In the

Supreme Court of the United States

THOMAS S. EISENSTADT,

Appellant,

v. No. 70-17

WILLIAM R. BAIRD,

Appellee.

Washington, D. C.
November 17 and 18, 1971

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v.	:	No. 70-17
WILLIAM R. BAIRD, Appellee.	:	

Washington, D. C.,

Wednesday, November 17, 1971.

The above-entitled matter came on for argument at 2:26 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

JOSEPH R. NOLAN, ESQ., Special Assistant Attorney General, 373 State House, Boston, Massachusetts 02133, for the Appellant.

JOSEPH D. TYDINGS, ESQ., 1120 Connecticut Avenue, N. W., Washington, D. C. 20036, for the Appellee.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hearing arguments in No. 17, Eisenstadt against Baird.

Mr. Nolan.

ORAL ARGUMENT OF JOSEPH R. NOLAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. NOLAN: Mr. Chief Justice, may it please the Court:

This case comes to this Court on an appeal from the First Circuit Court of Appeals. The Court noted probable jurisdiction on March 1st of 1971.

The case started factually on April 6th of 1967 when the appellee, Mr. Baird, addressed a group of people, mostly students, at Boston University, pursuant to an invitation. Approximately 2,000 people were in attendance.

At that time Mr. Baird used two particular demonstration boards in his lecture on contraception. These demonstration boards had various contraceptive devices, and alongside the lectern there was a carton or box filled with various other contraceptive devices.

After the lecture he invited the people to come to the lectern and, in grab-bag fashion, take what they wished from this carton.

He then -- I repeat it was after the lecture. He then handed a can of Emko, an admittedly contraceptive device,

to a young lady.

Now, I do want to bring to the Court's attention an inaccuracy in the appellant's brief. In the reference made to this young lady as being unmarried, the record does not indicate nor did the Commonwealth at this time introduce evidence tending to show that she was unmarried.

Q What page does that first appear on, would you --

MR. NOLAN: It is not significant, however. The case.

Page 4, under Statement of the Case, Mr. Chief Justice.

Q Right.

MR. NOLAN: It is not, however, significant to the case, but I do want to point out the inaccuracy and the correction made by Mr. Balliro in his brief, the original brief, is well taken.

Repeatedly during the lecture the appellee, Mr. Baird, invited the police to arrest him. He said, "Why don't you arrest me, Officers? I'm violating your Massachusetts law."

Finally, when he handed this can of Enko to this particular young lady, the police complied with his wishes.

Now, the appellee was charged in two indictments returned by the Suffolk County Grand Jury, for violation of Massachusetts General Laws, Chapter 272, Section 21, which, among other things, prohibits the giving away and the exhibition

of, to use the words of the statute, articles intended for the prevention of conception.

After the trial in Suffolk Superior Court, jury waived, he was found guilty and the trial court reported the case to the Supreme Judicial Court.

One indictment charged the defendant with exhibiting contraceptive devices in violation of the statute, and the other charged him with the giving away -- now, there are other words in there which are not important to us, such as selling, lending, and so forth. The two words that are important are "exhibiting" and the "giving away".

The Supreme Judicial Court reversed the conviction of Baird under the indictment charging him with exhibiting, because, in its opinion, it clearly violated his First Amendment rights, particularly his freedom of speech right.

However, by a divided court it sustained the conviction under the indictment charging the giving away of the can of Emko.

The --

Q Would there have been any difference in the case, Mr. Nolan, if Mr. Baird had been a licensed physician?

MR. NOLAN: Yes. Because I was going to call the Court's attention in a moment that both statutes, on page 2 and 3, should be read together. Chapter 272, Section 21, which is the prohibition statute, and Chapter 272, Section --

Q Well, maybe I didn't read this very carefully. 21A says, "A registered physician may administer to or prescribe for any married person drugs or articles" --

MR. NOLAN: Yes.

Q If Mr. Baird were a licensed physician, he was not at the time --

MR. NOLAN: He was not, no --

Q -- prescribing.

MR. NOLAN: He was not a physician.

Q Well, if he were; suppose Mr. Baird were a physician and was doing exactly as he did here, would he still be prosecuted under this statute?

MR. NOLAN: If this girl, and it would be at this point only that it would be significant as to whether she was married. He would not be prosecuted certainly if she were a married woman.

Q My question goes a little more deeply. "May administer to or prescribe for". You feel he was administering to her and prescribing for her, in a professional capacity?

MR. NOLAN: Yes.

Q Even though he was giving a lecture to a group of 2,000?

MR. NOLAN: Yes, because while many helped themselves, in this particular instance he gave this girl the Emko. I don't suppose it would be silly of me to say that he

was administering to, in the way a doctor would in handing to a person; it's a different act.

Q Well, it certainly is a different situation than the normally assumed doctor-patient relationship?

MR. NOLAN: Yes.

Q All right.

MR. NOLAN: The court, trial court, then sentenced the defendant to three months in the house of correction; stayed that sentence pending appeal to the Supreme Judicial Court; and a further stay was granted while a petition for certiorari was addressed to this Court to the Supreme Judicial Court. That was denied. And Mr. Baird then started serving his three months, and I believe he served 34 or 35 days of that, when the Circuit Court of Appeals -- and I'm getting ahead of myself -- in addressing itself to a petition for writ of habeas corpus to the District Court, the District Court, I might say, denied the petition for the writ, and the Circuit Court of Appeals for the First Circuit issued a certificate of probable cause, and released the appellee on bail.

He served, I believe, 34 or 35 days of his sentence.

This case then is in the posture of appeal directly from that order of the First Circuit, and I would add that in both cases the District Court Judge filed an opinion, which you will find in the Appendix, and of course the Circuit Court filed an opinion.

Now, there are two questions that I think are addressed to this Court, and the first is: whether the Massachusetts statute -- and when I say statute, of course, I must include a reading together of the two -- whether or not the Massachusetts statute prohibiting the giving away of an admittedly contraceptive substance, whether or not that is constitutional.

And, secondly, whether or not the Massachusetts statute is unconstitutional as applied to William Baird, who is admittedly a married man and who is, admittedly also, not a physician nor a nurse nor a registered pharmist, or clearly not a public health agency.

I would like to address myself to the second question first. That is the question of whether or not William Baird has standing to raise this question. He is admittedly a married man.

He is, in effect, asking this Court -- even a cursory reading of the brief, I think indicates this -- he's asking this Court to declare unconstitutional this statute as it applies to others, because clearly his constitutional rights are not invaded.

Q But he's challenging the conviction, isn't he?

MR. NOLAN: Yes, he is. But I don't believe that --

Q I should think he's got -- could he possibly have a greater interest?

MR. NOLAN: Well, it's my understanding that merely because he was in jail does not give him a tailormade standard, as what is usually --

Q No, but, excuse me, I thought he filed a petition for federal habeas corpus challenging the constitutionality of his detention by Massachusetts on the ground that the underlying statute is unconstitutional.

MR. NOLAN: Yes.

Q And you're suggesting he doesn't have standing in that?

MR. NOLAN: I'm suggesting that he does not have standing as we know standing, simply because he was convicted of the statute.

Now, perhaps, Mr. Justice Brennan, you're saying to me, well, any time there's a First Amendment problem here, he can -- he doesn't have to have the kind of standing that -- but I'm a little ahead of myself, but I don't believe that he has First Amendment standing is what I'm talking -- First Amendment rights here. I think -- I don't see where his rights have been invaded. I don't see where his wife's rights have been invaded.

Both of them can seek and receive contraceptive devices within the framework of the Massachusetts law. I think the language in the Raines case is clearly apposite here, where this Court said that the rule that one to whom applica-

tion of a statute is constitutional will not be heard to attack it, because it's unconstitutional as applied to somebody else.

Q Yes, but he certainly has standing to say that my conviction here is unconstitutional because the statute which restricts the distribution of contraceptive devices to physicians is unconstitutional.

Massachusetts said he violated the law, among other things, because he wasn't a physician.

MR. NOLAN: Yes.

Q And he says the law may not restrict the distribution of contraceptive devices to physicians. It's unconstitutional in that respect.

He's certainly got standing to say that.

MR. NOLAN: I would say he has standing there if, as the basis for saying that, the right to be a physician or the right, the accompanying right is a First Amendment right. But I don't see that --

Q First Amendment right? Well, I would think that if he said that Massachusetts could not, within the due process clause, for example, restrict the distribution of contraceptives to physicians.

MR. NOLAN: In answer to you, Mr. Justice White, I would say that he'd have no more standing -- he has no more standing here than if he went to practice medicine, was arrested for the illegal practice of medicine, and then said,

"Well, that statute is unconstitutional." I don't think that this Court would say that he had standing. Because the practice of medicine is not a First Amendment right as such, for a man who is obviously not a doctor.

Q I know, but the First Amendment isn't the only grounds on which a State statute could be unconstitutional perhaps.

MR. NOLAN: Well, the other grounds that he's talking about, namely due process, I will take in a moment; but the due process that he's talking about is some right of privacy.

Q Mr. Nolan, suppose Massachusetts had a statute that said that it was illegal to -- for anyone to prescribe the use of or to hand to any person any quantity of wheatgerm, for example, or some other innocuous substance, unless the person handing it or engaging in that act was a registered physician. Well, then he gives some wheatgerm away, and he's arrested. He'd have standing to challenge that statute --

MR. NOLAN: There's no problem with that at all. Because wheat--

Q How is it different from this one in that respect?

MR. NOLAN: Well, I say I think it's principally different, if it please the Court, I think it's principally different because from -- and I hope that the Court will see from our brief that there are some very dangerous sidelights

and side effects to the use of many contraceptives. And I think an examination -- and I am ahead of myself, but I think an examination of the Senate Committee on Monopoly, when the Pill was being examined --

Q Now you're going to the merits, aren't you, rather than just the question of standing?

MR. NOLAN: Well, I must need go to the merits, I think, to answer your wheatgerm example, that's all.

Q Yes.

MR. NOLAN: I don't think that it's an analogy, wheatgerm, I think, is --

Q From his point of view; that's all I am suggesting in my hypothetical. From his point of view, perhaps the situation of wheatgerm is exactly the same.

MR. NOLAN: Well, I think he may think so, but I don't believe that his thinking is --

Q Do we reach the merits of the validity of your position about the possible harmful effects on just the standing question?

MR. NOLAN: No, I do not believe you do. No. I believe that that has to be taken with respect to the constitutionality of the question itself.

But I do believe that there is a serious problem here on standing. Because he, himself, and his wife are not prevented from the benefits of the Massachusetts statute in

receiving contraceptives or in being prescribed contraceptives. There is no right of privacy involved here with him. This is not a Griswold situation. He keeps speaking about a right of privacy, for ex ample. But it's not his right of privacy. I think the District Court judge said that more eloquently than I did. In his opinion he said he, in effect, and I'm just paraphrasing it, it's in the record; he said that he would hear Mr. Baird if his right of privacy -- but he is asking you to hear him with respect to the right of privacy of the unmarried, for example.

And I don't believe that he has standing to do that. He -- it's interesting to take his brief and just -- some of the headnotes I think are interesting. On page 5 --

Q May I ask, Mr. Nolan: I read the opinion, am I correct, of the Court of Appeals for the First Circuit, the First Amendment arguments were rejected as an attack on the merits of the constitutional question, and the Court found that the statute was unconstitutional on quite different grounds: No reasonable relation --

MR. NOLAN: No reasonable relation to the exercise of police power.

Q Well now, if that's correct, what moment is it that we're urged to again turn this on First Amendment grounds? That the Court of Appeals was correct on the grounds it took, and then it requires affirmance, doesn't it?

MR. NOLAN: I raised the First Amendment, Mr. Justice Brennan, only in response to the question of standing. This Court has said that a person would have standing, which he otherwise would not have, --

Q He'd certainly have -- does he not have standing to assert the constitutional arguments that he did assert and on which he prevailed in the First Circuit?

MR. NOLAN: Well, of course, the First Circuit found that he did have standing. This is, I suppose --

Q They rejected his First Amendment grounds, I suggest, if I read their opinion correctly --

MR. NOLAN: Yes, that's right. That's right, and --

Q -- and they turned it on an entirely different constitutional infirmity, as they saw it.

MR. NOLAN: That's right.

Q And they -- is there any suggestion on your part that he didn't have standing to raise this other constitutional contention?

MR. NOLAN: Yes. I'm stoutly contending that he doesn't have standing for the very reason that he does not have a First Amendment freedom or right involved here.

Q I'm sorry. I just don't follow you, that's all.

MR. NOLAN: Well, he -- on page 8 --

Q You hope you're going to get to the grounds that the Court of Appeals did rely on, and maybe that will help.

MR. NOLAN: Just in a moment I am.

He refers to abstinence, for example, on page 8. He says, "Is abstinence an adequate answer?"

He refers to "Maternal Mortality" on page 9, or "Infant Mortality".

But it's not, I repeat, open to him. Again he purports to be the voice of somebody else in this particular question. He is asking you to overrule or to strike the statute because the statute affects other people, not him.

"Health Characteristics" on page 10; "The Unwanted Child", and so forth.

I repeat, I think that he does not have, in the strictest sense, the standing that he should have here to raise these other related questions, whatever; and I'm not questioning the various findings and the statistics that he has in the brief, that's not my point.

Now, to come to the first question which is raised, namely, the constitutionality of the statute itself. It prohibits, among other things, a person who's not a doctor, reading the statutes together, from giving away; and it prohibits a person who's not a nurse or a registered pharmacist from giving any advice or information.

I think it's critically important at this juncture to examine what the issue is not. You are not being called upon, in this case, to determine whether or not a statute making

it a crime to use a contraceptive would be unconstitutional. Because use is certainly not prohibited.

You're not being asked to rule on the wisdom of the Legislature in prohibiting, because, I suggest respectfully to you, that's beyond the power of this Court as to whether or not it's wise for the Massachusetts Legislature to have it. You certainly do not sit as a super Legislature to determine whether it's wise to do it.

You're not being asked to determine whether or not contraconception is, per se, evil or in violation of the natural law. Though it is interesting to note that, certainly, this statute was enacted in 1879, clearly a public morality statute, and while for the last few years there's been a solid attack on the question of the natural law and whether or not it's violated, there's still some few of us who believe that it's also against the natural law.

But that's not the issue. You're not being called upon to determine the intrinsic evil of contraception.

Q Was the statute first placed on the book in 1879?

MR. NOLAN: 1879, Your Honor, yes.

You're not being called upon to decide whether the Legislature of Massachusetts should improve the lot of the unmarried by allowing the untrammeled distribution of contraceptives.

Mr. Justice Black, speaking for this Court in the Ferguson, supra case, said, "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

Q Well, your -- I take it your argument is, in a way, that if the State wants to channel the distribution of a particular commodity through a certain group of licensed people, that they constitutionally do so?

MR. NOLAN: Particularly where the commodity has a certain element of potential to danger, yes.

Q For health?

MR. NOLAN: Yes.

Q But, in terms of the due process clause, arguably a State could say that, "Well, we're going to take bread, and we're going to give a monopoly to the distribution of bread to a certain group of people."

MR. NOLAN: I don't suppose it could do that, no. I'm not suggesting that.

Q Well, I don't know -- as far as the due process clause is concerned? It may not be able to do it in violation of the antitrust laws. But as far as due process is concerned, could they --

MR. NOLAN: Well, even with respect to due process, bread seems to be such an innocuous thing that I --

Q Well, I know, but it doesn't follow -- so you

are saying that if it is really innocuous, it would violate the due process clause; is that it?

MR. NOLAN: If it were bread or wheatgerm, something like that, I don't know that I would be able to muster much of an argument to say that the --

Q That it does not violate --

MR. NOLAN: -- State could require a doctor to do it.

I think the issue, then, is whether or not Massachusetts may, within the framework of the police power, enact a statute that I submit to you does more than just indirectly touch the public welfare, morals, safety, health of the community.

Now, I think it's almost fatuous to say that there's no connection. A great deal of my brother's brief is given over to saying, and I think the gist of it -- and it's always perilous, I suppose, to paraphrase your brother's argument -- but I think the gist, one of the arguments is that the prohibition against the unmarried having this has absolutely nothing to do with public morality; nothing at all to do with it.

Now, I would be the first to concede the lack of success that this statute has had, with respect to what the Founders or the legislature thought in 1879, in the language that was used in the Allison case: for a solid moral citizenry.

I'm the first to admit that it has certainly not

succeeded. But I do question whether or not the lack of success of the statute is any reason for declaring it unconstitutional. I think it's fatuous, I repeat, to say that it doesn't have a logical, albeit perhaps unsuccessful, connection with public morality, not to mention public health.

I think, to say that to lift the ban, to say that because -- I can think of only a quick parallel, but I don't suppose anybody would seriously contend that because gambling goes on, illegal gambling goes on in 80 percent of the, let's say, variety stores or barrooms in Massachusetts, that therefore the gambling statute is unconstitutional because it's not working out, or the anti-gambling statute.

And I think the analogy is not too far from here.

My brother has pointed out many social evils, all of which I think we're acquainted with: the unwanted child; the illegitimacy rate. Now, all of these things, as facts, of course must go uncontroverted. I'm not suggesting that there is anything inaccurate in my brother's brief.

I think, however, where he fails is in asking you to draw a nexus between the failure, for example the high illegitimacy rate.

Now, conspicuously absent from his brief is any study that would indicate that in jurisdictions where the Legislature has seen fit to relax the law on contraception and permit a free distribution of contraceptives, that in those

jurisdictions the illegitimacy rate is any better or any lower.

Now, that's significantly absent, I think, and conspicuously so, from my brother's brief. He is putting forth these social evils, all of which I admit, but failing to tie them in with the ban that this Massachusetts statute has on the free distribution of contraceptives.

The other argument that I would -- that I think is important here is that he keeps stressing the fact that nobody pays any attention to it anyway. And I've alluded to this moments ago, but I would say that I think it's important enough to repeat, that that can't be the measure of whether or not this statute is within the framework of the police power that Massachusetts has. It just cannot be.

Now, there is one argument that I would like to address, with respect to the Supplemental Brief and Appendix. Through no fault of my brother, I did not receive this until Monday.

In the Supplemental Brief of the Appellee, there is one argument advanced here with respect to an Act of the Congress, a law that was passed in December of 1970, entitled Family Planning Services and Population Research Act of 1970.

Now, the gist of the argument here is that the supremacy clause of the Sixth Amendment now will make the Massachusetts law on this inoperative, totally inoperative; something of an occupation of the field argument.

Now, I fail to see, and I repeat, I confess, I haven't researched this, I haven't had the time. But in reading the preamble here of the Congressional Act, "to promote public health and welfare by expanding, improving, and better coordinating the family planning services and population research activities of the Federal Government, and for other purposes", I fail to see where the Congress intends here to occupy the field, to the exclusion of a statute in Massachusetts that has been enacted under the police power.

I fail to see the connection between the supremacy clause and the Congressional Act.

Q I thought, Mr. Nolan, that your strongest point, really, was that the police power was being exercised here by the State of Massachusetts to protect people from harmful substances at the hands of non-physicians. You don't bend from that, do you?

MR. NOLAN: No, I do not, and that's treated in my brief, and there are quotations even from the Planned Parenthood, as to the dangers, not only with respect to the Pill, Mr. Chief Justice, but also related contraceptive devices, and warnings. Even on the can of Emko there's a warning that if there is any irritation, see your doctor.

MR. CHIEF JUSTICE BURGER: Well, Mr. Tydings, we'll give you an option, if you would prefer not to split your argument today and tomorrow, ten minutes today, we'll let you

begin in the morning. What's your choice in the matter?

MR. TYDINGS: I think I'd prefer, if it please the Court, to begin now, Mr. Chief Justice, and divide my argument.

MR. CHIEF JUSTICE BURGER: Very well.

ORAL ARGUMENT OF JOSEPH D. TYDINGS, ESQ.,

ON BEHALF OF THE APPELLEE

MR. TYDINGS: I'd like to call the Court's attention to the dissenting opinion in the Massachusetts Supreme Judicial Court. That decision was 4 to 3. It can be found at page 26 of the opinion. I think it's a very fine dissent.

Q Well, which one?

MR. TYDINGS: That's on the Supreme Judicial Court of Massachusetts.

Q But I think there are two opinions, aren't there?

MR. TYDINGS: No, this is the first, when the case originally went up. And it was held 4 to 3 that the --

Q Yes, but there are two dissenting opinions.

MR. TYDINGS: Well, I was referring to the one by Judges Whitemore and Cutter, found at page 26.

Q Yes.

MR. TYDINGS: And I'd also, in regard to standing, like to call the Court's attention to the fact that the Supreme Judicial Court of Massachusetts implicitly recognized the standing of the appellee, and it's stated on page 26 there, the issue was never raised until oral argument before the First

Circuit. That when a man's in jail, convicted, serving time because of an unconstitutional statute, I fail to see how he could better have standing to challenge the constitutionality of it.

Now, may it please the Court, the brief which I filed, and which my brother just referred to, describes with some particularity the legislative history and background of the Family Planning Acts before the Congress of the United States.

He failed to mention that we're talking about the supremacy clause here with respect to three separate statutes. The first one was the OEO statute in 1964, which authorized Family Planning Clinics to be operated throughout this country, and contraceptives to be distributed to married and unmarried, rich and poor, without discrimination, to protect against the unwanted pregnancy.

In 1967 that Act was amended to specifically make it a program of emphasis and earmark funds in OEO that had to be used for that purpose.

In 1967 we amended Title IV and Title V of the Social Security Act to provide that six percent of all funds appropriated for maternal and child care had to be expended in State Family Planning Clinics for the distribution of information and contraceptives to married and unmarried alike, and the regulation specifically said that a State could not

discriminate between married and unmarried.

In Title IV we specified that every woman receiving public assistance -- that's every woman on welfare -- had to have the opportunity, married or unmarried, rich or poor, to have Family Planning -- sir?

Q Is this a peremption argument?

MR. TYDINGS: Yes. This is the peremption -- this is the --

Q Has that been made in any brief?

MR. TYDINGS: Yes, sir. This is the whole substance of my brief.

Q Which is yours? I don't know that I have it.

MR. TYDINGS: The one of Joseph D. Tydings, David Rutstein, No. 70-17, Supplemental Brief and Appendix.

Q Well, excuse me, but I don't have it.

MR. TYDINGS: I'm sorry, Mr. Justice Brennan.

Q That's all right.

MR. TYDINGS: I wish you did.

(Laughter.)

But the --

Q Well, that's why I'm just not familiar with the peremption argument. I'll have to get it.

MR. TYDINGS: The fourth statute was the Family Planning Services Act of 1970, which my brother referred to, which specifically, I might say, in the very first clause of

the Act, Section 2, "It is the purpose of this Act to assist in making comprehensive voluntary family planning services readily available to all persons desiring such services."

The President, when he signed that Act, in two parts of his message, referred to adequate family planning services for the next five years to all those who want them.

This Act merely significantly increased the amount of funds available.

But clearly, Mr. Chief Justice, that the Massachusetts statute stands, and the Wisconsin statute stands, they block the carrying out of this statute, and of the 1964 Act and the '67 Amendments to the Social Security Act in Massachusetts and the State of Wisconsin.

Q Do you think it would be contrary to the federal Act for a State to attempt to comply, to be consistent with the federal Act if it said that all distribution of material, of contraceptive materials will be through physicians?

MR. TYDINGS: It would --

Q They say it will be available to married and unmarried alike, but our Family Planning Clinics are going to be manned solely by doctors, no one else is entitled to dispense contraceptives.

MR. TYDINGS: I am afraid that it would break down the whole thrust of the operation of the program, for the reason that, first of all, you're talking about non-prescriptive

and prescriptive.

Q Well, it may not work, but would it be contrary to the face of the federal Act, the federal regulation?

MR. TYDINGS: Well, it would be -- certainly it would break down the whole thrust of the Act. I would say, if I were the Administrator, I'd let them have the money.

Q Well, I know, but can a State --

MR. TYDINGS: Because --

Q I know, but where in the federal Act you raise does it say that the State may not use physicians solely? Or that someone besides physicians must be permitted to dispense?

MR. TYDINGS: It doesn't say that anywhere. But the thrust of the Act, Mr. Justice White, the thrust of the Act is to provide these Family Planning Services and contraceptives to the poor, to the unmarried mothers who need them, to provide them in clinics. And you just can't possibly afford to have a doctor in every clinic. And then when you tie on top of that, you make no distinction between prescriptive and non-prescriptive drugs, dangerous and non-dangerous drugs; in Massachusetts it's perfectly all right, you know, to sell a condom to a man if he says -- an unmarried man, if he's going to use it for purposes of venereal disease protection; but if he's going to use it for family planning protection, then it's a felony.

Now, --

Q I know your time is running out, Mr. Tydings, for

this afternoon, but I just want to ask a few questions.

MR. TYDINGS: All right.

Q I've just gotten a copy of your brief now. I take it the State hasn't answered this additional question, has it?

MR. TYDINGS: No, it hasn't.

Q And I gather this argument was not made in any court below, was it?

MR. TYDINGS: That's correct, Mr. Justice Brennan.

The right to make a decision to protect one's life, or to protect one's health is a fundamental, personal constitutional right, within the penumbra certainly of the Fourth and Fifth Amendments and the Ninth Amendment, as described in Judge Goldberg's decision in the Griswold case.

I think the right not to expose one's life, risk one's life to death, or to risk one's health by being forced to have an unwanted child is a constitutionally protected right.

Now, the Massachusetts statute is arbitrary, capricious, and has no reasonable relation to a proper legislative purpose, because it violates a fundamental, personal right, with no compelling State reason, and with not a narrowly defined statute.

And let me go one step further, if I might. There are two possible reasons for the Massachusetts statute.

The first would be health, and yet how can you argue

this is a health statute if you permit a married woman to receive advice and prescriptions from a gynecologist, and you don't permit an unmarried woman? How --

Q But is that an issue any longer?

MR. TYDINGS: Well, it's still an issue on the Massachusetts statute.

Q Well, on this particular case, though?

MR. TYDINGS: Well, this particular case --

Q Since there's no evidence in the case we find now, about the marital status of the person to whom the delivery of this contraceptive --

MR. TYDINGS: No, there was no -- there was no evidence, but it was before a college audience, may it please Mr. Chief Justice.

Q Well, isn't the offense -- I thought the offense was confined to the act of delivery to this one person.

MR. TYDINGS: Well, it is. The offense was defined. But the question of whether or not it was married or unmarried relates to the validity of the statute.

I mean, this statute is inherently unconstitutional, because there is no compelling State reason for it. And if I may continue, I'll show some of the absurdities and the contradictions which put it clearly behind any justification, either as a health statute or a moral statute.

For instance, this statute --

Q I might take it that that's the ground the Court of Appeals took?

MR. TYDINGS: That's correct, Mr. Justice Brennan.

Q And that the only possible justification could either be health or moral. And on the Court of Appeals' analysis, it was neither; therefore it was completely void. Is that it?

MR. TYDINGS: Exactly right.

And let me take it a step further, Mr. Chief Justice. This statute says that you can't get a prescription for a non-prescriptive, non-dangerous contraceptive like Emko Foam or a condom unless you go to a doctor, unless the sole purpose is for venereal disease.

So the poor mother -- let's say the poor married mother, for the time being, without regard to the unmarried woman. She is not going to have five or ten dollars to go down to a doctor and get a prescription to go down and get a can of foam. I mean, that cuts off any opportunity for her to protect her own health. She might have had four or five children. It might be very risky for her to have another one.

And yet this statute, it just arbitrarily discriminates against her.

You've got the situation where, until 1966, Mr. Chief Justice, this statute didn't even hold out any relationship to health whatsoever. It said that no woman, married or

unmarried, could receive a contraceptive from anyone.

Now, they put in that second statutory clause about a married woman and a doctor's prescription, and so forth, after the Griswold decision. But they tried to tailor it absolutely as closely as they could, without any relationship to a health measure.

MR. CHIEF JUSTICE BURGER: Well, we'll resume at that point in the morning, if you will.

MR. TYDINGS: Fine, sir.

(Whereupon, at 3:00 p.m., the Court was recessed, to reconvene at 10:00 a.m., Thursday, November 18, 1971.)

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IN THE SUPREME COURT OF THE UNITED STATES

THOMAS S. EISENSTADT,

Appellant,

v. : No. 70-17

WILLIAM R. BAIRD,

Appellee.

Washington, D. C.,

Thursday, November 18, 1971.

The above-entitled matter was resumed for argument at 10:03 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

(Same as heretofore noted.)

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will resume arguments in No. 17.

Mr. Tydings, you may continue. You have 20 minutes left.

ORAL ARGUMENT OF JOSEPH D. TYDINGS, ESQ.,

ON BEHALF OF THE APPELLEE (Resumed)

MR. TYDINGS: Mr. Chief Justice, and may it please the Court:

Yesterday afternoon, when the Court recessed, we were discussing the only possible interest, or the possible reasons for the Massachusetts statute.

And the first would be the health reason. And I was pointing out the absurdities of the statute and why it was not a health statute. And you recall I pointed out that it permitted a married woman to be examined, advised by a doctor, a gynecologist, but not an unmarried woman.

It permitted a, really a rich married woman, with easy access to a physician, to get all the prescriptions she needed, but it discriminated against the poor married woman, because it required her to get a prescription for a non-prescriptive or non-dangerous drug or contraconceptive.

I might, at this time, point out to the Court that the Massachusetts General Laws, Chapter 270, Section 3, at page 95 prohibits the giving away of medicines or drugs injurious to the user. And it incorporates the regulations

promulgated by the Food and Drug Administration of the United States. And under those regulations, members of the Court, there are certain contraceptives which must, in Massachusetts and every other State, be prescribed by a physician. For instance, the Pill, the IUD, or the diaphragm.

But the non-dangerous, the non-prescriptive drugs, like the condom, like the foam, like the vaginal jellies, they should be issued in Massachusetts, like any other State. If the Massachusetts Legislature had an interest in the health, they would have put it in here, but they protect it against the health.

Now, this statute is purely and simply anti-contraceptive.

Let me give you some of the patent absurdities. A married woman, who has been separated from her husband for three or four years, she can go, be prescribed and get a contraceptive for family planning purposes, despite the fact she hasn't seen her husband for years; obviously for illicit purposes. But the poor married woman who doesn't have enough money to go to the doctor, she can't.

A bride, a girl about to be married, she can't go to a gynecologist and be prescribed a contraceptive, non-prescriptive or any other type, until after the wedding ceremony, and she dashes from the church to the gynecologist to the drugstore and back to the wedding reception. It's patently absurd.

Now, let's move on to the so-called morale aspect of the statute. And if you would assume there was a moral reason, it would be, I assume, to restrain or deter fornication. But how could they permit, if that was the desire, how could they draw a statute which would permit a married woman who had been separated, or a husband whose wife had been away for two or three years, in the process of a divorce, and the divorce decree not final, how could she go down and get a contraceptive for family planning purposes, and the unmarried woman couldn't?

If it was really a deterrent effect, why wouldn't you increase the statute from a misdemeanor, fornication in Massachusetts is a misdemeanor, 90 days; whereas the selling of a non-prescriptive, non-dangerous contraceptive for family planning purposes to an unmarried person, that's five years, it's a felony.

Now, if they were really concerned with deterring illicit or premarital intercourse, they would increase the fornication statute from a misdemeanor of 90 days and they would enforce the laws that exist.

Q Is adultery also a criminal offense in Massachusetts?

MR. TYDINGS: It's my understanding it is. And yet this --

Q What punishment does that carry, do you know?

MR. TYDINGS: I do not know.

Q More or less than fornication?

You don't know?

MR. TYDINGS: I can't answer that, Mr. Justice Stewart.

Q I just thought that in adultery, under the law, this information is freely available to an adulterer --

MR. TYDINGS: That's right.

Q -- or an adulteress. Because, by definition, they're married.

MR. TYDINGS: That's right.

So it's -- if the restraint of adultery is its purpose, it's completely vitiated by the language of the statute.

The real thrust of the statute, may it please the Court, is that it's a holdover from the Comstockian days. It was originally, and until 1966, it was designed to prevent any person, married or unmarried, from using a contraceptive in the State of Massachusetts. After the Griswold case, they amended it as narrowly as possible to try and come within the confines of the Griswold case. But it's not a health statute. And it's really not a justifiable moral statute.

May it please the Court, I think the cases uniformly hold, where you're dealing with a fundamental personal right, and I think there is a fundamental personal right here, namely the right of an individual or a woman not to have an unwanted

pregnancy, which may be dangerous to her health or life, then you've got to show a compelling interest. And it's got to be narrowly defined. And the State of Massachusetts meets neither of these.

But, even more, the Massachusetts statute violates the strong interest of society and the people of Massachusetts, and that interest is to protect the health and safety of a mother and a child, be that mother married or unmarried, there is a strong interest to protect the health and safety of the child. There is a strong interest to society in Massachusetts to prevent unwanted pregnancies, and there's a strong interest in the State of Massachusetts to prevent unwanted and illegitimate children being brought into the world.

And look what the statute does. I mean, look at the damage caused by unwanted pregnancies. Take the mother, to begin with. The mother, and I might say that in the State of Massachusetts, from the period of 1964, I think -- 1966 to 1968, 31 percent of the white children conceived in the State of Massachusetts were conceived out of wedlock, and 64 percent of the non-white children were conceived out of wedlock. Now, that's not to say they were illegitimate. Because the illegitimacy rate was, I think, 6 percent in Massachusetts.

But they were conceived out of wedlock. So, so far as any deterrent effect, it doesn't have any.

But look at the consequences to the unmarried mother.

First of all, she's likely if she has -- if she's so desperate that she can't have the child, she'll go to some quack abortionist, particularly if she's poor, perhaps inflict on herself some grave and serious physical injury. She's likely to die. If she does have the child and she's illegitimate, it puts her in a cycle from which she may never recover. You know, I think, as well as I, the whole social problems of our nation with respect to the poor unwanted child and the welfare mother.

But once she gets in that cycle, it's almost impossible to get out. Her whole life is committed from that point on.

The health consequences to the -- particularly the poor unmarried mother are grave. You have a far higher maternal death rate from the unmarried mother than you do from the married mother. And let's look at the child.

The child born out of wedlock, -- the brief, may it please the Court, by Mrs. Harriet Pilpel, The Planned Parenthood, from pages 20 to 26, is very explicit and cites all of the studies, HEW and elsewhere, which back up the facts that I am going to just comment on here. I am sure that you know them, anyway. It's a very excellent presentation in this brief.

But take the child. You've got the higher death rate of children born out of wedlock; higher premature births; higher infant mortality in the first year. The greater likeli-

hood of disease and mental retardation. And of course the most saddest and really the most tragic thing of all, the greater likelihood of child abuse, child beating, and all the types of antisocial activities which contribute to making that child a ward of society from then on.

Now, finally, may it please the Court, it's the strong interest of society in the State of Massachusetts to prevent unwanted, illegitimate children from being born. Because these poor children with, in many instances, no father, in many instances, the mother may have three or four illegitimate children already.

What chance do they have to make it in our life? They just don't have a chance. And if you look at the statistics in your institutions, whether they're mental institutions, whether they're penal institutions, you'll find that the prevalence of the unwanted child without the father is right up at the top.

And that was the whole thrust and reasoning for the entire legislative programs that the Congress has passed during the past six or seven years, beginning with the OEO Act in '64, the '67 Amendments to the Social Security Act, and finally the Family Planning Act of 1970.

In May of this year, HEW announced in the State of Massachusetts that they're going to fund four major projects for low-income families in Lowell, Brockton, Springfield,

and one other area in the State of Massachusetts under the 1970 Act. And of course the regulations say there that you cannot discriminate between married and unmarried.

Now, what happens if this statute is held constitutional?

It will mean that in the State of Massachusetts, in nine hospitals involved, for low-income mothers, you are going to say "Sorry" to the unmarried mother who might have had four or five illegitimate children already, and the next birth may send her to -- cause grave physical injury, even death; to say "Sorry, we can't prescribe to you because you're unmarried"?

I mean, that's patently against the best interests of the State of Massachusetts. It's against the whole thrust of federal legislation. It's an outdated anachronism from a Comstockian statute back in the 1870's, which has no business being on the statute books today.

Let me, if I might, just make one or two other points.

I feel very strongly that the -- what the Griswold case really held was what Justice Harlan said in his dissent, back in Poe vs. Ullman, and that is: that there are limits to the extent to which a legislatively representative majority may conduct experiments at the expense of the dignity and the personality of the individual.

Here we're not only talking about the dignity and the personality of the individual, we're talking about the very

right to life and health, not only of the individual mother herself but to the possible unborn child that she may have or she may have some day.

For these reasons, I would hope that the Court would find the Massachusetts statute unconstitutional.

MR. CHIEF JUSTICE BURGER: Thank you. I think you have probably about five minutes reserved for rebuttal -- no, no, you have not used up your full time. You have five minutes left, if you want to use it.

MR. TYDINGS: Unless the Court has some questions, I have nothing further to say.

MR. CHIEF JUSTICE BURGER: Apparently not.

Mr. Nolan, you have five minutes left to use.

REBUTTAL ARGUMENT OF JOSEPH R. NOLAN, ESQ.,

ON BEHALF OF THE APPELLANT

MR. NOLAN: I had not reserved any time for rebuttal, but I would like to make one point, Mr. Chief Justice, may it please the Court:

My brother has alluded to Griswold. I think if there's any case that, while factually it may be somewhat close to Baird, if there's any case that's distinguishable with ease, it's the Griswold case.

First of all, Griswold dealt, in the main, with use; permitted the doctors or the directors of the Planned Parenthood, or the Clinic down there in Connecticut to use that. But

they were considered as -- they were permitted to bring the suit with standing, because, theoretically, they might be aiders and abettors, I think the Court said there.

The point I'm making is that in Griswold, you are talking about use; secondly, you're talking about married people exclusively; and, third, you're talking about advice given by qualified physicians.

Now, on the entire three bases here, the case is distinguishable from Baird, because in Baird we're talking about the propriety of a statute that bans contraceptives to the unmarried. We're not talking about use, we're talking about giving away or selling. And third, we're talking about people like Baird who are not qualified.

So I think that Griswold, in no sense, aids the appellee here.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Nolan.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 10:18 a.m., the case was submitted.)