CONSTITUTIONAL LAW—EQUAL PROTECTION—MASSACHUSETTS STATUTE RESTRICTING CONTRACEPTIVES TO MARRIED PERSONS IS UNCONSTITUTIONAL—*Eisenstadt v. Baird*, 405 U.S. 438 (1972).

While delivering a lecture to a group of students at Boston University, William Baird utilized diagrams of various contraceptives and commented on their respective merits. He noted that by displaying contraceptives he was violating a state statute and urged the students to petition the Massachusetts legislature to repeal the law.[1] At the conclusion of his presentation he invited the audience to help themselves to the contraceptive articles and handed a woman a package of vaginal foam, thus violating MASS. GEN. LAWS ANN. ch. 272, § 21A (1968).[2] He was arrested and convicted for exhibiting[3] and distributing[4] contraceptives.[5] Although the Supreme Judicial Court of Massachusetts unanimously reversed Baird's conviction for exhibiting contraceptive devices,[6] it affirmed his conviction for distribution of such articles.[7]

The Supreme Court denied Baird's petition for certiorari.[8] He subsequently sought habeas corpus relief from the federal district court, which dismissed his writ.[9] The court of appeals for the First Circuit vacated the dismissal and remanded to the district court, with directions granting a writ to discharge Baird.[10] Thomas Eisenstadt, the Sheriff of Suffolk County, appealed to the Supreme Court, which

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1 MASS. GEN. LAWS ANN. ch. 272, § 21 (1968) provides in part:

> Except as provided in section twenty-one A, whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article . . . for the prevention of conception . . . shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars.

2 MASS. GEN. LAWS ANN. ch. 272, § 21A (1968) provides in part:

> A registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. A registered pharmacist . . . may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

3 Baird was convicted for exhibiting contraceptives under MASS. GEN. LAWS ANN. ch. 272, § 21 (1968).

4 Distribution of contraceptives is covered by MASS. GEN. LAWS ANN. ch. 272, § 21A (1968).

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

6 The court held that section 21 as applied to Baird for exhibiting contraceptive devices was unconstitutional. *Id.* at 756, 247 N.E.2d at 580.

7 *Id.*

8 396 U.S. 1029 (1970).

9 Baird v. Eisenstadt, 310 F. Supp. 951, 957 (D. Mass. 1970).

10 Baird v. Eisenstadt, 429 F.2d 1398, 1402-03 (1st Cir. 1970).

noted probable jurisdiction.[11] The Court, speaking through Justice Brennan, affirmed the decision of the circuit court of appeals, declaring the Massachusetts statute unconstitutional as violative of the equal protection clause of the fourteenth amendment.[12]

Baird's first obstacle in his challenge to the constitutionality of sections 21 and 21A was establishing his standing to assert the rights of the unmarried. Standing[13] has been an especially formidable hurdle for opponents of legislation regulating the use and distribution of contraceptives.

In *Tileston v. Ullman*,[14] a physician sought a declaratory judgment that certain Connecticut statutes prohibiting him from giving advice about contraceptives were unconstitutional.[15] The Court in *Tileston*, applying a strict standard for standing, found that since the patients were not barred from asserting their own rights, the physician was not a proper party to question the constitutionality of the statute.

However, in *Poe v. Ullman*,[16] where two married women and a physician challenged the same statutes, again in a declaratory judgment action, the Court did not discuss the issue of standing. Justice Frankfurter, writing for four members of the Court, stated that there was no case or controversy within the meaning of article III of the Constitution[17] because of the lack of immediacy in the threat of prosecution.[18]

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11 401 U.S. 934 (1971).

12 405 U.S. 438, 443 (1972).

13 The Court commented on the standing problem recently, noting that

> [w]hether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a "personal stake in the outcome of the controversy," . . . as to ensure that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution."

Sierra Club v. Morton, 405 U.S. 727, 731-32 (1972) (citations omitted). For an explanation of standing, *see generally* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 YALE L.J. 599 (1962). *See also* Ashwander v. TVA, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

14 318 U.S. 44 (1943).

15 *Id.* at 45.

16 367 U.S. 497 (1961).

17 U.S. CONST. art. III, § 2 provides in part:

> The judicial power [of the United States] shall extend to all Cases [and Controversies] in Law and Equity, arising under this Constitution . . . .

18 367 U.S. at 508 (Frankfurter, J., joined by Warren, C.J., Clark & Whittaker, JJ., concurring). Justice Frankfurter stated that since there was no case or controversy, the matter was non-justiciable. *Id.* at 501-03. This lack of immediacy existed even though the state's attorney general had promised to prosecute any violations of the law. *Id.* at 501.

Justice Harlan, in a lengthy and vigorous dissent, argued that the possibility of future prosecution sufficiently infringed upon the petitioners' enjoyment of their right to privacy when the only thing which stood between them and a criminal conviction was the whim of the prosecutor.[19] The substantial injury resulting from this threat involved sufficient "personal stake in the outcome"[20] to invoke the Court's jurisdiction.[21] Harlan opined that the situation in *Poe* fulfilled the standing requirements put forth in *Tileston,* since appellants were, in his opinion, the most appropriate parties to assert their own rights.[22]

A situation with the "concrete adverseness"[23] requisite to justiciability was finally presented in the landmark case of *Griswold v. Connecticut,*[24] where a licensed physician and a Planned Parenthood executive were convicted for violating the Connecticut statutes.[25] The Court emphasized that any doubts that the facts before it presented a case or controversy under article III were removed by the "criminal conviction for serving married couples in violation of an aiding-and-abetting statute."[26] Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not or cannot constitutionally be a crime.[27] It is evident, therefore, that since appellants were appealing from criminal convictions as opposed to seeking declaratory relief, it was unnecessary to rely solely on the existence of a professional relationship between petitioners and the married persons whose rights they sought to assert.[28]

Lack of immediacy, or ripeness, is one element of justiciability. Other facets of justiciability include case or controversy, standing, political questions, and adverseness. *See generally* Bickel, *Forward: The Passive Virtues, The Supreme Court, 1960 Term,* 75 HARV. L. REV. 40, 42-51, 58-64, 74-79 (1961).

19 367 U.S. at 536.

20 Flast v. Cohen, 392 U.S. 83, 99 (1968) (quoting from Baker v. Carr, 369 U.S. 186, 204 (1962)).

21 To present a justiciable case the petitioner

> must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

Frothingham v. Mellon, 262 U.S. 447, 488 (1923).

22 367 U.S. at 530; *cf.* Ashwander v. TVA, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring); Texas v. ICC, 258 U.S. 158 (1922); Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co., 226 U.S. 217 (1912).

23 392 U.S. at 99.

24 381 U.S. 479 (1965).

25 *Id.* at 480.

26 *Id.* at 481.

27 Appellants in *Griswold* were charged with aiding and abetting, while Baird was charged with committing a felony.

28 Sedler, *supra* note 13, at 647:

The Court in *Baird* noted that the case for according standing was even stronger than in *Griswold,* since the unmarried in Massachusetts, unlike the users of contraceptives in Connecticut, were not subject to prosecution under section 21A, and would be denied a forum in which to assert their rights if Baird were not granted standing.[29]

The position of Chief Justice Burger, the lone dissenter,[30] was that Baird had been convicted under a statute which only permitted a physician or a pharmacist to dispense contraceptives. Burger concluded that as a health measure, this was a valid exercise of the police power of the state. Since Baird was neither a pharmacist nor a physician, "the statutory distinction based on marital status [had] no bearing on this case,"[31] for he would have been violating even a perfectly valid statute.[32]

> To the extent that a significant rather than a fortuitous relationship can be shown, the Court is more readily disposed to permit standing. . . . Indeed, standing has been permitted in every instance in which a professional relationship has been involved, with the exception of *Tileston*, and there the question was whether the relationship was sufficient to support standing to sue on behalf of the other party and not standing to assert his rights.
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> The more plausible the relationship, the more likely the Court is to permit standing. . . . Thus the significance of the relationship is a major factor in determining whether there is standing to assert the rights of others, though, in all probability, very special circumstances must be shown in order for the Court to permit standing to sue on the basis of a relationship alone. (footnote omitted).

See, e.g., Barrows v. Jackson, 346 U.S. 249 (1953) (vendor-vendee); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (owners of a school-parents of potential pupils); Meyer v. Nebraska, 262 U.S. 390 (1923) (teacher-students); Truax v. Raich, 239 U.S. 33 (1915) (employer-employee). The Court in *Baird* cited *Griswold* as evidence that

> the doctor-patient and accessory-principal relationships are not the only circumstances in which one person has been found to have standing to assert the rights of another.

405 U.S. at 445. In *Meyer, Barrows,* and *Griswold* a party who was granted standing was allowed to do so as a means of protecting his or her *own* interests. *See* Sedler, *supra* note 13, at 649.

[29] 405 U.S. at 446. In *Griswold* the majority opinion determined that the rights of the husband and wife

> are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

381 U.S. at 481.

[30] 405 U.S. at 465-72. Justices Powell and Rehnquist did not take part in the consideration or decision of this case. *Id.* at 455.

[31] *Id.* at 466.

[32] This view is considerably at odds with recent pronouncements of the Court which have allowed

> attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.

Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); *accord,* Gooding v. Wilson, 405 U.S. 518, 520-21 (1972); Coates v. City of Cincinnati, 402 U.S. 611 (1971):

> Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if

After Baird was accorded standing to assert the rights of the unmarried, the Court eschewed the substantive due process reasoning of the lower court[33] and treated the problem as an equal protection question.[34] In determining whether the classification was based upon "some ground of difference having a fair and substantial relation to the object of the legislation"[35] it was necessary for the Court to determine the purpose of the statute.

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the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. . . . The statute, in effect, is stricken down on its face.

Id. at 619-20 (White, J., joined by Burger, C.J. & Blackman, J., dissenting) (citation omitted).

The Court did not consider whether the unconstitutional portions of the statute might be separable from the remaining valid portion. Section 21A contains two provisions: the first provision restricts the class of distributors of contraceptives to prevent conception to registered physicians and registered pharmacists; the second half limits the recipients of such contraceptives to married persons.

> The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932); *accord,* United States v. Jackson, 390 U.S. 570, 585 (1968). *See generally* J. SUTHERLAND, 2 STATUTORY CONSTRUCTION §§ 2403-04 (3d ed. 1943). However, as is pointed out notes 41 and 58 *infra,* and accompanying text, the statute was intended as a prohibition on contraception. In light of this finding, it would seem that the provisions are not separable.

33 429 F.2d 1400-02.

34 There are two standards employed in deciding equal protection questions. The first test established by the Court to determine if a classification is invidious and therefore in violation of the equal protection clause of the fourteenth amendment requires that a classification

> must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). *See also* Jackson v. Indiana, 406 U.S. 715 (1972). A state can treat different classes of people in different ways. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Railway Express Agency, Inc. v. City of New York, 336 U.S. 106 (1949); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Barbier v. Connolly, 113 U.S. 27 (1885). However, should legislation encroach upon fundamental personal liberties or erect a classification deemed suspect, "the State may prevail only upon showing a subordinating interest which is compelling." Bates v. City of Little Rock, 361 U.S. 516, 524 (1960); *accord,* Shapiro v. Thompson, 394 U.S. 618, 634 (1969). The state must then show that the law is "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida, 379 U.S. 184, 196 (1964). *See also* Schneider v. State, 308 U.S. 147, 161 (1939). The Court in *Baird,* maintaining that it avoided a determination of whether the right to contraceptives was a fundamental right, noted that it was unnecessary to apply the compelling state interest test since the statute's validity did not even satisfy the rationally related public interest test. 405 U.S. at 447 n.7.

35 F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

Originally the statute had been designed to protect morals.[36] However, *Commonwealth v. Corbett*[37] limited the scope of the statute by creating two categories of contraceptives: those for the prevention of disease, and those for the prevention of conception.[38] It held that since it was not part of the public policy of the Commonwealth to permit venereal disease to spread "even among those who indulge in illicit sexual intercourse," the sale of contraceptives to those persons to prevent disease did not offend public policy.[39] The restriction on devices to prevent conception under section 21 became even more questionable after *Griswold*, which held unconstitutional a state statute prohibiting use of articles to prevent conception by married persons.[40] As a result of that case section 21A was added in order to preserve, at least as to the unmarried, a ban on articles to prevent conception.[41]

The supreme judicial court, reviewing section 21A in 1969, maintained that the legislature had a "legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences."[42] A more compelling purpose, however, as announced in *Sturgis v. Attorney General*,[43] was the discouragement of extra-marital relations through

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36 The supreme judicial court determined that its purpose was "to engender in the State and nation a virile and virtuous race of men and women." Commonwealth v. Allison, 227 Mass. 57, 62, 116 N.E. 265, 266 (1917).

37 307 Mass. 7, 29 N.E.2d 151 (1940).

38 *Id.* at 8-9, 29 N.E.2d at 152.

39 *Id.* at 8, 29 N.E.2d at 152.

40 381 U.S. 479 (1965).

41 Commonwealth v. Baird, 355 Mass. 746, 748-49, 247 N.E.2d 574, 576 (1969).

42 *Id.* at 753, 247 N.E.2d at 578.

43 — Mass. —, 260 N.E.2d 687 (1970). In *Sturgis*, a group of gynecologists licensed to practice in Massachusetts filed for declaratory relief. The plaintiffs were attempting to determine the validity of sections 21 and 21A, as well as section 20. Section 20 covers dispensing of information on abortions and contraception, as opposed to section 21 which prohibits advertising for the sale of contraceptives as well as selling, lending, or giving them away. MASS. GEN. LAWS ANN. ch. 272, §§ 20, 21 (1968).

The physicians argued that the statutory provisions interfered with their right to practice their profession and their duty to care for their patients as protected by the fourteenth amendment of the United States Constitution and various articles of the Massachusetts Bill of Rights. — Mass. at — , 260 N.E.2d at 689. In alleging injury to themselves, the physicians avoided the standing pitfalls of *Tileston*. See notes 13 and 14 *supra* and accompanying text.

The supreme judicial court found, however, that

> [t]he physician's obligation to his conscience and to his profession is entirely consonant with his obligation also to abide appropriate regulation imposed by the body politic in the public interest.

— Mass. at — , 260 N.E.2d at 691.

The prohibition against distribution was sustained as an attempt by the state to protect the health of its citizens, even though the court was aware that the statute may be

control of the private sex lives of single persons.[44]

Married persons were permitted access to contraceptives to prevent conception and disease,[45] while single persons, who had access to contraceptives to prevent disease, were not deterred from engaging in illicit sexual relations with married persons.[46] However, when evaluating the effect of the statute on moral conduct, the Court took cognizance of the fact that the ban on contraception had only a marginal relation to the prevention of premarital sex.[47] The Court was unwilling to accept the fact that section 21 and section 21A were intended to discourage fornication, which is a misdemeanor in Massachusetts,[48] noting the disparity between the three months' penalty for fornication and the five year penalty for distribution.[49] Additionally, Justice Brennan maintained that it would be unreasonable for the legislature to prescribe pregnancy and the birth of an unwanted child as punishment for a misdemeanor.[50]

The Commonwealth's defense of the statute as a health measure also proved unsatisfactory. As the *Baird* Court noted, quoting from the dissent in *Commonwealth v. Baird*:[51]

> If there is need to have a physician prescribe (and a pharmacist dispense) contraceptives, that need is as great for unmarried persons as for married persons.[52]

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open to attack for overbreadth in including contraceptives which constitute no health hazard. *Id.* at — , 260 N.E.2d at 690. *Cf.* Justice White's view on the hazards involved in *Baird*, note 82 *infra*. The court, however, acknowledged that the discrepancy of treatment between married and unmarried persons was unhappy at best. — Mass. at — , 260 N.E.2d at 690; *cf.* note 52 *infra* and accompanying text.

44 — Mass. at — , 260 N.E.2d at 690.

45 *Compare* Commonwealth v. Corbett, 307 Mass. 7, 29 N.E.2d 151 (1940), *with* Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969).

46 405 U.S. at 448-49. The Court quoted Justice Goldberg's concurring opinion in *Griswold*:

> The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception.

381 U.S. at 498.

By its failure to mention it at all, the Court apparently rejected any deterrent value of the Masachusetts law on adultery, MASS. GEN. LAWS ANN. ch. 272, § 14 (1968), which provides for a maximum imprisonment of three years or for a fine of five hundred dollars.

47 405 U.S. at 448.

48 MASS. GEN. LAWS ANN. ch. 272, § 18 (1968). The PROPOSED CRIMINAL CODE OF MASSACHUSETTS (1972) does not undertake to punish private fornication (except as rape), private prostitution, or private adultery. *Id.* ch. 265, § 19 (1972) (Revision Commission Note).

49 405 U.S. at 449.

50 *Id.* at 448.

51 355 Mass. at 758, 247 N.E.2d at 581 (Whittemore & Cutter, JJ., dissenting in part).

52 *Id.* In *Baird* the state charged that the unmarried had no health interest in con-

The Court in *Baird* observed that the statute would be overbroad[53] even with respect to the married, since not all contraceptives are potentially hazardous.[54] As the court of appeals concluded, "[t]he legislature made no attempt to distinguish, in the statutory restriction, between dangerous or possibly dangerous articles, and those which are medically harmless."[55] The majority opinion differed with the Chief Justice, finding that the purpose of section 21A could not be its use as a health measure because of the extant federal and state laws regulating distribution of harmful drugs.[56] Furthermore, the court of appeals remarked that

> [c]onsistent with the fact that the statute was contained in a chapter dealing with "Crimes Against Chastity, Morality, Decency and Good Order," it was cast only in terms of morals.[57]

After deciding that it was not dealing with a statute which effec-

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traception since they had no right to engage in sexual intercourse. The Court observed that the devices the state sought to regulate when used to prevent pregnancy were available to both married and unmarried for the prevention of disease, and concluded that

> [i]t is inconceivable that the need for health controls varies with the purpose for which the contraceptive is to be used when the physical act in all cases is one and the same.

405 U.S. at 451 n.8.

53 A criminal statute is void if the statute, either on its face or as construed, while reaching conduct that may be lawfully punished, is nevertheless so broad in its sweep that it may be used to punish constitutionally protected conduct. *See* Keyishian v. Board of Regents, 385 U.S. 589 (1967); Cox v. Louisiana, 379 U.S. 536 (1965); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940).

54 405 U.S. at 451.

55 429 F.2d at 1401.

56 405 U.S. at 452; *see, e.g.*, 21 U.S.C. § 353 (1970), which provides in part:

> (b) (1) A drug intended for use by man which—
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> . . . .
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> (B) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug . . . .
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> shall be dispensed only (i) upon a written prescription of a practitioner licensed by law to administer such drug . . . .

MASS. GEN. LAWS ANN. ch. 94, § 187A (1954) (now Chapter 94C) Cum. Supp. 1971 provided in part:

> No person shall sell or offer for sale at retail or dispense or give away any harmful drug . . . to any person other than a physician, dentist or a veterinarian . . . .

57 429 F.2d at 1401. This chapter, MASS. GEN. LAWS ANN. ch. 272, §§ 1 *et seq.* (1968), is a broadly inclusive one whose purpose seems adequately, though generally, stated in its title. The chapter includes prohibitions against abduction of women and girls, adultery, sale of obscene literature, dissemination of information concerning diseases, drunkenness, begging by children, tramps, cruelty to animals, pigeon shooting, false notice of birth, eavesdropping, marathons and walkathons.

tively deterred illicit sexual behavior or protected health, the Court considered section 21A as a bare prohibition on contraception.[58] The court of appeals had determined that prohibition of contraceptives was beyond the competency of the state since such prohibition "conflicts with fundamental human rights."[59] The Supreme Court, however, maintained that it was not necessary to reach that issue.[60] It held that if *Griswold* prohibited a ban on *distribution*, a proscription for the unmarried would be as impermissible as a ban on distribution to the married.[61] If, however, a ban on distribution were constitutional, the state could not forbid distribution *only to the unmarried* and remain consistent with the equal protection clause. Such "underinclusion," the Court pronounced, where the evil perceived is the same, would be invidious.[62]

Despite the reluctance of the Court to interpret *Griswold* as establishing a right of access to contraceptives,[63] *Baird* was able to expand the doctrine of *Griswold* to a right of access by using the equal protection clause which was apparently more acceptable to a majority of the Court.[64]

Griswold was replete with references to the "marriage relation," "marital privacy," and the "marital home."[65] But the Court in *Baird* saw the marital couple as "an association of two individuals each with

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58 405 U.S. at 451-52. Both Massachusetts and Connecticut passed legislation prohibiting distribution and use, respectively, of birth control materials in 1879. Such legislation was part of the movement created by "An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use," 18 U.S.C. §§ 1461-62 (1970); 19 U.S.C. § 1305 (1970). These statutes, enacted in 1873, were the handiwork of Anthony Comstock, fanatical Puritan reformer. *See* Dienes, *The Progeny of Comstockery—Birth Control Laws Return to Court*, 21 AM. U.L. REV. 1, 3, 10 (1971). It has been suggested that such laws were passed as a result of widespread feeling about the effects of obscenity on the young. Brooks, *The Early History of the Anti-Contraceptive Laws in Massachusetts and Connecticut*, 18 AM. Q. 3 (1966); Dienes, *supra*, at 3.

The *Baird* Court apparently accepted this interpretation quoting with approval from the opinion of the court of appeals that "so far as morals are concerned, it is contraceptives per se that are considered immoral—to the extent that *Griswold* will permit such a declaration." 429 F.2d at 1401-02.

59 *Id.* at 1402; *cf.* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race.").

60 405 U.S. at 453.

61 *Id.*

62 *Id.* at 454.

63 *Griswold* involved a law which forbade "the *use* of contraceptives rather than regulating their manufacture or sale." 381 U.S. at 485.

64 Justice Stewart, who dissented in *Griswold*, 381 U.S. at 527, joined the majority in *Baird*.

65 *Id.* at 498-99 (Goldberg, J., joined by Warren, C.J. & Brennan, J., concurring). *See also* Poe v. Ullman, 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

a separate intellectual and emotional makeup."[66] From the foregoing, it can be deduced that whatever rights of privacy were established by *Griswold* belonged as much to unmarried persons as to married persons.[67] And among these rights of privacy the *Baird* Court found

> 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.[68]

Justice Douglas, in his concurring opinion, stressed freedom of speech to the point of excluding any concern with the distribution of contraceptives.[69] Douglas felt that Baird's act of distributing contraceptives was part of his lecture and was therefore protected as a "permissible adjunct of free speech" under the first amendment.[70] He seemed to suggest that the issue presented to the Court was not so much the right of the unmarried to have access to contraceptives, but rather a question of state limitation of " 'the spectrum of available knowledge.' "[71]

The separate opinions of Justice White and Chief Justice Burger formed a dialogue. The only points on which they apparently agreed were that it was unnecessary to discuss the question of Baird's standing, and that there was no equal protection problem in the case.[72] White relied on *Griswold* to a greater extent than any of the other opinions. He felt that any conduct relating to contraceptives involved constitutional rights, recognized in *Griswold*,[73] which require that a statute be justified by a strong state interest.[74] The Chief Justice, however, con-

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66 405 U.S. at 453.

67 *Id.* at 453-54.

68 *Id.* at 453; *cf.* Stanley v. Georgia, 394 U.S. 557, 564 (1969).

69 Baird's distribution of a package of contraceptives was, according to Justice Douglas, simply a traditional teaching technique, used "as an aid to understanding the ideas which he was propagating." 405 U.S. at 459-60.

70 *Id.* at 460. Justice Spiegel, dissenting in part in Commonwealth v. Baird, 355 Mass. at 759, 247 N.E.2d at 582, said that he was

> unable to discern the distinction the majority draw [sic] between the defendant's *exhibiting* and the defendant's *distributing*. . . . Basically the distribution should be considered part of constitutionally free speech and protest.

71 405 U.S. at 457 (quoting from *Griswold*, 381 U.S. at 482). Justice Douglas used the "spectrum of available knowledge" concept as one of the specific guarantees in the Bill of Rights which formed "penumbras" protecting the right of privacy in *Griswold*. *Id.* at 482-83.

72 Indeed, Justice White remarked:

> Because this case can be disposed of on the basis of settled constitutional doctrine, I perceive no reason for reaching the novel constitutional question whether a State may restrict or forbid the distribution of contraceptives to the unmarried.

405 U.S. at 465.

73 *Id.* at 485.

74 *Id.* at 463-64.

tended that *Griswold* was not controlling authority for *Baird*,[75] since, in his opinion, the only issue before the Court was the validity of restrictions on distributors of medical substances.[76]

White noted that although regulation of drugs fell within the state's police power, when the exercise of a fundamental right depended upon the availability of a certain drug, the state was required to show a compelling state interest to justify any restriction.[77] Burger felt that even though more than the simple distribution of pharmaceuticals might be involved, the state was functioning within its police power unless acting arbitrarily or capriciously.[78] Burger labeled White's requirement of documented evidence "unprecedented", noting that no authority was cited for such a proposition.[79] The Chief Justice further countered that the "shifting tides of scientific opinion" should not result in changes in constitutional pronouncements,[80] and lamented the erosion of the constitutional prerogatives of the state to regulate health as a result of the Court's use of substantive due process.[81]

On the basis of *Griswold*, Justice White found himself unable to sustain Baird's conviction for distributing foam[82] to an unmarried person since the state maintained that the marital status of the distributee was irrelevant.[83] Because nothing in the record indicated the marital status of the distributee,[84] he was unable to affirm Baird's

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75 *Id.* at 472. The Chief Justice accepted *Griswold* "despite its tenuous moorings to the text of the Constitution." *Id.*

76 *Id.* at 465-66.

77 *Id.* at 463-64. Justice White ostensibly urged the use of the compelling state interest test, although the majority opinion clearly indicated that the rational basis test was sufficient for this case. *See* note 34 *supra*.

78 405 U.S. at 469.

79 *Id.*

80 *Id.* at 470.

81 *Id.* at 467-69.

82 In restricting his opinion to the present facts, Justice White cautioned: "Had Baird distributed a supply of the so-called 'pill,' I would sustain his conviction under this statute." *Id.* at 463 (footnote omitted).

> Nothing in the record even suggests that the distribution of vaginal foam should be accompanied by medical advice in order to protect the user's health. Nor does the opinion of the Massachusetts court . . . marshal facts demonstrating that the hazards of using vaginal foam are common knowledge or so incontrovertible that they may be noticed judicially. On the contrary, the State acknowledges that Emko [vaginal foam] is a product widely available without prescription.

Id. at 464.

83 *Id.* at 464-65. The indictment made no reference to the status of the distributee in charging Baird with violation of the statute. *Id.* at 462 n.2. Likewise, the supreme judicial court observed that Baird's conviction rested upon his status as a "distributor and not . . . the marital status of the recipient." Commonwealth v. Baird, 355 Mass. 746, 753, 247 N.E.2d 574, 578 (1969).

84 Although the court of appeals referred to the distributee as "an unmarried adult

conviction; since the foam was not in his judgment a dangerous substance, Baird might have made a "constitutionally protected distribution . . . to a married person."[85] Burger, on the other hand, found it unnecessary to go any further with potential constitutional issues than to the fact that, whatever Baird was distributing to anyone, he was not a physician and therefore violated the statute.[86]

The progeny of *Griswold* have been protecting private consensual activities of a sexual nature. *Baird* is significant because it views marriage as an association of individuals rather than as a discrete constitutionally recognized unit. The effect of *Baird* was to reinforce lower court holdings[87] that had expanded *Griswold*, linking these with the type of privacy guaranteed by *Stanley v. Georgia*.[88] In *Stanley*, the Court reversed a conviction for possession of obscene films in a private home.[89] Basing its decision on the first amendment as applied to the states through the fourteenth amendment,[90] the Court concluded:

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woman," 429 F.2d at 1399, the majority opinion pointed out that there was no evidence of her marital status in the record. 405 U.S. at 440 n.1.

85 *Id.* at 464-65. Justice White cited the principle established in Stromberg v. California, 283 U.S. 359 (1931), that a

> conviction cannot stand where the "record fail[s] to prove that the conviction was not founded upon a theory which could not constitutionally support a verdict."

405 U.S. at 465 (quoting from Street v. New York, 394 U.S. 576, 586 (1969)).

86 405 U.S. at 465.

87 *See, e.g.*, Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970) (right to privacy guards against unwarranted intrusions by police and other governmental officials); Cotner v. Henry, 394 F.2d 873 (7th Cir. 1968) (private consensual marriage relations outside scope of regulation by state sodomy statute); YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972) (New Jersey abortion statute violates women's right to privacy); Gayer v. Laird, 332 F. Supp. 169 (D.D.C. 1971) (individuals, including homosexuals, professed or otherwise, have right to keep details of sex life private); *In re* Labady, 326 F. Supp. 924 (S.D.N.Y. 1971) (official inquiry into person's private sexual habits does violence to constitutionally protected zone of privacy). *Contra*, Commonwealth v. Leis, 355 Mass. 89, 243 N.E.2d 898 (1969) (smoking marijuana not protected by right of privacy); People v. Sinclair, 30 Mich. App. 473, 186 N.W.2d 767 (1971) (possession of marijuana not protected in house).

88 394 U.S. 557 (1969).

89 *Id.* at 568. Justice Stewart preferred in his concurring opinion to base the decision on the fourth amendment since he felt that the films were inadmissible because of the method of their seizure. *Id.* at 569, 572 (Stewart, J., joined by Brennan & White, JJ., concurring).

90 For explanations and interpretations of the incorporation of the Bill of Rights into the fourteenth amendment, *see* Adamson v. California, 332 U.S. 46, 68-123 (1947) (Black, J., dissenting), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964). *Contra*, Bartkus v. Illinois, 359 U.S. 121, 124 (1959). *See generally* Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Frankfurter, Memorandum on "Incorporation" of the Bill of Rights Into the Due Process Clause of the Fourteenth Amendment, 78 HARV. L. REV. 746 (1965); Mykkeltvedt, *Justice Black and the Intentions of the Framers of the Fourteenth Amendment's First Section: The Bill of Rights and the States*, 20 MERCER L. REV. 432 (1969).

> If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.[91]

One question left unanswered by the *Stanley* Court was why the situs of the defendant's activity made any difference in the power of the state to regulate his life.[92] Recent lower court decisions have referred to *Griswold* as it affects the family unit.[93] Such a view has the effect of limiting whatever aspects of privacy were contained in *Griswold* to the home. The effect of *Baird* in attaching rights of privacy to individuals is to make even sexual privacy operant on individuals rather than on the marital or familial associations:

> Part of our claim to privacy is in the prohibition of the Fourth Amendment against unreasonable searches and seizures. It gives the guarantee that a man's home is his castle beyond invasion either by inquisitive or by officious people. A man loses that privacy of course when he goes upon the streets or enters public places. But even in his activities outside the home he has immunities from controls bearing on privacy. . . . The First Amendment in its respect for the conscience of the individual honors the sanctity of thought and belief.[94]

Baird mandates that the Court present guidelines to delineate clearly the limitations of governmental intrusions into an individual's life. Privacy centering on the individual rather than on the institution of marriage will aid immeasurably in supporting the "right to be let alone."[95]

Daniel Ellis

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91 394 U.S. at 565.

92 *See* Hufstedler, *The Directions and Misdirections of a Constitutional Right of Privacy*, 26 RECORD OF N.Y.C.B.A. 546, 560 (1971).

93 *See, e.g.*, YWCA v. Kugler, 342 F. Supp. 1048, 1077-79 (D.N.J. 1972) (Garth, J., dissenting).

94 Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467-68 (1952) (Douglas, J., dissenting).

95 Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).