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NOTES

Eisenstadt v. Baird: Massachusetts Statute Prohibiting Distribution of Contraceptives to Unmarried Persons Held Unconstitutional

William Baird was arrested and held for violating a Massachusetts law which prohibited the exhibition and distribution of contraceptives, but allowed the distribution to married persons by either a physician or a pharmacist.[1] Following Baird's conviction in state court, the Massachusetts Supreme Court set aside the conviction for the exhibition of contraceptive devices as being violative of Baird's first amendment rights, but sustained the conviction for distribution.[2] Baird's petition for a writ of habeas corpus was dismissed in federal district court.[3] The court of appeals vacated the dismissal and directed that the writ be granted, holding, *inter alia*, that the Massachusetts statute was an arbitrary and discriminatory prohibition on contraception per se.[4] The Supreme Court of the United States noted probable jurisdiction.[5] *Held, affirmed*: The Massachusetts statute banning distribution of contraceptives to unmarried persons constitutes a prohibition on contraception per se, which violates the rights of single persons under the equal protection clause of the fourteenth amendment. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

I. The Anti-Contraception Experience

The Massachusetts law prohibiting the distribution of contraceptives has remained virtually unchanged since its enactment in 1879. As originally enacted, the law stated that "[w]hoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument . . . drug, medicine or article whatever for the prevention of conception or for causing unlawful abortion

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[1] MASS. GEN. LAWS ANN. ch. 272, § 21 (1966) provides that except for the provisions in § 21A, anyone who distributes, exhibits, advertises, or manufactures a drug, medicine, instrument, or article designed to prevent conception or cause unlawful abortion is guilty of a felony.

MASS. GEN. LAWS ANN. ch. 272, § 21A (1966) provides an exception to § 21 under which (1) a physician may prescribe such articles to a married person who may obtain the same from a registered pharmacist, and (2) a public health clinic, registered nurse, or maternity health clinic operated in an accredited hospital may furnish information with respect to such articles to married persons.

Baird's arrest occurred at the termination of a lecture which included a display of various contraceptive devices and an explanation of their respective merits. During the address, Baird stated that he knew he was violating the state law and was inviting arrest. At the close of the discussion, Baird invited the audience to come forward and help themselves to the assorted contraceptive articles, whereupon he handed a presumably unmarried woman a package of contraceptive foam.

[2] Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969).

[3] Baird v. Eisenstadt, 310 F. Supp. 951 (D. Mass. 1970). The district court stated that Baird's act of giving the contraceptive device to the young woman "added nothing to the understanding of the lecture and was not in exercise of a right guaranteed under the First Amendment." *Id.* at 954. It was further held that the statute had a legitimate purpose in safeguarding the health of the members of the community and was not unconstitutionally vague.

[4] Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970). The court held that the statute in question "did not bear a real and substantial relation to public health, safety, morals, or some other phase of general welfare" and was void. *See* Nebbia v. New York, 291 U.S. 502, 537 (1934); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923).

[5] Eisenstadt v. Baird, 401 U.S. 934 (1971).

. . . is guilty of a felony."[6] Literature which advertised contraceptive devices or otherwise informed the public of any means by which conception might be prevented was held to be obscene and too indecent to be spread upon the records.[7] Later, however, the regulation of obscenity as a legitimate purpose of the statute was disregarded.[8]

An early attempt to create judicial exceptions in the statute for physicians and those acting under physician's instructions was fruitless.[9] The 1879 statute was interpreted and enforced as enacted until 1940, when it was held that there could not be a conviction for the sale of an article susceptible of use to prevent disease as well as for contraception without proof that, in a particular case, a contraceptive use was intended.[10]

A most important step in the erosion of the constitutionality of laws prohibiting the distribution of contraceptives was taken in 1965 by the United States Supreme Court in *Griswold v. Connecticut*, which held that a Connecticut statute forbidding the use and giving of advice on contraceptives violated the right of marital privacy.[11] This decision prompted a revision in the Massachusetts law which created a class of individuals (physicians, pharmacists, and married persons) who were to have access to contraceptives. Unmarried individuals, however, were still excluded.[12]

In a suit by several physicians for declaratory relief, the Massachusetts Supreme Court later held that the regulation of the private sexual lives of single persons was a legitimate subject of state concern, and that unmarried individuals were still to be excluded from the provisions of the law allowing distribution of contraceptives to married persons.[13] Thus, although an exception had been added allowing the distribution of contraceptives to married persons by physicians and pharmacists, the original prohibitory statute was basically intact at the time *Commonwealth v. Baird*[14] was decided. Having commented on the fact that obscenity was no longer an issue, the court in *Commonwealth v. Baird* stated that "a statute preventing distribution by in-

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[6] Law of May 10, 1879, ch. 159, § 1, [1879] Mass. Laws 1; *see* note 10 *infra*, and accompanying text.

[7] Commonwealth v. Allison, 227 Mass. 57, 116 N.E. 265 (1917). It was held that the statute was not in contravention of any portion of the constitution since its purpose was to protect purity, preserve chastity, encourage continence, and defend the sanctity of the home. *Id.* at 266.

[8] *See, e.g.*, Memoirs v. Massachusetts, 383 U.S. 413 (1966) (prurient interests test for obscenity accepted); Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptive material held not to be obscene); Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969) (construction of more recent Supreme Court decisions on obscenity held binding in Massachusetts).

[9] Commonwealth v. Gardener, 300 Mass. 372, 15 N.E.2d 222 (1938). The court in this case interpreted the statute as "sweeping, absolute and devoid of ambiguity . . . with nothing in the circumstances of the case at bar or in the history of the statute, to support the conclusion that physicians . . . were intended to be excepted from the operation of the statute." *Id.* at 223.

[10] Commonwealth v. Corbett, 307 Mass. 7, 29 N.E.2d 151 (1940). *See also* Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969).

[11] Griswold v. Connecticut, 381 U.S. 479 (1965). The Court found that the right of marital privacy was "within the penumbra of specific guaranties of the Bill of Rights." *Id.* at 481-86.

[12] MASS. GEN. LAWS ANN. ch. 272, § 21A (1966); *see* note 1 *supra*.

[13] Sturgis v. Attorney General, 260 N.E.2d 687, 690 (Mass. 1970).

[14] 355 Mass. 746, 247 N.E.2d 574 (1969).

discriminate persons is [not] beyond legislative power."[15] The constitutionality of the portion of the statute which prohibited the distribution of contraceptives was upheld. However, the portion of the statute which prohibited exhibition was held to be unconstitutional as applied to Baird on the ground that it violated his right of speech as guaranteed by the first amendment.[16] Thus, the statute was no longer intact, and an important step had been taken toward liberalizing the statute's judicial interpretation.

II. THE EISENSTADT APPROACH IN PERSPECTIVE

In *Eisenstadt v. Baird* the appellant contended that Baird "did not have standing to assert the rights of unmarried persons denied access to contraceptives because he was neither an authorized distributor nor a single person unable to obtain contraceptives."[17] Noting that the "case or controversy" requirement of article III of the Constitution had been met, Justice Brennan, in delivering the opinion of the Court, agreed that relaxation of the Court's self-imposed rule against allowing litigants to advance the rights of third parties was required. In *Griswold v. Connecticut*[18] this rule was relaxed in order that physicians who had prescribed the use of contraceptives to married persons might have standing to assert the constitutional rights of the patients with whom they had a professional relationship. Following this precedent to its logical conclusion, the *Eisenstadt* Court saw no reason why Baird, who was convicted under a statute which was not a health measure,[19] should be prevented, because he was neither a doctor nor a druggist, from asserting his right as an advocate of those persons who desired to obtain contraceptives.[20] The Court decided the issue of standing in favor of Baird, reasoning that because "unmarried persons [were] denied access to contraceptives in Massachusetts, they were [not] themselves subject to prosecution and, to that extent, [were] denied a forum in which to assert their own rights."[21]

Having determined the issue of standing, the Court sought to determine whether a legislative purpose existed which would explain the discriminatory treatment accorded the class of unmarried persons denied access to contraceptives under Massachusetts law. The Court concluded that no such legitimate purpose existed.[22] The object of the statute as a deterrent to premarital

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[15] 247 N.E.2d at 578.

[16] *Id.*

[17] 405 U.S. 438, 443 (1972).

[18] 381 U.S. 479 (1965).

[19] In Baird v. Eisenstadt, 429 F.2d 1398 (1st Cir. 1970), the Court of Appeals for the First Circuit determined that the statute under which Baird was convicted was not a health measure, implying that the statute's provision for a physician's role was unnecessary. *See* text accompanying note 28 *infra.*

[20] *See* NAACP v. Alabama, 357 U.S. 449 (1963) (standing accorded third party because those who suffered under the law had no forum in which to assert their rights); Barrows v. Jackson, 346 U.S. 249 (1953) (seller under a racially restrictive convenant has standing to assert equal protection rights of non-Caucasian purchasers).

[21] 405 U.S. at 446. The Court stated: "In fact, the case for according standing to asserted third party rights is stronger in this regard here than in *Griswold*" because a proper forum for single persons desiring to obtain contraceptives would otherwise be denied since they are not subject to prosecution as were users of contraceptives under the Connecticut statute in *Griswold.*

[22] 405 U.S. at 447.

sexual activity was attacked by the Court as unreasonable in light of the fact that contraceptives were distributed to married individuals without regard to their prospective use.[23] In addition, the Court noted that the distribution of contraceptives for the prevention of disease was not regulated.[24] The Court also compared the sentence for distributing contraceptives with the sentence for fornication, a misdemeanor, and found that the former punishment was twenty times greater than the ninety-day sentence of the latter. The Court agreed with the opinion of the court of appeals that Massachusetts had chosen to expose the aider and abetter who simply gives away a contraceptive to twenty times the sentence of the user. Since contraceptives were distributed in Massachusetts without regard to their intended use, and since birth control devices for the prevention of disease were not regulated by statute, the Court concluded that there was little in the way of a deterrent to premarital sex in either section of the Massachusetts law. Since the status of the offender was preferable to the status of the aider and abetter of fornication under Massachusetts law, the Court further concluded that the deterrence of premarital sex could not be the legitimate purpose of the legislation.[25]

The Court similarly attacked the interpretation of the legislative aim of the Massachusetts statute advanced by the court in *Commonwealth v. Baird.*[26] The Massachusetts Supreme Court had stated that the purpose of the statute was to "prevent the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences."[27] The *Eisenstadt* Court found, however, that if the interest in the public health was to be served, the state could not discriminate against the unmarried. Neither could the Court agree with appellant's contention that all contraceptives are potentially dangerous. The Court concluded, accordingly, that, "despite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations."[28]

Having determined that the legislative purpose of the statute was neither to promote health nor to deter fornication, the Court found that the constitutionality of the statute could be sustained, if at all, solely as a prohibition on contraception per se.[29] The Court, agreeing with the decision of the court of appeals on this issue, decided that to consider contraceptives immoral, in and of themselves, and to forbid their distribution to single persons would conflict with the fundamental human rights of individuals to avoid unwanted pregnancy.[30] In addition, the Court found that such action would constitute an over-extension of the legislative powers of the state.[31]

Thus, rather than taking a new approach in resolving the constitutionality of the Massachusetts anti-contraception statute, the Court in *Eisenstadt* ex-

[23] *Id.* at 449.
[24] *Id.* at 448-49.
[25] *Id.* at 449.
[26] 355 Mass. 746, 247 N.E.2d 574 (1969).
[27] 247 N.E.2d at 578.
[28] 405 U.S. at 452.
[29] *Id.*
[30] *Id.* at 453.
[31] *Id.* at 452.

panded upon the judicial technique employed earlier in *Griswold v. Connecticut*. In *Griswold* the Court brought the controversy surrounding the contraception issue within the protection afforded by the Bill of Rights.[32] In delivering the opinion of the Court in *Eisenstadt*, Justice Brennan stated:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[33]

The Court thus used the *Griswold* approach to show that specific guarantees of the Constitution[34] enable both married and unmarried persons to be similarly situated with respect to the choice of bearing or not bearing children. In line with this reasoning, the *Eisenstadt* Court employed the equal protection clause of the fourteenth amendment[35] to invalidate the Massachusetts statute which provided "dissimilar treatment for married and unmarried persons who are similarly situated."[36]

Although the decision in *Eisenstadt* is of great importance, it should not be offered as a significant development in constitutional interpretation. *Griswold* had broken the ice on the constitutional question surrounding anti-contraception legislation in holding that a statute forbidding the use of contraceptives by married persons was unconstitutional. *Eisenstadt* extends the *Griswold* analysis to declare unconstitutional a statute prohibiting the distribution of contraceptives to the unmarried.[37] In attacking the constitutionality of the statute by systematically disposing of the legislative purposes behind it, *Eisenstadt* narrows the possibility of future state legislation seeking to circumvent its ruling, and, as such, is justified in resolving novel constitutional questions through a borrowed but effective judicial technique.[38]

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[32] 381 U.S. 479, 481-86 (1965). A Connecticut statute forbidding the use of contraceptives was held violative of the right of marital privacy guaranteed penumbrally through the Bill of Rights.

[33] 405 U.S. at 453.

[34] U.S. CONST. amend. IV states in part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." *See also* note 32 *supra.*

U.S. CONST. amend. XIV, § 1 states in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property . . . ; nor deny to any person within its jurisdiction the equal protection of the laws." *Griswold* interpreted the guarantees under the fourteenth amendment to mean that Connecticut could not enact legislation which would enable state government to encroach upon the privacy of the marriage.

[35] U.S. CONST. amend XIV.

[36] 405 U.S. at 454-55.

[37] *Id.* at 460 (White & Blackmun, JJ., concurring in the result). Justices White and Blackmun noted that a similar result would obtain in the case without having to resort to novel constitutional arguments. Since there was no evidence of the marital status of the young woman to whom Baird handed the contraceptive, both Justices agreed that such a flaw in the record would be a sufficient ground for reversal.

[38] For an interesting discussion of the respective merits of the several approaches to this question, *see* 84 HARV. L. REV. 1525 (1971). *See also* 32 OHIO ST. L.J. 221 (1971).