also be moral questions for Catholics regarding the types of public family planning programs to which they could give their support and cooperation. Such moral questions have been referred to elsewhere and, will not be discussed herein. They were not treated in any detail either in the "Bishops' Statement" or in Mr. Ball's testimony. It will be understood, however, that they would have to be specifically

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5 Ball, Government Birth Control: Reply To Mr. Sirilla, S.J., 12 Catholic Law. 216 (1966).
considered in any comprehensive analysis of the position Catholics should or may take regarding particular proposals.

The Bishops’ Statement

While recognizing that the state has a role in fostering conditions in modern society which will help the family achieve the fullness of its life, the “Bishops’ Statement” admits a major preoccupation with the freedom of spouses to determine the size of their families. For much of the rest of the statement, the problems of coercion of the right of free choice as to family size, and of invasions of the right of human privacy in intimate matters of married life are referred to in one way or another in connection with federal and state welfare programs for the poor. That these are important and fundamental human rights seems beyond question. Likewise, combining birth-control or family-planning programs directly with welfare department programs of economic assistance poses a serious threat to these rights for those who are on welfare or public assistance, and for that reason should be avoided. Thus, the remark in the “Bishops’ Statement” urging a clear and unqualified separation of welfare assistance from birth control in order to safeguard the freedom of the person and the autonomy of the family would logically follow from a concern for protecting the rights under consideration.

The “Bishops’ Statement” seems to have been interpreted by some as opposing under any circumstances the use of public funds to provide birth-control information and services. The remarks in their statement which probably gave rise to this interpretation are as follows:

It should be obvious that a full understanding of human worth, personal and social, will not permit the nation to put the public power behind the pressures for a contraceptive way of life. . . . We call upon all—and especially Catholics—to oppose, vigorously and by every democratic means, those campaigns already underway in some states and at the national level toward the active promotion, by tax-supported agencies, of birth prevention as a public policy, above all in connection with welfare benefit programs.

It should be noted, however, that these remarks follow almost directly the allegations that “government activities increasingly seek aggressively to persuade and even coerce the underprivileged to practice birth control,” and that “intimate details of personal, marital and family life are suddenly becoming the province of government officials in programs of assistance to the poor.” Thus, it is possible to interpret this call for opposition to the use of public funds for birth-control purposes to be aimed only at presently operating programs and only because the statement alleges that these particular programs are administered so as to be coercive and violative of the right of privacy, and to promote “birth prevention as a public policy, above all in connection with welfare benefit programs.”

Their stated objections, therefore, arise from a concern for the rights of the poor, and from a fear that government will promote or is now promoting birth prevention as a public policy. It would seem to follow, then, that if publicly supported family-planning programs could be set up in this country, as by legislation, so as properly to respect the rights of the

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8 Reston, supra note 6.
poor, and so as not to promote birth prevention or a contraceptive way of life as a public policy, the objections in the "Bishops' Statement" would not be applicable. For example, would it be possible to set up federally supported family-planning programs, completely independent of any welfare programs giving economic assistance, and whose policy regarding the poor would be to provide the necessary education and services to help them carry out their own freely made decisions as to family size? This policy could operate to help those who freely choose to have children as well as those who freely choose to limit family size. In other words, it could also provide assistance for the purpose of having children to those couples who because of some correctable and temporary difficulty or problem have not been able to have any children, and who are too poor or uneducated to secure the proper attention and services needed, on their own. As to limiting family size, freedom of choice as to method would also have to be provided. If such programs were feasible, then in the words of the "Bishops' Statement" they would involve "a clear and unqualified separation of welfare assistance from birth control considerations" wherein the federal government would assume "a role of neutrality whereby it neither penalizes nor promotes birth control."

**Freedom from Coercion and the Rights of the Poor**

That the right of spouses to be free from governmental coercion in their decisions as to family size (large or small), and method of carrying out those decisions is of fundamental importance cannot be denied. It has been previously admitted by Fr. Hanley and this writer. Thus, the charge in Mr. Ball's reply to my article that Fr. Hanley "saw the Catholic moral teaching on contraception as the sole issue involved" and that he "touched upon the problem of governmental coercion and of free choice, but . . . solely in terms of governmental coercion of the Catholic conscience, free choice for the Catholic" cannot be understood, particularly in the light of Fr. Hanley's statement that "full freedom of choice seems to me to involve the capacity to choose more children, as well as less, in situations where one is able to provide for and educate children." It is not seen how this latter statement can be interpreted to apply solely to the Catholic conscience. It shows, rather, the breadth of the freedom of choice envisaged by Fr. Hanley—a freedom of choice broad enough to cover the choice of simply having children or having more children, a choice plainly not the concern solely of Catholics nor related solely to the Catholic moral teaching on contraception.

Mr. Ball, in his testimony before Senator Gruening's subcommittee, sug-

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9 This right could be argued to be guaranteed by the fourteenth amendment. For example, in Meyer v. Nebraska, 262 U.S. 390 (1932), it was held that the amendment guaranteed the right "to marry, establish a home and bring up children..." Id. at 399. In referring to this case, as well as others, Mr. Justice White in his concurring opinion in Griswold v. Connecticut, 381 U.S. 479 (1965), stated that "these decisions affirm that there is a 'realm of family life which the state cannot enter' without substantial justification." Id. at 502.

10 Ball, supra note 5, at 217.

11 Ibid.

12 Senate Hearings at 1276.
gested an analogy with the school prayer cases to conclude that there would be coercion in any publicly supported family-planning program insofar as it affected the poor. This analogy was based on his interpretation of the school prayer cases as being decided on the ground that there was coercion of the children and thus an infringement of their rights under the free exercise clause of the first amendment. In my article, I urged that the clear language of the school prayer cases indicated they were decided on the basis of the establishment clause and not the free exercise clause, and hence I questioned the use of those cases as authoritatively supporting Mr. Ball's coercion theory. Mr. Ball admitted in his reply to my article that these cases were at least formally decided on the basis of the establishment clause, but he goes on to argue that the Court found "establishment" because there were children involved. In other words, his position is that in spite of the clear language used by the Court, these cases would not have been decided on the establishment clause if there were no violation of the free exercise clause through coercion of the children. To justify this interpretation, he draws a distinction between publicly

13 Sirilla, supra note 4, at 207, 208. Furthermore, in Abington School Dist. v. Schempp, 374 U.S. 203, 224-25 (1963), the Court stated: “Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause.” Such a statement would not be consistent with an interpretation that the case was decided on the basis of coercion and the free exercise clause.

14 Ball, supra note 5, at 219.

sponsored school prayers and publicly sponsored praying in legislatures and federal chaplaincies, stating:

It seems most unlikely that the Court would declare publicly sponsored praying in legislatures an unconstitutional practice. The federal chaplaincies 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.

These questions of publicly sponsored praying in legislatures and federal chaplaincies have not been officially passed upon by the Supreme Court, although in his concurring opinion in the Engel case, Mr. Justice Douglas considered the distinction between school prayer and praying in Congress, suggested by Mr. Ball:

The fact that taxpayers do not have standing in the federal courts to raise the issue (Frothingham v. Mellon, 262 U.S. 447) is of course no justification for drawing a line between what is done in New York on one hand and on the other what we do and what Congress does in this matter of prayer.

Mr. Justice Douglas indicates in the same opinion that the principle would be the same in both situations referred to, irrespective of the question of coercion:

Yet for me the principle is the same, no matter how briefly the prayer is said, for in each of the instances given the person praying is a public official on the public payroll, performing a religious exercise in a governmental institution.

Thus, the distinction suggested by Mr. Ball to support his interpretation of the school prayer cases would seem open to

15 Id. at 219, 220.
17 Id. at 441.
18 Id. at 441.
question. This is not to say that coercion could not be constitutionally significant in cases involving state or federal religious activity. But, to say that it was determinative in the school prayer cases, on the basis of a distinction between them and publicly sponsored praying in legislatures and federal chaplaincies, would seem to be a matter of speculation and conjecture at best.

Additionally, it should be noted that school children ordinarily have ample opportunities to pray and worship outside of school time, and that by denying them the opportunity to pray during school hours, their constitutional right to the free exercise of religion is not infringed. This seems to have been the answer of the Court in the Schempp case,\(^{19}\) to the contention that “the majority’s right to free exercise of religion”\(^{20}\) would require that school prayer be permitted. In rejecting this contention, the Court recognized the opportunity for worship at home and in church, and its importance.\(^ {21}\) Thus, the children’s constitutional right to free exercise of religion was not unconstitutionally impaired by the denial of public prayer at school.

In its consideration of this point, the Court also referred to, as a distinct question, the use of government facilities and personnel in connection with religious practices for military personnel.\(^ {22}\) Thus, the Court seems to be recognizing the tension between the demands of the free exercise clause and the establishment clause in situations where the government is responsible for conditions (e.g., military service) that deprive a person of the usual and ordinary opportunities for exercising his religion. And it would then seem that the demands of the free exercise clause can constitutionally require the federal government to provide publicly supported facilities and personnel for religious services on military bases and the like. This would be a situation where it could be said that the power, prestige, and financial support of government are placed behind the practice of religion. Yet the government’s activity can still be constitutionally justified, for the reason, among others, that the demands of the free exercise clause require it since the government is responsible in some way for the conditions that deprive military personnel of the usual and ordinary opportunities for religious worship.

That government may constitutionally act in this situation suggests a theory for justifying the use of public funds to support family-planning programs for the poor. For example, it might be asked

\(^{20}\) Id. at 226.
\(^{21}\) Ibid.
\(^{22}\) Abington School Dist. v. Schempp, supra note 19. The Court noted the problems presented for military personnel: “Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship.” Id. at 213. The Court continued: “We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.” Id. at 226 n.10.
as to such programs, whether, given the present circumstances in this country, there might be some right on the part of the poor requiring the government to act in this area? Let us consider the right of the poor to be free to make their own decisions as to family size. If this right is to be realizable, it would seem to presuppose that the poor will have a reasonable opportunity to carry out their decisions as to family size, just as the free exercise clause presupposes a reasonable opportunity for religious worship. Let us assume, for the sake of argument, that the poor, and especially those on public assistance (who often have little education and extremely limited financial resources), really do not have a reasonable opportunity at present to carry out their decisions as to family size, whether to limit family size, or to have children in the case where there is some temporary difficulty. To prove whether or not this assumption is correct would be beyond the scope of this paper. It is being made only for the purpose of the following analysis.\textsuperscript{23}

The next question would be whether there may be some obligation requiring the government to help the poor realize or carry out their decisions as to family size, when conditions in society are such that, without such help, their decisions as to family size could not be adequately achieved. An analogy might be considered between this situation and the one where-in government acts to provide facilities and personnel to enable military personnel to realize their right to free exercise of religion. The similarity would include the fact that in each case, if government did not act, the personal right in question could not be effectively exercised, and that government is responsible in some way for the conditions depriving the people of the reasonable opportunity for effectively exercising the right in question.

Admittedly, government may not have acted directly to place the poor in their disadvantaged positions, whereas there may be direct government action in placing military servicemen in their stations of duty. Yet, can it be said that government has no responsibility regarding the conditions in which the poor find themselves, and which inaction in fact may have contributed to a greater or lesser degree to their present state of financial, educational, and cultural deprivation? Might some theory be advanced, on the basis of government responsibility, in connection with the growing tendency to recognize that the poor may have rights (not just privileges) to receive public assistance as to matters essential to their well-being?\textsuperscript{24} And might these rights be broad-

\textsuperscript{23} It might be noted, however, that Dr. Milo D. Leavitt, Jr., Deputy Secretary of the United States Health, Education, and Welfare Department, stated in an address to social workers on November 29, 1966 in Kansas City, Missouri, that: “We have five million indigent women who desire family planning aid, but only a half million now receive such aid.”

\textsuperscript{24} This tendency is discussed in Reich, \textit{The New Property}, 73 \textit{Yale L.J.} 733 (1964). The author states: “The concept of right is most urgently needed with respect to benefits like . . . public assistance. . . . These benefits are based upon a recognition that misfortune and deprivation are often caused by forces far beyond the control of the individual. . . . [I]n theory they [such benefits] represent part of the individual’s rightful share in the commonwealth. Only by making such benefits into rights can the welfare state achieve its goal of providing a secure
ened to include the right to receive education and assistance in carrying out their decisions as to family size? Family size directly affects the well-being of the entire family unit, and in fact might even be argued to be a matter of such importance for the well-being of the poor or impoverished family as to impose an obligation on society to provide public assistance to the poor to help them carry out their decisions both as to the having of children (when the couple might need medical and professional help for this purpose), as well as to limiting family size.

The Right of Privacy
As was the case with the right of the poor to be free from coercion in their decisions as to family size and method, Mr. Ball's main objection regarding the right of privacy of the poor in the intimate details of their married life stems from his fear or concern that family-

minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.” Id. at 785-86.

See also tenBroek and Wilson, Public Assistance and Social Insurance—A Normative Evaluation, 1 U.C.L.A.L. Rev. 237 (1954). The authors discuss the idea that an earned right is based on productive work and suggest that society has a duty to keep the path to the labor market free of any socially created road block. If society fails to do this, then those who suffer have a right to receive assistance. Id. at 248, 249. They further state: “Considerable progress has been made also toward establishing aid payments as a matter of right under the public assistance programs. Some courts have said that eligible clients have the right to assistance.” Id. at 247.


planning programs will necessarily be directly connected with public welfare programs giving economic assistance to the poor. Such a connection would thus provide the welfare caseworkers with opportunities to put pressure on the poor to limit family size, and to divulge information, such as intimate matters of their married life. As I indicated in my article, serious constitutional questions would be involved if such coercion and invasion of privacy could not be adequately protected against. In this connection, it is agreed that family-planning programs should be separated entirely from welfare programs giving economic assistance. Furthermore, it might be noted that the poor who might be entitled to assistance in such family-planning programs would not all have to be on welfare. The poor of this country are not coextensive with the welfare rolls, and thus family-planning programs limited to those on welfare would not be available to all the poor—another reason why they should not be connected with welfare programs.

Presumably, Mr. Ball would have no objection if the poor made free and voluntary confidential disclosures as to intimate details of married life, as needed to carry out their decisions as to family size and as to method, just as those who can afford medical advice would make similar disclosures in connection with securing assistance to carry out their decisions as to family size (large or small), and as to method.

Sirilla, supra note 4, at 209.
Present State and Federal Activity, and Need for Legislation

According to a recent estimate of the Bureau of the Budget, the federal government has spent or plans to spend the following sums on birth control and family planning in fiscal years 1965, 1966, 1967: in 1965—$2.3 million; in 1966—$14.7 million; and in 1967—$25.3 million. These estimates include funds for research and development as well as for information, counseling and services. They also include aid to foreign countries. If we just consider the programs of the Department of Health, Education and Welfare, the Office of Economic Opportunity, and the Department of the Interior, and exclude research and development, the estimates would be as follows: in 1965—$439,000 (with no data available for the Department of Health, Education and Welfare); in 1966—$6.3 million; and in 1967—$9.8 million.

According to a survey, conducted by Senator Gruening's subcommittee, on family-planning programs in all the states and based on a 100 per cent response from state governors and other officials, it was determined that: twenty-one states presently have state-operated family-planning programs; nine states have some local government programs but no state programs; seven more states are studying a program or anticipate one in the near future; four states only refer patients to private physicians; only nine states have no state or local programs and no state study underway; and the District of Columbia, Puerto Rico, American Samoa and the Virgin Islands have centralized programs.

It will be apparent that there already exists in this country substantial federal and state activity in birth-control and family-planning programs, and discussion should not be confined, then, only as to what government may or may not do in the future, as though there has not yet been any governmental activity in this area. Whether or not there have been any actual cases of coercion or invasion of privacy in the administration of present programs, it would seem that in view of the increasing federal and state activity in this area and out of concern for the rights of the poor, it must be asked: What should be done now to be sure that the rights of the poor considered herein are properly protected?

Some of the possible alternatives would include: (1) trying to form public opinion to oppose all publicly supported family-planning programs and leave the whole problem to private clinics and institutions; (2) relying on the good will of the people who administer these public programs, that they will not violate the rights of the poor; (3) trying to institute litigation to challenge the propriety of such use of public funds, for example, on the basis of actual cases of coercion or invasion of privacy, if there are such, in an effort to prevent such occurrences; or, (4) trying to work out federal legislation to establish criteria for public programs and safeguards for the rights of poor.  

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26 This estimate appears in a Press Release, dated Nov. 2, 1966, from the office of Senator Gruening, and including copy of a letter dated October 19, 1966 to Senator Gruening from Phillip S. Hughes, Deputy Director of the Bureau of the Budget.

27 Senate Hearings at 2015.
the poor in the administration of such programs.

As to the first alternative, it would be a matter of conjecture whether present public opinion could be swayed to such an extent that it would force the federal and the state agencies involved to discontinue entirely their activity in this matter. In fact, the increase in such activity over the past few years would seem to indicate a lack of any widespread public opinion opposing such measures. Furthermore, it would seem open to serious question whether private clinics and institutions would be adequate, by themselves, to meet the needs of the country.

As to the second alternative, this would not seem preferable or acceptable for the reason, among others, that it would not prevent family-planning programs from being tied in with the administration of welfare programs. The possibility of abuse in such situations, as noted above, indicates that some provision should be made for separation of the two types of programs.

One of the difficulties with the third alternative would be the question of standing to sue. As to the second part of that alternative, it would be necessary to find someone whose rights had actually been violated, and who would be willing to sue. If such an action could be properly developed, and if it were successful, it conceivably could result in some pronouncement limiting the present activities of governmental agencies in the area of family-planning. It is doubtful, however, that any court would preclude, a priori, the possibility of future valid legislation in this area which more effectively protected the rights of the poor. Moreover, litigation could not prevent the operation of private birth-control clinics, and as long as such private clinics exist, it could be argued that overzealous welfare case-workers might use the power of their position, relative to the welfare recipient, to force decisions on family limitation against the latter's will.

Thus, if there is no legislation in this area establishing criteria and safeguards, it could be argued, as Mr. Ball suggests, that the rights of the poor on welfare, in matters of decisions on family size, method, and marital privacy, might rest in some cases on the zeal or good will of their caseworkers. In other words, even if there were no state or federal activity regarding birth control, but only private programs, there would still be the possibility that welfare case-workers might use their position and influence to infringe upon the rights of the poor on welfare, as by invading their marital privacy or by coercing them to use the services of private birth-control clinics. With no specific federal legislation covering this subject, it would be virtually impossible to protect against the possibility of such individual abuses, or to detect them and take appropriate action if they should occur.

This would seem to present a reason in favor of the fourth alternative mentioned above, namely, trying to work out federal legislation to establish criteria for publicly supported family-planning programs and safeguards for the rights of the poor in the administration of such programs. Fr. Hanley, in addressing himself to these problems, offered the following suggestion:

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(Continued)

I have one fundamental proposal to make. The sensitive nature of the subject matter and the dangerous potentialities for control which are present suggest that careful governmental supervision is required. Administrative determination should not proliferate; private programs cannot be cut adrift. Without a central authority exercising responsible control, it becomes impossible for legitimate criticisms ever to catch up with the facts. This is true of both domestic and international programs. Hence, I suggest that, at the federal level, a special congressional subcommittee be established to supervise and oversee initial federal programs, to require and evaluate reports, and to seek continuing evidence as to the practical effects of the programs.28

Besides the advantage of being able to provide "a central authority exercising responsible control" over the administration of such programs, federal legislation could also advantageously provide for a more coordinated effort. As indicated by Fr. Hanley:

I think that the matter is too important and delicate to be left to piecemeal efforts by governmental agencies, whether acting by themselves or in cooperation with private groups. 29

In view of the present concern and trends in this country for family-planning programs, it seems likely that renewed efforts will be made in the 90th Congress to enact appropriate legislation. And, even if the suggestion of Fr. Hanley were adopted, there would still remain problems, such as the working out of administrative procedures, etc., to avoid coercion, direct or indirect, and invasions of privacy, but in the words of Mr. Ball, this "is an area [avoiding coercion] for searching discussion by lawyers" 30 and

"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." 31

Furthermore, as indicated above, there would be moral questions for Catholics that would have to be examined, such as the types of public family-planning programs they could support, the extent to which they could cooperate in the administration of such programs, and who the recipients may be (e.g., only the married, or also unmarried women who already have a family of illegitimate children). These are questions for renewed and careful analysis by Catholic moral theologians in light of present conditions, so that the results of their deliberations may help Catholic lay leaders in the public forum to enter into a more enlightened and fruitful dialogue with others, in trying to reach a satisfactory resolution of the present uncoordinated and piecemeal efforts.

29 Ibid.
30 Ball, supra note 5, at 221.
31 Id. at 267.