Broad Attack On Attempts To Regulate Sex Morals

United Press International

Birth-control crusader William Baird won a test case last week when a Federal court overthrew a Massachusetts law banning the dissemination of contraceptives to unmarried persons.

WASHINGTON — After years in which American law operated on the assumption that sex was likely to get out of hand unless it was hemmed in by laws, the constitutional right and propriety of governmental interference with the private sexual morals of adults is coming under a broad attack.

A revealing sign came last week, when the United States Court of Appeals for the First Circuit struck down the anti-birth control law of Massachusetts, the last state to seriously enforce a law against contraceptives. Described as a measure to deal with "crimes against chastity, morality, decency and good order," the law forbade giving contraceptive advice or devices to unmarried persons.

Traditionally, such a law would be considered constitutional because governmental power in this country has included broad authority to protect the general welfare — including health, safety and morals. But the First Circuit held that because the law conflicted with people's "fundamental human rights" to sexual privacy the Massachusetts Legislature was not justified in banning contraceptives simply because it considered them inherently immoral.

The assumption that sexual privacy can outweigh the Government's interest in enforcing its view of morality has emerged in many quarters in recent months. It could eventually sweep away much of the current legislation in the field of morals, unless the Supreme Court calls a halt to the process.

America's traditional penchant for legislating morality has produced a melange of laws against obscenity, adultery, fornication, homosexuality, sodomy and other activities, to the point that in some states virtually all sex is illegal except face-to-face relations between spouses.

But the most troublesome laws have been those inspired by Anthony Comstock, the puritanical crusader of the 19th century. In 1883 Congress passed the first "Comstock Law"; it outlawed the importation and the mailing of any devices that could be used for contraception.

About half of the states followed suit with "Little Comstock Laws," but only Connecticut and Massachusetts, with their large Roman Catholic majorities, really worked at enforcing them.

Connecticut's law fell in 1965 when the Supreme Court began the current hands-off trend toward sex, in Griswold v. Connecticut. The law prohibited even married people from using contraceptives — a prohibition the Court found to be a violation of the rights of marital privacy that are protected by the Bill of Rights.

About a dozen states repealed their "Little Comstock Laws" after the Griswold decision or changed them so as not to interfere with the growing number of Federally funded birth control clinics. The Massachusetts Legislature amended its law so that it did not apply to married couples. But it authorized up to five years' imprisonment for anyone who demonstrated, gave or sold contraceptive devices to unmarried persons.

This was a challenge to William R. Baird, an anti-Comstock crusader. He got himself arrested for giving a tube of contraceptive foam to an unmarried co-ed during a lecture at Boston University. After serving 36 days in jail, Mr. Baird succeeded in overturning the law on his appeal to the First Circuit.

(The Federal Government's "Comstock Law," incidentally, is still on the books, and would be hamstringing the Government's own birth control efforts if Federal judges hadn't interpreted the law as applying only to "unlawful" contraceptives.)

In support of governmental authority to ban contraceptives and obscenity, different grounds of alleged immorality were asserted. Both seemed thin in the context of present day mores. The ban on contraceptives grew out of the Victorian notion that sex should be solely for procreation, not available just for fun. Dirty pictures and books were thought to corrupt the mind and perhaps to encourage rape.

The Supreme Court enlarged on another aspect of the sexual privacy theme in a 1969 obscenity decision concerning a person's right "to satisfy his intellectual and emotional needs in the privacy of his own home." Overturning a Georgia man's conviction for possession of obscene stag movies in his home, the Court ruled that "the mere possession of obscene matter cannot constitutionally be made a crime" because the Government cannot tell citizens how to think.

If ever there was doubt as to the potential of this privacy doctrine to cancel out sexual morality laws, it was laid to rest by the impact of this ruling on the obscenity laws. Because the Supreme Court had said that individuals have a right to view obscenity in private, lower Federal court judges have since held:

¶That the Federal laws against importing or mailing pornography are unconstitutional, since people must be able to get pornography if they are to exercise their right to see it.

¶That the film "I Am Curious (Yellow)" cannot be banned in Boston, since this is the poor man's equivalent of enjoying stag movies at home.

Appeals of these cases will be heard in the next few months by the Supreme Court, which could approve the privacy trend or could signal the lower courts to slow down. Whatever the outcome, there are signs that in other areas of morals law the same hands-off policy toward private sexual morality is developing.

—FRED P. GRAHAM

The New York Times
Copyright © The New York Times
Originally published July 12, 1970