

Michigan Law Review

Volume 58 | Issue 6

1960

Constitutional Law - Substantive Due Process - Statute Prohibiting Use of Contraceptives

Erik J. Stapper S.Ed.
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Health Law and Policy Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Erik J. Stapper S.Ed., *Constitutional Law - Substantive Due Process - Statute Prohibiting Use of Contraceptives*, 58 MICH. L. REV. 929 (1960).

Available at: <https://repository.law.umich.edu/mlr/vol58/iss6/11>

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

CONSTITUTIONAL LAW—SUBSTANTIVE DUE PROCESS—STATUTE PROHIBITING USE OF CONTRACEPTIVES—A Connecticut statute prohibits the use of contraceptives to prevent conception.¹ Plaintiff-doctor sought a declaratory judgment to have the statute declared unconstitutional as an unreasonable restraint on his right to practice his profession inasmuch as his advice would render him an accessory to a violation of the statute.² Three companion cases were also brought, one by a patient to whom another pregnancy would present serious danger, and two by married couples who could not give birth to normal children. The patients claimed that the statute deprived them of the doctor's best medical advice which would relieve them of a dangerous threat to their health and happiness, and should therefore be declared unconstitutional as a violation of the Fourteenth Amendment. The trial court sustained the state's demurrer to the complaint. On appeal, *held*, affirmed. Use of contraceptives may be the best scientific method of preventing pregnancy, but the legislature need not approve this method where there is the alternative of abstinence from sexual intercourse. It cannot be said that the legislature could not reasonably conclude that the greater good would be served by a prohibition without exceptions. *Buxton v. Ullman*, (Conn. 1959) 156 A. (2d) 508, review granted 28 U.S. LAW WEEK 3344 (1960).

A statute prohibiting the use of contraceptives is an exercise of the state's power to protect the public health, morals and welfare.³ The Supreme

¹ Conn. Rev. Stat. (1958) §53-32 provides: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." The Connecticut Supreme Court held in 1942 that no exception could be read into the law where pregnancy would endanger the life of a married woman. *Tileston v. Ullman*, 129 Conn. 84, 26 A. (2d) 582 (1942). The Supreme Court of the United States subsequently dismissed an appeal on the ground the plaintiff-doctor could not assert the rights of his patients. *Tileston v. Ullman*, 318 U.S. 44 (1943).

² Conn. Rev. Stat. (1958) §54-196.

³ Connecticut is the only state to prohibit the use of contraceptives. Sixteen states have no law at all concerning contraceptives, while seven states include them in their maternal health programs. The remaining states have a variety of laws, but usually provide an exception for physicians or druggists, except Massachusetts, which prohibits the sale for the purpose of preventing conception. The Massachusetts statute has been construed to allow a sale for the purpose of preventing disease; *Commonwealth v. Corbett*, 307 Mass.

Court of the United States relies on the due process clause of the Fourteenth Amendment as a method by which to test state exercise of the police power. Whether the Court will in fact utilize that method depends on the area sought to be regulated. The use of the due process clause in reviewing state economic regulations has almost been abandoned.⁴ A presumption of constitutionality exists which has been justified by saying that protection from legislative abuse is to be obtained at the polls, not in the courts.⁵ However, this same rationale need not be applied to legislation outside the economic area. There seems to exist an area of preferred freedoms where the Supreme Court will scrutinize the record to see if in fact a rational relation exists between the evils which the legislature has apprehended and the means which have been selected to attack those evils.⁶ This use of the due process clause is justified on the ground that the freedoms involved are vital to the operation of a democratic system.⁷ In view of the divergence in attitude depending on the area sought to be regulated, it is extremely important how the anti-contraceptive statute is categorized. The statute classifies the use of contraceptives to prevent conception as a crime against the person,⁸ which raises the question who is the person protected. It must either be one of the marriage partners or the unborn, unconceived child. In either case the statute is outside the economic area, and governs marriage or procreation, which are among the basic civil rights.⁹ Therefore the flat presumption of constitutionality ought not to be applied.¹⁰ Instead it would seem a court would be justified in scrutinizing the record and determining whether the legislation is reasonably related to the evils it is attacking. The evils which the state of Connecticut has seen are two. First there is the fear of exposing the uninformed person to injurious devices.¹¹ Second-

7, 29 N.E. (2d) 151 (1940). Federal law makes it a crime to mail contraceptive materials, 18 U.S.C. (1958) §1461. But the federal courts have construed this prohibition as not applicable to materials sent to qualified people, which not only includes physicians, but also married couples using contraceptives upon the advice of a physician. *Consumers Union of the United States v. Walker*, (D.C. Cir. 1944) 145 F. (2d) 33. A summary of the statutes can be found in CALDERONE, ABORTION IN THE UNITED STATES 155 and 197 (1958), while cases are discussed in SULLOWAY, BIRTH CONTROL AND CATHOLIC DOCTRINE 159-166 (1959).

⁴ See Kauper, "Trends in Constitutional Interpretation," 24 F.R.D. 155 at 174-175 (1959); Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 N.W. UNIV. L. REV. 13 at 23 (1958).

⁵ *Williamson v. Lee Optical*, 348 U.S. 483 at 488 (1955); *Day Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 at 425 (1952); *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220 at 224 (1949).

⁶ See Kauper, "Trends in Constitutional Interpretation," 24 F.R.D. 155 at 176 (1959); Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 N.W. UNIV. L. REV. 13 at 15-16 (1958).

⁷ See Kauper, "Trends in Constitutional Interpretation," 24 F.R.D. 155 at 176 (1959).

⁸ Section 53-32 is part of the chapter of crimes against the person.

⁹ See *Skinner v. Oklahoma*, 316 U.S. 535 at 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390 at 399 (1923). The language of these cases was used in declaring the California miscegenation statute unconstitutional. *Perez v. Sharp*, 32 Cal. (2d) 711, 198 P. (2d) 17 (1948).

¹⁰ It was the application of the presumption of constitutionality which divided the court in *Perez v. Sharp*, note 9 supra. The dissent wanted to apply it. 32 Cal. (2d) at 753.

¹¹ See *State v. Nelson*, 126 Conn. 412 at 425, 11 A. (2d) 856 (1940).

ly, there is the possibility that the availability of contraceptives encourages illicit relationships.¹² To prevent injury to uninformed people by means of a flat prohibition against the use of contraceptives by anyone equates the informed person with the uninformed. All married couples in Connecticut are confined in the exercise of their marital rights to what the uninformed person can comprehend, since medically approved items are absolutely prohibited. Therefore the statute is not limited to combating the apprehended evil, but appears to restrict unreasonably the exercise of a part of a civil right.¹³ As indicated the state of Connecticut also believes that the prohibition against contraceptives will engender a fear of pregnancy and illegitimate childbearing which will act as a deterrent upon illicit relationships. The Connecticut Supreme Court accepted this argument and held the statute a valid exercise of the police power, because where pregnancy endangers the woman there is an alternative in total abstinence from intercourse.¹⁴ Connecticut has thus in fact said to these plaintiffs that if they exercise their marital right according to the best medical advice both they and the doctor will be breaking the law, and therefore their only alternatives are risking injury or non-exertion of their marital right. But marriage is a basic civil right, and the state can demand from its citizens that they refrain from exercising a part of a civil right only when the state has a compelling interest.¹⁵ Is the deterrent effect on fornication and adultery of this anti-contraceptive law such a compelling interest as to warrant an abrogation of a part of a basic civil right? Since there are already criminal provisions against adultery¹⁶ and fornication,¹⁷ the anti-contraceptive statute has at the most an auxiliary effect, and is cumulative and not essential to the purpose of the state. Depending, therefore, on the judicial identification and appraisal of the basic rights involved and the degree of judicial scrutiny in weighing the public interest served by the statute, the statute may well be termed an unreasonable restraint on these plaintiffs' civil rights.¹⁸

Erik J. Stapper, S.Ed.

¹² *State v. Nelson*, note 11 supra, at 424-425.

¹³ Cf. *Butler v. Michigan*, 352 U.S. 380 at 383 (1957).

¹⁴ *Tileston v. Ullman*, note 1 supra, and principal case at 514.

¹⁵ *N.A.A.C.P. v. Alabama*, 357 U.S. 449 at 463 (1958).

¹⁶ *Conn. Rev. Stat. (1958) §53-218.*

¹⁷ *Conn. Rev. Stat. (1958) §53-219.*

¹⁸ The constitutionality issue in the principal case perhaps could be avoided on the ground the decision is on a demurrer to a declaratory judgment on a penal statute where no threat of prosecution exists, and therefore no case or controversy is involved according to *United Public Workers of America v. Mitchell*, 330 U.S. 75 at 89 (1947). However it has been suggested that the *Mitchell* case was overruled in *Adler v. Board of Education*, 342 U.S. 485 (1952). See dissent in *Adler* at 503-505, and note, 34 N.Y. UNIV. L. REV. 141 at 146 (1959). If this is true then it would no longer be necessary to await prosecution before a constitutional issue can be decided. Cf. *Evers v. Dwyer*, 358 U.S. 202 (1958); *Barrows v. Jackson*, 346 U.S. 249 at 257 (1953). But in *Feldman v. Ervin*, (S.D. Fla. 1955) 128 F. Supp. 822 such declaratory relief was denied.