Program Title: Everything Old is New Again

Date Presented: 11/1/2015  Inn Year: 2015

Presenting Inn: Gus Solomon  Inn Number: 

City: Portland  State: Oregon

Contact Person: Lisa V. Hunt  Phone: 503-517-0851

E-mail Address: lhuntlaw.com

Program Summary:
Be concise and detailed in summarizing the content, structure, and legal focus of your program. Please attach additional sheets if necessary.

Women's issues (as brought to the fore in the upcoming presidential race) are explored at the dawning of the 21st century, mid-century, and present day. Primary focus is pay equity, access to healthcare, adoption and abortion, civil rights (Planned Parenthood)

Program Materials:
The following materials checklist is intended to insure that all the materials that are required to restage the program are included in the materials submitted to the Foundation office. Please check all that apply and include a copy of any of the existing materials with your program submission:

☑ Script   ☑ Articles   ☑ Citations of Law   ☑ Legal Documents   ☑ Fact Pattern   ☑ List of Questions   ☑ Handouts

☑ PowerPoint Presentation   ☐ CD   ☑ DVD   ☐ Other Media (Please specify)________________________

Specific Information Regarding the Program:
Number of participants required for the program: 12
Has this program been approved for CLE? ☑ Yes   ☐ No
Which state's CLE? Oregon   How many hours? 1   ☑ Pending   ☐ Approved

Recommended Physical Setup and Special Equipment:
i.e., DVD and TV, black board with chalk, easel for diagrams, etc.

Laptop - projector - screen - "couch" - chairs

Comments:
Clarify the procedure, suggest additional ways of performing the same demonstration, or comment on Inn members' response regarding the demonstration.

THIS FORM IS ALSO AVAILABLE FOR DOWNLOAD ON OUR WEBSITE: WWW.INNSOFCOURT.ORG
Program Submission Form

Roles:
List the exact roles used in the demonstration and indicate their membership category; i.e., Pupil, Associate, Barrister or Master of the Bench.

<table>
<thead>
<tr>
<th>Role</th>
<th>Membership Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Narrators/Askit</td>
<td>Barrister-Master-Judge</td>
</tr>
<tr>
<td>&quot;Doctors&quot; + &quot;Woman at&quot;</td>
<td>Varied</td>
</tr>
<tr>
<td>&quot;Interviewers&quot; + Female agent</td>
<td>Applicant</td>
</tr>
<tr>
<td>&quot;Doctors&quot; + Lawyers</td>
<td></td>
</tr>
</tbody>
</table>

Agenda of Program:
List the segments and scenes of the demonstration and the approximate time each item took; i.e., "Introduction by judge (10 minutes).

<table>
<thead>
<tr>
<th>Item</th>
<th>Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>Womanhood seeks therapy</td>
<td>5 min</td>
</tr>
<tr>
<td>Doctors saw at turn of century</td>
<td>8 min</td>
</tr>
<tr>
<td>Doctors + woman patient</td>
<td>10-12 min</td>
</tr>
<tr>
<td>Employers + female job applicant</td>
<td>10-12 min</td>
</tr>
<tr>
<td>Doctors seeking legal advice</td>
<td>10-12 min</td>
</tr>
</tbody>
</table>

Program Awards: Please complete this section only if the program is being submitted for consideration in the Program Awards.

Describe how your program fits the Program Awards Criteria:

Relevance: How did the program promote or incorporate elements of our mission? (To Foster Excellence in Professionalism, Ethics, Civility, and Legal Skills)
Presenters performed deep historical research, working together in subgroups comprised of diverse practitioners.
Entertaining: How was the program captivating or fun?
The scripts were comedic and captivating.

Creative and Innovative: How did the program present legal issues in a unique way?
Each script presented historical context to present day issues - e.g., history repeats itself and present-day issues are not new; but the same issues still need to be addressed.

Educational: How was the program interesting and challenging to all members?
See above - audience comment was that the content was stimulating and left many rather impassioned.

Easily Replicated: Can the program be replicated easily by another Inhh? Yes [ ] No [ ]
This program is: [ ] Original [ ] Replicated

Questions:
Please contact program library staff at (703) 684-3590 or by e-mail at programlibrary@innsofcourt.org.

Please include ALL program materials. The committee will not evaluate incomplete program submissions.
Everything Old is New Again
Pre Suffragette Era

Coverture, Woman Lawyers in the 1800’s,
Expatriation Act and the Suffragette Movement
Coverture and the Privy Examination

• **Coverture** — The Common Law Doctrine whereby, upon marriage, a women’s legal rights and obligations were subsumed by those of her husband, accordance with legal status of femme covert.
  
  – As Stated by Blackstone — William Blackstone. *Commentaries on the Laws of England*. Vol, 1 (1765), pages 442-445- By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a *feme-covert, foemina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.

• **Privy Exam** - Proceeding to establish whether a woman could dispose of her separate property.
  
  – Judge and Woman meet *in camera* so the court can determine if her husband is coercing her.
  
  – Common in the 1800’s and in Oregon

• **See Rainey v Gordon (Tenn) 25 Tenn 345**
Women and the Law in 1800’s

Bradwell v. Illinois

• **Mid 1800’s** – State Bar Associations began to limit admission to men only.
  – *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873)
  – Issue – Could a woman become a lawyer in Illinois?
  – Application was denied because married woman did not have the capacity to independently contract with their clients. Decision of the U.S. Supreme Court, Affirmed.
  – Quote from Illinois Supreme Court - ‘That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.’ Id. at 132.
  – Quote from US Supreme Court concurring opinion – “The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society “ Id. at 141.

• Oregon was not alone in resisting “Women in the Law”
Mary Leaonard – Oregon’s First Woman Attorney
Oregon’s First Woman Attorney

Mary Leonard was Oregon’s first woman attorney.

- Widowed in 1877 after her husband was mysteriously shot two days before divorce was final.
- Moved to Portland then to Seattle.
- Passed the Washington Bar in 1885 studying under J.C. Haines.
- Supreme Court cooked up a ad-hoc “residency requirement” to deny her admission
- A year later granted admission when she argued male lawyers in the same situation were admitted.

(see http://offbeatoregon.com/1205b-mary-leonard-murder-trial-part2.html)
A Nationality of Her Own

Women, Marriage, and the Law of Citizenship

Candice Lewis Bredbenner
Women’s Citizenship Rights

• One of the key factors of the Suffragette movement was the passage of the Expatriation Act of 1907

• Until 1907, the status of a woman as a US citizen was unchanged upon marriage.

• Expatriation Act of 1907 – 8 USC 6-17

• 8 USC 3 – Loss of Women’s Citizenship when married to a alien.

• Repealed in 1922 under the Cable Act
MacKenzie v. Hare

• Ethel MacKenzie, an American Citizen marries a British Citizen
• Tries to register to vote in San Francisco. The Clerk denies registration under the Expatriation Act of 1907.
• Files a writ of mandamus to the California Supreme Court – affirmed.

• Ethel Mackenzie v. John Hare, 239 U.S. 299, 36 S.Ct. 106, 60 L.Ed. 297 (1915)
• MacKenzie argues the 14th amendment prevents expatriation by marriage
• The Supreme Court denies this argument stating that “The identity of husband and wife is an ancient principle of our jurisprudence”
• Congress has
The First Fifty Years of Abortion Trials in Portland, Oregon

NEARLY TWENTY YEARS after Oregon adopted its ban on abortions, Portland authorities prosecuted the state’s first “criminal operation,” as the procedure was often called at the time. The Oregonian remarked on the “particular character” of the “unusual and, in some respects, remarkable trial” and noted that nothing of its kind had ever appeared “before any of the courts during the history of the state.” The “mysterious affair” of the abortion trial stirred the public and elicited “a painful degree of suspense” over its solution.1 An end-of-the-year assessment by the newspaper described the trial as one of the principal events of 1873.2 Although the prosecution was successful, newspaper coverage of the trial introduced Portlanders to the obstacles that made the law’s enforcement elusive during the decades that followed.

That first abortion case involved C.G. Glass, a practitioner of eclectic medicine charged with manslaughter for performing an abortion that led to the death of Mary E. Hardman, a nineteen-year-old single woman.3 Glass was a purveyor of herbal remedies at his downtown operation, which he advertised as The Eclectic Dispensary. He specialized in “all chronic and private diseases,” including the ailments of young men who had “injured their constitutions by secret habits” and of women who were “dragging out a life of misery” from “diseases peculiar to the sex.” He also sold what he called Female Regulator Pills to help women with reproductive concerns.4 His business typified the kind of unlicensed practice that the local medical society worked to banish.

At the trial, Glass testified that Hardman was several months pregnant when he examined her but that she “was carrying a dead child.” He reported that she had disclosed earlier attempts to end her pregnancy, first with the help of a midwife and then by ingesting oil of tansy, a plant believed to
The Portland City and County Medical Society sought to ensure the professional and financial status of licensed physicians by ridding Portland of alternative healers and anyone who assisted with illegal abortions. The campaign reached a peak during the early 1900s, as headlined on February 16, 1908, in the Oregonian.
induce abortions. He declared that he had agreed to provide medical care and lodging to her for $250, a considerable sum. Mary Anna Cooke Thompson, identified by historians as the first woman to practice medicine in Portland, testified along with another physician that Hardman had sought help from them (presumably for an abortion), but they had both refused.

Glass reportedly told Hardman’s brother that she had died of “bilious intermittent fever,” but other doctors disputed that assessment. One believed death resulted from inflammation of the womb and that she was unlikely to have died of hemorrhage after he saw her. Another conducted the post-mortem with two medical colleagues and concluded that the organs were healthy with no damage from the bilious fever Glass had proposed. Instead he found a “violence and rough usage” of the uterus, and believed Hardman had “died of hemorrhage consequent upon delivery of a fetus six months old.” Two physicians who had examined the woman’s body as part of an autopsy testified that she had died of inflammation and hemorrhaging associated with an abortion of a six-month-old fetus. After three days of proceedings in Multnomah County Circuit Court, jurors retreated to determine the intent of the practitioner, the viability of the pregnancy, whether an abortion had occurred, and the cause of the woman’s death. Following two-and-a-half hours of deliberation, the jury found Glass guilty as charged, and the judge sentenced him to five years in the state penitentiary.

Portland’s first abortion trial ended with a conviction, but the outcome proved more an exception than the rule in prosecutions that followed.

A study of the first fifty years (1870–1920) of abortion trials in Portland, as reported in the Oregonian, reveals the two significant factors that hindered
prosecutions and thwarted convictions: a lack of sufficient evidence peculiar to abortion cases, and ambiguities of the abortion law itself. Physicians often contributed to evidentiary difficulties, and their reticence to collaborate with enforcement was likely due to several reasons examined here. Throughout the fifty-year period under study, a number of practitioners avoided legal problems and provided abortions to women who were determined to end their pregnancies. Among that group was Dr. Marie Equi, the only Portland physician of the time known to provide abortion services as part of a larger, holistic commitment to women’s reproductive health.

No study has previously been published about this period of prosecutions in Portland, but segments of the city’s early abortion history have appeared in a handful of important works, including Ruth Barnett’s autobiography (as told to Doug Baker) of her life as an abortion provider beginning in 1919, Rickie Solinger’s biography of Barnett and her contemporaries, Nancy Krieger’s journal article about Dr. Marie Equi, Sandy Polishuk’s manuscript about Equi based on her research with Krieger and Susan Dobrof, and Polishuk’s biography of activist Julia Ruuttila. Gloria E. Myers and, more recently, Sadie Anne Adams have also addressed aspects of Portland’s abortion history in their biographical studies of Lola G. Baldwin and Dr. Jessie Laird Brodie.

Oregon adopted its first anti-abortion law in 1854, during its territorial days and following the lead of twenty-one states and territories that had criminalized the practice as part of a national campaign initiated by the American Medical Association (AMA). From the mid to late nineteenth century, the AMA lobbied state legislatures to outlaw abortion as part of its overall goal to drive competition from the medical field and to enhance the status, professional domain, and financial wellbeing of its members. The AMA spoke for regular physicians rather than irregular, or alternative, practitioners, and abortion bans were part of its strategy to force midwives from the childbirth and abortion care they had provided women for hundreds of years. At a time when medical

\[\text{Helquist, “Criminal Operations”}\]
science had yet to provide many diagnostic and clinical tools, the AMA sought to establish regular doctors as the sole source of all medical care, including obstetrics.11

Civic boosters, business interests, and politicians readily joined the anti-abortion efforts, reasoning that well-ordered, proper communities attracted more settlers, commerce, and investments. Church leaders, in turn, supported restrictions purported to bolster moral behavior. The campaign drew on the anxiety of many Americans that declining birth rates among Anglo-Saxon women, aided in part by access to abortion, might plummet further and result in a nation with too many immigrant births. The leader of the anti-abortion campaign, Dr. Horatio R. Storer, exhorted white, native-born women “upon [whose] loins depends the future destiny of the nation.”12 The rallying cry against abortion succeeded, and by 1900, “virtually every jurisdiction” had banned the procedure. Ironically, the laws codified by the states complicated enforcement of the bans.13

One of the most vexing elements of the abortion bans was confusion about when life began. Traditional beliefs held that until a woman felt a quickening, or movement, of the fetus — usually between the fourth and sixth months of pregnancy — life was not present. Before fetal movement was detected, women sought help from midwives or folk treatments to “unblock” their menstrual cycles. Accordingly, common law defined abortion as an act that occurred after quickening. Only by the mid to late nineteenth century did states prohibit abortive acts at every stage of pregnancy, even before quickening. Many people held to the traditional belief, however, and their ideas about when life began often hindered abortion prosecutions.14

OREGON’S 1864 REVISED ABORTION LAW

“If any person shall administer to any woman pregnant with a child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such a child, unless the same shall be necessary to preserve the life of such mother, such person shall, in the case of the death of such child or mother be thereby produced, be deemed guilty of manslaughter.”

The matter of an abortion provider’s intent proved especially troublesome to prosecutors. Several states required evidence that an accused practitioner intended to end the life of a child. Proving intent was a difficult proposition because most abortion discussions and procedures occurred in private, typically in a patient’s home or a doctor’s office. Only the participants knew the pregnant woman's circumstances, the nature of her request, and the practitioner’s response. If challenged after an abortion was reported — and especially if the woman had died in the course of the procedure — providers could claim the woman presented conditions unrelated to pregnancy. Or they could simply deny any intent to end a pregnancy.

Another complicating factor involved a clause eventually included in nearly all abortion statutes. What was known in legal realms as the therapeutic exception allowed a provider to proceed with an abortion if the woman’s life appeared to be endangered. James C. Mohr identifies New York as the first state to adopt the clause, which helped create what Leslie J. Reagan describes as a “legal loophole” and led to an understanding of “therapeutic abortion.” What constituted valid medical indications that the woman’s life was at risk remained largely up to the clinical judgment of one or more physicians. Practitioners might cite all sorts of physical, psychological, or even financial difficulties that their clients presented to justify an abortion.

Oregon legislators revised the state abortion ban in 1864 (after statehood) to clarify and tighten its prohibitions and to bring it more in line with current scientific understanding. James C. Mohr argues that the changes in Oregon forecast more restrictive abortion laws adopted in several states following the Civil War and contributed to “the most important burst of anti-abortion legislation in the nation’s history.” Oregon dropped the quickening doctrine and added both intent to do harm as a necessary condition of guilt and the therapeutic exception. The revised law referred specifically to a child — rather than a fetus — although it left open to interpretation the legal definition of when viability began and when the fetus became a child. The destruction of a child in utero became a manslaughter offense regardless of whether the woman died, and the punishment for destroying the child or causing the death of the mother was set at one to fifteen years in prison. Although anyone who procured or assisted with the abortion could be held liable and prosecuted, the pregnant woman was exempt.

A clear sense of the incidence of abortion in Portland during this period is difficult to determine due to the few available records from hospitals, clinics, medical practices, and illegal operations. Studies undertaken for cities and states of the Midwest and East Coast suggest significant numbers of abortions. Edwin G. Burrows cites an 1868 New York City study that estimated abortions were procured by 20 percent of pregnant women, and Rickie
Solinger notes that an 1898 survey by the Michigan Board of Health found one-third of pregnant women obtained abortions.\textsuperscript{18} At a June 1895 meeting of a Washington, D.C., medical society, a prominent physician lamented that abortion throughout the country was “fully as frequent” as ever before, not only in the cities but in the “remotest country districts” as well.\textsuperscript{19} Statistics for West Coast cities or those comparable in population size to Portland have not been located, however, and federal surveys overall did not include abortion in annual mortality reports during this period.\textsuperscript{20}

Unofficial observations by abortion practitioners suggest a total of more than 6,000 abortions were performed annually in Portland during the early 1900s. That number results from an extrapolation of observations by Ruth Barnett, a naturopath who assisted physicians with full-time abortion practices during this period. She noted that five to seven women a day could crowd the waiting rooms of Dr. Alys Bixby Griff’s downtown office, and she discussed the robust practices of five other regular doctors.\textsuperscript{21} On a basis of four to five abortions performed each workday, one full-time practitioner might account for 1,000 to 1,250 annually, and the work of five providers might have totaled 5,000 to 6,250. In addition, Dr. Charles T. Atwood, a practitioner notorious for his abortion prosecutions, claimed in 1908 that he and his physician son refused in one month alone fifty requests to end pregnancies.\textsuperscript{22} Atwood’s assertion may have fit his defense strategy and therefore may not be the most reliable estimate. Nevertheless, the services of Atwood, as well as those of general medicine practitioners, irregulars, and entrepreneurs, could add another 1,000 abortions each year, boosting the minimum combined total to 6,000 or more abortions. Although these totals result from imprecise accounts and a degree of speculation, it is evident that several thousand abortions were performed in Portland each year during the early 1900s and, in comparison, there were remarkably few prosecutions.

The \textit{Oregonian} reported twenty-seven abortion trials in Portland during the fifty years between 1870 and 1920 (see Table 1). The relatively small total initially suggests that enforcement was a low priority in the city, but the ratio was not unlike those in other cities. In her comprehensive examination of Chicago’s history of abortion control, Reagan notes that the much larger city undertook “at most a handful” of abortion cases each year during the period between 1902 and 1934.\textsuperscript{23} She also suggests that a full assessment of a jurisdiction’s resolve to enforce an abortion ban should include the number of abortion arrests as well as the “entire investigative process,” a scope that is unfortunately beyond the reach of this study. She adds that Chicago prosecutors limited the number of abortion cases to those with the greatest potential for conviction.\textsuperscript{24} The data from this study suggest that Portland
authorities, facing difficulties with obtaining convictions, pursued a similar strategy over time.

Seven-year gaps occurred between the first abortion trial in 1873 and the next in 1880, and again from 1880 to 1887. The cause of these lapses is unknown, but they may reflect the priorities of district attorneys at the time. The total of twelve trials from 1873 to 1900 is similar in number to the fifteen of the latter period, 1900 to 1920, but a significant spike occurred in the early 1900s, with fourteen cases taken to court between 1906 and 1911 and five in 1908 alone. The surge in numbers likely reflects the influence of Progressivism that was at the peak of its fervor and power in Oregon during those years. Progressives tended to view abortion as a threat to the social order, because it alleviated unintended consequences of extra-marital sex and separated intercourse from reproduction. The greater number of prosecutions also coincides with a second campaign by the AMA to encourage greater enforcement of the abortion bans. As will be seen in the case examples that follow, one Multnomah County District Attorney, John Manning, spearheaded many of the prosecutions during the early 1900s in Portland.

The spike of Progressive Era trials ended by 1916, and no further reports of abortion prosecutions appeared in the Oregonian through the end of 1920. Several factors may have contributed to the drop-off, including prosecutors’ frustration with the law and their reticence to indict, the fading of the Progressive Era and its political agenda, and doctors’ shift to other concerns. Reagan notes that as early as 1908 a proposal by obstetricians within the AMA to investigate anti-abortion laws and further suppress the procedure failed to clear committee deliberations for lack of support. She concludes that the Progressive Era anti-abortion campaign failed to enlist most physicians nationally and, by 1920, “few doctors talked anymore about the evil of criminal abortion and how to combat it.” Instead, the medical establishment became more engaged with other national policy questions, including access to birth control and the government’s emerging role in providing public health to infants and mothers. Mohr observes that, by the early twentieth century, regular physicians had achieved many of the goals of the initial anti-abortion campaign, and middle- and upper-class women increasingly relied on birth control methods other than abortion. In addition, world events — World War I and, especially for physicians, the overlapping influenza epidemic of 1918 to 1919 — pressed on everyone to mobilize for a greater national purpose. The reported trial data reveal three other factors that influenced whether cases would be taken to court and what the outcomes might be: the professional status of providers, the pregnant woman’s marital status, and whether the woman survived the abortion.
# Table 1: Abortion Trials in Portland, Oregon, Reported in the Oregonian, 1873 Through 1920 (See Continuation on p. 16)

<table>
<thead>
<tr>
<th>Year</th>
<th>Defendant</th>
<th>Type of Practitioner</th>
<th>Woman's Name</th>
<th>Woman's Age, Marital Status</th>
<th>Health after Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>1873</td>
<td>C.G. Glass</td>
<td>Irregular</td>
<td>Mary E. Hardman</td>
<td>Nineteen, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1880</td>
<td>Joseph A. Riddle</td>
<td>Unknown</td>
<td>Rosa Lent</td>
<td>Unknown age, Single</td>
<td>Survived</td>
</tr>
<tr>
<td>1887</td>
<td>Mrs. James Cornwall</td>
<td>Irregular</td>
<td>Emma Crozier</td>
<td>Unknown age, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1888</td>
<td>Mrs. and Mr. F.M. Murray</td>
<td>Irregular (Mrs.), non-practitioner (Mr.)</td>
<td>Mary Schueller</td>
<td>Unknown age, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1889</td>
<td>William E. Morand</td>
<td>M.D.</td>
<td>Hattie Reed</td>
<td>Thirty, Single</td>
<td>Survived</td>
</tr>
<tr>
<td>1892</td>
<td>W.J. Taylor</td>
<td>M.D.</td>
<td>Rosa Steiner</td>
<td>Unknown age, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1893</td>
<td>Mrs. Tomaro Vann, Charles A. Bowker</td>
<td>Irregular (Vann), non-practitioner (Bowker)</td>
<td>Henrietta Wilson</td>
<td>Unknown age, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1893</td>
<td>Meyer Schwartz</td>
<td>Irregular</td>
<td>Mamie Middross</td>
<td>Nineteen, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1894</td>
<td>Mrs. E. Brunke</td>
<td>Irregular</td>
<td>Mrs. Mary Arata</td>
<td>Twenty-five, Married</td>
<td>Died</td>
</tr>
<tr>
<td>1895</td>
<td>William Spencer</td>
<td>Unknown</td>
<td>Lucy Augustine</td>
<td>Unknown age, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1896</td>
<td>William Eisen</td>
<td>M.D.</td>
<td>Mrs. Louise Markley</td>
<td>Unknown age, Married</td>
<td>Survived</td>
</tr>
<tr>
<td>1897</td>
<td>Dr. and Mrs. Palmer, Jennie Melcher</td>
<td>Irregular (Dr.), non-practitioner (Mrs. and Melcher)</td>
<td>Mary Mac Mahon</td>
<td>Unknown age, Single</td>
<td>Survived</td>
</tr>
<tr>
<td>1906</td>
<td>Paul Semler</td>
<td>M.D.</td>
<td>Winifred McGrath</td>
<td>Fifteen, Single</td>
<td>Survived</td>
</tr>
<tr>
<td>1907</td>
<td>Charles H.T. Atwood</td>
<td>M.D.</td>
<td>Hattie Fee</td>
<td>Sixteen, Single</td>
<td>Survived</td>
</tr>
</tbody>
</table>

** A manslaughter charge was not reported specifically, but it was the designated charge for an abortion case.
<table>
<thead>
<tr>
<th>Charge</th>
<th>Legal Outcomes</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manslaughter</td>
<td>Convicted, sentenced to five years</td>
<td>Oregon Supreme Court upheld the conviction. The governor pardoned Glass in 1877.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Unknown</td>
<td>The woman testified against accused. No further reports.</td>
</tr>
<tr>
<td>Manslaughter **</td>
<td>Unknown</td>
<td>Cornwall operated a small lying-in hospital. She was arrested for giving abortifacients and jailed pending trial. No further reports.</td>
</tr>
<tr>
<td>Both defendants sued for woman's death; uncertain of manslaughter charge</td>
<td>Unknown</td>
<td>The Murrays were sued for $5,000 damages. No further reports.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Convicted at first trial, charges dismissed during second trial</td>
<td>Reed later withdrew charge during second trial that was allowed by the judge. Insufficient evidence also complicated the second trial.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Unknown</td>
<td>The trial received a continuance. Insufficient evidence and application of law was a difficulty during the trial. No further reports.</td>
</tr>
<tr>
<td>Manslaughter for both defendants</td>
<td>Both convicted; Vann sentenced to three years and Bowker ten years</td>
<td>Vann became ill in jail and died. The Oregon Supreme Court reversed Bowker conviction and a new trial was expected. No further reports.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Acquitted</td>
<td>Middross was diagnosed with blood poisoning and there were indications of abortion, but insufficient evidence overall. No further reports.</td>
</tr>
<tr>
<td>Manslaughter **</td>
<td>Unknown</td>
<td>Brunke operated a maternal care facility. The case was continued. No further reports.</td>
</tr>
<tr>
<td>Unknown</td>
<td>Dismissed by judge</td>
<td>Another doctor reported abortion as the cause of the woman’s death, but there was uncertain and insufficient evidence to convict.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Acquitted</td>
<td>Eisen was acquitted during his second trial. The judge did not allow submission of woman’s “dying declaration” naming the abortionist because she survived. Insufficient evidence to convict.</td>
</tr>
<tr>
<td>Manslaughter for the Palmers and Melcher</td>
<td>All three acquitted</td>
<td>The abortion was possibly self-induced by Mac Mahon. Conflicting circumstances and insufficient evidence prevailed.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Uncertain outcome</td>
<td>Defense counsel argued that charges of abortion did not constitute a crime. Confusion about the law as well as insufficient evidence complicated the case. No further reports.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Hung jury; charges dismissed by judge</td>
<td>A second trial was planned, but the district attorney stated that Oregon’s abortion law was insufficient for prosecution. There was also a lack of compelling evidence to proceed.</td>
</tr>
</tbody>
</table>
## TABLE 1 (continued): ABORTION TRIALS IN PORTLAND, OREGON, REPORTED IN THE OREGONIAN, 1873 THROUGH 1920

<table>
<thead>
<tr>
<th>Year</th>
<th>Defendant</th>
<th>Type of Practitioner</th>
<th>Woman’s Name</th>
<th>Woman’s Age, Marital Status</th>
<th>Health after Procedure</th>
</tr>
</thead>
<tbody>
<tr>
<td>1907</td>
<td>Ernest Heymans, William Eisen, David Smith</td>
<td>Entrepreneur (Heymans), M.D. (Eisen), non-practitioner (Smith)</td>
<td>Jennie Seighers</td>
<td>Seventeen, Single</td>
<td>Survived</td>
</tr>
<tr>
<td>1907</td>
<td>J.W. Morrow</td>
<td>M.D.</td>
<td>Unknown</td>
<td>Unknown age, Single</td>
<td>Survived</td>
</tr>
<tr>
<td>1908</td>
<td>G.B. Whitney</td>
<td>M.D. (dentist)</td>
<td>Mabel Wirtz</td>
<td>Twenty-one, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1908</td>
<td>J.S. Courtney</td>
<td>M.D.</td>
<td>Stella Bennett</td>
<td>Fifteen, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1908</td>
<td>Ernest Heymans</td>
<td>Entrepreneur</td>
<td>Golda Rowland</td>
<td>Twenty-five, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1908</td>
<td>Charles H.T. Atwood and Charles H. Atwood</td>
<td>M.D. (father and son)</td>
<td>Mrs. Bessie Crippin</td>
<td>Unknown age, Married</td>
<td>Died</td>
</tr>
<tr>
<td>1908</td>
<td>Charles H.T. Atwood and Charles H. Atwood</td>
<td>M.D. (father and son)</td>
<td>Pearl Lamb</td>
<td>Unknown age, Single</td>
<td>Survived</td>
</tr>
<tr>
<td>1910</td>
<td>W.I. May and C.H. Francis</td>
<td>M.D. (May), M.D. (Francis)</td>
<td>Mrs. Frances Roberts</td>
<td>Unknown age, Married</td>
<td>Died</td>
</tr>
<tr>
<td>1910</td>
<td>William Eisen</td>
<td>M.D.</td>
<td>Mrs. Anna Foleen</td>
<td>Unknown age, Married</td>
<td>Died</td>
</tr>
<tr>
<td>1910</td>
<td>J.J. Rosenberg</td>
<td>M.D.</td>
<td>Vera Hall</td>
<td>Twenty, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1911</td>
<td>O.C. Liscum</td>
<td>Irregular</td>
<td>Mrs. A. Scheiderhahn</td>
<td>Unknown age, Married</td>
<td>Survived</td>
</tr>
<tr>
<td>1911</td>
<td>Charles F. Candiani</td>
<td>M.D.</td>
<td>Lillian Krueger</td>
<td>Twenty-two, Single</td>
<td>Died</td>
</tr>
<tr>
<td>1915</td>
<td>Andre A. Ausplund</td>
<td>M.D.</td>
<td>Anna Anderson</td>
<td>Unknown age, Single</td>
<td>Died</td>
</tr>
</tbody>
</table>

**Notes:**
1. Portland’s first abortion prosecution occurred in 1873. Oregon enacted state law banning abortion in 1864.
2. Oregon law specified indeterminate one-to-fifteen year prison sentences for anyone who procured, provided, or assisted with an abortion. These acts were manslaughter offenses. A pregnant woman seeking an abortion was not charged.
<table>
<thead>
<tr>
<th>Charge</th>
<th>Legal Outcomes</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contributing to delinquency of minor (Eisen and Smith)</td>
<td>Eisen convicted and fined $500; Smith’s charges dismissed by judge</td>
<td>Heymans granted immunity to testify against Eisen. The delinquency charge was in lieu of manslaughter for the abortion.</td>
</tr>
<tr>
<td>Uncertain if trial proceeded</td>
<td>Unknown</td>
<td>The Oregon State Medical Board tried to revoke Morrow’s medical license, but witnesses for the case disappeared. No further reports.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Convicted, sentenced to five years in prison, fined $100, then released</td>
<td>Whitney was convicted for administering abortifacients to his fiancée. The Oregon Supreme Court overruled his conviction.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Judge delayed trial, uncertain if it resumed</td>
<td>The minor’s family consented to the abortion; they respected the doctor and thought it would be a simple operation. A prime witness was missing for the case. No further reports.</td>
</tr>
<tr>
<td>Manslaughter initially, then forgery</td>
<td>Acquitted of death certificate forgery</td>
<td>Heymans operated X-Radium Institute and was implicated in the abortion for Goelda Rowland, but insufficient evidence and problems with the law complicated the trial.</td>
</tr>
<tr>
<td>Maintaining a public nuisance</td>
<td>Acquitted</td>
<td>The abortion provider in this case was uncertain. The district attorney attempted to convict on a lesser charge related to abortion.</td>
</tr>
<tr>
<td>Maintaining a public nuisance</td>
<td>Convicted; both sentenced to five months in county jail</td>
<td>The district attorney attempted to convict on a lesser charge related to abortion. The U.S. Supreme Court upheld the conviction.</td>
</tr>
<tr>
<td>Manslaughter for both defendants</td>
<td>Case dismissed by judge</td>
<td>Roberts had been married for ten years and had an affair. The jury remained undecided after seven hours of deliberation.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Case dismissed by grand jury</td>
<td>Foleen made a dying declaration and signed it, but the grand jury still found that there was insufficient evidence to go to trial.</td>
</tr>
<tr>
<td>Murder</td>
<td>Case dismissed by judge</td>
<td>The doctor provided anesthesia. Hall died before the abortion began, although preparations for the procedure were apparent. Uncertain of criminal intent and procedure.</td>
</tr>
<tr>
<td>Suspected of crime</td>
<td>Case presumably dismissed but not reported</td>
<td>Scheiderhahn refused to testify against her doctor and the case floundered with insufficient evidence. Liscum was licensed in other states as an M.D.</td>
</tr>
<tr>
<td>Manslaughter</td>
<td>Delayed due to illness</td>
<td>Candiani returned home to Italy and died before the trial could proceed.</td>
</tr>
<tr>
<td>Indicted for manslaughter; one report indicated second degree murder</td>
<td>Convicted of manslaughter with leniency recommended by jury; sentenced to one to fifteen years</td>
<td>The Oregon Supreme Court upheld the conviction. The U.S. Supreme Court dismissed an appeal. Oregon’s Governor pardoned Ausplund after one year in prison, and he resumed his practice.</td>
</tr>
</tbody>
</table>

3. Follow-up information about several prosecutions after initial charges could not be found in the Oregonian.
4. No reports of “abortion” or “criminal operations” were found in a digital search of the Oregonian for the periods 1864 to 1873, 1874 to 1886, 1898 to 1906, or 1916 to 1920.
5. Please see end notes for a description of research methods and limitations of this study.
From 1870 to 1900, irregular practitioners were more often the targets of prosecutions than regular medical doctors; seven of the twelve trials involved irregulars. The reasons for this predominance are uncertain, but prosecutors may have been influenced by medical societies that denigrated irregulars as hucksters who preyed on the public’s gullibility with promises of quick and easy remedies. Prosecutors may also have believed that irregulars wielded less political power and commanded fewer financial resources to fight a prosecution. By the start of the twentieth century, however, reports of abortion trials in Portland indicate a shift from targeting alternative providers to licensed, regular physicians. From 1900 to 1920, regular doctors and one dentist were implicated in thirteen of fifteen abortion prosecutions reported in the *Oregonian*. Three doctors were involved in more than one trial. This change of emphasis appears to result from the Progressive Era’s campaign conducted by the local medical society, civic leaders, and district attorneys to rid the medical profession of what they deemed rogue physicians.31

The study data indicate that single women figured in abortion trials significantly more often than married women. Twenty-one of the twenty-seven trials — 78 percent over the fifty-year period — involved single women. Reagan and other historians believe that most women who sought abortions during this period were married, but they have found that those entangled in prosecutions were more frequently single.32 A partial explanation for this disparity is the likelihood that middle-class and well-to-do married women enjoyed ready and affordable access to abortions from their personal or family physicians or from others through collegial referrals for assistance. This explanation does not address the plight of poor and working-class married women who were less able to afford the professional, private care that skirted public attention. Unfor-

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*Dr. William Eisen avoided conviction in two abortion trials and was implicated in the notorious X-Radium Institute scandal of 1908. His record was examined in a front-page article in the Portland Evening Telegram on November 1, 1910.*
tunately, the trial reports do not reveal with certainty whether the married women implicated were of lower economic status; however, four of the six cases with married women targeted less-reputable providers who probably charged less than more respectable physicians.33

According to the data, prosecutors favored abortion cases that involved a woman’s death. Of the twenty-seven trials, seventeen (63 percent) were conducted when the woman had died as a result of the abortion. The deaths also appeared to predict convictions. Four of the seven trials that ended with guilty verdicts in local courts (57 percent) involved a woman who had died. Prosecutors had good reason to pursue these incidents. An investigation often began with notice from a social service worker or another physician that a woman had suffered from a poorly executed abortion. In such instances, police and sometimes doctors sought from the woman a dying declaration, a signed statement in which she confirmed her pregnancy and the identity of the abortion provider. These declarations were admissible as evidence in court and, as such, greatly strengthened a prosecutor’s case against a provider.34 In the 1896 and 1910 abortion trials of Dr. William Eisen, however, the presence of dying declarations did not ensure conviction. In the first, the judge did not allow the statement, perhaps because the woman ultimately survived and the document carried less legal standing than if she had died. In the second, the grand jury dismissed the case for lack of sufficient evidence.35

Abortion convictions were especially difficult to obtain in Portland due to both insufficient evidence and the law’s ambiguities and limits. The challenges often resulted in withdrawal of cases, dismissals by judges, or hung juries and contributed to a low conviction rate, based on reports in the Oregonian. Yet the outcomes of eight other trials were unreported or could not be located. Several involved continuances, witnesses who failed to appear, and possible out-of-court settlements. Guilty verdicts in any of these eight instances would increase the conviction rate.

Most criminal trials presented a complex mix of hearsay, conflicting testimony, and legal maneuvering, but abortion trials also introduced an array of factors specific to the alleged offense. An abortion prosecution was highly stigmatizing to the woman involved, suggesting unwed pregnancies or extramarital affairs. A trial thrust a fundamentally private and personal matter onto a public stage, and a woman’s reputation, relationships, and, possibly, livelihood were often damaged beyond repair. Women had good reason to avoid the public shame that a trial could bring to themselves and their families. Reagan’s examination of arrest records and coroner reports in Chicago during the early 1900s revealed the reluctance to endure the stigma of court appearances and testimony on the part of women, their relatives, and friends.36 When the woman died, the jury typically heard only the abortion
provider’s account of what had transpired. On other occasions, witnesses other than the pregnant woman feared association with the scandal of an abortion trial and never appeared in court to testify. One such incident occurred in 1908, when the Oregon State Board of Medical Examiners was forced to postpone indefinitely an attempt to revoke the license of an abortion provider when two witnesses failed to appear, even after receiving subpoenas. Evidence sometimes was lacking simply because medical science and diagnostic technology had not yet provided the necessary understanding, skills, or instruments. Mohr observes that prosecutors often could not obtain definitive assessments from medical examiners about the viability of a fetus or, in some cases, the cause of death. He concludes that abortion cases were “essentially impossible to prove.”

CASE EXAMPLE: THE 1907 CHARLES H.T. ATWOOD TRIAL

In April 1907, a sensational incident of rape and abortion involving a minor revealed the difficulties of obtaining adequate evidence. The case also demonstrates how a private, social service organization could become involved with enforcement of the abortion ban.

Police arrested Dr. Charles Herbert T. Atwood for providing an abortion to Hattie Fee, a sixteen-year-old girl who did not die as a result. Atwood was an unremarkable fifty-three-year-old, married man with three adult children who practiced from offices in the downtown Lewis Building and advertised his services in the Oregonian. “Dr. Atwood, female disease cases, private hospital” one of his notices read. According to the Oregonian, the announcement attracted Willard B. Holdiman, a forty-year-old married man with two children, who had impregnated Fee, the daughter of his housekeeper. Holdiman allegedly arranged for Atwood to perform an abortion on Fee. When she suffered complications from the procedure, her case came to the attention of the Travelers’ Aid Society, a Progressive Era organization concerned with the perceived moral dangers for young women drawn to the city. The society’s director, Lola Greene Baldwin, then took charge of Fee’s case.

Gloria E. Myers recounts that Baldwin, a stalwart Progressive who would become the nation’s first policewoman, hoped to develop “an elaborate institutional apparatus of social control” to counter behavior she and her allies found immoral and unsuitable. In response to Fee’s plight, Baldwin told the Oregonian that “the time has come when drastic measures should be used” against physicians in the abortion trade. She prepared the cases against Holdiman for statutory rape and against Atwood for abortion. Holdiman pleaded guilty to a statutory crime and was sentenced to one year in the county jail. The Oregonian described the case as “the first of a crusade”
against physicians who performed criminal operations.\textsuperscript{44}

At his trial, Atwood declared that Fee was not pregnant when she visited him.\textsuperscript{46} Perhaps he was aware of an 1887 decision by the Oregon Supreme Court (\textit{State v. Clements}) that declared the state, not the defendant, must prove all charges, including whether a woman had been pregnant and whether an abortion was necessary to save her life.\textsuperscript{46} His denial of pregnancy may also have appealed to jurors who harbored lingering beliefs about quickening. Atwood also denied any criminal intent — an essential requirement for a conviction — and he claimed to have administered only legal medicines to Fee.\textsuperscript{47} Multnomah County District Attorney John Manning built his prosecution on Fee’s testimony alone. Not even the girl’s mother testified, perhaps fearing that to do so against her employer would risk her livelihood. The judge cleared the courtroom before Fee “sobbed out her story” of sickness and distress after the operation while Atwood sat with one hand shadowing his eyes.\textsuperscript{48} The jury stalemated after three votes, and Judge C.U. Gattenbein dismissed the jurors, acknowledging the “perplexing issues” in the case. The \textit{Oregonian} noted the public remained interested in the case and that Manning declared he would consider a new trial, vowed to prosecute all physicians who performed abortions, and intended “to wipe out the practice.” Less than a month later, however, the \textit{Oregonian} noted that Manning and Gattenbein agreed a conviction was not possible in the Atwood case because Oregon laws were “not sufficiently specific to prove manslaughter in such a case.”\textsuperscript{49}

Facets of the abortion law often entangled prosecutors in legal dilemmas with no clear path to obtaining guilty verdicts. In just seven (26 percent) of
the trials in the study, prosecutors and judges cited specific problems with the law, but most abortion trials were fundamentally affected by trouble with elements of the law. As prosecutors found, proving pregnancy, intent, an actual abortion, and the death of a child often posed insurmountable challenges.

The anti-abortion law of 1864 clearly stated that any person who uses any means with intent to destroy a pregnant woman’s child shall be found guilty of manslaughter if the woman or child dies as a result. But the law did not define child or when life begins, and prosecutors often struggled to convince juries that a child’s (or fetus’s) death had occurred when the woman survived, when there was no proof of pregnancy, or when no aborted fetus was available as evidence.

Prosecutors were often hard-pressed to question the authority and clinical prerogatives of licensed physicians. In the 1907 Atwood trial, the doctor asserted that he administered only legal medications that the patient required, and prosecutors did not find a way to counter his professional judgment. The following year, a dentist was found guilty of administering abortifacients to his pregnant fiancé, but the Oregon Supreme Court overruled the decision based on a faulty indictment that was insufficient to prove voluntary manslaughter and that failed to charge involuntary manslaughter.

District attorneys in Portland sometimes sidestepped problems with the abortion law by charging suspected abortion providers with lesser crimes. C.H.T. Atwood and his physician son, known as C.H. Atwood, became targets of the strategy after reports of deaths suspected of being abortion-related at the maternity hospital they operated. In one case, a jury censured the doctors for not obtaining a dying declaration from a patient, and in another, prosecutors considered a charge of malpractice instead of manslaughter. Others suspected of abortion work were convicted of contributing to the delinquency of a minor or of maintaining a facility deemed a public nuisance. In 1908, members of the local medical society brought charges before the Oregon State Medical Board to revoke the licenses of two doctors for having provided criminal operations.

CASE EXAMPLE: THE 1908 ERNEST HEYMANS TRIAL

Progressive leaders in Portland tackled another abortion case in 1908, but difficulties with ambiguities of the law proved as troublesome as they had in the Atwood case the year before. The case became one of the most egregious and controversial abortion incidents reported in the Oregonian, and the coverage documented the collaboration among Progressive politicians, prosecutors, medical leaders, and clergy in a local anti-abortion campaign.
Dr. Esther Pohl (later Pohl Lovejoy), a prominent suffragist, was appointed Portland’s City Health Officer in July 1907 by the Portland Board of Health and the Democratic Mayor, Harry Lane. She shared Lane’s commitment to public health reforms as integral elements of a Progressive agenda. Several months into her new position, Pohl confronted what became known as the “Rowland scandal.” In early February 1908, Pohl reported to the Board of Health that Golda Rowland, a twenty-five-year-old school teacher living in Washington State, had died the previous September from an abortion performed at the X-Radium Institute. (Public interest in the discovery of radium and the use of x-ray technology apparently inspired the outfit’s name.) Pohl also charged that the death certificate for Rowland had been altered to conceal the crime. According to newspaper reports, Ernest Heymans, a proprietor of the institute, forged the signature of a Portland physician on the death certificate. But Heymans claimed that the doctor in question, Carey Talbott, authorized him to sign her name because she was ill. The Rowland scandal then swirled with counter charges and contradictions. Talbott adamantly denied any involvement, but Rowland’s mother testified that the woman doctor had cautioned her against making a fuss that would be pointless and damaging to her daughter’s reputation. Dr. William Eisen, a physician at the X-Radium Institute, alarmed the public by claiming he knew of four murders committed on site and that “infants, prematurely born” had been “incinerated in a furnace.” Health officer Pohl expressed her dismay to the Oregonian: “Think of a poor, unfortunate girl, dying among a crowd of grafters, such as Heymans and his assistants!”

The same day that Pohl reported the incident, Heymans sold his interest in the institute and fled the city. Four days later, the police closed the facility. A committee of doctors joined members of the clergy and the local bar
With a name that reads today like a hangout for a Spider-Man villain, the X-Radium Institute purported to be a clinic for advanced medical care. Located at Third and Alder streets in downtown Portland, the operation touted elixirs to treat sexually transmitted diseases and suggested women would receive assistance with ending pregnancies. This ad appeared in the Oregonian on October 15, 1905.

association to rid the city of criminal operations. Ministers railed against the circumstances of the case. Dr. J. Whitcomb Brougher, the prominent pastor of the First Baptist Church, spoke of the Rowland “murder” before an overflow audience at a downtown auditorium. He suggested that society made it difficult for “erring” women to return to “rectitude.” Many, he declared, might feel driven to death rather than endure the disgrace of their condition. Brougher characterized the state of affairs around Rowland’s case as “simply horrible” and tried to rally “moral people” to undertake the disagreeable task of ridding the city of abortion providers, who he called a “generation of vipers.”

Several months later, in late July 1909, Heymans was arrested in Seattle and then tried in Portland for the lesser charge of forging the Rowland death
When the Medical Examiners Board revoked Dr. Eisen’s license due to his involvement in the case, the Oregon Supreme Court overruled the decision, citing insufficient proof that Heymans intended to end a life.  

Manning vented to the *Oregonian* his immense frustration with what he considered the ambiguities of the abortion law. “I have been through the courts many times in these cases and have never been able to score a conviction, much as the courts and I have tried.” He complained that Oregon had a statute against manslaughter, not abortion. “But manslaughter is the taking of life,” he said. “Life must be present before it can be destroyed. In nearly every case of abortion there is no taking of life, according to the legal and medical authorities.”

Several months after the Rowland scandal played out, the Multnomah County Grand Jury essentially agreed with Manning.

Golda W. Rowland, a twenty-five-year-old schoolteacher, died from an abortion conducted at the X-Radium Institute in downtown Portland. Her death and the trial that followed triggered sensational newspaper coverage at the peak of the Progressive Era’s campaign against abortion. On February 8, 1908, the Oregonian published a copy of Rowland’s death certificate.
In an official report, the panel recognized that abortions had become “an established industry” in Portland and that a “new and more forceful law” was needed because “the present law is of little or no effect.” Whether a more restrictive and punitive ban would have made a difference in ending abortions or increasing the conviction rate is not known, because the state never enacted a more restrictive law.

WITH THE MANY OBSTACLES to successful prosecutions, Portland authorities obtained guilty verdicts in just seven of the twenty-seven trials, for an overall 30 percent conviction rate. Prosecutors in the 1870–1900 period achieved convictions in three of twelve trials (25 percent) compared to the four convictions in fifteen trials (27 percent) during the years 1900 to 1920. The increase in the latter period probably reflects the vigilance of Progressives and the determination of Manning, who served as district attorney from 1902 to 1908, when nine abortion-related trials were prosecuted. Portland’s experience was not much different from that of other jurisdictions. Reagan observes that Chicago sometimes obtained only one or two convictions a year, and in one ten-year period, that city’s conviction rate was less than 25 percent.

Given the repeated entreaties by the district attorney and the medical society, most Portland physicians apparently resisted demands from legal and medical leaders to assist with enforcement of the state’s abortion law. During the early 1900s, the Oregonian gave extensive coverage to alleged abortion offenses and allowed parties to the acts to make unsubstantiated, scandalous claims. With convictions difficult to obtain even in high-profile trials, one Portland prosecutor, Manning, vented his frustration at regular physicians and the local medical society. His sentiments echoed the discontent of prosecutors in other cities who also demanded collaboration from physicians. They wanted doctors to identify abortion providers, report indications of abortions, obtain dying declarations, and testify at trials. After the Atwood trial in 1907, Manning placed local doctors and the City and County Medical Society on notice: “I shall when the proper time comes, call upon the society to produce all the evidence its members have.” Anything less, he implied, would be tantamount to hindering prosecutions.

Local medical society leaders needed little prodding; they were already engaged in a public dispute with the AMA over Oregon’s quality of medical education and the state’s medical profession overall, and they wanted no further damage to doctors’ reputations. Dr. Alan Welch Smith, secretary of the society, urged members at a May 1907 meeting to identify and help prosecute practitioners among their ranks and to “stamp out this blot on the medical profession.” He complained of the “clique of doctors” who dared
to advertise their “unholy vocation” and then boasted of the money they pocketed.\textsuperscript{71} Another doctor, C.N. Suttner, expressed disgust for the situation in an article for \textit{Northwest Medicine}, a medical journal. He wondered if his law-abiding colleagues would ever have the courage to banish abortion providers from their medical societies, shun them from their homes, and refuse to defend them before a court of law.\textsuperscript{72}

The doctors who attended the May 1907 session agreed that abortion had become so rampant in the city that drastic measures were necessary, and the \textit{Oregonian} reported that every member of the medical society had pledged to assist with securing evidence against abortion providers. A few doctors testified at abortion trials, including the prosecution of Dr. Atwood. The physicians continued their efforts into the following year, and in February 1908, society members agreed on an informal collaboration between their “abortion committee” and legal authorities that was similar to arrangements developed in Chicago, Philadelphia, and other cities.\textsuperscript{73}

Despite these cases of collaboration, the repeated requests and demands for doctors’ help suggest that cooperation was limited and that most doctors were unwilling to help bring charges against their colleagues or risk involvement at any level in a public abortion case. The AMA’s early anti-abortion efforts had empowered the state to control women’s reproductive lives, but individual doctors apparently did not expect the state to place demands or attempt to exert control of them as well. The \textit{Oregonian} reported that these “legitimate practitioners” had known for some time that at least a dozen physicians performed abor-

\textbf{Oregon's first reported abortion trial led to the conviction of the proprietor of this operation that touted herbal remedies for an assortment of maladies. This advertisement, published in the Oregonian on September 1, 1873, targeted men with “secret habits” and women in need of “Female Regulator Pills.” A nineteen-year-old woman died from an abortion procured at this facility in 1873.}
Smith conceded the point and admitted that an earlier lack of vigilance in purging abortion providers from the profession had led to the distressing circumstances before them.74 The demands on doctors ignored that many physicians, as Solinger notes, “treat[ed] their work as a private business” and valued their clinical and financial independence.75

The matter of collaboration by individual physicians was more complicated than it might appear. Doctors who had no direct role in an abortion often risked their reputations when they became implicated as medical experts or as autopsy assistants in a trial. Likewise, providing medical care to a woman suffering from a botched abortion could also mean becoming the last attending physician before the woman died. Reporting the incident as required could bring the suspicions of the coroner or prosecutor. Obtaining dying declarations provided some protection, but that strategy proved contentious as well. One of the few outspoken advocates for legal abortion, Dr. William Robinson of New York, objected to distressing a patient over a dying declaration: “The business of the doctor is to relieve pain, cure disease and save life,” “not to act as a bloodhound [for] the state.”76

No reports in the Oregonian during this fifty-year period describe the medical practices, professional lives, or personal motivations of abortion providers who avoided indictments and trials. Nevertheless, those
unprosecuted individuals reveal another part of the city’s experience with enforcement of the abortion ban.

Ruth Barnett, a naturopath and abortion assistant, identified several regular, licensed physicians who practiced during this study period and avoided legal troubles for their abortion work in Portland.77 She published her recollections in her later years and, as a well-known abortion provider at the time, had reason to portray her colleagues in a positive light. Her accounts suggest she held them in high regard. Given the few trials and convictions during this period, the physicians assumed low legal risk and provided the service for professional and personal reasons. Barnett disclosed that she had obtained an abortion from Dr. George Watts, a “highly skilled physician and surgeon” who had shifted his general practice to offer full-time abortion assistance to “woebe-gone women.”78 Barnett then described Dr. Edward Stewart as a cosmopolitan provider with a flourishing practice that occupied the eighth floor of the modern, elegant Broadway Building downtown. He also switched his practice to specialize in abortions, and his swank location probably increased his appeal to middle-class and wealthy patients. Stewart dismissed others’ concerns about abortion, according to Barnett, and declared what was important to him was “the appreciation of the hundreds of women I’ve helped — yes!, and that of their husbands and lovers.”79 Two women abortion providers also became associates of Barnett. Dr. Maude K. Van Alstyne of Grants Pass, Oregon, graduated in 1902 from the University of Oregon Medical Department (UOMD) and maintained a suite of offices in the Broadway Building. Dr. Alys Bixby Griff also completed her UOMD studies in 1902. She established a practice for the diseases of women and maintained it until the increasing demand for abortions prompted her to
specialize in the service. A vivacious, confident, and sometimes nervous woman, Griff hired Barnett as her assistant, and they worked together for eleven years. Barnett’s portrayals of these practices clearly contrast with the newspaper reports of outfits such as the X-Radium Institute, presenting a fuller picture of abortion services during the fifty-year study period.

Dr. Marie Equi stands out among the abortion-providing physicians of her time for offering the service as part of a larger medical and political commitment to women’s reproductive rights. According to her contemporaries, she performed abortions for a wide range of clients, including regular patients, poor and working-class immigrant women, political activists, and the wealthy women referred to her. One of her radical colleagues recalled: “She did most of it for nothing . . . cuz working-class women needed it,” adding: “If they could, they paid, if not, not.” Equi brought to her medical practice a fierce independence as a woman often regarded as an outsider. She spent her youth in New Bedford, Massachusetts, as the daughter of Catholic, working-class, immigrant parents, and she understood the difficulties for families at a time when birth control was forbidden. Her mother gave birth to eleven children in sixteen years, and Equi witnessed the death of three of them during childhood. She was an eager student, but she was forced to leave her high school studies to work in the city’s gritty textile mills. She managed to escape with a girlfriend to an Oregon homestead, and there she first became known for seeking the intimate company of women exclusively — a lesbian before the term was used.

Equi self-studied her way into medical school and graduated in 1903 as one of Oregon’s early woman physicians. She became a local hero for her relief work after the San Francisco earthquake and fire. She aligned
herself first with Progressives and worked for woman suffrage and civic reforms before becoming radicalized after rough treatment by police during a labor dispute in 1913. She made abortion and birth-control services part of her medical practice, and she was an active member and supporter of the Portland Birth Control League. In 1916, she spent a night in jail with Margaret Sanger, both charged with distributing birth control information. Equi is not known for publicly protesting against the abortion law as she did criminalization of birth control, but her commitment to full patient services and her life as an outsider led her to disregard the demands of prosecutors and medical leaders. Treated as disreputable by many for her lesbianism and her radical politics, Equi sided with women considered morally irresponsible for seeking abortions.

Radical activist Julia Ruuttila, a younger contemporary, thought Equi performed abortions because “she believed that women should have the right of choice and should not be forced to bear a child . . . if they didn’t want that child or couldn’t take care of it.” Portland physician Jessie Laird Brodie, who started her practice in the 1920s, noted that she and other doctors refused to risk performing abortions. Those doctors who did offer the service did so, she said, because “they felt so strongly about it and I think Marie Equi was one of that type.”

**THE AMA’S ANTI-ABORTION** campaign succeeded in criminalizing the procedure nationwide, an achievement that aided its efforts to diminish the role of midwives and push irregular and alternative practitioners to the periphery of health care. As a result, regular physicians increased their dominance of the nation’s medical marketplace and were well positioned...
to enhance their status once scientific and technological advances increased their ability to treat infectious diseases.\textsuperscript{88}

The abortion ban also produced unanticipated consequences. Prosecutors found the law extremely difficult to enforce, and their best efforts yielded low conviction rates. And, according to physician observers, women sought abortions no matter how the bans were drafted or revised. For their part, physicians discovered that the willingness of the state to regulate women’s reproductive choices might also extend to how they conducted their medical practices. Doctors in Portland and elsewhere proved reluctant to help the state enforce the law. Mohr notes that in the Midwest and on the East Coast, many physicians believed their professional goals for the abortion ban had been met by the 1890s, and they felt less motivated to engage in enforcement.\textsuperscript{90} In 1908, the first chair of the abortion committee of the Chicago Medical Society, according to Reagan, concluded that “the public does not want, the profession does not want, the women in particular do not want any aggressive campaign against the crime of abortion.”\textsuperscript{90} Four years later, another member of the same group remarked that the coroner and prosecutors stood convinced that “the profession of Chicago and [of] the Chicago Medical Society is apathetic in the extreme, in matters relating to criminal abortion.”\textsuperscript{91}

How much physicians in Portland and elsewhere in the West shared this lack of desire for anti-abortion legislation and the apathy for enforcement is uncertain. They may have prized their independence and clinical prerogatives over helping enforce prohibitions on private decisions. Many Portland physicians enabled the practice of abortion by providing post-abortion medical care, by invoking the therapeutic exception and helping end pregnancies, by referring patients to willing physicians, and by not reporting their colleagues.\textsuperscript{92} Reports suggest that more than a dozen Portland physicians skirted the law to help women end their pregnancies during this fifty-year time frame.\textsuperscript{93} Many of those practitioners combined surgical skill and discrete service to attract sizeable numbers of clients from all backgrounds, although poor and working-class women were probably hard-pressed to afford their assistance. At least one, Equi, was known to provide abortions regardless of whether a woman could afford her care. She also achieved distinction for distributing birth control information at a time when doing so was illegal.

The first fifty years of attempted enforcement of the abortion ban in Portland became mired in legal, medical, and sometimes political quandaries that challenged and frustrated city and county officials, the medical establishment, and individual physicians. One civic body in 1908 suggested the state abortion law should be revised with “more forceful” provisions to address these difficulties.\textsuperscript{94} The recommendation was not pursued. Instead, at the conclusion of the next fifty-year period, in 1969, Oregon adopted a more
liberal abortion law following the Model Penal Code proposed by the American Law Institute. The new law legalized abortion in cases of rape, incest, or when the pregnancy would damage a woman’s physical or mental health.95

Oregon’s revision of its abortion ban held until the U.S. Supreme Court’s landmark Roe v. Wade ruling on January 22, 1973, which decriminalized abortion throughout the United States. In the seven-to-two decision, the court declared the right of privacy included “a woman’s decision whether or not to terminate her pregnancy.”96 Abortions became legal throughout a woman’s pregnancy, although states were allowed to set conditions during the second trimester and possibly prohibit abortions during the third trimester except when the life or health of the woman was at risk. The era of illegal abortions ended, and, as historian Reagan notes, “for the first time, the state recognized women’s role and rights in reproductive policy.”97 The Oregonian carried the abortion story the following day in the middle of page one in its morning edition, but the news was overshadowed by reports of former president Lyndon B. Johnson’s death.98 Embedded on page thirty-seven ran an advertisement: “BIRTHRIGHT,” Untimely pregnancy? Is abortion the solution? Call if you desire professional help or advice.”99

The early history of Portland’s abortion trials reflects the difficulty with enforcement since the enactment of the ban, and it foreshadows the abortion policy conflicts of the mid nineteenth century as well as many today. This analysis of the city’s experience also highlights the nuanced and disparate reactions of physicians who found themselves on the front lines of abortion services, policies, and enforcement.

Much of the early history of reproductive rights in the Pacific Northwest — and women’s roles in the efforts — remains unexamined. It can be argued, however, that an understanding of the conflicts over reproductive policy are as important to women’s and the nation’s history as the struggle to achieve woman suffrage and other rights of citizenship. Both arenas deserve further analysis. The data source examined in this study yielded several accounts of women’s involvement with abortion issues. Women such as Mary Hardman, Hattie Fee, and Golda Rowland, who defied the ban, officials and advocates such as Lola Baldwin and Dr. Esther Pohl, who supported protection of women and enforcement, and physicians such as Alys Griff and Marie Equi, who assumed professional risks by providing abortions — all contributed to the ebb and flow of an issue that has roiled the body politic for more than 150 years. Other data sources — municipal and district court records, arrest and jail records, public documents, additional periodicals, private collections, and medical reports — await the examination that can broaden and deepen our understanding of abortion and women’s reproductive rights in the Pacific Northwest.

Helquist, “Criminal Operations”
A digital version of the Oregonian served as primary data source for this study. Searches for abortion and criminal operation from 1864 to 1920 yielded accounts of arrests, investigations, and prosecutions. Incidents occurring outside Portland were excluded from the analysis. When an accused practitioner was identified, an additional search by surname was conducted to obtain additional information, such as trial outcomes. Decisions by the Oregon Supreme Court and the U.S. Supreme Court, some of which are available online, revealed the outcomes of appeals as well as clarifications of the abortion law.

The Oregonian mostly offered straightforward accounts of the trials, exercising the restraint that Peter Boag notes in its coverage of anti-vice campaigns and the 1912 same-sex scandal (Peter Boag, Same-Sex Affairs, Constructing and Controlling Homosexuality in the Pacific Northwest, Berkeley: University of California Press, 2003, 161). Only during the most controversial cases in the 1900s did the paper appear to stoke as well as report public concern.

A few abortion prosecutions in Portland during this period may not have been reported in the newspaper, and a number of arrests and investigations may have been missed. The newspaper occasionally employed euphemisms for abortion — for example, “for reasons growing out of their intimacy” and “preventing possible working out of the laws of nature” — that eluded searches and were found in full page-by-page readings.

This study did not include reports of trials that may have appeared in non-digitized and less-accessible Portland newspapers, and it did not examine court records. The newspaper coverage cited here failed to examine the national ban on distribution of birth control information as an underlying cause of unplanned pregnancies.

The author appreciates the assistance of several colleagues who helped guide this project, especially the participants at the 2014 Pacific Northwest History Conference, where an earlier version of this study was presented. Thanks also to the anonymous manuscript readers and to Eliza Canty-Jones, editor; Erin Brasell, assistant editor; and Rose Tucker Fellow Melissa Lang of the Oregon Historical Quarterly for their excellent support and insight. Dale Danley’s data-driven perspective proved invaluable.

1. “Found Guilty: Concluding Testimony in the Trial of Dr. C.G. Glass – Argument of Counsel.” Oregonian, November 17, 1873, 4. Note: C.G. Glass employed the term “Doctor” but there is no evidence of his having obtained a medical degree

2. “1873, Principal Events of the Year,” Oregonian, January 1, 1874, 3.


6. Ibid. “The Noble Representative Woman from Oregon, Dr. Mary Anna Cooke Thompson,” Oregon Historical Quarterly 108:3 (Fall 2012): 411. Thompson (1825–1919) lacked a medical degree but had undertaken ten years of medical study and started a medical practice with the guidance of two physicians before settling in Portland.


8. Ruth Barnett, They Weep On My Doorstep (Beaverton, Ore.: Halo Publishers,


15. Witherspoon, “Re-examining Roe,” 45 n49; Mohr, Abortion in America; Reagan, When Abortion Was A Crime, 63–64.


19. Reagan, When Abortion Was a Crime, 80. The observation was made by Dr. Joseph Taber Johnson before the Washington, D.C., Obstetrical and Gynecological Society on June 7, 1895. Johnson helped lead a second anti-abortion crusade once abortion became illegal in all the states.


24. Reagan, When Abortion Was a Crime, 114–18. The scope of this study is an ex-
amination of one primary source of data to document and better understand Portland’s enforcement of the state abortion ban specifically through prosecution of providers. A broader study might assess other facets of the “investigative process” over a fifty-year or more period through other sources. These might include arrest and jail records, county court records, appellate court records, official reports by enforcement personnel, other private and public documents, and coverage in other newspapers. It is possible that the number of abortion prosecutions was greater than those reported by the Oregonian. Vagaries in the newspaper business may have led to an incomplete accounting. Outcomes of many of the indictments and trials were inconclusive or were not reported.

30. Mohr, Abortion in America, 72. The outcomes of many of the indictments and trials were inconclusive or were not reported.

31. “The Quacks and Fake Doctors of Portland,” Medical Notes, Northwest Medicine, April 1908, 155; Alan Welch Smith M.D., “Practical Methods of Dealing with Quacks and Quackery,” Northwest Medicine, July 1908, 300–307; “Drive Out Quacks, Committee Declares War on Illicit Practitioners,” Oregonian, February 16, 1908, 8; “Swoop by Officials Bags 11 Doctors,” Oregonian, September 10, 1911, 10.


33. Of the six trials that involved married women, one in 1894 implicated a small-time, irregular female provider, two dealt with the notorious Dr. William Eisen (in 1896 and in 1910), and one with the frequently indicted Dr. C.H.T. Atwood (1908). See Table 1.

34. Reagan, When Abortion Was a Crime, 113–31. Reagan examines the full investigative process that often led to trials in Chicago.


38. Mohr, Abortion in America, 72. The outcomes of many of the indictments and trials were inconclusive or were not reported.


42. Mohr, A Municipal Mother, 2–3, 75–90.

43. “Dr. Atwood Is Arrested,” Oregonian, April 8, 1907, 14; “Holdiman to Serve a Year,” Oregonian, June 16, 1907, 15. Leniency was granted to Holdiman at the request of his attorney and with the concurrence of the District Attorney.

44. Myers, A Municipal Mother, 8–24. Baldwin’s work led to the establishment of a women’s protective unit in the police department in 1908 with Baldwin as director. “Accused of Criminal Operation,” Oregonian, February 24, 1906, 11.


(San Francisco: Bancroft Whitney Company, 1902).


48. “Slow Progress Is Made,” Oregonian, May 18, 1907, 11; “Evidence Completed in Atwood Case,” Portland Daily News, May 18, 1907, 1. Atwood’s attorneys also filed for a dismissal on grounds that there was no state law under which Dr. Atwood could be prosecuted. The motion was overruled.


56. Reagan, When Abortion Was a Crime, 28–29. Reagan describes how unwed women were urged to bear their children at maternity homes, but that women often objected to the treatment they received there. The name of the institute apparently reflected the public’s interest in the relatively recent discovery of radium and the use of x-ray technology in American hospitals as well as “x-radium” for all sorts of questionable consumer products.

57. “Death Certificate Conceals Crime,” Sunday Oregonian, February 2, 1908, 10. The X-Radium Institute was located at 3rd and Alder streets. The article lists the age of Golda Rowland as 32, but her death certificate, published in the Oregonian, February 5, 1908, 10, reports her birth as January 21, 1882, and her age as 25.


61. “Crusade Is Opened,” Oregonian, February 17, 1908, 5. Other ministers to join the committee included the pastors of First Congregational Church (Dr. Luther B. Dyott), First Christian Church (Rev. E.W. Muckley), First Presbyterian Church (Rev. William Hiram Foulkes), and Grace Methodist Episcopal Church (Dr. W.H. Heppe).


63. Board of Medical Examiners v. Eisen, 61 Or. 492 (April 23, 1912), Oregon Supreme Court, Reports of Cases decided in the Supreme Court of the State of Oregon, Volume 61 (San Francisco: Bancroft-Whitney, 1915), 492–96. In 1910, the Oregon State Board of Medical Examiners revoked Dr. Eisen’s license for procuring an abortion in Portland, but the Oregon Supreme Court overruled the decision for lack of proof of intent to end a life and mistakes of the lower court. Eisen continued in his practice.

64. “Criminal Doctors to be Prosecuted,” Sunday Oregonian, February 23, 1908, 12.


Helquist, “Criminal Operations” 37
66. These four trial convictions involved five defendants found guilty (1907, Eisen; 1908, Whitney; 1908, both Atwoods; 1915, Ausplund).


71. “Black Sheep To Be Driven Out,” Oregonian, May 16, 1907, 10. Other Portland doctors who joined the effort to rid the city of abortion providers included R.C. Coffey, E.P. Geary, E.F. Tucker, and Esther Pohl.


74. Black Sheep To Be Driven Out,” Oregonian, May 16, 1907, 10.

75. Solinger, Pregnancy and Power, 70.


80. Ibid., 11–16. The six physicians who provided abortions kept offices in the following downtown buildings: Dr. George Watts (Oregonian building and later the Broadway Building), Drs. Edward Stewart and Maude van Alstyne (as well as Ruth Barnett after 1919, Broadway Building), Drs. Alys Griff and Marie Equi (Lafayette Building). Seventeenth Annual Announcement, Medical Department of the University of Oregon, Session 1903–1904 (Portland: Anderson Printing, 1901), 29–30. Maud Kremer (later Alstyne) of Grants Pass is listed among the graduates of 1902.

81. Lew Levy with Sandy Polishuk, Interview, April 5, 1976, OHS, ACC 28389. Levy was an Oregon member of the Industrial Workers of the World.


88. During the fifty-year period of the study, scientists discovered the causes and treatments for tuberculosis, cholera, diphtheria, rabies, and syphilis.

89. Mohr, Abortion in America, 240–45.

90. Reagan, When Abortion Was a Crime, 89. The chair of Chicago’s Criminal Abortion Committee was Rudolph Holmes.


93. Myers, Municipal Mother, 75–90, n23, 199. Police officer Lola Baldwin listed the following abortion providers who practiced in Portland: Courtney, Von Falkenstein, CHT and CH Atwood, McCormick, Pierce, Walker, Armstrong, Candiani, McKay, Watts, Mallory, King, and Ausplund. Of the fourteen, nine are not known to have been prosecuted in Portland for abortion, although in 1911 a few of these were arrested for practicing without a license. “Swoop by Officials Bags 11 ‘Doctors’,” Oregonian, September 10, 1911, 10. Barnett, They Weep On My Doorstep, 11–25. Barnett named an additional four physicians who offered abortions without encountering legal problems in Portland: Stewart, Littlefield, van Alstyne, and Griff.

94. “Mayor’s Crusade Opposed by Jury,” Oregonian, October 4, 1908. This report detailed the work of the Multnomah County Grand Jury and its recommendations.


97. Reagan, When Abortion Was a Crime, 244–45.


Helquist, “Criminal Operations” 39
corporation (other than a mutual savings bank) or a member of a partnership organized for any purpose whatsoever which shall make loans secured by stock or bond collateral to any individual, association, partnership, or corporation other than its own subsidiaries."

Sec. 34. The right to alter, amend, or repeal this Act is hereby expressly reserved. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Approved, June 16, 1933, 11:45 a.m.

[CHAPTER 90.]

AN ACT

To encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—INDUSTRIAL RECOVERY

DECLARATION OF POLICY

SECTION 1. A national emergency productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist. It is hereby declared to be the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources.

ADMINISTRATIVE AGENCIES

Sec. 2. (a) To effectuate the policy of this title, the President is hereby authorized to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the provisions of the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed.

(b) The President may delegate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint, and may establish an industrial planning and research agency to aid in carrying out his functions under this title.
Termination of agencies, etc.

(C) This title shall cease to be in effect and any agencies established hereunder shall cease to exist at the expiration of two years after the date of enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

Codes of fair competition.

Approval by the President.

Sec. 3. (a) Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

(b) After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended; but nothing in this title shall be construed to impair the powers of the Federal Trade Commission under such Act, as amended.

Jurisdiction of district courts to restrain violations.

(c) The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this title; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

(d) Upon his own motion, or if complaint is made to the President that abuses inimical to the public interest and contrary to the policy herein declared are prevalent in any trade or industry or subdivision thereof, and if no code of fair competition therefor has heretofore been approved by the President, the President, after such public notice and hearing as he shall specify, may prescribe and approve a code of fair competition for such trade or industry or subdivision thereof, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of this section.

(e) On his own motion, or if any labor organization, or any trade or industrial organization, association, or group, which has complied with the provisions of this title, shall make complaint to the President
that any article or articles are being imported into the United States in substantial quantities or increasing ratio to domestic production of any competitive article or articles and on such terms or under such conditions as to render ineffective or seriously to endanger the maintenance of any code or agreement under this title, the President may cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, and if, after such investigation and such public notice and hearing as he shall specify, the President shall find the existence of such facts, he shall, in order to effectuate the policy of this title, direct that the article or articles concerned shall be permitted entry into the United States only upon such terms and conditions and subject to the payment of such fees and to such limitations in the total quantity which may be imported (in the course of any specified period or periods) as he shall find it necessary to prescribe in order that the entry thereof shall not render or tend to render ineffective any code or agreement made under this title. In order to enforce any limitations imposed on the total quantity of imports, in any specified period or periods, of any article or articles under this subsection, the President may forbid the importation of such article or articles unless the importer shall have first obtained from the Secretary of the Treasury a license pursuant to such regulations as the President may prescribe. Upon information of any action by the President under this subsection the Secretary of the Treasury shall, through the proper officers, permit entry of the article or articles specified only upon such terms and conditions and subject to such fees, to such limitations in the quantity which may be imported, and to such requirements of license, as the President shall have directed. The decision of the President as to facts shall be conclusive. Any condition or limitation of entry under this subsection shall continue in effect until the President shall find and inform the Secretary of the Treasury that the conditions which led to the imposition of such condition or limitation upon entry no longer exists.

(f) When a code of fair competition has been approved or prescribed by the President under this title, any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense.

AGREEMENTS AND LICENSES

SEC. 4. (a) The President is authorized to enter into agreements with, and to approve voluntary agreements between and among persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations, or groups, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title with respect to transactions in or affecting interstate or foreign commerce, and will be consistent with the requirements of clause (2) of subsection (a) of section 3 for a code of fair competition.

(b) Whenever the President shall find that destructive wage or price cutting or other activities contrary to the policy of this title are being practiced in any trade or industry or any subdivision thereof, and, after such public notice and hearing as he shall specify, shall find it essential to license business enterprises in order to make effective a code of fair competition or an agreement under this title or otherwise to effectuate the policy of this title, and shall publicly
so announce, no person shall, after a date fixed in such announcement, engage in or carry on any business, in or affecting interstate or foreign commerce, specified in such announcement, unless he shall have first obtained a license issued pursuant to such regulations as the President shall prescribe. The President may suspend or revoke any such license, after due notice and opportunity for hearing, for violations of the terms or conditions thereof. Any order of the President suspending or revoking any such license shall be final if in accordance with law. Any person who, without such a license or in violation of any condition thereof, carries on any such business for which a license is so required, shall, upon conviction thereof, be fined not more than $500, or imprisoned not more than six months, or both, and each day such violation continues shall be deemed a separate offense. Notwithstanding the provisions of section 2 (c), this subsection shall cease to be in effect at the expiration of one year after the date of enactment of this Act or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended.

SEC. 5. While this title is in effect (or in the case of a license, while section 4 (a) is in effect) and for sixty days thereafter, any code, agreement, or license approved, prescribed, or issued and in effect under this title, and any action complying with the provisions thereof taken during such period, shall be exempt from the provisions of the antitrust laws of the United States.

Nothing in this Act, and no regulation thereunder, shall prevent an individual from pursuing the vocation of manual labor and selling or trading the products thereof; nor shall anything in this Act, or regulation thereunder, prevent anyone from marketing or trading the produce of his farm.

LIMITATIONS UPON APPLICATION OF TITLE

SEC. 6. (a) No trade or industrial association or group shall be eligible to receive the benefit of the provisions of this title until it files with the President a statement containing such information relating to the activities of the association or group as the President shall by regulation prescribe.

(b) The President is authorized to prescribe rules and regulations designed to insure that any organization availing itself of the benefits of this title shall be truly representative of the trade or industry or subdivision thereof represented by such organization. Any organization violating any such rule or regulation shall cease to be entitled to the benefits of this title.

(c) Upon the request of the President, the Federal Trade Commission shall make such investigations as may be necessary to enable the President to carry out the provisions of this title, and for such purposes the Commission shall have all the powers vested in it with respect of investigations under the Federal Trade Commission Act, as amended.

SEC. 7. (a) Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any
company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

(b) The President shall, so far as practicable, afford every opportunity to employers and employees in any trade or industry or subdivision thereof with respect to which the conditions referred to in clauses (1) and (2) of subsection (a) prevail, to establish by mutual agreement, the standards as to the maximum hours of labor, minimum rates of pay, and such other conditions of employment as may be necessary in such trade or industry or subdivision thereof to effectuate the policy of this title; and the standards established in such agreements, when approved by the President, shall have the same effect as a code of fair competition, approved by the President under subsection (a) of section 8.

(c) Where no such mutual agreement has been approved by the President he may investigate the labor practices, policies, wages, hours of labor, and conditions of employment in such trade or industry or subdivision thereof; and upon the basis of such investigations, and after such hearings as the President finds advisable, he is authorized to prescribe a limited code of fair competition fixing such maximum hours of labor, minimum rates of pay, and other conditions of employment in the trade or industry or subdivision thereof investigated as he finds to be necessary to effectuate the policy of this title, which shall have the same effect as a code of fair competition approved by the President under subsection (a) of section 3. The President may differentiate according to experience and skill of the employees affected and according to the locality of employment; but no attempt shall be made to introduce any classification according to the nature of the work involved which might tend to set a maximum as well as a minimum wage.

(d) As used in this title, the term "person" includes any individual, partnership, association, trust, or corporation; and the terms "interstate and foreign commerce" and "interstate or foreign commerce" include, except where otherwise indicated, trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States.

APPLICATION OF AGRICULTURAL ADJUSTMENT ACT

SEC. 8. (a) This title shall not be construed to repeal or modify any of the provisions of title I of the Act entitled "An Act to relieve the existing national economic emergency by increasing agricultural purchasing power, to raise revenue for extraordinary expenses incurred by reason of such emergency, to provide emergency relief with respect to agricultural indebtedness, to provide for the orderly liquidation of joint-stock land banks, and for other purposes," approved May 12, 1933; and such title I of said Act approved May 12, 1933, may for all purposes be hereafter referred to as the "Agricultural Adjustment Act."

(b) The President may, in his discretion, in order to avoid conflicts in the administration of the Agricultural Adjustment Act and this title, delegate any of his functions and powers under this title.
Oil regulation.

Regulation of oil-pipe lines.

Executive Orders Nos. 6596, July 11, 1933; 6606, July 14, 1933. Transportation rates to be fixed.

Oil regulation.

Sec. 9. (a) The President is further authorized to initiate before the Interstate Commerce Commission proceedings necessary to prescribe regulations to control the operations of oil pipe lines and to fix reasonable, compensatory rates for the transportation of petroleum and its products by pipe lines, and the Interstate Commerce Commission shall grant preference to the hearings and determination of such cases.

(b) The President is authorized to institute proceedings to divorce from any holding company any pipe-line company controlled by such holding company which pipe-line company by unfair practices or by exorbitant rates in the transportation of petroleum or its products tends to create a monopoly.

(c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both.

Rules and regulations.

Prescribed by President.

Penalty for violations.

Amendment of orders.

Rules and regulations.

Prescribed by President.

Penalty for violations.

Amendment of orders.

TITLE II—PUBLIC WORKS AND CONSTRUCTION PROJECTS

Federal Emergency Administration of Public Works.

Establishment authorized. Post, p. 351.

Appointments.

Duties to be prescribed.

Federal Emergency Administration of Public Works.

Establishment authorized. Post, p. 351.

Appointments.

Duties to be prescribed.

SECTION 201. (a) To effectuate the purposes of this title, the President is hereby authorized to create a Federal Emergency Administration of Public Works, all the powers of which shall be exercised by a Federal Emergency Administrator of Public Works (hereafter referred to as the “Administrator”), and to establish such agencies, to accept and utilize such voluntary and uncompensated services, to appoint, without regard to the civil service laws, such officers and employees, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary, to prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may dele-
gate any of his functions and powers under this title to such officers, agents, and employees as he may designate or appoint.

(b) The Administrator may, without regard to the civil service laws or the Classification Act of 1923, as amended, appoint and fix the compensation of such experts and such other officers and employees as are necessary to carry out the provisions of this title; and may make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books and books of reference, and for paper, printing and binding) as are necessary to carry out the provisions of this title.

(c) All such compensation, expenses, and allowances shall be paid out of funds made available by this Act.

(d) After the expiration of two years after the date of the enactment of this Act, or sooner if the President shall by proclamation or the Congress shall by joint resolution declare that the emergency recognized by section 1 has ended, the President shall not make any further loans or grants or enter upon any new construction under this title, and any agencies established hereunder shall cease to exist and any of their remaining functions shall be transferred to such departments of the Government as the President shall designate: Provided, That he may issue funds to a borrower under this title prior to January 23, 1939, under the terms of any agreement, or any commitment to bid upon or purchase bonds, entered into with such borrower prior to the date of termination, under this section, of the power of the President to make loans.

Sec. 202. The Administrator, under the direction of the President, shall prepare a comprehensive program of public works, which shall include among other things the following: (a) Construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control and also the construction of any river or drainage improvement required to perform or satisfy any obligation incurred by the United States through a treaty with a foreign Government heretofore ratified and to restore or develop for the use of any State or its citizens water taken from or denied to them by performance on the part of the United States of treaty obligations heretofore assumed: Provided, That no river or harbor improvements shall be carried out unless they shall have heretofore or hereafter been adopted by the Congress or are recommended by the Chief of Engineers of the United States Army; (c) any projects of the character heretofore constructed or carried on either directly by public authority or with public aid to serve the interests of the general public; (d) construction, reconstruction, alteration, or repair under public regulation or control of low-cost housing and slum-clearance projects; (e) any project (other than those included in the foregoing classes) of any character heretofore eligible for loans under subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and paragraph (3) of such subsection (a) shall for such purposes be held to include loans for the construction or completion of hospitals the operation of which is partly financed from public funds, and of reservoirs and pumping plants and for the construction of dry docks; and if in the opinion of the President it seems desirable, the construction of naval vessels within the terms and/or limits established by the London Naval Treaty of 1930 and of aircraft required therefor and construction of heavier-than-air
Aircraft and technical construction for the Army Air Corps and such Army housing projects as the President may approve, and provision of original equipment for the mechanization or motorization of such Army tactical units as he may designate: Provided, however, That in the event of an international agreement for the further limitation of armament, to which the United States is signatory, the President is hereby authorized and empowered to suspend, in whole or in part, any such naval or military construction or mechanization and motorization of Army units: Provided further, That this title shall not be applicable to public works under the jurisdiction or control of the Architect of the Capitol or of any commission or committee for which such Architect is the contracting and/or executive officer.

Sec. 203. (a) With a view to increasing employment quickly (while reasonably securing any loans made by the United States) the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, (1) to construct, finance, or aid in the construction or financing of any public-works project included in the program prepared pursuant to section 202; (2) upon such terms as the President shall prescribe, to make grants to States, municipalities, or other public bodies for the construction, repair, or improvement of any such project, but no such grant shall be in excess of 30 per centum of the cost of the labor and materials employed upon such project; (3) to acquire by purchase, or by exercise of the power of eminent domain, any real or personal property in connection with the construction of any such project, and to sell any security acquired or any property so constructed or acquired or to lease any such property with or without the privilege of purchase: Provided, That all moneys received from any such sale or lease or the repayment of any loan shall be used to retire obligations issued pursuant to section 209 of this Act, in addition to any other moneys required to be used for such purpose; (4) to aid in the financing of such railroad maintenance and equipment as may be approved by the Interstate Commerce Commission as desirable for the improvement of transportation facilities; and (5) to advance, upon request of the Commission having jurisdiction of the project, the unappropriated balance of the sum authorized for carrying out the provisions of the Act entitled “An Act to provide for the construction and equipment of an annex to the Library of Congress”, approved June 13, 1930 (46 Stat. 583); such advance to be expended under the direction of such Commission and in accordance with such Act: Provided, That in deciding to extend any aid or grant hereunder to any State, county, or municipality the President may consider whether the action is in process or in good faith assured therein reasonably designed to bring the ordinary current expenditures thereof within the prudently estimated revenues thereof. The provisions of this section and section 202 shall extend to public works in the several States, Hawaii, Alaska, the District of Columbia, Puerto Rico, the Canal Zone, and the Virgin Islands.

(b) All expenditures for authorized travel by officers and employees, including subsistence, required on account of any Federal public-works projects, shall be charged to the amounts allocated to such projects, notwithstanding any other provisions of law; and there is authorized to be employed such personal services in the District of Columbia and elsewhere as may be required to be engaged upon such work and to be in addition to employees otherwise provided for, the compensation of such additional personal services to be a charge against the funds made available for such construction work.
(c) In the acquisition of any land or site for the purposes of Federal public buildings and in the construction of such buildings provided for in this title, the provisions contained in sections 305 and 306 of the Emergency Relief and Construction Act of 1932, as amended, shall apply.

(d) The President, in his discretion, and under such terms as he may prescribe, may extend any of the benefits of this title to any State, county, or municipality notwithstanding any constitutional or legal restriction or limitation on the right or power of such State, county, or municipality to borrow money or incur indebtedness.

Sec. 204. (a) For the purpose of providing for emergency construction of public highways and related projects, the President is authorized to make grants to the highway departments of the several States in an amount not less than $400,000,000, to be expended by such departments in accordance with the provisions of the Federal Highway Act, approved November 9, 1921, as amended and supplemented, except as provided in this title, as follows:

1. For expenditure in emergency construction on the Federal aid highway system and extensions thereof into and through municipalities. The amount apportioned to any State under this paragraph may be used to pay all or any part of the cost of surveys, plans, and of highway and bridge construction including the elimination of hazards to highway traffic, such as the separation of grades at crossing, the reconstruction of existing railroad grade crossing structures, the relocation of highways to eliminate railroad crossings, the widening of narrow bridges and roadways, the building of footpaths, the replacement of unsafe bridges, the construction of routes to avoid congested areas, the construction of facilities to improve accessibility and the free flow of traffic, and the cost of any other construction that will provide safer traffic facilities or definitely eliminate existing hazards to pedestrian or vehicular traffic. No funds made available by this title shall be used for the acquisition of any land, right of way, or easement in connection with any railroad grade elimination project.

2. For expenditure in emergency construction on secondary or feeder roads to be agreed upon by the State highway departments and the Secretary of Agriculture: Provided, That the State or responsible political subdivision shall provide for the proper maintenance of said roads. Such grants shall be available for payment of the full cost of surveys, plans, improvement, and construction of secondary or feeder roads, on which projects shall be submitted by the State highway department and approved by the Secretary of Agriculture.

(b) Any amounts allocated by the President for grants under subsection (a) of this section shall be apportioned among the several States seven-eighths in accordance with the provisions of section 21 of the Federal Highway Act, approved November 9, 1921, as amended and supplemented (which Act is hereby further amended for the purposes of this title to include the District of Columbia), and one-eighth in the ratio which the population of each State bears to the total population of the United States, according to the latest decennial census and shall be available on July 1, 1933, and shall remain available until expended; but no part of the funds apportioned to any State need be matched by the State, and such funds may also be used in lieu of State funds to match unobligated balances of previous apportionments of regular Federal-aid appropriations.
(c) All contracts involving the expenditure of such grants shall contain provisions establishing minimum rates of wages, to be predetermined by the State highway department, which contractors shall pay to skilled and unskilled labor, and such minimum rates shall be stated in the invitation for bids and shall be included in proposals for bids for the work.

(d) In the expenditure of such amounts, the limitations in the Federal Highway Act, approved November 9, 1921, as amended and supplemented, upon highway construction, reconstruction, and bridges within municipalities and upon payments per mile which may be made from Federal funds, shall not apply.

(e) As used in this section the term “State” includes the Territory of Hawaii and the District of Columbia. The term “highway” as defined in the Federal Highway Act approved November 9, 1921, as amended and supplemented, for the purposes of this section, shall be deemed to include such main parkways as may be designated by the State and approved by the Secretary of Agriculture as part of the Federal-aid highway system.

(f) Whenever, in connection with the construction of any highway project under this section or section 202 of this Act, it is necessary to acquire rights of way over or through any property or tracts of land owned and controlled by the Government of the United States, it shall be the duty of the proper official of the Government of the United States having control of such property or tracts of land with the approval of the President and the Attorney General of the United States, and without any expense whatsoever to the United States, to perform any acts and to execute any agreements necessary to grant the rights of way so required, but if at any time the land or the property the subject of the agreement shall cease to be used for the purposes of the highway, the title in and the jurisdiction over the land or property shall automatically revert to the Government of the United States and the agreement shall so provide.

(g) Hereafter in the administration of the Federal Highway Act, and Acts amendatory thereof or supplementary thereto, the first paragraph of section 9, of said Act shall not apply to publicly owned toll bridges or approaches thereto, operated by the highway department of any State, subject, however, to the condition that all tolls received from the operation of any such bridge, less the actual cost of operation and maintenance, shall be applied to the repayment of the cost of its construction or acquisition, and when the cost of its construction or acquisition shall have been repaid in full, such bridge thereafter shall be maintained and operated as a free bridge.

Sec. 205. (a) Not less than $50,000,000 of the amount made available by this Act shall be allotted for (A) national forest highways, (B) national forest roads, trails, bridges, and related projects, (C) national park roads and trails in national parks owned or authorized, (D) roads on Indian reservations, and (E) roads through public lands, to be expended in the same manner as provided in paragraph (2) of section 301 of the Emergency Relief and Construction Act of 1932, in the case of appropriations allocated for such purposes, respectively, in such section 301, to remain available until expended.

(b) The President may also allot funds made available by this Act for the construction, repair, and improvement of public highways in Alaska, the Canal Zone, Puerto Rico, and the Virgin Islands.

Sec. 206. All contracts let for construction projects and all loans and grants pursuant to this title shall contain such provisions as are necessary to insure (1) that no convict labor shall be employed on any such project; (2) that (except in executive, administrative,
and supervisory positions), so far as practicable and feasible, no individual directly employed on any such project shall be permitted to work more than thirty hours in any one week; (3) that all employees shall be paid just and reasonable wages which shall be compensation sufficient to provide, for the hours of labor as limited, a standard of living in decency and comfort; (4) that in the employment of labor in connection with any such project, preference shall be given, where they are qualified, to ex-service men with dependents, and then in the following order: (A) To citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the political subdivision and/or county in which the work is to be performed, and (B) to citizens of the United States and aliens who have declared their intention of becoming citizens, who are bona fide residents of the State, Territory, or district in which the work is to be performed; (5) that the maximum of human labor shall be used in lieu of machinery wherever practicable and consistent with sound economy and public advantage.

Sec. 207. (a) For the purpose of expediting the actual construction of public works contemplated by this title and to provide a means of financial assistance to persons under contract with the United States to perform such construction, the President is authorized and empowered, through the Administrator or through such other agencies as he may designate or create, to approve any assignment executed by any such contractor, with the written consent of the surety or sureties upon the penal bond executed in connection with his contract, to any national or State bank, or his claim against the United States, or any part of such claim, under such contract; and any assignment so approved shall be valid for all purposes, notwithstanding the provisions of sections 3737 and 3477 of the Revised Statutes, as amended.

(b) The funds received by a contractor under any advances made in consideration of any such assignment are hereby declared to be trust funds in the hands of such contractor to be first applied to the payment of claims of subcontractors, architects, engineers, surveyors, laborers, and material men in connection with the project, to the payment of premiums on the penal bond or bonds, and premiums accruing during the construction of such project on insurance policies taken in connection therewith. Any contractor and any officer, director, or agent of any such contractor, who applies, or consents to the application of, such funds for any other purpose and fails to pay any claim or premium hereinbefore mentioned, shall be deemed guilty of a misdemeanor and shall be punished by a fine of not more than $1,000 or by imprisonment for not more than one year, or by both such fine and imprisonment.

(c) Nothing in this section shall be considered as imposing upon the assignee any obligation to see to the proper application of the funds advanced by the assignee in consideration of such assignment.

Subsistence Homesteads

Sec. 208. To provide for aiding the redistribution of the overbalance of population in industrial centers $25,000,000 is hereby made available to the President, to be used by him through such agencies as he may establish and under such regulations as he may make, for making loans for and otherwise aiding in the purchase of subsistence homesteads. The moneys collected as repayment of said loans shall constitute revolving fund.
constitute a revolving fund to be administered as directed by the President for the purposes of this section.

RULES AND REGULATIONS

SEC. 209. The President is authorized to prescribe such rules and regulations as may be necessary to carry out the purposes of this title, and any violation of any such rule or regulation shall be punishable by fine of not to exceed $500 or imprisonment not to exceed six months, or both.

ISSUE OF SECURITIES AND SINKING FUND

SEC. 210. (a) The Secretary of the Treasury is authorized to borrow, from time to time, under the Second Liberty Bond Act, as amended, such amounts as may be necessary to meet the expenditures authorized by this Act, or to refund any obligations previously issued under this section, and to issue therefor bonds, notes, certificates of indebtedness, or Treasury bills of the United States.

(b) For each fiscal year beginning with the fiscal year 1934 there is hereby appropriated, in addition to and as part of, the cumulative sinking fund provided by section 6 of the Victory Liberty Loan Act, as amended, out of any money in the Treasury not otherwise appropriated, for the purpose of such fund, an amount equal to 2½ per centum of the aggregate amount of the expenditures made out of appropriations made or authorized under this Act as determined by the Secretary of the Treasury.

REEMPLOYMENT AND RELIEF TAXES

SEC. 211. (a) Effective as of the day following the date of the enactment of this Act, section 617 (a) of the Revenue Act of 1932 is amended by striking out "1 cent" and inserting in lieu thereof "1 1/2 cents".

(b) Effective as of the day following the date of the enactment of this Act, section 617 (c) (2) of such Act is amended by adding at the end thereof a new sentence to read as follows: "As used in this paragraph the term 'benzol' does not include benzol sold for use otherwise than as a fuel for the propulsion of motor vehicles, motor boats, or airplanes, and otherwise than in the manufacture or production of such fuel."

SEC. 212. Titles IV and V of the Revenue Act of 1932 are amended by striking out "1934 " wherever appearing therein and by inserting in lieu thereof "1935 ". Section 761 of the Revenue Act of 1932 is further amended by striking out " and on July 1, 1933, " and inserting in lieu thereof " and on July 1, 1933, and on July 1, 1934, ".

SEC. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act.

(b) Every corporation required to deduct and withhold any tax under this section shall, on or before the last day of the month following the payment of the dividend, make return thereof and pay the tax to the collector of the district in which its principal place of business is located, or, if it has no principal place of business in the United States, to the collector at Baltimore, Maryland.
(c) Every such corporation is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payment made in accordance with the provisions of this section.

(d) The provisions of sections 115, 771 to 774, inclusive, and 1111 of the Revenue Act of 1932 shall be applicable with respect to the tax imposed by this section.

(e) The taxes imposed by this section shall not apply to the dividends of any corporation enumerated in section 103 of the Revenue Act of 1932.

Sec. 214. Section 104 of the Revenue Act of 1932 is amended by striking out the words “the surtax” wherever occurring in such section and inserting in lieu thereof “any internal-revenue tax.” The heading of such section is amended by striking out “surtaxes” and inserting in lieu thereof “internal-revenue taxes.” Section 13(c) of such Act is amended by striking out “surtax” and inserting in lieu thereof “internal-revenue tax.”

Sec. 215. (a) For each year ending June 30 there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

(b) For each year ending June 30 there is hereby imposed upon every foreign corporation with respect to carrying on or doing business in the United States for any part of such year an excise tax equivalent to $1 for each $1,000 of the adjusted declared value of capital employed in the transaction of its business in the United States.

(c) The taxes imposed by this section shall not apply—

(1) to any corporation enumerated in section 103 of the Revenue Act of 1932;

(2) to any insurance company subject to the tax imposed by section 201 or 204 of such Act;

(3) to any domestic corporation in respect of the year ending June 30, 1933, if it did not carry on or do business during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive; or

(4) to any foreign corporation in respect of the year ending June 30, 1933, if it did not carry on or do business in the United States during a part of the period from the date of the enactment of this Act to June 30, 1933, both dates inclusive.

(d) Every corporation liable for tax under this section shall make a return under oath within one month after the close of the year with respect to which such tax is imposed to the collector for the district in which is located its principal place of business or, if it has no principal place of business in the United States, then to the collector at Baltimore, Maryland. Such return shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe. The tax shall, without assessment by the Commissioner or notice from the collector, be due and payable to the collector before the expiration of the period for filing the return. If the tax is not paid when due, there shall be added as part of the tax interest at the rate of 1 per centum a month from the time when the tax became due until paid. All provisions of law (including penalties) applicable in respect of the taxes imposed by section 600 of the Revenue Act of 1926 shall, in so far as not inconsistent with this section, be applicable in respect of the taxes imposed by this section. The Commissioner may extend the time for making the returns and paying the taxes
imposed by this section, under such rules and regulations as he may prescribe with the approval of the Secretary, but no such extension shall be for more than sixty days.

(e) Returns required to be filed for the purpose of the tax imposed by this section shall be open to inspection in the same manner, to the same extent, and subject to the same provisions of law, including penalties, as returns made under title II of the Revenue Act of 1926.

(f) For the first year ending June 30 in respect of which a tax is imposed by this section upon any corporation, the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (which declaration of value cannot be amended), as of the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section (or as of the date of organization in the case of a corporation having no income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section). For any subsequent year ending June 30, the adjusted declared value in the case of a domestic corporation shall be the original declared value plus (1) the cash and fair market value of property paid in for stock or shares, (2) paid-in surplus and contributions to capital, and (3) earnings and profits, and minus (A) the value of property distributed in liquidation to shareholders, (B) distributions of earnings and profits, and (C) deficits, whether operating or nonoperating; each adjustment being made for the period from the date as of which the original declared value was declared to the close of its last income-tax taxable year ending at or prior to the close of the year for which the tax is imposed by this section. For any subsequent year ending June 30, the adjusted declared value in the case of a foreign corporation shall be the original declared value adjusted, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, to reflect increases or decreases (for the period specified in the preceding sentence) in the capital employed in the transaction of its business in the United States.

(g) The terms used in this section shall have the same meaning as when used in the Revenue Act of 1932.
(2) the repeal of the eighteenth amendment to the Constitution,

whichver is the earlier.

(b) Effective as of the 1st day of the calendar year following the date so proclaimed section 617(a) of the Revenue Act of 1932, as amended, is amended by striking out “1½ cents” and inserting in lieu thereof “1 cent.”

(c) The tax on dividends imposed by section 213 shall not apply to any dividends declared on or after the 1st day of the calendar year following the date so proclaimed.

(d) The capital-stock tax imposed by section 215 shall not apply to any taxpayer in respect of any year beginning on or after the 1st day of July following the date so proclaimed.

(e) The excess-profits tax imposed by section 216 shall not apply to any taxpayer in respect of any taxable year after its taxable year during which the date so proclaimed occurs.

Sec. 218. (a) Effective as of January 1, 1933, sections 117, 23(i), 169, 187, and 205 of the Revenue Act of 1932 are repealed.

(b) Effective as of January 1, 1933, section 23(r) (2) of the Revenue Act of 1932 is repealed.

(c) Effective as of January 1, 1933, section 23(r) (3) of the Revenue Act of 1932 is amended by striking out all after the word “Territory” and inserting a period.

(d) Effective as of January 1, 1933, section 182(a) of the Revenue Act of 1932 is amended by inserting at the end thereof a new sentence as follows: “No part of any loss disallowed to a partnership as a deduction by section 25(r) shall be allowed as a deduction to a member of such partnership in computing net income.”

(e) Effective as of January 1, 1933, section 141 (c) of the Revenue Act of 1932 is amended by inserting at the end thereof a comma and the following: “except that no tax shall be imposed in the case of persons admitted free to any spoken play (not a mechanical repro-

73d CONGRESS. SESS. I. CH. 90. JUNE 16, 1933.

209

Repeal of eighteenth amendment.
Post, p. 1729.

Tax reductions.
Vol. 47, p. 596.

Ante, p. 205.

Ante, p. 207; post, p. 771.

Sections repealed.

Section amended.
Vol. 47, p. 183.

Vol. 47, p. 222.

Vol. 47, p. 183.

Vol. 47, p. 213.

Assessment, etc., of income taxes.

Revenue Act of 1926, amendment.
Vol. 47, p. 139.

Inspection of returns.

Tax on admissions and dues.

Sec. 219. Section 500 (a) (1) of the Revenue Act of 1926, as amended, is amended by striking out the period at the end of the second sentence thereof and inserting in lieu thereof a comma and the following: “except that no tax shall be imposed in the case of persons admitted free to any spoken play (not a mechanical repro-

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Sec. 220. For the purposes of this Act, there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $3,300,000,000. The President is authorized to allocate so much of said sum, not in excess of $100,000,000, as he may determine to be necessary for expenditures in carrying out the Agricultural Adjustment Act and the purposes, powers, and functions heretofore and hereafter conferred upon the Farm Credit Administration.

Sec. 221. Section 7 of the Agricultural Adjustment Act, approved May 12, 1933, is amended by striking out all of its present terms and provisions and substituting therefor the following:

"Sec. 7. The Secretary shall sell the cotton held by him at his discretion, but subject to the foregoing provisions: Provided, That he shall dispose of all cotton held by him by March 1, 1936. Provided further, That notwithstanding the provisions of section 6, the Secretary shall have authority to enter into option contracts with producers of cotton to sell to the producers such cotton held by him, in such amounts and at such prices and upon such terms and conditions as the Secretary may deem advisable, in combination with rental or benefit payments provided for in part 2 of this title.

"Notwithstanding any provisions of existing law, the Secretary of Agriculture may in the administration of the Agricultural Adjustment Act make public such information as he deems necessary in order to effectuate the purposes of such Act."

TITLE III—AMENDMENTS TO EMERGENCY RELIEF AND CONSTRUCTION ACT AND MISCELLANEOUS PROVISIONS.

Section 301. After the expiration of ten days after the date upon which the Administrator has qualified and taken office, (1) no application shall be approved by the Reconstruction Finance Corporation under the provisions of subsection (a) of section 201 of the Emergency Relief and Construction Act of 1932, as amended, and (2) the Administrator shall have access to all applications, files, and records of the Reconstruction Finance Corporation relating to loans and contracts and the administration of funds under such subsection: Provided, That the Reconstruction Finance Corporation may issue funds to a borrower under such subsection (a) prior to January 23, 1939, under the terms of any agreement or any commitment to bid upon or purchase bonds entered into with such borrower pursuant to an application approved prior to the date of termination, under this section, of the power of the Reconstruction Finance Corporation to approve applications.

DECREASE OF BORROWING POWER OF RECONSTRUCTION FINANCE CORPORATION

Sec. 302. The amount of notes, debentures, bonds, or other such obligations which the Reconstruction Finance Corporation is authorized and empowered under section 8 of the Reconstruction Finance Corporation Act, as amended, to have outstanding at any one time is decreased by $400,000,000.
SEPARABILITY CLAUSE

SEC. 303. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

SHORT TITLE

SEC. 304. This Act may be cited as the “National Industrial Recovery Act.”

Approved, June 16, 1933, 11:55 a.m.

[CHAPTER 91.]

AN ACT
To relieve the existing national emergency in relation to interstate railroad transportation, and to amend sections 5, 15a, and 193 of the Interstate Commerce Act, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the “Emergency Railroad Transportation Act, 1933.”

TITLE I—EMERGENCY POWERS

SECTION 1. As used in this title—
(a) The term “Commission” means the Interstate Commerce Commission.
(b) The term “Coordinator” means the Federal Coordinator of Transportation hereinafter provided for.
(c) The term “committee” means any one of the regional coordinating committees hereinafter provided for.
(d) The term “carrier” means any common carrier by railroad subject to the provisions of the Interstate Commerce Act, as amended, including any receiver or trustee thereof.
(e) The term “subsidiary” means any company which is directly or indirectly controlled by, or affiliated with, any carrier or carriers. For the purpose of the foregoing definition a company shall be deemed to be affiliated with a carrier if so affiliated within the meaning of paragraph (8) of section 5 of the Interstate Commerce Act, as amended by this Act.
(f) The term “employee” includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service), who performs any work defined as that of an employee or subordinate official in accordance with the provisions of the Railway Labor Act.
(g) The term “State commission” means the commission, board, or official, by whatever name designated, exercising power to regulate the rates or service of common carriers by railroad under the laws of any State.

SEC. 2. In order to foster and protect interstate commerce in relation to railroad transportation by preventing and relieving obstructions and burdens thereon resulting from the present acute economic emergency, and in order to safeguard and maintain an adequate national system of transportation, there is hereby created the Office of Federal Coordinator of Transportation, who shall be appointed by the President, by and with the advice and consent of the Senate, or by designated by the President from the membership of the Commission. If so designated, the Coordinator shall be relieved from other duties as Commissioner during his term of service to such extent as the
EVERYTHING OLD IS NEW AGAIN

INTRODUCTION

Scene 1

Psychiatrist Office: Dr. Loren approaches the podium and addresses the audience.

DR. LOREN

Good evening. I am Dr. Loren, world-renowned psychiatrist for the sick, the ailing, and the redundant. I am here to discuss with you today....

Enter WOMANHOOD with an audible groan and maybe some wailing...

DR. LOREN

Excuse me. I am in the middle of a presentation...

WOMANHOOD

Well, so am I. Perhaps you can share the stage?

DR. LOREN

I don't even know who you are.

WOMANHOOD
And that's exactly my point!!! How can you still not know? I am Womanhood in America!! I've been around for at least two hundred years!

DR. LOREN

That's impossible. You don't look a day over a hundred.

WOMANHOOD

Oh, you---flatterer you! I'm actually older than two hundred years, but a girl's really gotta stop counting those birthdays at some point.

But seriously. I don't need flattery, Dr. Loren, I need your help.

DR. LOREN

What seems to be ailing you, Womanhood?

WOMANHOOD

Haven't you heard all the campaign mumbo jumbo of late?

DR. LOREN

Well, yes...
WOMANHOOD

And how I've once again become the target of political discourse.

DR. LOREN

(Taking notes)

Hmm...showing signs of paranoia...

WOMANHOOD

Are you belittling my feelings, Mr. Man?

DR. LOREN

Of course not. I'm a new age kinda guy. I am just trying to understand what's bothering you.

WOMANHOOD

I think it's PTSD.

DR. LOREN

Post traumatic stress?

WOMANHOOD

Or maybe it's some form of CAD--campaign affect disorder.
There is medication for that.

Or it could be suppressed rage that’s been plaguing my soul and psyche over the last hundred years, and causing me fits of anxiety!

Perhaps you should leave the diagnosing to me. Why don’t you just tell me what’s going on.

Well I’d really like to show you what’s going on. May I?

Really? Like interpretive dance?

No! Like really giving you a peek inside my brain! Did you see the movie Inside Out? You know, the latest Pixar film about all the talking characters inside the little girl’s head...
Ah, so you're hearing voices in your head...

WOMANHOOD

Oh jeez, Doc! I'm not crazy! I'm having a perfectly normal reaction to the last century. My life has been constant struggle. And yet, I keep hearing the same old issues repeat themselves like bad gas after eating chili.

DR. LOREN

You haven't eaten any of that lately, have you?

WOMANHOOD

Here. Just watch this.

*If we can steal chairs to be used as a therapist’s couch, Womanhood ushers Dr. Loren into one of those.*

DR. LOREN

Most unusual...

PLAY MOVIE

Scene 2: Turn of the last century.

DR. LOREN
Well, I can see from what you just shared, that there's been a lot of up's and down's in your life.

WOMANHOOD

It never stops, Dr. Loren! Just when I think we've made some progress, it's back to the drawing board again.

DR. LOREN

So instead of focusing on the progress that's been made, you are looking only at the shortcomings in history.

WOMANHOOD

History? HIS-story. Hmm?

DR. LOREN

I am detecting some hostility here. Maybe we need to start at the beginning. Tell me about your childhood.

WOMANHOOD

I was never a child.

DR. LOREN
Clearly. But let's talk about the early part of the last century.

WOMANHOOD

You talk. I'll listen.

DR. LOREN

That's not exactly the way we do things here.

WOMANHOOD

Fine. Curtis?

CURTIS

Yes, Womanhood?

WOMANHOOD

Can you please tell him about my life a hundred years ago?

CURTIS

Sure.

EARLY LAWS PRESENTATION

Scene 3: Pay Equity

WOMANHOOD has reacted badly to the forgoing presentation. She is in a heap.
DR. LOREN

Okay. There, there. Womanhood?

WOMANHOOOD

(sobbing)

DR. LOREN

That was a long, long time ago.

WOMANHOOOD

(reaches out a hand)

Can I have a tissue?

DR. LOREN

(handing her a hanky)

What we need to focus on here, is the positive.

WOMANHOOOD

(obnoxious nose blowing into the hanky)

DR. LOREN

Those outdated laws and situations don’t exist anymore.

WOMANHOOOD

(putting hanky back in Loren’s shirt pocket)
Well, of course not. You’re the one who wanted to talk about ancient herstory.

DR. LOREN

But you have to try to look at the positive—the progress you’ve made—this focusing on the negative is what’s getting you down.

WOMANHOOD

I don’t think it’s negative. I am just tired. I am tired of getting hopeful every fifty years or so, only to suddenly realize the struggle is once again on instant replay.

DR. LOREN

Perhaps we need to break this “struggle” down into more discrete parts.

WOMANHOOD

Okay.

DR. LOREN

Name a particular issue that’s bothering you.

WOMANHOOD
Well, for one thing, I’ve been working my ass off for the last two hundred years.

DR. LOREN

Go on.

WOMANHOOD

And that work has largely been uncompensated. Its value barely acknowledged.

DR. LOREN

Well, now. Historically, yes. But...

WOMANHOOD

Don’t “but” me! You start anything with “but” and you are about to negate what you said before!

DR. LOREN

I am just trying to help you focus on more productive thoughts.

WOMANHOOD

Do you remember the ERA passing quite some time ago?

DR. LOREN

Yes. See? Progress!

WOMANHOOD
Doc your enthusiasm is making me sad.

DR. LOREN

But do you see how women's participation in the work force has largely improved?

WOMANHOOD

Improved? Doc we’ve been fighting for the same rights for over a hundred years! Shouldn’t it be resolved by now? A no-brainer? A non-issue?

DR. LOREN

I think you could use some perspective on this. May I show YOU something now?

WOMANHOOD

Okay.

DR. LOREN


PAY EQUITY PRESENTATION

Scene 4: Women’s Healthcare

WOMANHOOD appears unconvinced.

WOMANHOOOD
And that was supposed to cheer me up?

   DR. LOREN

I was hoping so.

   WOMANHOOD

It didn't work.

   DR. LOREN

Well let's move on to a different issue, then.

   WOMANHOOD

It's not going to get any better...

   DR. LOREN

Let's just try. You really need to work on not being so pessimistic.

   WOMANHOOD

I am not pessimistic. I'm an idealist. That's kind of an optimist in pessimistic clothing.

   DR. LOREN

Let's move on to the next issue, shall we? What's another example of something that's bothering you?
WOMANHOOD

(gesturing to herself)

Right here. This. This is my body.

DR. LOREN

Oh dear...

WOMANHOOD

The point is, it's mine! (to Loren) Not yours. (to audience) Not theirs. MINE.

DR. LOREN

Okay...That's clear.

WOMANHOOD

Well it's not that clear to everyone else. My health and the care of my body, seems to be everybody else's business.

DR. LOREN

(to healthcare group)

I'm throwing out a lifeline here.
Yes. Andrew? David? Nicki? Can you school us all on this matter?

HEALTHCARE PRESENTATION

Scene 5: Planned Parenthood

DR. LOREN slumps over to the “therapist’s couch” and shoves WOMANHOOD over.

DR. LOREN

Oh gawd. Now I’m getting depressed.

WOMANHOOOD

See? I told you. Everybody keeps gettin’ in my bid-ness. And do you know why?

DR. LOREN

I’m afraid to ask.

WOMANHOOOD

(gesturing to her hips)

Because THIS is the future of the world!

DR. LOREN

Oh-Kaaay! Delusions of grandeur. We’ve got our work cut out for us here.
I'm just making a point, Doc. Apparently the proper use of my ovaries and uterus are a big political issue.

You're right. They always have been.

You're coming around, Doc!!

Every step forward, is another step back.

See? Even you can get it.

What now?

Planned Parenthood! Because our time is almost up here!

Actually, our session is slated for fifty minutes. That leaves enough time to answer any questions.
That's thoughtful of you.

DR. LOREN

Jennifer, Austen, Chris—you’re up!

PLANNED PARENTHOOD PRESENTATION

LOREN ad lib the Q & A and conclusion.
The Comstock Law is a federal act passed by the United States Congress on March 3, 1873, as the Act for the "Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use.” Here is its text:

“Be it enacted... That whoever, within the District of Columbia or any of the Territories of the United States...shall sell...or shall offer to sell, or to lend, or to give away, or in any manner to exhibit, or shall otherwise publish or offer to publish in any manner, or shall have in his possession, for any such purpose or purposes, an obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure, or image on or of paper or other material, or any cast instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever, for the prevention of conception, or for causing unlawful abortion, or shall advertise the same for sale, or shall write or print, or cause to be written or printed, any card, circular, book, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom, or by what means, any of the articles in this section…can be purchased or obtained, or shall manufacture, draw, or print, or in any wise make any of such articles, shall be deemed guilty of a misdemeanor, and on conviction thereof in any court of the United States...he shall be imprisoned at hard labor in the penitentiary for not less than six months nor more than five years for each offense, or fined not less than one hundred dollars nor more than two thousand dollars, with costs of court.”
Inns of Court: “Women’s Issues” Pupillage Group
“Access To Contraception”—Script

EARLY 20TH CENTURY:

[Sign that indicates late 19th century/early 20th century]

Patient: Hello kind doctors, my name is Mrs. Pettywagon.

Doctor 1: Hello, Mrs. Pettywagon. Shall we wait a moment for Mr. Pettywagon to arrive?

Patient: Well…um…no, Mr. Pettywagon will not be joining us today.

Doctor 2: Please forgive us, we are so sorry for your loss.

Patient: What? No---Mr. Pettywagon is still alive. I just, I—um—well this visit of a very sensitive nature. Please do not tell my husband.

Doctor 1: Mrs. Pettywagon, you know very well that by marriage, a husband and a wife are one person in the law. You have no separate legal identity from your husband. I have to inform you that there is no law prohibiting us from telling your husband.

Patient: Oh please, I beg for your discretion. This is very embarrassing to talk about. I came here today to discuss options about my, well, issues of a feminine nature . . . [whispers] . . . reproduction. I’m not sure I want to have children. I had read in a woman’s magazine about contraceptives. Something called a diaphragm?

Doctor 1: [Gasp!] Mrs. Pettywagon, are you aware of the federal Comstock Law? It was passed in 1873 and criminalizes the dissemination of contraceptives through the postal service and interstate commerce. It makes me proud that United States is on the forefront—why, at the time of this law’s passing, the United States was the only western nation to enact laws criminalizing contraceptives. We need more laws like this to prevent our women from acting like fluzies and degrading the morality of the God-fearing gentlemen of this nation.

Doctor 2: Mrs. Pettywagon, my views on this issue depart from my colleague’s. Before the Comstock Law, contraceptives were easily available in pharmacies and
well-advertised. Although the Comstock Law is in effect now, it only prohibits the *mailing* or dissemination of contraceptives. While many states also have passed laws outlawing the *use* of contraceptives, they are still relatively common and available to middle-class and upper-class women such as yourself. Despite these options in birth control today, I just wish there was a magic pill that women could take. Ha—now wouldn’t that be something?

**Patient:** Oh, my, this all sounds very overwhelming. I have one more question to ask. It’s of a very sensitive nature. What happens if I accidentally become—well—in trouble? Would I be able to get an abortion?

**Doctor 1:** Heavens! Why, this is 1900—abortion is a felony! The American Medical Association, the AMA, was one of the leaders in passing laws outlawing abortion! This talk is just full of prunes. Also, you are aware of the eugenics movement aren’t you? We need white women to reproduce! Are you suffering from hysteria? I’m going to call the nurse to get you a bed! We must start treatment immediately!

[Doctor 1 exits]

**Doctor 2:** Mrs. Pettywagon, excuse my colleague—he is very excitable. I believe in the free love movement and am a supporter of women’s access to contraceptives and abortion. Please promise me that if you become in trouble, you must not go to a quack. If you do, you will risk your life and may wind up sterile.

**Patient:** Oh dear God! I do not want to become a criminal or worse yet, die! Why don’t men have to think about these things? Thank you doctor, but I must go. I have much to think about.
MID 20TH CENTURY:

[Sign that shows that we’re transitioning from early century to midcentury—Boston, Massachusetts, 1967]

Doctor 1: What brings you in today?

Patient: I’d like to talk to you about contraception. My boyfriend and I aren’t ready to have children just yet. We might want to if we get married, but we don’t want any surprises right now.

Doctor 1: As a single person, Massachusetts law only permits us to prescribe contraception to prevent disease, which clearly limits your choices.

Patient: I understand. I was more interested in something that could be taken orally . . . that I would had control over.

Doctor 2: Massachusetts law only allows oral contraceptives for married persons. In my personal opinion, despite its puritanical roots, this state has no business regulating fornication – I mean premarital relations - between consenting adults.

Patient: Yes, but as all we know, this is the same state that used to hang consenting adults for what was called witchcraft.

Doctor 1: Just to be clear, you aren’t married? That would make things a lot easier. Isn’t that a ring on your finger?

Patient: Yes, that was from my late husband, who died when one of the chests of tea fell on him during a Boston Tea Party reenactment.

Doctor 2: It would be unreasonable to assume that Massachusetts prescribed pregnancy and the birth of an unwanted child as punishment for premarital relations.

Patient: Completely agree - it’s plainly unreasonable; that’s why I’m here. . . to obtain oral contraceptives and avoid an unplanned pregnancy.
**Doctor 1:** Two years ago, the Supreme Court ruled a Connecticut statute that prohibited married couples from obtaining contraceptives, violated the 1st Amendment right of privacy.

**Patient:** Fascinating, but how does that help me obtain contraceptives? I am single and Massachusetts has a public policy against premarital relations.

**Doctor 2:** To say that contraceptives are immoral, and forbidden from single persons such as yourself, means that you must risk for an unwanted pregnancy, for the child, illegitimacy, and, for society, a possible obligation of support. In my opinion, such a view of morality is not only the very mirror image of sensible legislation, it conflicts with fundamental human rights!

**Doctor 1:** As far as I am concerned, the Supreme Court only got it partially right in the Connecticut case. While a married couple may have a 1st Amendment right of privacy, they are not an independent entity, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.

**Patient:** Wow, that’s very articulate doctors. But how does your erudite legal analysis prevent me from conceiving a child.

**Doctor 1:** We didn’t write the law. For that you’ll need to talk to a lawyer.

**Patient:** That sounds like a deterrence to pregnancy to me! Thank you, doctors.
Doctor 1: What brings you in today?

Patient: I’d like to talk to you about contraception options. I don’t feel like my husband and I are ready to have children just yet. We might want to in the future, but I don’t want any surprises right now.

Doctor 1: OK we can give you an idea of your options and advise you on them.

Patient: That’s great. But I have one concern that I’d like to discuss first. I’m not entirely sure that my husband and I are on the same page about having kids. I know that we’re not ready, but he seems to think that we are. It’s a touchy subject between us. Does he need to be involved in this discussion that we’re about to have?

Doctor 2: That’s entirely up to you. We can include him if you want, but we don’t have to. Today, there are many laws that protect your privacy and ability to make your own choices about your health. For example, in 1996, Congress passed the Health Insurance Portability and Accountability Act, also known as HIPAA. Among other things, that law prevents medical providers from sharing “Protected Health Information” without the patient’s authorization. That means that we can’t share our discussion with your husband unless you authorize it.

Patient: That makes me feel better. I’ve already done some research and it seems like my best option would be the birth-control pill. But I’m worried about the cost. I’m not sure that I can afford it.

Doctor 2: The birth-control pill is a good option. Ever since the US Supreme Court decided *Eisenstadt v. Baird* in 1972, the pill has been available to all adults in all states. Do you have insurance?

Patient: Yes, I have insurance through my employer. But I already checked and the insurance doesn’t cover contraceptives.

Doctor 1: That’s possible, but that doesn’t sound right. In 2010, Congress passed the Affordable Care Act, also known as the ACA or Obamacare. That law requires all private health-insurance plans to cover all FDA-approved prescription
contraceptives. The United States Supreme Court upheld that law in 2012. Where do you work?

**Patient:** I work for a craft store called Hobby Lobby. They have one or two stores in Oregon.

**Doctor 1 and 2 together:** Ooohhhhh . . . .

**Doctor 1:** In 2014, the United States Supreme Court decided *Burwell v. Hobby Lobby*. In that case, the court decided that closely held, for-profit businesses are exempt from the ACA’s contraception-coverage mandate if the business’s objection to coverage is based on a sincerely held religious belief.

**Doctor 2:** But Oregon has a contraception-equity law that requires health plans to provide coverage for any FDA-approved prescription contraception drug or device. It’s unclear what that means for businesses like Hobby Lobby in Oregon.

**Patient:** Ok. Maybe I’ll talk to a lawyer about that. But let’s say that my insurance doesn’t cover birth-control pills and I can’t afford the pill on my own. What are my options?

**Doctor 1:** In 1970, Congress passed the Public Health Service Act. Title X of that act provided funding for family-planning clinics that serve low-income and traditionally underserved women. Today, there are thousands of clinics around the country that get funding from Title X. One of those clinics might be able to help.

**Patient:** I’ll check that out. Ok. Worst-case scenario: I get pregnant and I’m not ready to have kids. If I decide to get an abortion, do I need to tell my husband first?

**Doctor 1:** That’s up to you. You don’t have to tell him or get his permission if you don’t want to. In 1992, the court narrowly upheld *Roe v. Wade* in *Planned Parenthood v. Casey* and struck down a “spousal consent” requirement for abortions.

**Patient:** You said the court “narrowly” upheld *Roe*. Is there a chance that the court is going to someday overrule it?

**Doctor 2:** There’s a chance. The outcome of the upcoming presidential election could affect the likelihood of that. In the next few years, several justices on the
Supreme Court will likely retire and the new president will get to appoint the replacements. That will change the composition of the court, which will, in turn, create the possibility of a court that might want to revisit *Roe* and *Planned Parenthood*.

**Patient:** Are there any other possible political changes like that that I should know about?

**Doctor 2:** Several US Senators have proposed The 21st Century Women’s Health Act. If Congress passes that act, the ACA’s contraception-coverage mandate will apply to Medicaid. Right now, it doesn’t; it applies to only private-insurance providers. The act will also require hospitals around the country to provide free emergency contraception for rape survivors.

**Patient:** Wow. You’ve given me a lot to think about. Thanks!
Appellee, furthermore, has standing to assert the rights of unmarried persons denied access to contraceptives because their ability to obtain them will be materially impaired by enforcement of the statute. Cf. Griswold, supra; Barrows v. Jackson, 346 U.S. 249. Pp. 443-446.

2. By providing dissimilar treatment for married and unmarried persons who are similarly situated, the statute violates the Equal Protection Clause of the Fourteenth Amendment. Pp. 446-455.

(a) The deterrence of fornication, a 90-day misdemeanor under Massachusetts law, cannot reasonably be regarded as the purpose of the statute, since the statute is riddled with exceptions making contraceptives freely available for use in premarital sexual relations and its scope and penalty structure are inconsistent with that purpose. Pp. 447-450.

(b) Similarly, the protection of public health through the regulation of the distribution of potentially harmful articles cannot reasonably be regarded as the purpose of the law, since, if health were the rationale, the statute would be both discriminatory and overbroad, and federal and state laws already regulate the distribution of drugs unsafe for use except under the supervision of a licensed physician. Pp. 450-452.

(c) Nor can the statute be sustained simply as a prohibition on contraception per se, for, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike. If, under Griswold, supra, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible, since the constitutionally protected right of privacy inheres in the individual, not the marital couple. If, on the other hand, Griswold is no bar to a prohibition on the distribution of contraceptives, a prohibition limited to unmarried persons would be underinclusive, and invidiously discriminator. Pp. 452-455.

429 F.2d 1398, affirmed.
decision of the case.

Page 440

BRENNAN, J., lead opinion

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellee William Baird was convicted at a bench trial in the Massachusetts Superior Court under Massachusetts General Laws Ann., c. 272, § 21, first, for exhibiting contraceptive articles in the course of delivering a lecture on contraception to a group of students at Boston University and, second, for giving a young woman a package of Emko vaginal foam at the close of his address.[1] The Massachusetts Supreme Judicial Court unanimously set aside the conviction for exhibiting contraceptives on the ground that it violated Baird's First Amendment rights, but, by a four-to-three vote, sustained the conviction for giving away the foam. Commonwealth v. Baird, 355 Mass. 746, 247 N.E.2d 574 (1969). Baird subsequently filed a petition for a federal writ of habeas corpus, which the

[92 S.Ct. 1032] District Court dismissed. 310 F.Supp. 951 (1970). On appeal, however, the Court of Appeals for the First Circuit vacated the dismissal and remanded the action with directions to grant the writ discharging Baird. 429 F.2d 1398 (1970). This appeal by the Sheriff of Suffolk County, Massachusetts, followed, and we noted probable jurisdiction. 401 U.S. 934 (1971). We affirm.

Massachusetts General Laws Ann., c. 272, § 21, under which Baird was convicted, provides a maximum five-year term of imprisonment for "whenever . . . gives away . . . any drug, medicine, instrument or article whatever

Page 441

for the prevention of conception," except as authorized in § 21A. Under § 21A,

[a] registered physician may administer to or prescribe for any married person drugs or articles intended for the prevention of pregnancy or conception. [And a] registered pharmacist actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.[2]

As interpreted by the State Supreme Judicial

Page 442

Court, these provisions make it a felony for anyone, other than a registered physician or pharmacist acting in accordance with the terms of § 21A, to dispense any article with the intention that it be used for the prevention of conception. The statutory scheme distinguishes among three distinct classes of distributees -- first, married persons may obtain contraceptives to prevent pregnancy, but only from doctors or druggists on prescription; second, single persons may not obtain contraceptives from anyone to prevent pregnancy; and, third, married or single persons may obtain contraceptives from anyone to prevent not pregnancy, but the spread of disease. This construction of state law is, of course, binding on us. E.g., Groppi v. Wisconsin, 400 U.S. 505, 507 (1971).

The legislative purposes that the statute is meant to serve are not altogether clear. In Commonwealth v. Bard, supra, the Supreme Judicial Court noted only the State's interest in protecting the health of its citizens: "[T]he prohibition in § 21," the court declared, "is directly related to" the State's goal of preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences.


[92 S.Ct. 1033] the court, however, found "a second and more compelling ground for upholding the statute" -- namely, to protect morals through "regulating the private sexual lives of single persons."[3] The Court of Appeals, for reasons that will

Page 443

appear, did not consider the promotion of health or the protection of morals through the deterrence of fornication to be the legislative aim. Instead, the court concluded that the statutory goal was to limit contraception in and of itself -- a purpose that the court held conflicted "with fundamental human rights" under Griswold v. Connecticut, 381 U.S. 479 (1965), where this Court struck down Connecticut's prohibition against the use of contraceptives as an unconstitutional infringement of the right of marital privacy. 429 F.2d at 1401-1402.

We agree that the goals of deterring premarital sex and regulating the distribution of potentially harmful articles cannot reasonably be regarded as legislative aims of §§ 21 and 21A. And we hold that the statute, viewed as a prohibition on contraception per se, violates the rights of single persons under the Equal Protection Clause of the Fourteenth Amendment.

I

We address at the outset appellant's contention that Baird does not have standing to assert the rights of
unmarried persons denied access to contraceptives, because he was neither an authorized distributor under § 21A nor a single person unable to obtain contraceptives. There can be no question, of course, that Baird has sufficient interest in challenging the statute's validity to satisfy the "case or controversy" requirement of Article III of the Constitution.[4] Appellant's argument, however, is that

Page 444

this case is governed by the Court's self-imposed rules of restraint, first, that

one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.

*United States v. Raines*, 362 U.S. 17, 21 (1960), and, second, the "closely related corollary that a litigant may only assert his own constitutional rights or immunities," *id.* at 22. Here, appellant contends that Baird's conviction rests on the restriction in § 21A on permissible distributors, and that that restriction serves a valid health interest independent of the limitation on authorized distributees. Appellant urges, therefore, that Baird's action in giving away the foam fell squarely within the conduct that the legislature meant and had power to prohibit, and that Baird should not be allowed to attack the statute in its application to potential recipients. In any event, appellant concludes, since Baird was not himself a single person denied access to contraceptives, he should not be heard to assert their rights. We cannot agree.

The Court of Appeals held that the statute under which Baird was convicted is not a health measure. If that view is correct, we do not see how Baird

[92 S.Ct. 1034] may be prevented, because he was neither a doctor nor a druggist, from attacking the statute in its alleged discriminatory application to potential distributees. We think, too, that our self-imposed rule against the assertion of third-party rights must be relaxed in this case, just as in *Griswold v. Connecticut*, *supra*. There, the Executive Director of the Planned Parenthood League of Connecticut and a licensed physician who had prescribed contraceptives for married persons and been convicted as accessories to the crime of using contraceptives were held to have standing to raise the constitutional rights of the patients with whom they had a professional relationship.

Page 445

Appellant here argues that the absence of a professional or "aiding and abetting" relationship distinguishes this case from *Griswold*. Yet, as the Court's discussion of prior authority in *Griswold*, 381 U.S. at 481, indicates, 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. Indeed, in *Barrows v. Jackson*, 346 U.S. 249 (1953), a seller of land was entitled to defend against an action for damages for breach of a racially restrictive covenant on the ground that enforcement of the covenant violated the equal protection rights of prospective non-Caucasian purchasers. The relationship there between the defendant and those whose rights he sought to assert was not simply the fortuitous connection between a vendor and potential vendees, but the relationship between one who acted to protect the rights of a minority and the minority itself. Sedler, Standing to Assert Constitutional *Jus Tertii* in the Supreme Court, 71 Yale L.J. 599, 631 (1962). And so here, the relationship between Baird and those whose rights he seeks to assert is not simply that between a distributor and potential distributees, but that between an advocate of the rights of persons to obtain contraceptives and those desirous of doing so. The very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives.

In any event, more important than the nature of the relationship between the litigant and those whose rights he seeks to assert is the impact of the litigation on the third-party interests.[5] In *Griswold*, 381 U.S. at 481, the

Page 446

Court stated:

The rights of husband and wife, pressed here, 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.

A similar situation obtains here. Enforcement of the Massachusetts statute will materially impair the ability of single persons to obtain contraceptives. In fact, the case for according standing to assert third-party rights is stronger in this regard here than in *Griswold*, because unmarried persons denied access to contraceptives in Massachusetts, unlike the users of contraceptives in Connecticut, are not themselves subject to prosecution, and, to that extent, are denied a forum in which to assert their own rights. Cf. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Barrows v. Jackson*, *supra*.[6] The Massachusetts statute, unlike the Connecticut law considered in

[92 S.Ct. 1035] *Griswold*, prohibits, not use, but distribution.

For the foregoing reasons we hold that Baird, who is now in a position, and plainly has an adequate incentive, to
assert the rights of unmarried persons denied access to contraceptives, has standing to do so. We turn to the merits.

II

The basic principles governing application of the Equal Protection Clause of the Fourteenth Amendment are familiar. As THE CHIEF JUSTICE only recently explained in Reed v. Reed, 404 U.S. 71, 75-76 (1971):

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment

Page 447

does not deny to States the power to treat different classes of persons in different ways. Barbier v. Connolly, 113 U.S. 27 (1885); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911); Railway Express Agency v. New York, 336 U.S. 106 (1949); McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. 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.


The question for our determination in this case is whether there is some ground of difference that rationally explains the different treatment accorded married and unmarried persons under Massachusetts General Laws Ann., c. 272, §§ 21 and 21A.[7] For the reasons that follow, we conclude that no such ground exists.

First. Section 21 stems from Mass.Stat. 1879, c. 159, § 1, which prohibited, without exception, distribution of articles intended to be used as contraceptives. In Commonwealth v. Allison, 227 Mass. 57, 62, 116 N.E. 265,

Page 448

266 (1917), the Massachusetts Supreme Judicial Court explained that the law's plain purpose is to protect purity, to preserve chastity, to encourage continence and self-restraint, to defend the sanctity of the home, and thus to engender in the State and nation a virile and virtuous race of men and women.

Although the State clearly abandoned that purpose with the enactment of § 21A, at least insofar as the illicit sexual activities of married persons are concerned, see n. 3, supra, the court reiterated in Sturgis v. Attorney General, supra, that the object of the legislation is to discourage premarital sexual intercourse. Conceding that the State could, consistently with the Equal Protection Clause, regard the problems of extramarital and premarital sexual relations as "[e]vils . . . of different dimensions and proportions, requiring different remedies," Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1955), we cannot agree that the deterrence of premarital sex may reasonably be regarded as the purpose of the Massachusetts law.

[92 S.Ct. 1036] It would be plainly unreasonable to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication, which is a misdemeanor under Massachusetts General Laws Ann., c. 272, § 18. Aside from the scheme of values that assumption would attribute to the State, it is abundantly clear that the effect of the ban on distribution of contraceptives to unmarried persons has, at best, a marginal relation to the proffered objective. What Mr. Justice Goldberg said in Griswold v. Connecticut, supra, at 498 (concurring opinion), concerning the effect of Connecticut's prohibition on the use of contraceptives in discouraging extramarital sexual relations, is equally applicable here.

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

Page 449

prevention of disease, as distinguished from the prevention of conception.

See also id. at 505-507 (WHITE, J., concurring in judgment). Like Connecticut's laws, §§ 21 and 21A do not at all regulate the distribution of contraceptives when they are to be used to prevent, not pregnancy, but the spread of disease. Commonwealth v. Corbett, 307 Mass. 7, 29 N.E.2d 151 (1940), cited with approval in Commonwealth v. Baird, 355 Mass. at 754, 247 N.E.2d at 579. Nor, in making contraceptives available to married persons without regard to their intended use, does Massachusetts attempt to deter married persons from engaging in illicit sexual relations with unmarried persons. Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim.

Moreover, §§ 21 and 21A, on their face, have a dubious relation to the State's criminal prohibition on
fornication. As the Court of Appeals explained,

Fornication is a misdemeanor [in Massachusetts], entailing a thirty dollar fine, or three months in jail. Massachusetts General Laws Ann. c. 272 § 1. Violation of the present statute is a felony, punishable by five years in prison. We find it hard to believe that the legislature adopted a statute carrying a five-year penalty for its possible, obviously by no means fully effective, deterrence of the commission of a ninety-day misdemeanor.

429 F.2d at 1401. Even conceding the legislature a full measure of discretion in fashioning means to prevent fornication, and recognizing that the State may seek to deter prohibited conduct by punishing more severely those who facilitate than those who actually engage in its commission, we, like the Court of Appeals, cannot believe that, in this instance, Massachusetts has chosen to expose the aider and abetter who simply gives away a contraceptive to

Page 450

20 times the 90-day sentence of the offender himself. The very terms of the State's criminal statutes, coupled with the de minimis effect of §§ 21 and 21A in deterring fornication, thus compel the conclusion that such deterrence cannot reasonably be taken as the purpose of the ban on distribution of contraceptives to unmarried persons.

Second. Section 21A was added to the Massachusetts General Laws by Stat. 1966, c. 265, § 1. The Supreme Judicial Court, in Commonwealth v. Baird, supra, held that the purpose of the amendment was to serve the health needs of the community by regulating the distribution of potentially harmful articles. It is plain that Massachusetts had no such purpose in mind before the enactment of § 21A. As the Court of Appeals remarked,

Consistent 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. A physician was forbidden to prescribe contraceptives even when needed for the protection of health. Commonwealth v. Gardner, 1938, 300 Mass. 372, 15 N.E.2d 222.

429 F.2d at 1401. Nor did the Court of Appeals believe that the legislature [in enacting § 21A] suddenly reversed its field and developed an interest in health. Rather, it merely made what it thought to be the precise accommodation necessary to escape the Griswold ruling.

Ibid.

Again, we must agree with the Court of Appeals. If health were the rationale of § 21A, the statute would be both discriminatory and overbroad. Dissenting in Commonwealth v. Baird, 355 Mass. at 758, 247 N.E.2d at 581, Justices Whittemore and Cutter stated that they saw in § 21 and § 21A, read together, no public health purpose. 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.

Page 451

The Court of Appeals added:

If the prohibition [on distribution to unmarried persons] . . . is to be taken to mean that the same physician who can prescribe for married patients does not have sufficient skill to protect the health of patients who lack a marriage certificate, or who may be currently divorced, it is illogical to the point of irrationality.

429 F.2d at 1401.[8] Furthermore, we must join the Court of Appeals in noting that not all contraceptives are potentially dangerous.[9] As a result, if the Massachusetts statute were a health measure, it would not only invidiously discriminate against the unmarried, but also be overbroad with respect to the married, a fact that the Supreme Judicial Court itself seems to have conceded in Sturgis v. Attorney General, 358 Mass. at ___, 260 N.E.2d at 690, where it noted that it may well be that certain contraceptive medication and devices constitute no hazard to health, in which event it could be argued that the statute swept too broadly in its prohibition.

"In this posture," as the Court of

Page 452

Appeals concluded,

it is impossible to think of the statute as intended as a health measure for the unmarried, and it is almost as difficult to think of it as so intended even as to the married.

429 F.2d at 1401.

But if further proof that the Massachusetts statute is not a health measure is necessary, the argument of Justice Spiegel, who also dissented in Commonwealth v. Baird, 355 Mass. at 759, 247 N.E.2d at 582, is conclusive:

It is, at best, a strained conceit to say that the Legislature intended to prevent the distribution of articles "which may have undesirable, if not dangerous, physical consequences." If that was the Legislature's goal, § 21 is not required.
in view of the federal and state laws already regulating the distribution of harmful drugs. See Federal Food, Drug, and Cosmetic Act, § 503, 52 Stat. 1051, as amended, 21 U.S.C. § 353; Mass.Gen.Laws Ann., c. 94, § 187A, as amended. We conclude, accordingly, that, despite the statute's superficial earmarks as a health measure, health, on the face of the statute, may no more reasonably be regarded as its purpose than the deterrence of premarital sexual relations.

Third. If the Massachusetts statute cannot be upheld as a deterrent to fornication or as a health measure, may it, nevertheless, be sustained simply as a prohibition on contraception? The Court of Appeals analysis led inevitably to the conclusion 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 1401-1402. The Court of Appeals went on to hold, id. at 1402:

To say that contraceptives are immoral as such, and are to be forbidden to unmarried persons who will nevertheless persist in having intercourse, means that such persons must risk for themselves an unwanted pregnancy, for the child, illegitimacy, and.

Page 453

for society, a possible obligation of support. Such a view of morality is not only the very mirror image of sensible legislation: we consider that it conflicts with fundamental human rights. In the absence of demonstrated harm, we hold it is beyond the competency of the state.

We need not, and do not, however, decide that important question in this case, because, whatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.

If, under Griswold, the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that, in Griswold, the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity, with a mind and heart of its own, but an association of two individuals, each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. See Stanley v. Georgia, 394 U.S. 557 (1969).[10] See also Skinner v. Oklahoma,

Page 454


On the other hand, if Griswold is no bar to a prohibition on the distribution of contraceptives, the State could not, consistently with the Equal Protection Clause, outlaw distribution to unmarried, but not to married, persons. In each case, the evil, as perceived by the State, would be identical, and the underinclusion would be invidious. Mr. Justice Jackson, concurring in Railway Express Agency v. New York, 336 U.S. 106, 112-113 (1949), made the point:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to

[92 S.Ct. 1039] arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation, and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Although Mr. Justice Jackson's comments had reference to administrative regulations, the principle he affirmed has equal application to the legislation here. We hold that, by providing dissimilar treatment for married and unmarried persons who are similarly situated, Massachusetts

Page 455

General Laws Ann., c. 272, §§ 21 and 21A, violate the Equal Protection Clause. The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

DOUGLAS, J., concurring

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, there is for me a narrower ground for affirming the Court of Appeals. This to
me is a simple First Amendment case, that amendment being applicable to the States by reason of the Fourteenth. *Stromberg v. California*, 283 U.S. 359.

Under no stretch of the law as presently stated could *Massachusetts* require a license for those who desire to lecture on planned parenthood, contraceptives, the rights of women, birth control, or any allied subject, or place a tax on that privilege. As to license taxes on First Amendment rights we said in *Murdock v. Pennsylvania*, 319 U.S. 105, 11:

A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers, and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position.

We held in *Thomas v. Collins*, 323 U.S. 516, that a person speaking at a labor union rally could not be required to register or obtain a license:

As a matter of principle a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers. And the right either of workmen or of unions under these conditions to assemble and discuss their own affairs is as fully protected by the Constitution as the right of businessmen, farmers, educators, political party members or others to assemble and discuss their affairs and to enlist the support of others.

* * * *

... If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.

*Id.* 539, 540.

Baird addressed an audience of students and faculty at Boston University on the subject of birth control and overpopulation. His address was approximately one hour in length, and consisted of a discussion of various contraceptive devices displayed by means of diagrams on two demonstration boards, as well as a display of contraceptive devices [92 S.Ct. 1040] in their original packages. In addition, Baird spoke of the respective merits of various contraceptive devices; overpopulation in the world; crises throughout the world due to overpopulation; the large number of abortions performed on unwed mothers; and quack abortionists and the potential harm to women resulting from abortions performed by quack abortionists. Baird also urged members of the audience to petition the Massachusetts Legislature and to make known their feelings with regard to birth control laws in order to bring about a change in the laws. At the close of the address, Baird invited members of the audience to come to the stage and help themselves to the contraceptive articles. We do not know how many accepted Baird’s invitation. We only know that Baird personally handed one woman a package of Emko Vaginal Foam. He was then arrested and indicted (1) for exhibiting contraceptive devices and (2) for giving one such device away. The conviction for the first offense was reversed, the Supreme Judicial Court of Massachusetts holding that the display of the articles was essential to a graphic representation of the lecture. But the conviction for the giving away of one article was sustained. 355 Mass. 746, 247 N.E.2d 574. The case reaches us by federal habeas corpus.

Had Baird not "given away" a sample of one of the devices whose use he advocated, there could be no question about the protection afforded him by the First Amendment. A State may not "contract the spectrum of available knowledge." *Griswold v. Connecticut*, 381 U.S. 479, 482. *See also Thomas v. Collins, supra; Pierce v. Society of Sisters*, 268 U.S. 510; *Meyer v. Nebraska*, 262 U.S. 390. However noxious Baird’s ideas might have been to the authorities, the freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the "conventional wisdom," may not be abridged. *Terminiello v. Chicago*, 337 U.S. 1. Our system of government requires that we have faith in the ability of the individual to decide wisely, if only he is fully apprised of the merits of a controversy.

Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.

The teachings of Baird and those of Galileo might be of a different order, but the suppression of either is equally repugnant.

As Milton said in the Areopagitica, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

It is said that only Baird's conduct is involved, and United States v. O'Brien, 391 U.S. 367, is cited. That case involved a registrant under the Selective Service Act burning his Selective Service draft card. When prosecuted for that act, he defended his conduct as "symbolic speech." The Court held it was not.

Whatever may be thought of that decision on the merits,[1] O'Brien is not controlling here. The distinction between "speech" and "conduct" is a valid one insofar as it helps to determine in a particular case whether the purpose of the activity was to aid in the communication of ideas and whether the form of the communication so interferes with the rights of others that reasonable regulations may be imposed.[2] See Public Utilities Comm'n v. Pollak, 343 U.S. 451, 467 (DOUGLAS, J., dissenting).

Thus, excessive noise might well be "conduct" -- a form of pollution -- which can be made subject to precise, narrowly drawn regulations. See Adderley v. Florida, 385 U.S. 39, 54 (DOUGLAS, J., dissenting). But this Court has repeatedly stated, [First Amendment] rights are not confined to verbal expression. They embrace appropriate types of action. . . .


Baird gave an hour's lecture on birth control, and, as an aid to understanding the ideas which he was propagating, he handed out one sample of one of the devices whose use he was endorsing. A person giving a lecture on coyote-getters would certainly improve his teaching technique if he passed one out to the audience; and he would be protected in doing so, unless, of course, the device was loaded and ready to explode, killing or injuring people. The same holds true in my mind for mousetraps, spray guns, or any other article not dangerous per se on which speakers give educational lectures.

It is irrelevant to the application of these principles that Baird went beyond the giving of information about birth control and advocated the use of contraceptive articles. The First Amendment protects the opportunity to persuade to action whether that action be unwise or immoral, or whether the speech incites to action. See, e.g., Brandenburg v. Ohio, 395 U.S. 444; Edwards v. South Carolina, 372 U.S. 229; Terminiello v. Chicago, supra.

In this case, there was not even incitement to action.[3] There is no evidence or finding that Baird intended that the young lady take the foam home with her when he handed it to her, or that she would not have examined the article and then returned it to Baird, had he not been placed under arrest immediately upon handing the article over.[4]

First Amendment rights are not limited to verbal expression.[5] The right to petition often involves the right to walk. The right of assembly may mean pushing or jostling. Picketing involves physical activity, as well as a display of a sign. A sit-in can be a quiet, dignified protest that has First Amendment protection even though no speech is involved, as we held in Brown v. Louisiana, supra. Putting contraceptives on display is certainly an aid to speech and discussion. Handing an article under discussion to a member of the audience is a technique known to all teachers, and is commonly used. A handout may be on such a scale as to smack of a vendor's marketing scheme. But passing one article to an audience is merely a projection of the visual aid, and should be a permissible adjunct of free speech. Baird was not making a prescription, nor purporting to give medical advice. Handing out the article was not even a suggestion that the lady use it. At most, it suggested that she become familiar with the product line.

I do not see how we can have a Society of the Dialogue, which the First Amendment envisages, if time-honored teaching techniques are barred to those who give educational lectures.

WHITE, J., concurring

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACKMUN joins, concurring in the result.

In Griswold v. Connecticut, 381 U.S. 479 (1965), we reversed criminal convictions for advising married persons with respect to the use of contraceptives. As there applied, the Connecticut law, which forbade using contraceptives or giving advice on the subject, unduly invaded a zone of marital privacy protected by the Bill of Rights. The Connecticut law did not regulate the manufacture or sale of such products, and we expressly left open any question
concerning the permissible scope of such legislation. 381 U.S. at 485.

Chapter 272, § 21, of the Massachusetts General Laws makes it a criminal offense to distribute, sell, or give away any drug, medicine, or article for the prevention of conception. Section 21A excepts from this prohibition registered physicians who prescribe for and administer such articles to married persons and registered pharmacists who dispense on medical prescription.[1]

Page 462

Appellee Baird was indicted for giving away Emko Vaginal Foam, a "medicine and article for the prevention of conception. . . ."[2] The State did not purport to charge or convict Baird for distributing to an unmarried person. No proof was offered as to the marital status of the recipient. The gravamen of the offense charged was that Baird

[92 S.Ct. 1043] had no license, and therefore no authority to distribute to anyone. As the Supreme Judicial Court of Massachusetts noted, the constitutional validity of Baird's conviction rested upon his lack of 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). The Federal District Court was of the same view.[3]

Page 463

I assume that a State's interest in the health of its citizens empowers it to restrict to medical channels the distribution of products whose use should be accompanied by medical advice. I also do not doubt that various contraceptive medicines and articles are properly available only on prescription, and I therefore have no difficulty with the Massachusetts court's characterization of the statute at issue here as expressing

a legitimate interest in preventing the distribution of articles designed to prevent conception which may have undesirable, if not dangerous, physical consequences.

Id. at 753, 247 N.E.2d at 578. Had Baird distributed a supply of the so-called "pill," I would sustain his conviction under this statute.[4] Requiring a prescription to obtain potentially dangerous contraceptive material may place a substantial burden upon the right recognized in Griswold, but that burden is justified by a strong state interest, and does not, as did the statute at issue in Griswold, sweep unnecessarily broadly, or seek "to achieve its goals by means having a maximum destructive impact upon" a protected relationship. Griswold v. Connecticut, 381 U.S. at 485.

Baird, however, was found guilty of giving away vaginal foam. Inquiry into the validity of this conviction does not come to an end merely because some contraceptives are harmful and their distribution may be restricted. Our general reluctance to question a State's judgment on matters of public health must give way where, as here, the restriction at issue burdens the constitutional

Page 464

rights of married persons to use contraceptives. In these circumstances, we may not accept on faith the State's classification of a particular contraceptive as dangerous to health. Due regard for protecting constitutional rights requires that the record contain evidence that a restriction on distribution of vaginal foam is essential to achieve the statutory purpose, or the relevant facts concerning the product must be such as to fall within the range of judicial notice.

Neither requirement is met here. 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 or the State's brief filed here 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 is a product widely available without prescription. Given Griswold v. Connecticut, supra, and absent proof of the probable hazards of using vaginal foam, we could not sustain appellee's conviction had it been for selling or giving away foam to a married person. Just as in Griswold, where the right of married persons to use contraceptives was "diluted or adversely

[92 S.Ct. 1044] affected" by permitting a conviction for giving advice as to its exercise, id. at 481, so, here, to sanction a medical restriction upon distribution of a contraceptive not proved hazardous to health would impair the exercise of the constitutional right.

That Baird could not be convicted for distributing Emko to a married person disposes of this case. Assuming, arguendo, that the result would be otherwise had the recipient been unmarried, nothing has been placed in the record to indicate her marital status. The State has maintained that marital status is irrelevant because an unlicensed person cannot legally dispense vaginal foam.

Page 465

either to married or unmarried persons. This approach is plainly erroneous, and requires the reversal of Baird's conviction, for, on the facts of this case, it deprives us of knowing whether Baird was, in fact, convicted for making a constitutionally protected distribution of Emko to a married
person.

The principle established in *Stromberg v. California*, 283 U.S. 359 (1931), and consistently adhered to is 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." *Street v. New York*, 394 U.S. 576, 586 (1969). To uphold a conviction even though we cannot know that it did not rest on the invalid constitutional ground . . . would be to countenance a procedure which would cause a serious impairment of constitutional rights.


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. Cf. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring).

BURGER, J., dissenting

MR. CHIEF JUSTICE BURGER, dissenting.

The judgment of the Supreme Judicial Court of Massachusetts in sustaining appellee's conviction for dispensing medicinal material without a license seems eminently correct to me, and I would not disturb it. It is undisputed that appellee is not a physician or pharmacist, and was prohibited under Massachusetts law from dispensing contraceptives to anyone, regardless of marital status. To my mind, the validity of this restriction on dispensing medicinal substances is the only issue before the Court.

Page 466

and appellee has no standing to challenge that part of the statute restricting the persons to whom contraceptives are available. There is no need to labor this point, however, for everyone seems to agree that, if Massachusetts has validly required, as a health measure, that all contraceptives be dispensed by a physician or pursuant to a physician's prescription, then the statutory distinction based on marital status has no bearing on this case. *United States v. Raines*, 362 U.S. 17, 21 (1960).

The opinion of the Court today brushes aside appellee's status as an unlicensed layman by concluding that the Massachusetts Legislature was not really concerned with the protection of health when it passed this statute. MR. JUSTICE WHITE acknowledges the statutory concern with the protection of health, but finds the restriction on distributors overly broad because the State has failed to adduce facts showing the health hazards of the particular substance dispensed by appellee as distinguished from other contraceptives. MR. JUSTICE DOUGLAS' concurring opinion does not directly challenge the power of Massachusetts to prohibit laymen from dispensing contraceptives, but considers that appellee, rather than dispensing the substance, was resorting to a "time-honored teaching

[92 S.Ct. 1045] technique" by utilizing a "visual aid" as an adjunct to his protected speech. I am puzzled by this third characterization of the case. If the suggestion is that appellee was merely displaying the contraceptive material without relinquishing his ownership of it, then the argument must be that the prosecution failed to prove that appellee had "given away" the contraceptive material. But appellee does not challenge the sufficiency of the evidence, and himself summarizes the record as showing that, "at the close of his lecture, he invited members of the audience . . . to come and help themselves." On the other hand, if the concurring opinion means that the First Amendment protects the distribution

Page 467

of all articles "not dangerous per se" when the distribution is coupled with some form of speech, then I must confess that I have misread certain cases in the area. See, e.g., *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502 (1949).

My disagreement with the opinion of the Court and that of MR. JUSTICE WHITE goes far beyond mere puzzlement, however, for these opinions seriously invade the constitutional prerogatives of the States, and regretably hark back to the heyday of substantive due process.

In affirming appellee's conviction, the highest tribunal in Massachusetts held that the statutory requirement that contraceptives be dispensed only through medical channels served the legitimate interest of the State in protecting the health of its citizens. The Court today blithely hurdles this authoritative state pronouncement and concludes that the statute has no such purpose. Three basic arguments are advanced: first, since the distribution of contraceptives was prohibited as a moral matter in Massachusetts prior to 1966, it is impossible to believe that the legislature was concerned with health when it lifted the complete ban, but insisted on medical supervision. I fail to see why the historical predominance of an unacceptable legislative purpose makes incredible the emergence of a new and valid one.[1] See McGowan
v. Maryland, 366 U.S. 420, 445-449 (1961). The second argument, finding its origin in a dissenting opinion in the Supreme Judicial Court of Massachusetts, rejects a health purpose because,

[i]f there is need to have a physician prescribe . . . contraceptives, that need is as great for unmarried persons as for married persons.

355 Mass. 746, 758, 247 N.E.2d 574, 581. This argument confuses the validity of the restriction on distributors with the validity of the further restriction on distributees, a part of the statute not properly before the Court. Assuming the legislature too broadly restricted the class of persons who could obtain contraceptives, it hardly follows that it saw no need to protect the health of all persons to whom they are made available. Third, the Court sees no health purpose underlying the restriction on distributors, because other state and federal laws regulate the distribution of harmful drugs. I know of no rule that all enactments relating to a particular purpose must be neatly consolidated in one package in the statute books, for, if so, the United States Code will not pass [92 S.Ct. 1046] muster. I am unable to draw any inference as to legislative purpose from the fact that the restriction on dispensing contraceptives was not codified with other statutory provisions regulating the distribution of medicinal substances. And the existence of nonconflicting, nonpreemptive federal laws is simply without significance in judging the validity or purpose of a state law on the same subject matter.

It is possible, of course, that some members of the Massachusetts Legislature desired contraceptives to be dispensed only through medical channels in order to minimize their use, rather than to protect the health of their users, but I do not think it is the proper function of this Court to dismiss, as dubious, a state court's explication of a state statute absent overwhelming and irrefutable reasons for doing so.

Page 469

MR. JUSTICE WHITE, while acknowledging a valid legislative purpose of protecting health, concludes that the State lacks power to regulate the distribution of the contraceptive involved in this case as a means of protecting health.[2] The opinion grants that appellee's conviction would be valid if he had given away a potentially harmful substance, but rejects the State's placing this particular contraceptive in that category. So far as I am aware, this Court has never before challenged the police power of a State to protect the public from the risks of possibly spurious and deleterious substances sold within its borders. Moreover, a statutory classification is not invalid simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat.

Purity Extract & Tonic Co. v. Lynch, 226 U.S. 192, 204 (1912). But since the Massachusetts statute seeks to protect health by regulating contraceptives, the opinion invokes Griswold v. Connecticut, 381 U.S. 479 (1965), and puts the statutory classification to an unprecedented test: either the record must contain evidence supporting the classification or the health hazards of the particular contraceptive must be judicially noticeable. This is indeed a novel constitutional doctrine, and, not surprisingly, no authority is cited for it.

Since the potential harmfulness of this particular medicinal substance has never been placed in issue in the state or federal courts, the State can hardly be faulted for its failure to build a record on this point. And it totally mystifies me why, in the absence of some evidence in the record, the factual underpinnings of the statutory classification must be "incontrovertible," or a matter of "common knowledge."

The actual hazards of introducing a particular foreign substance into the human body are frequently controverted, and I cannot believe that unanimity of expert opinion is a prerequisite to a State's exercise of its police power, no matter what the subject matter of the regulation. Even assuming no present dispute among medical authorities, we cannot ignore that it has become commonplace for a drug or food additive to be universally regarded as harmless on one day and to be condemned as perilous on the next. It is inappropriate for this Court to overrule a legislative classification by relying on the present consensus among leading authorities. The commands of the Constitution cannot fluctuate with the shifting tides of scientific opinion.

Even if it were conclusively established once and for all that the product [92 S.Ct. 1047] dispensed by appellee is not actually or potentially dangerous in the somatic sense, I would still be unable to agree that the restriction on dispensing it falls outside the State's power to regulate in the area of health. The choice of a means of birth control, although a highly personal matter, is also a health matter in a very real sense, and I see nothing arbitrary in a requirement of medical supervision.[3] It is generally acknowledged that
contraceptives vary in degree of effectiveness

Page 471

and potential harmfulness.[4] There may be compelling health reasons for certain women to choose the most effective means of birth control available, no matter how harmless the less effective alternatives.[5] Others might be advised not to use a highly effective means of contraception because of their peculiar susceptibility to an adverse side effect.[6] Moreover, there may be information known to the medical profession that a particular brand of contraceptive is to be preferred or avoided, or that it has not been adequately tested. Nonetheless, the concurring opinion would hold, as a constitutional matter, that a State must allow someone without medical training the same power to distribute this medicinal substance as is enjoyed by a physician.

It is revealing. I think, that those portions of the majority and concurring opinions rejecting the statutory limitation on distributors rely on no particular provision of the Constitution. I see nothing in the Fourteenth Amendment or any other part of the Constitution

Page 472

that even vaguely suggests that these medicinal forms of contraceptives must be available in the open market. I do not challenge Griswold v. Connecticut, supra, despite its tenuous moorings to the text of the Constitution, but I cannot view it as controlling authority for this case. The Court was there confronted with a statute flatly prohibiting the use of contraceptives, not one regulating their distribution. I simply cannot believe that the limitation on the class of lawful distributors has significantly impaired the right to use contraceptives in Massachusetts. By relying on Griswold in the present context, the Court has passed beyond the penumbras of the specific guarantees into the uncircumscribed area of personal predilections.

The need for dissemination of information on birth control is not impinged in the slightest by limiting the distribution of medicinal substances to medical and pharmaceutical channels, as Massachusetts has done by statute. The appellee has succeeded, it seems, in cloaking his activities in some new permutation of the First Amendment, although his conviction rests, in fact and law, on dispensing a medicinal substance without a license. I am constrained to suggest that, if the Constitution can

[92 S.Ct. 1048] be strained to invalidate the Massachusetts statute underlying appellee's conviction, we could quite as well employ it for the protection of a 'curbstone quack,' reminiscent of the 'medicine man' of times past, who attracted a crowd of the curious with a soapbox lecture and then pldied them with "free samples" of some unproved remedy. Massachusetts presumably outlawed such activities long ago, but today's holding seems to invite their return.

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Notes:

[1] The Court of Appeals below described the recipient of the foam as "an unmarried adult woman." 429 F.2d 1398, 1399 (1970). However, there is no evidence in the record about her marital status.

[2] Section 21 provides in full:

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 intended to be used for self-abuse, or any drug, medicine, instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article 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.

Section 21A provides in full:

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 actually engaged in the business of pharmacy may furnish such drugs or articles to any married person presenting a prescription from a registered physician.

A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device.

[3] Appellant suggests that the purpose of the Massachusetts statute is to promote marital fidelity, as well as to discourage premarital sex. Under § 21A, however,
contraceptives may be made available to married persons without regard to whether they are living with their spouses or the uses to which the contraceptives are to be put. Plainly, the legislation has no deterrent effect on extramarital sexual relations.

[4] This factor decisively distinguishes Tileston v. Ullman, 318 U.S. 44 (1943), where the Court held that a physician lacked standing to bring an action for declaratory relief to challenge, on behalf of his patients, the Connecticut law prohibiting the use of contraceptives. The patients were fully able to bring their own action. Underlying the decision was the concern that "the standards of 'case or controversy' in Article III of the Constitution [not] become blurred," Griswold v. Connecticut, 381 U.S. 479, 481 (1965) -- a problem that is not at all involved in this case.

[5] Indeed, in First Amendment cases, we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable inhibitory effect on freedom of speech. E.g., Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940). See United States v. Raines, 362 U.S. 17, 22 (1960).

[6] See also Prince v. Massachusetts, 321 U.S. 158 (1944), where a custodian, in violation of state law, furnished a child with magazines to distribute on the streets. The Court there implicitly held that the custodian had standing to assert alleged freedom of religion and equal protection rights of the child that were threatened in the very litigation before the Court, and that the child had no effective way of asserting herself.

[7] Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms under Griswold, the statutory classification would have to be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest. E.g., Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967). But just as in Reed v. Reed, 404 U.S. 71 (1971), we do not have to address the statute's validity under that test, because the law fails to satisfy even the more lenient equal protection standard.

[8] Appellant insists that the unmarried have no right to engage in sexual intercourse, and hence no health interest in contraception that needs to be served. The short answer to this contention is that the same devices, the distribution of which the State purports to regulate when their asserted purpose is to forestall pregnancy, are available without any controls whatsoever so long as their asserted purpose is to prevent the spread of disease. It 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.

[9] The Court of Appeals stated, 429 F.2d at 1401:

[W]e must take notice that not all contraceptive devices risk "undesirable . . . [or] dangerous physical consequences." It is 200 years since Casanova recorded the ubiquitous article which, perhaps because of the birthplace of its inventor, he termed a "redingote anglais." The reputed nationality of the condom has now changed, but we have never heard criticism of it on the side of health. We cannot think that the legislature was unaware of it, or could have thought that it needed a medical prescription. We believe the same could be said of certain other products.

[10] In Stanley, 394 U.S. at 564, the Court stated:

[A]lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized man." Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).


[1] I have earlier expressed my reasons for believing that the O'Brien decision was not consistent with First Amendment rights. See Brandenburg v. Ohio, 395 U.S. 444, 455 (concurring opinion).

[2] In Giboney v. Empire Storage Co., 336 U.S. 490, the Court upheld a state court injunction against peaceful picketing carried on in violation of a state "anti-restraint-of-trade" law. Giboney, however, is easily distinguished from the present case. Under the circumstances there present,

There was clear danger, imminent and immediate, that, unless restrained, appellants would succeed in making [state antitrust] policy a dead letter. . . . They were exercising their economic power, together with that of their allies, to compel Empire to abide by union, rather than by state, regulation of trade.

Id. at 503 (footnote omitted; emphasis supplied). There is no such coercion in the instant case, nor is there a similar
frustration of state policy, see text at n. 4, infra. For an analysis of the state policies underlying the Massachusetts statute which Baird was convicted of having violated, see Dienes, The Progeny of Comstockery -- Birth Control Laws Return to Court, 21 Am.U.L.Rev. 1, 3-44 (1971).

[3] Even under the restrictive meaning which the Court has given the First Amendment, as applied to the States by the Fourteenth, advocacy of law violation is permissible "except where such advocacy is directed to inciting or producing imminent lawless action, and is likely to incite or produce such action." Brandenburg v. Ohio, supra, n. 1, at 447.

[4] This factor alone would seem to distinguish O'Brien, supra, as that case turned on the Court's judgment that O'Brien's "conduct" frustrated a substantial governmental interest.

[5] For a partial collection of cases involving action that comes under First Amendment protection see Brandenburg v. Ohio, supra, n. 1, at 455-456 (concurring opinion).

[1] Section 21 provides as follows:

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 intended to be used for self-abuse, or any drug, medicine; instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card; circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article 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.

Section 21A makes these exceptions:

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

A public health agency, a registered nurse, or a maternity health clinic operated by or in an accredited hospital may furnish information to any married person as to where professional advice regarding such drugs or articles may be lawfully obtained.

This section shall not be construed as affecting the provisions of sections twenty and twenty-one relative to prohibition of advertising of drugs or articles intended for the prevention of pregnancy or conception; nor shall this section be construed so as to permit the sale or dispensing of such drugs or articles by means of any vending machine or similar device.

[2] The indictment states:

The Jurors for the Commonwealth of Massachusetts on their oath present that William R. Baird, on the sixth day of April, in the year of our Lord one thousand nine hundred and sixty-seven, did unlawfully give away a certain medicine and article for the prevention of conception, to wit: Emko Vaginal Foam, the giving away of the said medicine and article by the said William R. Baird not being in accordance with, or authorized or permitted by, the provisions of Section 21A of Chapter 272, of the General Laws of the said Commonwealth.

[3] Had § 21A authorized registered physicians to administer or prescribe contraceptives for unmarried, as well as for married, persons, the legal position of the petitioner would not have been in any way altered. Not being a physician, he would still have been prohibited by § 21 from "giving away" the contraceptive.


[4] The Food and Drug Administration has made a finding that birth control pills pose possible hazards to health. It therefore restricts distribution and receipt of such products in interstate commerce to properly labeled packages that must be sold pursuant to a prescription. 21 CFR § 130.45. A violation of this law is punishable by imprisonment for one year, a fine of not more than $10,000, or both. 21 U.S.C. §§ 331, 333.

[1] The Court places some reliance on the opinion of the Supreme Judicial Court of Massachusetts in Sturgis v. Attorney General, 358 Mass. ___, 260 N.E.2d 687 (1970), to show that § 21A is intended to regulate morals, rather than public health. In Sturgis, the state court rejected a challenge by a group of physicians to that part of the statute prohibiting the distribution of contraceptives to unmarried women. The court accepted the State's interest in "regulating the private sexual lives of single persons," that interest being expressed in the restriction on distributors. Id. at ___, 260 N.E.2d at 690. The purpose of the restriction on distributors was not in issue.

[2] The opinion of the Court states, in passing, that, if the restriction on distributors were, in fact, intended as a health measure, it would be overly broad. Since the Court does not develop this argument in detail, my response is addressed
solely to the reasoning in the opinion of MR. JUSTICE WHITE, concurring in the result.


Oregon has some case law on point for Planned Parenthood and updated statutes to reflect the findings.

The statute is 411.404 (updated in 2009)

Determination of eligibility for medical assistance

- rules

(1) The Department of Human Services or the Oregon Health Authority shall determine eligibility for medical assistance according to criteria prescribed by rule and in accordance with the requirements for securing federal financial participation in the costs of administering Titles XIX and XXI of the Social Security Act.

(2) Rules adopted under this section may not require any needy person over 65 years of age, as a condition of entering or remaining in a hospital, nursing home or other congregate care facility, to sell any real property normally used as the persons home. [Formerly 414.042; 2011 c.602 §34; 2011 c.720 §103; 2013 c.14 §5; 2013 c.688 §43]

The case was from 1984 in OR:

Rule arbitrarily limiting number of elective abortions woman in medical assistance program may receive was outside authority of Division because under this section only factors to be considered in determining need are requirements and needs of individual, income, responsibility of spouse, parent or guardian and individual circumstances. Planned Parenthood Assn. v. Dept. of Human Resources, 297 Or 562, 687 P2d 785 (1984)

The status of abortion providers throughout the US I was able to find the chart below (information from NARAL Pro Choice America):

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As the chart shows the majority of Americans live in counties without abortion providers.

Oregon has no additional restrictions on abortions and does not require the parents of a minor receiving an abortion to be informed, OR does not require pre-abortion counseling, and it does not require a transvaginal ultrasound before the abortion.

Other states require the above, and some require that physicians performing abortions have admissions at local hospitals, as well as, abortion centers meet standards for surgical centers which they do not need as abortions are not performed in operating rooms. Additionally, some states require physicians performing abortions to read a script with incorrect medical information to the patient receiving an abortion before performing the abortion.

The 8th circuit heard Planned Parenthood v. Rounds (686 F.3d 889 (8th Cir. 2012), and affirmed that the state could force a physician to read a medically inaccurate script to abortion patients. No other circuit courts have addressed the issue.
1919

Criminal Statutes on Birth Control

J. C. Ruppenthal

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In the United States, laws relating to birth control seem to have been developed since about 1870. Congress, the legislatures of nineteen states and Porto Rico, and the commission of the Canal Zone, have enacted statutes that clearly and definitely refer to the prevention of conception in women as a practice to be declared a crime by such laws. In Canada, at least Ontario has such a law. Twenty-two more states of the Union, and also Hawaii have statutes which the courts, with liberality of construction or strictness, hold to apply or not apply criminally to the matter of birth control, at least through prevention of conception, or "contraception." The District of Columbia, and the states of Rhode Island and Florida have kindred enactments, relating in the states to causing miscarriage of a pregnant woman, and in the District to abortion. Four states, Georgia, New Hampshire, New Mexico, and North Carolina, and also Alaska, appear to have no legislation that either certainly or possibly may be held to apply to birth control. All the forty-nine sets of enactments referred to, are found in the statute books under "obscenity" and "offenses against morals," as headings. In most cases the phraseology relating to contraception is found embedded among many clauses relating to pornographic or non-mailable matter, to indecent and immoral printing, writing, painting and the like. Colorado, Indiana and Wyoming mention "self-pollution," and Massachusetts names "self-abuse" along with abortion and prevention of conception.

Clear and definite laws on contraception are found on the statute books of the states of Arizona, California, Colorado, Connecticut, Idaho, Indiana, Iowa, Kansas, Massachusetts, Minnesota, Montana, New Jersey, New York, North Dakota, Ohio, Oklahoma, Washington and Wyoming—eighteen—as well as Porto Rico, Ontario, the Canal Zone and the United States. The federal laws are quite full in expression, and perhaps served as model for most of the states.

If a court regards written matter relating to contraception or means to accomplish this, as "obscene, vulgar and indecent," then laws

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1 Judge of the Twenty-third Judicial District of Kansas; Judge Advocate U. S. Army.
apply also in the states of Alabama, Arkansas, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maine, Maryland, Michigan, Mississippi, Missouri, Nebraska, Pennsylvania, Nevada, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia and Wisconsin—twenty-five in number. In some states a limitation is “if they manifest a tendency to corrupt the morals of youth,” or morals generally.

“Articles and instruments of immoral use or purpose” are denounced, but no specific purpose or object of such is set out, in the laws of Connecticut, Illinois, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Oregon, Pennsylvania, Rhode Island and Utah. In Maryland “obscene and indecent” books are mentioned, and “obscene” matters in South Carolina, with no more specific designation. In Ontario the law very widely includes the assertion or warranty of the offender, as the language is “any article intended or represented as a means of preventing conception or causing abortion.” To make prosecutions more easy, Idaho provides that the complaint need not set out any portion of the language alleged to have been unlawfully used. To aid in capture of contraband articles, instruments and literature or other things, search warrants or seizure, or both, are authorized in Arizona, California, Colorado, Idaho and Nevada.

Where advice or information as to abortion is forbidden, though some states, as Minnesota and New York, carefully discriminate against “unlawful abortion,” others, as Kansas and Iowa, say, “procuring abortion,” with no intimation that such could, in any case, be lawful. Kansas, however, in another statute—as to manslaughter of a woman pregnant or her child—excepts “when it shall be necessary to save the life of the mother,” and thus inferentially distinguishes acts as of two classes.

While some statutes are word for word alike in several states, most of them vary in scope. Among the forbidden acts, in connection with articles, instruments, books, papers, etc., are to “exhibit” (United States law and Colorado); “bring into the state” (Alabama); “import” (Hawaii); “buy,” “sell,” “lend,” “keep for sale,” “have in possession,” (Iowa); “have in possession with intent to sell,” “have possession with or without intent to sell” (Indiana); “advertise,” “distribute” (New York); “manufacture,” (Missouri, New York); “has possession with intent to utter or expose to view or to sell,” “for gratuitous distribution” (in Ohio, drug or nostrum; in Kansas, literature); “conveying notice, hint or reference to,” under “real or fictitious name” (Rhode
Island); "give information orally" (New York, Minnesota, Indiana); "write, compose, or publish" (notice or advertisement, in Arizona); "manifesting a tendency to the corruption of the morals of youth or of morals generally," (Hawaii); "cautions females against its use when in pregnancy" (Ohio); "drug or nostrum purporting to be exclusively for the use of females" (Ohio). To meet the ingenuity of evasive devices, New Jersey includes all persons "who shall in any manner, by recommendation against its use or otherwise give or cause to be given, or aid in giving any information, how or where any of the (literature, instruments, medicines, etc.) may be had or seen or bought or sold." Whatever is prohibited directly to anyone is usually expanded in terms to include aiding in any way toward the forbidden end.

A few exceptions from the sweeping provisions are incorporated. In Ontario the offense must be "knowingly, without lawful excuse or justification;" in New Jersey, "without just cause." In some states the law provides that it "shall not be construed to affect teaching in medical colleges" (Colorado, Indiana, Ohio); "nor standard medical books" (Colorado, Indiana, Kansas, Ohio); "nor the practice of regular practitioners of medicine and druggists (Colorado) in their legitimate business" (Ohio); "nor works of scientific character, or on anatomy, surgery or obstetrics" (Kentucky); "article or instrument used or applied by physicians is not . . . indecent." In Connecticut possession of the things forbidden is unlawful "unless with intent to aid in their suppression or in enforcing the provisions" of the law.

Almost everything denounced under any of these laws is non-mailable under the laws of the United States, Colorado, Illinois, Indiana, Iowa, Missouri, Nebraska, Ohio, and New York. Delivery of such to express or railroad companies is forbidden by the United States, Illinois, Indiana and New York. Besides forbidding the deposit of such matters in the mails, Colorado adds "or with any person."

From the foregoing it may be seen that no general principle runs through the statutes of all the states; etc. As with laws everywhere that impinge upon sex matters in any way, there is more of tabu and superstition in the choice and chance, the selection and caprice, the inclusions and exclusions of these several enactments than any clear, broad, well-defined principle or purpose underlying them. Without such principle, well-defined and generally accepted, the various laws must remain largely haphazard and capricious.
ABSTRACT OF THE CRIMINAL LAWS OF THE UNITED STATES,
THE SEVERAL STATES THEREOF, AND CANADA,
RELATING TO BIRTH CONTROL

United States. Every obscene, lewd, or lascivious, and every filthy
book, pamphlet, picture, paper, letter, writing, print, or other publication
of an indecent character, and every article or thing designed, adapted, or
intended for preventing conception or producing abortion, or for any in-
decent or immoral use and every article, instrument, substance, drug,
medicine, or thing which is advertised or described in a manner calculated
to lead another to use or apply it for preventing conception or producing
abortion, or for any indecent or immoral purpose and every written or
printed card, letter, circular, book, pamphlet, advertisement, or notice of
any kind giving information directly or indirectly, where, or how, or from
whom, or by what means any of the hereinbefore-mentioned matters,
articles, or things may be obtained or made, or where or by whom any
act or operation of any kind for the procuring or producing of abortion
will be done or performed, or how or by what means conception may be
prevented or abortion produced, whether sealed or unsealed; and every
letter, packet, or package, or other mail matter containing any filthy, vile, or
indecent thing, device, or substance; and every paper, writing, advertise-
ment, or representation that any article, instrument, substance, drug,
medicine, or thing may, or can be, used or applied for preventing con-
ception or producing abortion, or for any indecent or immoral purpose;
and every description calculated to induce or incite a person to so use
or apply any such articles, instrument, substance, drug, medicine, or thing,
is hereby declared to be nonmailable matter and shall not be conveyed
in the mails or delivered from any postoffice or by any letter carrier. Who-
ever shall knowingly deposit, or cause to be deposited for mailing or
delivery, anything declared by this section to be nonmailable, or shall
knowingly take, or cause the same to be taken, from the mails for the
purpose of circulating or disposing thereof, or of aiding in the circulation
or disposition thereof, shall be fined not more than $5,000, or imprisoned
not more than five years, or both.—Act of Congress, March 4, 1909, sec.
211; 35 Statutes at Large, p. 1129; Criminal Code of the United States.

Whoever shall sell, lend, give away, or in any manner exhibit, or offer
to sell, lend, give away, or in any manner exhibit, or shall otherwise pub-
lish or offer to publish in any manner, or shall have in his possession for
any such purpose, any obscene book, pamphlet, paper, writing, advertise-
ment, circular, print, picture, drawing, or other representation, figure, or
image on or of paper or other material, or any cast, instrument, or other
article of an immoral nature, or any drug or medicine, or any article of
whatever, for the prevention of conception, or for causing unlawful abor-
tion, or shall advertise the same for sale, or shall write or print, or cause
to be written or printed, any card, circular, book, pamphlet, advertisement,
or notice of any kind, stating when, where, how, or of whom, or by what
means, any of the articles above-mentioned can be purchased or obtained,

*A similar statute of Colorado here has "instrument" also.
or shall manufacture, draw, or print, or in anywise make any of such articles, shall be fined not more than $2,000 or imprisoned not more than five years, or both. Ib., sec. 312, p. 1149.

Whoever shall bring or cause to be brought into the United States or any place subject to the jurisdiction thereof, from any foreign country, or shall therein knowingly deposit or cause to be deposited with any express company or other common carrier, for carriage from one state, territory, or district of the United States, or place non-contiguous to, but subject to the jurisdiction thereof, to any other state, territory, or district of the United States, or place non-contiguous to, but subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States through a foreign country to any place in or subject to the jurisdiction thereof, or from any place in or subject to the jurisdiction of the United States to a foreign country, any obscene, lewd, or lascivious, or any filthy book, pamphlet, picture, paper, letter, writing, print, or other matter of indecent character, or any drug, medicine, article, or thing designed, adapted, or intended for preventing conception, or producing abortion, or for any indecent or immoral use, or any written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, how, or of whom, or by what means any of the hereinbefore-mentioned articles, matters or things may be obtained or made; or whoever shall knowingly take or cause to be taken from such express company or other common carrier any matter or thing the depositing of which for carriage is herein made unlawful, shall be fined not more than $5,000, or imprisoned not more than five years, or both. Ib., 245, p. 2138.

Alabama. "Any person who brings or causes to be brought into this state, for sale, or advertises, or prints, or sells, or offers to sell, or receives subscriptions for any indecent or obscene book, pamphlet, print, picture, or paper, must, on conviction be fined" ($50 to $1,000).—Act of December 3, 1884; Section 7428, Code of 1907, Alabama.

Alaska. (Alaska does not seem to have any laws upon the subject of Birth Control, or that can be construed as such.)

Arizona. Every person who writes, composes, prints, publishes, sells, distributes, or keeps for sale, gives or loans to any person, or exhibits any obscene or indecent writing, paper, or book, etc., or writes, composes, or publishes any notice or advertisement of any such . . . is guilty of a misdemeanor . . . (such) may be seized and destroyed.—Section 313, Revised Statutes of Arizona of 1913.

Every person who wilfully writes, composes,* or publishes any notice or advertisement, or any medicine of means for producing or facilitating miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement or otherwise, to assist in the accomplishment of any such purpose is guilty of a misdemeanor.—Sec. 318, Rev. Stat. Arizona, 1913. Cp., California, § 317; Montana, § 8399.

Arkansas. The sale, circulation, or attempted circulation, etc., of obscene, vulgar and indecent papers, books and periodicals, in which are

*Idaho, in a similar statute, omits "writes, composes."
illustrated any indecent or vulgar pictures, is forbidden.—Sec. 2099, Kirby's Digest of Statutes of Arkansas, 1916.

Every person publicly exhibiting any obscene or indecent picture or figures shall be deemed guilty of misdemeanor.—Sec. 2103, ibid.

CALIFORNIA. Penal Code of California, 1915, section 311, is similar to Arizona, § 313, and was enacted February 14, 1872. The act was amended by "Code Amendments, 1873-4" by omitting "or any notice or advertisement for producing or facilitating miscarriage."

Sec. 317, Code Amendments, 1873-4, is the same as § 318 of Arizona, except that violation of the act is made a felony.

CANAL ZONE. Penal Code 1904, sec. 213. Every person who wilfully writes, composes or publishes any notice or advertisement of any medicine, or means for producing or facilitating a miscarriage or abortion, or for the prevention of conception, or who offers his services by any notice, advertisement, or otherwise, to assist in the accomplishment of any such purpose is guilty of a felony.

Section 228 is similar to section 313 of Arizona, with a further summary provision in section 230, like section 373 of South Dakota.

COLORADO. Whoever exhibits, lends, gives away, sells or offers to . . . , or in any manner publishes or offers to publish, or has in his possession for any such purpose, any obscene, lewd or indecent or lascivious book, pamphlet, circular, paper, drawing, print, picture, advertisement, writing, circular, or other representation, figure or image . . . for procuring abortion, or for self-pollution, or for preventing conception . . . (then follows language similar to U. S. Criminal Code, § 312, and a penalty of $20 to $2,000, or one month to one year prison, or both, and a further limitation that the law shall be) "not construed to affect teaching in regularly chartered medical colleges, or the publication and sale of standard medical books, or the practice of regular practitioners of medicine or druggists in their legitimate business."—Act of 1885, p. 172, section one; section 1778 Revised Statutes of Colorado, 1908.

Sec. 1779, ib., makes it a crime to deposit in the mails or with any person any of the things denounced in sec. 1777.

Sec. 1780 authorizes search for such forbidden matter with a search warrant for authority, and the destruction of the material when found.

CONNECTICUT. Every person who shall buy, sell, advertise, give, lend, offer or show, or have in his possession with intent to sell, etc., . . . , containing obscene, indecent or impure language, or any picture, . . . of like character, or any article or instrument of indecent or immoral use or purpose, unless with intent to aid in their suppression or in enforcing the provisions hereof, etc. (punishable by sentence of not over two years, or fine up to $1,000, or both).—General Statutes of Connecticut, 1902, section 1325; Gen. Stat., 1918, section 6397.

Every person who shall use any drug, medicinal article or instrument for the purpose of preventing conception, shall be fined not less than $50, or imprisoned not less than 60 days nor more than one year, or both.—Gen. Stat., 1902, Connecticut, section 1327; Gen. Stat., 1918, section 6399.

DELAWARE. Whoever prints, etc., . . . a book, etc., . . . containing any obscene or indecent picture of any description tending to corrup-
tion of the morals of youth, is guilty of a misdemeanor. Sec. 2231 Rev. Statutes, Delaware, 1915.

DISTRICT OF COLUMBIA. Forbids "obscene books, pamphlets, etc., and "articles of indecent or immoral use ... or any drug, etc., ... intended to produce abortion." Sec. 872, Code of March 3, 1901, Dist. of Columbia.

FLORIDA. Whoever knowingly advertises, prints, publishes, distributes or circulates, books, papers, etc., "for the purpose of causing or procuring the miscarriage of any woman pregnant with child," punishable in state prison up to one year, or fine to $1,000. Sec. 3539 Compiled Laws of Fla., 1914.

Sec. 3540. Whoever imports, prints, publishes, sells, or distributes any book, pamphlet, ballad, printed paper or other thing containing obscene language, or any obscene prints, figures, pictures or descriptions manifestly tending to the corruption of the morals of youth, or introduces into any family, school or place of education, or buys, procures, receives or has in his possession any such book, pamphlet, ballad, printed paper or other thing, either for the purpose of sale, exhibition, loan, or circulation, or with the intent to introduce the same into any family, school or place of education, shall be punished by imprisonment in the state prison," etc.

GEORGIA. (Parks' Annotated Code of Georgia, 1914, seems to contain nothing relating to birth control, directly or indirectly.)

HAWAII. The imparting, printing, publishing, selling, offering for sale, putting into circulation, distributing, lending, exhibiting publicly, or introducing into any family, school or place of education, any obscene picture, or pamphlet, sheet or other thing, containing obscene language, obscene prints, figures, descriptions, or representations, manifestly tending to the corruption of the morals of youth, or of morals generally; or having, procuring, receiving or having in possession, any such picture, book, pamphlet, sheet, or other thing, with intent to sell, circulate, distribute, lend or exhibit the same, or to introduce the same into any family, school, or place of education, is a common nuisance. Section 4129, Revised Laws of Hawaii, 1915; Penal Code, 1869, ch. 36. Section 4130 provides for seizure of such things upon warrant.

IDAHO. Idaho Revised Codes of 1908, sec. 7695 (same in Rev. Stat., 1887), provides that in proceeding in court against this class of offenses, the complaint "need not set forth any portion of the language," etc.

Idaho Rev. Code, sec. 6840, of 1908 (same as R. S. 1887), is the same as California Penal Code of 1872, and Arizona Code, except that clause 4, after "or," omits the provision about miscarriage.

Idaho Code, 1908, sec. 6841, provides how officials "may seize any obscene or indecent writing, paper, book, picture, print, or figure, found in the possession of, or under the control of a person so arrested (for violation of the preceding section), and to deliver same to the magistrate before whom the person so arrested is taken."

Idaho Code, 1908, sec. 6843, is like R. S. Arizona, sec. 318.

ILLINOIS. Forbids to "bring in or sell, etc., any book, pamphlet, etc., instrument, or article of indecent or immoral use ... or (states) where such indecent or obscene articles and things may be pur-
chased or otherwise obtained or (to) manufacture . . . any such articles."—Illinois Statutes Annotated, 1913, sec. 3861.

Sec. 3862, ibid., forbids to "deposit (such) in postoffice or in express office or with a common carrier or other person."

Indiana. Whoever sells or lends, or offers to sell or lend, or gives away, or offers to give away, or in any manner exhibits, or has in his possession with or without intent to sell, lend or give away, any obscene, lewd, indecent or lascivious book, pamphlet, paper, drawing, lithograph, engraving, picture, daguerreotype, photo, stereoscopic picture, model, cast, instrument or article or indecent or immoral use, or instrument or article for procuring abortion, or for self-pollution, or medicine for procuring abortion or preventing conception, or advertising the same, or any of them for sale, or writes or prints any letter, circular, handbill, card, book, pamphlet, advertisement, or notice of any kind, or gives information orally, stating when, how, where, or by what means or of whom any of the obscene, lewd, indecent or lascivious articles or things hereinbefore mentioned can be purchased, borrowed, presented, or otherwise obtained, or are manufactured; or whoever manufactures, draws, prints," etc. (such things), shall be fined $10 to $5,000, and may be further imprisoned ten days to six months, "but this shall not affect teaching in regularly chartered medical colleges," etc.—Burns' Annotated Indiana Statutes, 1914, section 2359.

Sec. 2360, ibid., forbids depositing any of the things denounced in section 2359, in postoffice or express office, or in charge of any person or corporation to be carried or conveyed.

Sec. 2362 is the same as sec. 13034 of Ohio.

Iowa. "Whoever sells, or offers to sell, or gives away, or has in his possession with intent to sell or give away any obscene, lewd book, etc., or any instrument or article of indecent or immoral use, or any medicine or thing designed or intended for procuring abortion or preventing conception, or advertising the same" . . . shall be fined $50 to $1,000, or sentenced to jail not over one year, or both fine and jail.—Code of Iowa, 1897, sec. 4952, being act 21 General Assembly, ch. 177, sec. 1, amended by ch. 170 of 34 G. A. 1911.

Sec. 4953, Code Iowa, forbids depositing such things in the postoffice, or in charge of any one to be carried or conveyed, as are forbidden in the preceding section, 4952.

Kansas. "If any publisher or other person shall, by printing, writing, or in any other way, publish, or cause to be published, or expose to sale any obscene pictures; an account, advertisement or description of any drug, medicine, instrument or apparatus used or recommended to be used, for the purpose of preventing conception, or procuring abortion or miscarriage; or shall by writing or printing in any circular, newspaper, pamphlet, or book, or in any way, publish or circulate any advertisement or obscene notice herein recited; or shall within the state of Kansas keep for sale or for gratuitous distribution any newspaper, circular, book or pamphlet containing such notice, or advertisement of such drugs, medicines, instrument or apparatus; or shall keep for sale any secret nostrum, drug, medicine, instrument or apparatus named; . . . such publisher or other person
... shall be fined $50 to $1,000 or 30 days to six months in jail, or both. Provided, That nothing in this act shall be so construed as to prevent the publication and sale of standard medical works.—General Statutes of Kansas, 1915, sec. 3676, being laws of 1874, chapter 89, section one.

"Every person or persons who shall bring or cause to be brought into the state, or shall buy, sell, or cause to be sold, or shall advertise, lend, give away, offer, show, exhibit, or have in his possession, with the intent to sell, lend, give away, offer, show, exhibit, distribute, or cause to be distributed, or shall design, copy, draw, photograph, print, etch, or engrave, cut, carve, make, publish, or otherwise prepare or assist in preparing, or shall receive subscriptions for any indecent or obscene book, pamphlet, paper, picture, print, drawing, figure, image, or other engraved, printed or written matter, or any article or instrument of immoral use, or any book, pamphlet, magazine, or paper devoted principally or wholly to the publication of criminal news or pictures, or stories of deeds of bloodshed or crime, shall be guilty of a misdemeanor ... (penalty, $5 to 300, or not over 30 days in jail, or both).—Sec. 3677 Gen. Stat., 1915, being chapter 101, section 1, laws of 1886.

KENTUCKY. Section 1352 of Carroll's Kentucky Statutes, 1915, forbids the sale, etc., of any immoral or obscene book, etc., or any article or instrument of indecent or immoral use” (No allusion is made to the purpose of such article or instrument.—Act of Jan. 27, 1894.

Sec. 1355 provides that the preceding sections do not apply to works of a scientific character, or on anatomy, surgery and obstetrics, or other scientific publications, nor prevent issuing and selling such books.

LOUISIANA. If any person shall bring or cause to be brought into this state, for sale or exhibition or shall sell or offer to sell, or shall give away or offer to give away, or, having possession thereof, shall knowingly exhibit to another, any indecent pictorial newspaper, tending to debauch the morals, or any indecent or obscene book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, picture, or any model, cast, instrument or article of indecent and obscene use, or shall advertise any of said articles or things for sale, by any form of notice, printed, written, or verbal, or shall manufacture, draw or print any of said articles, with intent to sell or expose, or to circulate the same, such person so offending shall be guilty of a misdemeanor. Revised Statutes of Louisiana, 1915, Marr's annot., vol. 1, sec. 2488; Laws, 1884, p. 148, act 111.

MAINE. Revised Statutes of Maine, 1916, chapter 126, section 23, forbids publications tending to corruption of the morals of youth. The same as Florida, sec. 3540. Section 24 authorizes seizure of such when an arrest is made.

MASSACHUSETTS. Chapter 212, section 20, Revised Statutes of Massachusetts, 1902, penalizes "whoever imports, prints, etc., any book, paper, pamphlet, etc., tending to corrupt the morals of youth." The same as Florida, sec. 3540.

Chap. 212, sec. 26, penalizes "whoever sells, lends, gives away, exhibits or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug for self-abuse, or any drug, med..
cine, instrument or article whatever for prevention of conception, or for causing unlawful abortion, or advertises the same, or writes, prints, or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article, shall be punished by imprisonment in the state prison," etc.

MARYLAND. Public General Laws of Maryland, 1914, Bagby, vol. 3, article 27, sec. 372, forbids to "bring into the state, sell, lend, etc., ... obscene or indecent books, etc., or any article or instrument of indecent or immoral use, or shall design ... or prepare such ... article, or shall (give) written information or orally, stating when, where, how, or of whom, or by what means such a lewd, indecent, or obscene article or thing can be purchased, seen, or obtained, shall be guilty of a misdemeanor ...; provided that this section shall not apply to any person committing the acts thereby prohibited with intent to prevent violations of this subtitle, or to procure the punishment of offenses against the same. (No specific purpose is mentioned.)

MICHIGAN. Howell's Michigan Statutes, 1913, chapter 406, section 14785, prohibits anyone to "import, print, etc. (matter), tending to corrupt the morals of youth." The same as Florida, sec. 3540.

Section 14786 authorizes a search warrant to seek such. Section 14787 refers to "prints, articles, instruments," etc., but no specific purpose thereof is denounced.

MINNESOTA. Section 8705, General Statutes, Minnesota, 1913, is the same as California, section 311.

Sec. 8706 makes it a crime to "sell, lend, ... etc., have in possession to sell, advertise to sell, or distribute, any instrument or article, or any drug or medicine for the prevention of conception or for causing unlawful abortion, ..." or to give oral information where such can be obtained or who manufactures such articles, etc.

MISSISSIPPI. Hemingway's Annotated Code of Mississippi of 1917, section 1025, forbids persons to sell, lend, etc., articles, etc., of indecent or obscene use, but names no specific purpose of such articles, etc.

Section 1026 is the same as Section 8706 of Minnesota.

MISSOURI. Revised Statutes of Missouri, 1909, section 4737, forbids anyone to manufacture, print, publish, buy, sell, etc., indecent or immoral articles, etc. (but names no specific purpose of such articles).

Section 4738 penalizes the deposit of any such forbidden things in the postoffice, or placing them in charge of any person to be carried or conveyed.

MONTANA. Section 8399 of the Revised Statutes of Montana, 1907, is the same as Arizona, § 318, and California, § 317.

NEBRASKA. Whoever sells, etc., things of obscene or immoral nature is punishable, but no special purpose of such articles is named.—Revised Statutes of Nebraska, 1913, sec. 8787. Sec. 8788 is the same as sec. 4738 of Missouri.

NEVADA. Revised Laws of Nevada, 1912, section 6461, is the same as section 313 of Arizona and section 311 of California.
Section 7069 provides that in prosecuting the exact language used by the defendant need not be set out in the complaint, etc.

NEW HAMPSHIRE. The Public Statutes of New Hampshire, 1901, Supplement of 1913 and Laws of 1915 and 1917, appear to contain nothing relating to birth control.

NEW JERSEY. "Any person who, without just cause, shall utter or expose to view of another, or have in his possession (with such intent) or to sell, any obscene or indecent book, pamphlet, etc., or any instrument, medicine, or other thing designed or purporting to be designed for the prevention of conception or the procuring of abortion, or shall in anywise advertise the same or in any manner by recommendation against its use or otherwise, give or cause to be given, or aid in giving any information, how or where any of the same may be had or seen or bought or sold, shall be guilty of a misdemeanor."—Compiled Statutes of New Jersey, 1910, vol. 2, p. 1762, sec. 53; P. L. 1898, p. 808.

NEW MEXICO. New Mexico Annotated Statutes, 1915, and Laws, 1917 and 1918, appear to contain no enactment relating to Birth Control, or kindred matters.

NEW YORK. Section 1141, of the Penal Law of New York, Laws of 1909, ch. 88, forbids anyone to sell, lend, etc., anything immoral, etc., but names no especial purpose of such thing forbidden.

Section 1142, same statute of New York: "A person who sells, lends, gives away, or in any manner exhibits or offers to sell, lend or give away, or has in his possession with intent to sell, lend or give away, or advertises, or offers for sale, loan or distribution, any instrument or article, or any recipe, drug or medicine for the prevention of conception, or for causing unlawful abortion, or purporting to be for the prevention of conception, or for causing unlawful abortion, or advertises, or holds out representations that it can be so used or applied, or any such description as will be calculated to lead another to so use or apply any such article, recipe, drug, medicine or instrument, or who writes or prints, or causes to be written or printed a card, circular, pamphlet, advertisement or notice of any kind, or gives information orally, stating when, where, how, or to whom or by what means such an instrument, article, recipe, drug or medicine can be purchased or obtained, or who manufactures any such instrument, article, recipe, drug or medicine, is guilty of a misdemeanor, and shall be liable to the same penalties," etc.

Sec. 1143 penalizes depositing any such thing, etc., in a post office, express office, or with a common carrier, or other person for transportation.

Sec. 1145. "An article or instrument, used or applied by physicians lawfully practising, or by their direction and prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use within this article. The supplying of such articles to such physicians, or by their direction or prescription, is not an offense under this article."

North Dakota. Section 9652, Compiled Laws North Dakota, 1913, similar to section 313 Arizona.

Section 9654 is the same as section 3677 of Kansas.

Ohio. "Whoever sells, gives away, or keeps for sale or gratuitous distribution, a secret drug or nostrum, purporting to be exclusively for the use of females, or for preventing conception, or procuring abortion or miscarriage, shall be fined" not over $1,000, or sentenced to six months, etc.

—Page & Adams Annotated Ohio General Code, 1912, section 13033.

Section 13034. Whoever prints or publishes an advertisement of a secret drug or nostrum purporting to be for the exclusive use of females, or which cautions females against its use when in a pregnant condition, or publishes an account or description of a drug, medicine, instrument or apparatus for preventing conception, or for procuring abortion or miscarriage, or keeps for sale or gratuitous distribution a newspaper, circular, pamphlet, or book containing such advertisement, account or description, shall be fined not more than $1,000 or imprisoned not more than six months, or both.

Section 13035. Whoever sells, lends, gives away, exhibits, or offers to sell, etc., or has in his possession for such purpose, a figure, image, cast, instrument, or article of an indecent or immoral nature, or a drug, medicine, article or thing intended for the prevention of conception or for causing an abortion, or advertises any of them for sale, or gives information, or manufactures such articles or things, shall be fined

Sec. 13036 makes it an offense to deposit any such matter in a post office, or in charge of a person to be carried or conveyed, etc.

Section 13036 makes it an offense to deposit in a postoffice or place in charge of any person, to be carried or conveyed, any such matter or things.

Sec. 13037. The next preceding three sections (secs. 13034-5-6) shall not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business.

Oklahoma. Section 2463, Revised Laws of Oklahoma, 1910, are substantially the same as those of Arizona, omitting a clause after "or," as to miscarriage. The prohibited matter or articles may be seized.

Ontario, Canada. Every one is guilty of an indictable offense and liable to two years' imprisonment, who knowingly, without lawful excuse or justification, offers to sell, advertises, publishes an advertisement of, or has for sale or disposal any medicine, drug or article intended or represented as a means of preventing conception or causing abortion.

Oregon. Lord's Oregon Laws, 1910, section 2094, being Laws 1864, sec. 637, forbids importing, printing, etc., obscene or immoral articles, but does not state any object of such articles.

Pennsylvania. If any person shall bring or cause to be brought into this state for sale or exhibition, or shall sell, lend, give away, or offer to give away or show, or have in his or her possession, with intent to sell or give away, or to exhibit, show, advertise, or otherwise offer, for loan, gift, sale or distribution, any obscene or indecent book, magazine, pamphlet, newspaper, story paper, writing, paper, picture, card, drawing or photograph,
or any article or instrument of indecent or immoral use. (The rest, and in fact the entire section substantially like section 372 of Maryland.) Purdon's Digest of Pennsylvania, 1905, sec. 366, vol. 1, p. 988; act of May 6, 1887.

Philippine Islands. These insular possessions do not seem to have legislated on these matters.

Porto Rico. Revised Statutes of Porto Rico, 1911-1913, section 5725, is the same as California laws on matter of birth control, omitting after "or . . . ;" as to miscarriage.

Rhode Island. Chapter 347, section 13, page 1277, General Laws of Rhode Island, 1909, forbids importation, etc., of articles and things to corrupt the morals (but gives no particulars). The same as section 3540 of Florida.

Sec. 24, page 1279, "Every person who shall advertise, print, etc., book, paper, etc., containing words or language giving or conveying any notice, hint or references to any person, or to the real or fictitious name of any person, from whom, or to any place, house, shop or office, where anything whatever, or any instrument or means whatsoever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any pregnant woman, shall be imprisoned not exceeding three years.

South Carolina. South Carolina Code, 1912, criminal code, sec. 391, is substantially the same as section 3540 of Florida if the acts be done "knowingly."

South Dakota. Compiled Laws of South Dakota, 1913, vol. 2, p. 602, sec. 371, is similar to sec. 313 of Arizona. Section 372 authorizes seizing the prohibited matter. Section 373 requires a summary determination by a magistrate whether or not to destroy the material seized.

Tennessee. Thompson's Shannon's Code of Tennessee, 1918, section 6770, is similar to Florida, section 3540.

Texas. Vernon's Criminal Statutes of Texas, 1916, Penal Code, article 508, forbids printing, etc., designed to corrupt the morals of youth.

Utah. Compiled Laws of Utah, 1907, section 4247, penalizes one who writes, etc., . . . obscene, immoral, indecent, etc., but no special purpose of the articles, things or instruments condemned is named.

Sections 4248 and 4249 are the same as sections 372 and 373 of South Dakota.

Vermont. General Laws of Vermont, 1917, section 7021, is substantially like section 3540 of Florida.

Virginia. "If any person import, print, etc., . . . any book, etc., . . . tending to corrupt morals of youth," he shall be punished, etc. Virginia Code, 1904, Pollard, section 3791, same as Florida, section 3540.

Washington. Code, 1912, title 135, sec. 413, is similar to sec. 313 of Arizona. This section and the next are similar to Minnesota's laws.

Section 415. Every person who shall expose for sale, loan or distribution, any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion, or shall write,
print, distribute, or exhibit any card, circular, pamphlet, advertisement, or notice of any kind, stating when, where, how, or of whom such article or medicine can be obtained, shall be guilty of a misdemeanor.

**West Virginia.** West Virginia Code, 1916, page 1221, chapter 149, section 11, being ch. 123, Act of 1889; Hogg's Code, 1913, sec. 5316, is substantially the same as the Virginia law.

**Wisconsin.** Section 4590, Wisconsin Statutes, 1917, is practically like the law of Florida, Virginia, etc.

**Wyoming.** "Whoever sells, or lends, etc., . . . any book or article, etc., . . . for self-pollution or abortion or medicine to procure abortion or prevent conception" shall be punished.—Wyoming Compiled Statutes, 1910, section 5911, being laws, 1890, chapter 73, section 81.

Section 5912, ibid., penalizes the deposit of any such things for delivery, by others.
APPENDIX XXIV.

Penal Law, Sections 80, 82, 1050, 1051, 1142.

Section 80.—Definition and punishment of abortion.—A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or the child with which she is pregnant, either:

1. Prescribes, supplies, or administers to woman, whether pregnant or not, or advises or causes a woman to take any medicine or drug or substance; or,

2. Uses, or causes to be used, any instrument or other means, is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in a county jail for not more than one year.

Section 82.—Selling drugs or instruments to procure a miscarriage.—A person who manufactures, gives or sells an instrument, a medicine or drug, or any other substance, with intent that the same may be unlawfully used in procuring the miscarriage of a woman, is guilty of a felony.

Section 1050.—Billing unborn quick child by administering drugs.—The willful killing of an unborn quick child, by an injury committed upon the person of the mother of such child, is manslaughter in the first degree.

A person who provides, supplies, or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter in the first degree.

Section 1051.—Punishment for manslaughter in the first degree.—Manslaughter in the first degree is punishable by imprisonment for a term not exceeding twenty years.

Section 1142.—Indecent Articles.—A person who sells, lends, gives away, or in any manner exhibits or offers to sell, lend or give away, or has in his possession with intent to sell, lend or give away, or advertises, or offers for sale, loan or distribution, any instrument or article, or any recipe, drug or medicine for the prevention of conception, or for causing unlawful abortion, or purporting to be for the prevention of conception, or for causing unlawful abortion, or advertises, or holds out representations that it can be so used or applied, or any such description as will be calculated to lead another to so use or apply any such article, recipe, drug, medicine or instrument, or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means such an instrument, article, recipe, drug or medicine can be purchased or obtained, or who manu-
factures any such instrument, article, recipe, drug or medicine, is
guilty of a misdemeanor, and shall be liable to the same penalties as
provided in section eleven hundred and forty-one of this chapter. (Is
guilty of a misdemeanor, and, upon conviction, shall be sentenced to
not less than ten days nor more than one year imprisonment or be
fined not less than fifty dollars nor more than one thousand dollars or
both fine and imprisonment for each offense.)
This circular advertised the opening of America's first birth control clinic, run by Margaret Sanger in Brownsville Brooklyn, NY, in 1916.
People v. Sanger
Court of Appeals of New York
December 10, 1917, Argued; January 8, 1918, Decided
No Number in Original

Reporter
222 N.Y. 192; 118 N.E. 637; 1918 N.Y. LEXIS 1445

The People of the State of New York, Respondent, v. Margaret H. Sanger, Appellant

Prior History: [***] Appeal from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered July 31, 1917, which affirmed a judgment of the Court of Special Sessions of the city of New York convicting the defendant of a violation of section 1142 of the Penal Law.


Disposition: Judgment affirmed.

Core Terms
prescription, disease, advice, prevention, advertise, medicine, patients, sickness, married, matters, cure

Case Summary

Procedural Posture
Defendant appealed the judgment of the Appellate Division of the Supreme Court in the Second Judicial Department (New York), which affirmed defendant conviction of a violation of N.Y. Penal Law § 1142 for disseminating information about contraceptives.

Overview
Defendant was convicted of N.Y. Penal Law § 1142, which makes it a misdemeanor for a person to sell, or give away, or to advertise or offer for sale, any instrument or article, drug or medicine, for the prevention of conception, or to give information orally, stating when, where or how such an instrument, article or medicine can be purchased or obtained. She was sentenced to 30 days in the workhouse. On appeal, defendant claimed that the law was unconstitutional, arguing that if the law was broad enough to prevent a duly licensed physician from giving advice and help to his married patients in a proper case, it was an unreasonable police regulation, and, therefore, unconstitutional. The court affirmed defendant's conviction. The court held that defendant was not a proper person to make such a constitutional claim, since she was not a physician, and that N.Y. Penal Law § 1145 excepted physicians from the provisions of § 1142.

Outcome
The court affirmed defendant's conviction and sentence.

LexisNexis® Headnotes

Governments > Legislation > Interpretation

Jennifer Morrissey
HN1 The general rule applies in a criminal as well as a civil case that no one can plead the unconstitutionality of a law except the person affected thereby.

Headnotes/Syllabus

Headnotes

Constitutional law -- the statute (Penal Code, § 1142) forbidding the dissemination of information for the prevention of conception does not violate the Constitution.

Syllabus

1. The general rule applies in a criminal as well as a civil case that no one can plead the unconstitutionality of a law except the person affected thereby.

2. The provision of section 1142 of the Penal Law which makes it a misdemeanor to sell, advertise or give information for the prevention of conception does not violate the Constitution.

The facts, so far as material, are stated in the opinion.

Counsel: Jonah J. Goldstein for appellant. Section 1142 violates both the federal and state Constitutions, as to individual liberty, because of its failure of regulation. It establishes an absolute inhibition of the dissemination of information [*3] to all persons, in that it fails to make provision for cases of women who suffer from certain infirmities, whereby the statute endangers their lives and brings about a condition injurious to their health. The inhibition precludes physicians from giving any information even where conception would make pregnancy dangerous or fatal. (Fisher v. Woods, 187 N.Y. 90; Barry v. Vil. of Port Jervis, 72 N.Y. Supp. 120.)


Opinion by: CRANE

Opinion

[*193] [*3] [*637] Section 1142 of the Penal Law, among other things, makes it a misdemeanor for a person to sell, or give away, or to advertise or offer for sale, any instrument or article, drug or medicine, for the prevention of conception; or to give information orally, stating when, where or how such an instrument, article or medicine can be purchased or obtained.

[*194] The appellant was convicted in the Court of Special Sessions of the city of New York, borough of Brooklyn, for a violation of this section, and sentenced to thirty days in the workhouse. She claims that the law is unconstitutional.

Some of the reasons assigned below for the illegality of this act have now been abandoned and it is conceded to be within the police power of the legislature, for the benefit of the morals and health of the community, to make such a law as this applicable to unmarried persons. But it is argued that if this law be broad enough to prevent a duly
licensed physician from giving advice and help to his married patients in a proper case, it is an unreasonable police regulation, and, therefore, unconstitutional. There are two answers to this suggestion.

In the first place, the defendant is [[**4] not a physician, and HN1 the general rule applies in a criminal as well as a civil case that no one can plead the unconstitutionality of a law except the person affected thereby. (Collins v. State of Texas, 223 U.S. 288, 296; People v. McBride, 234 Ill. 146, 164; Jenhour v. State, 157 Ind. 517, 520; State v. Haskell, 84 Vt. 429, 441; Commissioners of Franklin Co. v. State ex rel. Patton, 24 Fla. 55.)

Secondly, by section 1145 of the Penal Law, physicians are excepted from the provisions of this act under circumstances therein mentioned. This section reads: "An article or instrument, used or applied by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease, is not an article of indecent or immoral nature or use, within this article. The supplying of such articles to such physicians or by their direction or prescription, is not an offense under this article."

This exception in behalf of physicians does not permit advertisements regarding such matters, nor promiscuous advice to patients irrespective of their condition, but it [[**5] is broad enough to protect the physician who in good faith gives such help or advice to a married [[**638] person to cure or prevent disease. "Disease," by Webster's International Dictionary, is defined to be, "an alteration in the state of the body, or of some of its organs, interrupting or disturbing the performance of the vital functions, and causing or threatening pain and sickness; illness; sickness; disorder."

The protection thus afforded the physician would also extend to the druggist, or vendor, acting upon the physician's prescription or order.

Much of the argument presented to us by the appellant touching social conditions and sociological questions are matters for the legislature and not for the courts.

The judgment appealed from should be affirmed.

Jennifer Morrissey

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State v. Wilson

Supreme Court of Oregon

October 27, 1924, Argued; December 2, 1924, Decided

No Number in Original

Reporter
113 Ore. 450; 230 P. 810; 1924 Ore. LEXIS 28; 39 A.L.R. 84

STATE v. E. O. WILLSON.

Subsequent History: [***1] Rehearing Denied February 17, 1925, Reported at: 113 Ore. 450 at 458.

Prior History: From Union: JAMES A. EAKIN, Judge.

In Banc.

REVERSED.

Disposition: REVERSED AND REMANDED.

Core Terms

indictment, pregnant, foetus, abortion, woman

Case Summary

Procedural Posture

The Circuit Court of Union County (Oregon) convicted defendant of manslaughter for ending the life of an unborn child. Defendant appealed.

Overview

Defendant was indicted for unlawfully and feloniously using a certain metallic instrument into a woman's vagina and uterus, causing the destruction of the woman's unborn child. Defendant pleaded not guilty but he was later convicted on the charged crime. On appeal, defendant claimed that the trial court erred by allowing the prosecuting witness to testify that she became pregnant by defendant and that he performed two separate and distinct operations upon her resulting in the death of the child with which she was at the time pregnant. The court found that each of the acts described by the witness were complete crimes in themselves. The court determined that the evidence did not correspond with the allegations of the indictment. In addition, the court held that the State had no right merely to allege the use of an instrument and then add to that proof of the administration or use of a drug with intent to destroy the child. Lastly, the court determined that there was insufficient evidence presented that the witness was actually pregnant. Therefore, the court reversed defendant's conviction.

Outcome

The court reversed defendant's conviction of manslaughter for ending the life of an unborn child.

Jennifer Morrissey
LexisNexis® Headnotes

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Criminal Abortion > General Overview

HN1 If any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter. Or. Laws § 1900.

Criminal Law & Procedure > ... > Grand Juries > Indictments > Contents
Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN2 It is required by Or. Laws § 1437 that an indictment must contain a statement of the acts constituting the offense in ordinary and concise language, without repetition in such manner as to enable a person of common understanding to know what is intended.

Headnotes/Syllabus

Headnotes

Criminal Law—Prosecutrix’s Testimony of Operation Before One Alleged Held Improper.

1. Prosecutrix’s testimony that defendant made her pregnant, and performed two separate operations, resulting in death of foetus, prior to offense named in indictment, was improper as relating to distinct crimes not charged. 1


2. Under Section 1437, 1900, Ore. L., where indictment alleges use of certain metallic instrument, evidence of administration or use of drug with intent to destroy child is not admissible. 2

Criminal Law—Requested Instruction Alluding to "Complicity" of Prosecutrix Improper, but Cautionary Instruction as to Her Interest as Affecting Credibility Should have Been Given.

3. Requested instruction, that fact that prosecutrix consented to alleged abortion, and "fact of her complicity," might be considered as affecting her credibility and weight of her testimony, was objectionable as alluding to prosecutrix as accomplice; but some cautionary instruction should have been given as to interest of prosecutrix. 3

Criminal Law—Female Operated on by Accused not Accomplice.

4. In cases of abortion, female operated on is not an accomplice of one charged with the offense. 4


See 1 C. J. 315, 324; 16 C. J. 592, 678, 999, 1013 (1926 Anno.).

1 Evidence of other crimes in abortion and attempt to procure, see note in 62 L. R. A. 229. See, also, 8 R. C. L. 198.

2 Necessary allegations as to means used in indictment for abortion. See notes in 11 Ann. Cas. 221; Ann. Cas. 1912D, 1325. See, also, 1 R. C. L. 79.

3 See 14 R. C. L. 734.

4 Woman upon whom abortion is committed as accomplice, see notes in 12 Ann. Cas. 1009; Ann. Cas. 1916C, 629. See, also, 1 R. C. L. 71.

Jennifer Morrissey
Counsel: For appellant there was a brief over the names of Mr. F. S. Ivanhoe, Mr. Jesse Crum and Messrs. Green & Hess, with oral arguments by Mr. R. J. Green and Mr. Ivanhoe.

For respondent there was a brief over the names of Mr. Ed. Wright and Mr. E. R. Ringo, with an oral argument by Mr. Ringo.

Judges: BURNETT, J. BROWN, J., concurs in the result.

Opinion by: BURNETT

Opinion

[BURNETT, J.--There is an Oregon statute reading thus:

HN1 "If any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter." Ore. L., § 1900.

The grand jury of Union County returned an indictment against the defendant on February 5, 1924, the charging part of which reads as follows:

"The said E. O. Wilson on the 2d day of November, 1923, in the county of Union and State of Oregon, then and there being, did then and there unlawfully and feloniously use a certain metallic instrument, by then and there inserting said instrument in the vagina and uterus of one Hazel Barnes, said Hazel Barnes then and there being pregnant with a child, with the intent then and there thereby to destroy such child, said use of said instrument not being necessary to preserve the life of said Hazel * Barnes, and said defendant did then and there unlawfully and feloniously thereby produce the death of the said child, contrary to the statutes," etc.

A trial of the defendant on a plea of not guilty resulted in his conviction and he appealed.

It will be observed that there are two classes of acts by which the crime defined by the statute may be committed. They are the administration of any medicine, drug or substance, and the use or employment of any instrument or other means. HN2 It is required by Section 1437, Ore. L., that the indictment must contain:

"A statement of the acts constituting the offense in ordinary and concise language, without repetition in such manner as to enable a person of common understanding to know what is intended."

It appears in evidence, in substance, that the woman named in the indictment went to work for the defendant in his dental office in June, 1922, and continued there until August 17, 1923. She testified that after that date, there was no coitus between her and anyone until November 9, 1923, and none afterwards. Meanwhile, she had been regular in her menses and suspected nothing until November 18th when her catamenia were due but did not appear. The prosecution relies upon November 9th as the date of the intercourse resulting in the pregnancy charged in the indictment. The whole history of the charge in the indictment is included between November 9, 1923, and December 18th of that year, at which last date she claims she had a miscarriage.

1. One class of objections to the procedure of the court is that the prosecutrix was allowed to testify, over the objection [**811] and exception of defendant, that she became pregnant by him, and that he performed [**454] two separate and distinct operations upon her resulting in the death of the foetus with which she was at the time pregnant, prior to the one named in the indictment. This is contrary to the rule laid [**4] down in this state in the following decisions: State v. O'Donnell, 36 Ore, 222 (61 P. 892); State v. Dunn, 53 Ore, 304 (99 P. 278, 100 P. 258); State v. Start, 65 Ore. 178 (132 P. 512, 46 L. R. A. (N. S.) 266); State v. McAllister, 67 Ore. 480 (136 P. 354). Each
of the acts described by the witness, and which were objected to by the defendant, were complete crimes in themselves. If this procedure were permissible, it ought to be laid in the indictment with a continuando, but the statute says that the statement must be without repetition, Ore. L., § 1437, and it is axiomatic that the evidence shall correspond with the allegations of the accusing document. One consequence of supporting the procedure allowed in this respect by the trial court would be that no defendant could know how many violations of the law he would be called upon to defend upon a single charge, neither would he know when his prosecutions for some offense would come to an end. Another result would be that having narrated in testimony all the instances constituting separate offenses and failing in the prosecution of one, the state could take precisely the same evidence and, by changing the date of the indictment, prosecute a defendant on the same testimony an indefinite number of times. The statute contemplates the statement in the indictment of a single offense, and that the evidence shall be confined to that charge alone of which the defendant has been informed. The principle is settled in this state by the precedents cited.

2. Another objection to the procedure was that in the face of the allegations of the indictment confining the act to the use of "a certain metallic instrument," the state was allowed to produce testimony to the effect that certain drugs and medicines introduced and admitted in evidence were given by the defendant to the prosecuting witness on former occasions for the purpose of producing an abortion and the destruction of the foetus of which she was pregnant in those instances. Likewise, she was permitted to testify that he furnished her the money to buy turpentine which he administered to her to bring about the abortion of the foetus named in the indictment. If the state would prove such conduct it should allege it in the indictment, for it is one of the acts constituting the offense. The state had no right merely to allege the use of an instrument and then add to that proof of the administration or use of a drug with intent to destroy the child.

3, 4. The defendant also complains of the refusal of the court to give to the jury the following instruction:

"I instruct you, Gentlemen of the Jury, that the fact that Hazel Barnes consented to the alleged abortion and the fact of her complicity may be considered by you as affecting her credibility as a witness, and the force and weight of her testimony."

The instruction is subject to criticism, in that it alludes to "the fact of her complicity." The weight of authority is to the effect that the female in such instances is not an accomplice, but as stated in Seifert v. State, 160 Ind. 464 (67 N.E. 100, 98 Am. St. Rep. 340):

"The deceased was not strictly an accomplice, but the moral quality of the act and her connection with it were such as to entitle the appellant to have said instruction given to the jury."

According to the statement of the case in that precedent:

"At the proper time appellant tendered an instruction to the effect that, in determining what weight should be given to the dying declarations, the jury might consider the fact that according to her own admission therein the declarant had used the catheter upon her person to produce an abortion. The court refused so to instruct, and appellant reserved an exception."

The testimony for the state is to the effect that the woman named in the present indictment, accompanied by her sister, went to the defendant, complained that she was pregnant, and sought his assistance to produce an abortion, and so destroy the foetus of which she was then pregnant. There were two of these interviews at each of which, according to her statement, the prosecutrix, her sister and the defendant were present, viz.: on November 20th and 22d. Her motive of shame and dread of the disgrace attendant upon the discovery of her condition would naturally operate strongly on her mind to aid in bringing about the result she desired. She was deeply interested in the question, much more than any other witness, and hence in fairness to the defendant, some cautionary instruction ought to have been given.

In the instant case no qualified witness had ever seen what could be called a foetus, and no one has said anywhere in the testimony that the child of which the woman was alleged to be pregnant is dead. The prosecutrix relies

Jennifer Morrissey
upon sexual intercourse with the defendant November 9, 1923. She declared that she had frequent desire to urinate and had "morning [*457] sickness." These manifestations are classed as doubtful signs of pregnancy by some authors: 2 Witthaus & Becker, Med. Jur. 554; Draper Legal Med. 173. She testifies that the defendant administered [**812] to her turpentine on the twentieth of the same month; and that two days later, on November 22, 1923, he introduced a metallic instrument into her uterus. The testimony of her sister is to the effect that afterwards, on December 18, 1923, there passed from the prosecutrix with a clot of blood a piece of what "really looked almost like flesh" about the size of an adult woman's finger and about one and one half to two inches long. This was not exhibited to her attending physician whom she consulted on November 28th and December 18th and who testifies he saw no foetus. No one pretends to say that it was a foetus or that it was alive or dead. The record is silent as to any indication of development of the different members of the human [***9] body on the thing so discharged, though according to respectable authorities a foetus of the size described begins to show traces of eyes, nose, mouth, ears, hands and feet, as well as other characteristics of the human body which would readily distinguish it from a vaginal polypus not due to pregnancy: 1 Peterson, Haines & Webster, Leg. Med. & Tox. (2 ed.), 959; 2 Hamilton, System of Legal Medicine, 477. There is before us no history of pigmentation of the breasts or vulva nor softening of the uterus classed among the probable signs of pregnancy: 2 Witthaus & Becker Med. Jur. 557. It may well be doubted whether the testimony was sufficient in that respect, but for the errors already noted, the judgment is reversed and the cause remanded for new trial.

REVERSED AND REMANDED.

BROWN, J., concurs in the result.

Jennifer Morrissey
People v. Flaherty
Supreme Court of New York, Appellate Division, Fourth Department
November 9, 1926
No Number in Original

Reporter
218 A.D. 204; 1926 N.Y. App. Div. LEXIS 5893; 218 N.Y.S. 148

The People of the State of New York, Respondent, v. Charles Flaherty, Appellant

Prior History: [*1] Appeal by the defendant, Charles Flaherty, from a judgment of the County Court of the county of Livingston, rendered on the 8th day of April, 1926, convicting him of the crime of manslaughter in the first degree.

Disposition: Judgment of conviction reversed on the law and facts and a new trial granted.

Core Terms
young woman, district attorney, girl, dying declaration, morning, die, procure

Case Summary

Procedural Posture
Defendant sought review of his conviction by the County Court of the County of Livingston (New York) for manslaughter in the first degree.

Overview
Defendant was accused of administering drugs and using an instrument on a pregnant woman with the intent to procure a miscarriage and of causing the death of the woman. Defendant claimed that he only administered a heart medication, that he did not use any instruments, and that the trial court erred in admitting the woman's statements as dying declarations. The court reversed defendant's conviction. The court held that there was no evidence that defendant administered drugs designed to procure a miscarriage, that defendant only administered digitalis, and that expert testimony on the cause of death of the woman was not based on facts within the experts' knowledge and was improperly received into evidence. The court also held that the woman's statements to her mother were not made under a sense of impending death or without hope of recovery, that the statements were hearsay and were improperly admitted, and that defendant was entitled to a new trial.

Outcome
The court reversed defendant's conviction for manslaughter in the first degree and ordered a new trial.

LexisNexis® Headnotes

Evidence > ... > Exceptions > Dying Declarations > General Overview

HN1 To entitle dying declarations to be received in evidence, they must be made by a person who believes he or she is about to die and has no hope of recovery. The evidence shall be clear that the declarations were made under a sense of impending death without any hope of recovery.
Evidence > ... > Exceptions > Dying Declarations > General Overview
Evidence > ... > Exceptions > Dying Declarations > Form of Declarations
Evidence > Relevance > Preservation of Relevant Evidence > Exclusion & Preservation by Prosecutors

HN2 Where the evidence of a defendant's guilt is based largely on the fact that he may have had the opportunity to commit the crime, prejudicial dying declarations tending to establish the defendant's connection with the crime charged against him without laying a proper foundation for their admission in evidence is a substantial error which cannot be overlooked.

Criminal Law & Procedure > Appeals > Procedural Matters > Records on Appeal
Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN3 It is the duty of an appellate court to search the record and see that justice is done.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial
Criminal Law & Procedure > Trials > Judicial Discretion
Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN4 A defendant, attempting to try his own case without the aid of experienced counsel, is entitled to every reasonable consideration to the end that he receives a fair and impartial trial. If through inexperience or ignorance, or for any other cause, he fails to note exceptions or make motions to strike out improper evidence, it shall not preclude him from the right to a fair hearing. It is the duty of an appellate court to order a new trial, if in its opinion justice requires it, whether or not exceptions were taken by the defendant to erroneous rulings in the court below or motions made to strike from the record evidence that had been improperly received. N.Y. Code Crim. Proc. § 527.

Headnotes/Syllabus

Headnotes

Crimes -- manslaughter first degree -- defendant was charged with administering drugs and medicines and using instrument on woman for purpose of procuring miscarriage, from which death resulted -- evidence does not support charge as to use of medicines or drugs -- defendant was not represented on trial by attorney -- two physicians testified that death was result of septic peritonitis and that condition was caused by attempted operation -- said testimony was improperly admitted since neither physician gave facts on which opinion was based nor was testimony given in answer to hypothetical question based on facts assumed to be true -- testimony by mother of decedent as to statement by decedent was hearsay -- said statement was not dying declaration since testimony did not show that decedent anticipated death -- evidence of statements cannot be overlooked under Code of Criminal Procedure, [*2] § 542 -- fact that motion was not made to strike out evidence does not prevent Appellate Division from considering same.

Syllabus

On a prosecution for manslaughter in the first degree, based upon the death of a woman alleged to have been caused by the defendant through the administration of drugs and medicines, and through the use of an instrument with the intent to procure a miscarriage, the evidence does not sustain the charge that the defendant used medicines or drugs designed to procure or which did procure a miscarriage.

The testimony by two physicians, one of whom saw the decedent just before she died, and both of whom assisted in performing an autopsy, to the effect that septic peritonitis, which caused the death, was caused by an attempted
operation to terminate pregnancy, was improperly admitted, since neither physician gave any facts on which the opinion could have been based, nor did they give their opinion in answer to a hypothetical question based on facts assumed to be true, and, furthermore, both physicians testified that the septic condition might have been the result of any one of several causes.

It was error to admit testimony on the part of the mother of the ["3] decedent to the effect that the decedent told her, shortly before her death, that she had been operated on in defendant's house and that she had been in defendant's house all the time she was away, for that evidence was merely hearsay, the statement not having been made in the presence of the defendant.

Furthermore, said evidence was not admissible as a dying declaration, since the witness testified that the decedent did not believe that she was dying at the time the statement was made and did not anticipate death within a short time.

The Appellate Division will not overlook the error, under the authority of section 542 of the Code of Criminal Procedure, on the theory that defendant's rights have not been prejudiced, for the evidence in this case of defendant's guilt is based largely on the fact that he may have had the opportunity to commit the crime, and the testimony in question was very important in that connection and, therefore, the error was prejudicial.

The defendant was not represented on the trial by an attorney, and, therefore, the contention by the district attorney that no motion was made to strike out said evidence cannot be sustained, for it is the duty of the ["4] appellate court, especially under the circumstances of this case, to consider the entire case whether or not proper objections or motions were made by the defendant.

Counsel: Sebring & King [James O. Sebring of counsel], for the appellant.

Austin W. Erwin, District Attorney, for the respondent.

Judges: Clark, J. Hubbs, P. J., Davis, Sears and Crouch, JJ., concur.

Opinion by: CLARK

Opinion

["205] Defendant has been convicted in Livingston county of the crime of manslaughter in the first degree. He was charged with causing the death of one Clara Hagan, which resulted from a criminal operation, alleged to have been performed on the person of said woman by defendant for the purpose of procuring an abortion. (See Penal Law, §§ 80, 1050.)

The indictment charged that to accomplish this result defendant supplied and administered to the young woman drugs and medicines, and that he also used an instrument on said Clara Hagan with intent to procure a miscarriage, and that she died from the effects of such treatment.

There is no evidence that defendant ever prescribed or administered ["206] medicines or drugs designed to procure or which did procure a miscarriage. The only ["5] medicine that defendant is shown to have prescribed or administered was diluted tincture of digitalis, which is a heart stimulant and which was prescribed for her as such.

If this judgment stands it must be under the charge that defendant used some instrument on this young woman to procure a miscarriage, and that from the effects of that operation she lost her life.

The defendant is not a lawyer, but nevertheless tried his own case. Experienced counsel had been retained to conduct his defense, but when the case was moved for trial his counsel was not present and the trial proceeded.

Jennifer Morrissey

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Under the circumstances it is our duty to inquire carefully into the proceedings at the trial to see if this man, charged with a serious crime, and attempting to conduct his own case without the aid of counsel, was accorded that fair and impartial trial to which he was entitled under our system of administering the criminal law.

It was the theory of the People that Clara Hagan, a young woman some twenty-two years of age, died as the result of a criminal operation performed upon her by defendant at his residence in the village of Mount Morris sometime between the 12th and 19th days of January, 1926.

[**6] The evidence shows that the defendant was an old acquaintance of Clara's family and that some weeks prior to her death she and the young man charged with being the author of her condition, and her mother, called on defendant at his residence and asked his advice in the circumstances, and that defendant advised the young people to get married, which the young man was willing to do, but which proposition was not favorably received by the young woman. Defendant then advised that Clara go to some institution where she could be cared for. That suggestion was agreeable to the parties and the young man agreed to pay the expenses and did subsequently leave money with defendant for that purpose.

Defendant contends that on the morning of the 12th of January, 1926, Clara came to his residence and he turned over to her the money that had been left with him, as above stated, to defray her expenses; that after receiving this money she left defendant's house and was accompanied to the train by a Mr. Wheelock, who testified that he went with the young woman to the train and saw her board a west-bound train going to Buffalo on the morning of January twelfth.

Defendant further contends that [**7] he did not see Clara again until the evening of January 18, 1926, when she returned to his residence; [*207] that he attempted to communicate with her family that evening by telephone but was unable to do so, but that early the next morning, January nineteenth, he succeeded in that effort and very shortly the mother of the girl came to his residence and that Clara was able to and did go home with her mother that morning. She died the following afternoon, defendant not having seen her after she left his residence to go home with her mother on the morning of January nineteenth.

To sustain the charge that this young woman died from the effects of a criminal operation the People produced the testimony of two physicians, Dr. Roy A. Page and Dr. Harold A. Patterson. Neither one of these physicians had treated her. Dr. Page testified that he did not see the young woman until she was in a dying condition and just before her death, and Dr. Patterson never saw her until after her death. Dr. Page testified that he called to see her on the afternoon of January twentieth; that she was unconscious and dying and that he could get nothing from her as to how she felt, but a physical examination [*8] showed her condition was due to septic peritonitis. After her death he assisted in performing an autopsy and testified that from his examination and the history of the case it was his opinion that her death was caused by a criminal operation for the relief of pregnancy.

Dr. Patterson testified that from his investigation and examination it was his opinion that this septic condition was caused by an attempted operation to terminate pregnancy.

Dr. Page did not state what examination he had made or what facts were disclosed thereby. He did not state what history of the case he had received or from whom. Neither physician gave any facts from which they were enabled to form an opinion as to the cause of death. Both physicians testified that the septic condition they found could be produced by a great number of conditions aside from an operation to relieve pregnancy. So far as any facts are disclosed by the testimony of the physicians the septic condition they found might have resulted from any of the many causes they testified might produce it.

The opinions of these experts as to the cause of the death of this young woman were improperly received, for they were not based on any [*9] facts testified to by either of them that were within their knowledge, or assumed to be true in the form of a hypothetical question. (Marx v. Ontario Beach Hotel & Amusement Co., 211 N. Y. 33; Broderick v. Brooklyn, Queens County & S. R. R. Co., 186 App. Div. 546.)

Jennifer Morrissey

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In an attempt to connect the defendant with the performance of the operation to which the experts testified, the district attorney [*208] called the mother of the young woman and she was permitted to testify, over defendants objections and exceptions, that on the morning of January twentieth after the daughter had returned to her home she told her mother where she had been, and what had happened, and that she had been operated on and that she was "right in that [defendants] house from the time she went in until the time she came out."

Defendant was not present when it is claimed the girl made these statements to her mother. This was hearsay evidence pure and simple, and was improperly received. As the learned and experienced justice who granted a certificate of reasonable doubt in this case stated in his opinion: "I think the evidence as to the conversation, the defendant not being present, [*410] was erroneously received and that it was highly prejudicial to the defendant."

This evidence was received on the theory that it was a dying declaration. The district attorney, by repeated questions, sought to have the witness testify that these statements were made by her daughter in anticipation of death, but the mother could not so testify, but stated among other things in response to the district attorney's questions: "No, she didn't think but what she was coming all right," and then after the court had asked the district attorney to lay the foundation for the admission of the statements, he made a further effort and asked the witness: "Did she say anything else about expecting to die?" and the witness replied: "She didn't seem to worry so much about dying." The district attorney still persisted and asked the witness these questions: "Did she express any hope that she was going to recover?" "Was she gradually growing weaker and suffering more pain?" "Did she express to you in words or by actions that she understood that she was going to die?" He received no satisfactory answers and finally the court took hold of the situation and asked the witness: "What did she say about dying [*11] or living?" and the witness replied: "I don't think the girl really thought she was going to die at the last. I don't think so."

It is plain from this examination that no proper foundation was laid for the admission of the statements alleged to have been made by Clara Hagan to her mother in the absence of defendant on the theory that they were dying declarations.

HN1 To entitle dying declarations to be received in evidence they must be made by a person who believes he or she is about to die and has no hope of recovery.

"The evidence should be clear that the declarations were made under a sense of impending death without any hope of recovery." (People v. Sarzano, 212 N. Y. 231; People v. Conklin, 175 id. 333.)

[*209] "There must be proof that the declarant believed it, that recovery was impossible and no hope of recovery." (Peak v. State, 50 N. J. L. 179.) To the same effect: People v. Chase (79 Hun, 296; afd., 143 N. Y. 669); People v. Mikulec (207 App. Div. 505, 507).

The foundation laid for the admission of Clara's statements to her mother as a dying declaration did not measure up to these conditions. The deceased according to [*12] the testimony of her mother not only did not believe that she was going to die but as her mother testified the girl "didn't think but what she was coming all right. *** She didn't seem to worry so much about dying," and finally the mother testified: "I don't think the girl really thought she was going to die at the last. I don't think so."

Notwithstanding all this the damaging statements were permitted to stand, and in his summary to the jury the district attorney took full advantage of the mother's testimony when he said: "The testimony of the girls mother is such, and is uncontradicted and the record will show it uncontradicted by the defendant, and it must be taken here, gentlemen, as the truth, that that girl was deprived of her life by reason of this criminal operation for the termination of pregnancy, and that that criminal operation was performed, by the evidence here, beyond a reasonable doubt, at the residence of Charles Flaherty, the defendant, in the village of Mount Morris ***"

It is urged by the district attorney that even though the evidence of the mother as to the alleged dying statements of her daughter was erroneously received in evidence, it would not affect [*13] the result, and should be
overlooked under the authority of section 542 of the Code of Criminal Procedure, on the theory that defendant's rights had not been prejudiced.

That might be true in a case where such dying declarations added nothing to the facts presented (People v. Sprague, 217 N.Y. 373), but in a case like this HN2 where the evidence of defendant's guilt is based largely on the fact that he may have had the opportunity to commit the crime, prejudicial dying declarations tending to establish defendant's connection with the crime charged against him without laying a proper foundation for their admission in evidence, was a substantial error which cannot be overlooked.

It is urged by the district attorney that no motion was made to strike out this evidence, and that defendant should not now be heard to urge this error to defeat "a just verdict."

HN3 It is the duty of the appellate court to search the record and as far as may be see that justice is done. HN4 This defendant, attempting to try his own case without the aid of experienced counsel, was ["210] entitled to every reasonable consideration to the end that he receive a fair and impartial trial. If through inexperience ["14] or ignorance, or for any other cause he failed to note exceptions, or make motions to strike out improper evidence, it should not preclude him from the right to a fair hearing, and it is the duty of this court to order a new trial, if in its opinion justice requires it, whether or not exceptions were taken by defendant to erroneous rulings in the court below, or motions made to strike from the record evidence that had been improperly received. (Code Crim. Proc. § 527; People v. Minkowitz, 220 N.Y. 399; People v. Console, 194 App. Div. 824; People v. Oxfeld, 121 Misc. 524.)

Many other alleged errors are pointed out by the learned counsel for the defendant which it is urged require a reversal of this judgment. It is not necessary to discuss them, however, in view of the fact that we have concluded that because of the errors heretofore pointed out there must be a new trial.

The defendant may be guilty of the crime charged against him. If so and he is to be convicted it should be on sufficient and legal evidence and on a record reasonably free from substantial errors prejudicial to his interests.

The judgment of conviction should be reversed on the law ["15] and the facts, and a new trial ordered.

Jennifer Morrissey
People & Events: Margaret Sanger (1879-1966)

Margaret Sanger devoted her life to legalizing birth control and making it universally available for women. Born in 1879, Sanger came of age during the heyday of the Comstock Act, a federal statute that criminalized contraceptives. Margaret Sanger believed that the only way to change the law was to break it. Starting in the 1910s, Sanger actively challenged federal and state Comstock laws to bring birth control information and contraceptive devices to women. Her fervent ambition was to find the perfect contraceptive to relieve women from the horrible strain of repeated, unwanted pregnancies.

Tragedy Leads to Commitment

Sanger’s commitment to birth control sprung from personal tragedy. One of eleven children born to a working class Irish Catholic family in Corning, New York, at age nineteen Margaret watched her mother die of tuberculosis. Just 50 years old, her mother had wasted away from the strain of eleven childbirths and seven miscarriages. Facing her father over her mother’s coffin, Margaret lashed out, “You caused this. Mother is dead from having too many children.”

Nurses Botched Abortions

Determined to escape her mother’s fate, Sanger fled Corning to attend nursing school in the Catskills. Eventually, she found work in New York City as a visiting nurse on the Lower East Side. It was there that Sanger saw her personal tragedy writ large in the lives of poor, immigrant women. Lacking effective contraceptives, many women, when faced with another unwanted pregnancy, resorted to five dollar back-alley abortions. It was after these botched abortions that Sanger was usually called in to care for the women. After experiencing many women’s trauma and suffering, Sanger began to shift her attention from nursing to the need for better contraceptives.

Anger Turns to Militancy

Although married and the mother of three young children, Sanger devoted more and more of her time to her mission. Sanger’s anger turned into militancy, and her family took a backseat to her crusade. In 1914 she coined the term “birth control” and soon began to provide women with information and contraceptives. Indicted in 1915 for sending diaphragms through the mail and arrested in 1916 for opening the first birth control clinic in the country, Sanger would not be deterred. In 1921 she founded the American Birth Control League, the precursor to the Planned Parenthood Federation, and spent her next three decades campaigning to bring safe and effective birth control into the American mainstream.

Still More to Do

But by the 1950s, although she had won many legal victories, Sanger was far from content. After 40 years of fighting to help women control their fertility, Sanger was extremely frustrated with the limited birth control options available to women. Since the 1842 invention of the diaphragm in Europe and the introduction of the first full-length rubber condom in the U.S. in 1869, there had been no new advances in contraceptive methods. Sanger had championed the diaphragm, but after promoting it for decades, she knew it was still the least popular birth control method in America. The diaphragm was highly effective, but it was expensive, awkward -- and most women were too embarrassed to use it.

Worried about Population Growth

But Sanger, now in her seventies and in poor health, was not ready to give up. She had been dreaming of a “magic pill” for contraception since 1912. She was no longer just concerned about women suffering from unwanted pregnancies. Now, a firm believer in the theory of population control, she was also worried about the potential toll of unchecked population growth on the world’s limited natural resources.

A “Magic Pill”

Tired of waiting for science or industry to turn its attention to the problem, Margaret Sanger set out on a mission. She sought someone to realize her vision of a contraceptive pill as easy to take as an aspirin. She wanted a pill that could
provide women with cheap, safe, effective and female-controlled contraception. Her search ended in 1951 when she met Gregory Pincus, a medical expert in human reproduction who was willing to take on the project. Soon after, she found a sponsor for the research: International Harvester heiress Katharine McCormick. Their collaboration would lead to the FDA approval of Enovid, the first oral contraceptive, in 1960. With the advent of the Pill, Sanger accomplished her life-long goal of bringing safe and effective contraception to the masses.

A Dream Achieved
Not only did Sanger live to see the realization of her "magic pill," but four years later, at the age of 81, Sanger witnessed the undoing of the Comstock laws. In the 1965 Supreme Court case Griswold v. Connecticut, the court ruled that the private use of contraceptives was a constitutional right. When Sanger passed away a year later, after more than half a century of fighting for the right of women to control their own fertility, she died knowing she had won the battle.
Positive
As of: November 13, 2015 12:45 PM EST

In re Neshamkin

Supreme Court of New York, Appellate Division Third Department

November 2, 1938

No Number in Original

Reporter

In the Matter of the Application of Dr. ALEXANDER NESHAMKIN, Petitioner, Appellant, for a Review under Article 78 of the Civil Practice Act, of the Determination of THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, Respondents, Suspending Petitioner's License to Practice Medicine.

Core Terms

recommendation, violation of section, grievance committee, criminal abortion, subcommittee, unanimously, medicine, procure, costs

Case Summary

Procedural Posture

Petitioner physician sought review of a determination by respondent Board of Regents of the University of the State of New York, which suspended the physician's license after he was charged with having procured and performed criminal abortions in violation of N.Y. Penal Law § 1142.

Overview

The physician was charged with having procured and performed criminal abortions on three occasions. The Board found that the physician had offered one woman a pill that he told her would relieve her of her pregnancy and that he had offered to procure abortions for two other women. The Board suspended the physician's license. He appealed, but the court affirmed. The court held that the Board's findings were warranted by the evidence.

Outcome

The court confirmed the Board's determination.

Opinion

[***1] [**897] [**483] Review in the nature of certiorari of a determination by the Commissioner of Education of the State made June 1, 1938, and transferred to this court by an order of the Special [**898] Term made June 30, 1938. The petitioner was charged with undertaking and engaging to procure and to perform criminal abortions in violation of section 1142 of the Penal Law, on December 18, 1936, and January 5 and 7, 1937, and that he performed overt acts to that end. The charges were tried in the first instance by a subcommittee of the committee on grievances, the latter consisting of ten practitioners of medicine appointed by the Board of Regents pursuant to section 1265 of the Education Law. The subcommittee [**484] took testimony and made findings of fact and a recommendation to the grievance committee. These findings and this recommendation were unanimously adopted by the grievance committee and by that committee certified to the Department of Education and the Board

Jennifer Morrissey
of Regents. The committee found that on December 18, 1936, the petitioner had offered to sell and give to a woman a pill for the purpose of relieving her of pregnancy in violation of section 1142 [*2] of the Penal Law, and on January 5, 1937, that the petitioner engaged to procure criminal abortions on two other women. These findings were based on the testimony of at least two witnesses in each instance who testified to physical examinations and diagnoses made by the petitioner. The Board of Regents adopted said findings and recommendation and made its determination that the license of said petitioner to practice medicine in the State of New York be suspended for the "period of one year from May 20, 1938, to May 20, 1939, and until the further order of the Commissioner of Education, with leave to respondent [petitioner] to apply to the Department of Education for reinstatement," upon the expiration of said period, and upon proof that during such period he shall have actually abstained from such practice in any form, as principal, agent, assistant or employee. The findings made were warranted by the evidence, and the determination of the Commissioner of Education is confirmed, with costs. Determination unanimously confirmed, with fifty dollars costs and disbursements. Present - Hill, P.J., Rhodes, McNamee, Crapser and Heffeman, JJ.
Depending on your point of view, Dr. Ruth Barnett was one of Portland's most famous -- or infamous -- women.

For years, long before 1973's Roe v. Wade made the practice legal, Barnett reigned as the city's most sought-after abortion provider. What's more, she failed to project the image associated with her vocation -- slatternly and operating down seedy alleys.

Barnett had class.
In her heyday, she operated in the open, without fear. She catered to rich and poor alike, egalitarian except for payment. The rich paid a lot. The poor sometimes paid nothing.

In her 1969 autobiography, "They Weep on My Doorstep," Barnett said she had performed at least 40,000 abortions during her career. She collected cash in advance for her services, with a career total of as much as $17 million, according to various estimates. (Even so, there's no evidence she paid an IRS demand in 1952 for $1.2 million in back taxes; she died with a net worth of about $150,000.)

Her clinic occupied the eighth floor of downtown's upscale Broadway Building, now the site of Nordstrom. And it was plush.

"The reception area and treatment rooms were decorated in a thoroughly modern style," Rickie Solinger wrote in a 1994 biography, "The Abortionist, A Woman Against the Law."

"Dorothy Taylor, Ruth's nurse in the clinic for many years, described the rooms where the operations were done as spotlessly antiseptic," Solinger wrote. In her private office, "Ruth indulged her love of luxury and elegance. ... Comfortable lounges, plants, antiques, a massive painting of Shangri-la, other expensive oils by nineteenth century naturalists, oriental rugs, and elaborate filigreed floor lamps fitted with seductive red lights."

Barnett's lifestyle, too, was opulent. She owned palatial Portland residences, two ranches in eastern Oregon, racehorses, two houses in Seaside and several successful nightclubs. She reveled in late-night parties and played a mean hand of poker.

She dressed to the nines, evidence of her flamboyant social life. But the city's upper crust, despite its patronage, shunned her. She turned to "club owners, musicians, entertainers, other nocturnal people ... perhaps because such people were not so hide-bound and prudish," she wrote in her book.

Despite an 1864 state law outlawing abortions, as of the late 19th century, a number of medical practitioners offered them without legal repercussions. At age 16 in 1908, Barnett underwent an abortion after a boyfriend abandoned her.

"I was relieved of an exaggerated burden of apprehension and terror that inevitably comes to a young, unmarried girl," she wrote in her autobiography.

After a failed five-year marriage and a stint as a dental assistant, she went to work for one of the city's premier female physicians, Dr. Alys Griff, who, among services, performed abortions. Barnett picked up Griff's techniques.

In the early '30s, Barnett went to work for Dr. George Watts in the Broadway Building, earned a license as a naturopathic physician and eventually bought his practice. She later bought out two other physicians in the building, Drs. Maude Van Alstyne and Ed Stewart. She kept the latter's name for her clinic.
The next two decades brought her huge success. Through it all, head held high, she defended her services. "In spite of my patients' tears and anguish, I toiled in a happy climate, because here, in my surgery, came the end of tears and anguish," she wrote.

"She felt she was doing something that needed to be done, and apparently that (the illegality) didn't bother her," says retired journalist Rolla Crick, now 91, whose 1951 expose in the Oregon Journal prompted a crackdown on Barnett and fellow providers.

"Of all the abortionists in town at that time, she was the best," Crick says, saying he found 18 altogether.

For Barnett, the crackdown heralded 15 years of arrests, court appearances, two terms in the Multnomah County Jail and a stretch in the Oregon State Penitentiary women's unit.

In the 1960s, she enlisted Journal columnist Doug Baker to help with her autobiography. The book is Barnett's unflagging self-defense.

A 1997 article by Kerry Donaghue and Cathy Ramey in the anti-abortion journal Life Advocate turned Barnett's words against her, branding her a murderer and social pariah.

In 1968 as a condition of her release from prison, Barnett pledged to never perform another abortion. She died of cancer the next year at age 79.

-- John Terry, johnferry@comcast.net

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Biographical Note

Margaret Louise Higgins was born in Corning, New York, on September 15, 1879, the sixth of eleven children and the third of four daughters born to Anne Purcell Higgins and Michael Hennessey Higgins, a stone mason. Her two elder sisters worked to supplement the family income, and financed her education at Claverack College, a private coeducational preparatory school in the Catskills. After leaving Claverack, Higgins took a job teaching first grade to immigrant children, but decided after a short time that the work did not suit her temperament. She returned to Corning where her mother, then only forty-nine years old, was dying of tuberculosis. Margaret Higgins blamed her mother's untimely death, as well as her sisters' need to sacrifice their own ambitions to support the family, on her parents' high fertility. Though she loved and admired her father, she resented his demand that she take her mother's place managing the household. Shortly after her Anne Higgins's death, Margaret Higgins left Corning for White Plains, New York, where she entered nursing school.

In 1902, after completing two years of practical nursing training and gaining acceptance to a three-year degree program, Higgins met and married William Sanger, an architect and aspiring artist. By 1910 Margaret Sanger had survived her own bout with tuberculosis and given birth to three children (Stuart, 1903; Grant, 1908; and Peggy, 1910), but was chafing inside her role as a traditional housewife and mother in Hastings-on-Hudson, New York. Later that year the family moved to Manhattan where, through her work as a home nurse on the Lower East Side and her political involvements with the International Workers of the World and anarchist Emma Goldman, Margaret Sanger was drawn into the burgeoning struggle for women's right to control their sexuality and fertility. By 1912 Sanger was widely recognized as a writer and speaker about sex reform. Later that year she became a regular contributor to the socialist newspaper The Call, where she published a series of articles on sexual hygiene. One of these, an article about syphilis published in February 1913, was targeted by the U.S. Post Office under the Comstock Act of 1873, which banned the distribution of sexually-related material through the U.S. mail. This repression of her writings, combined with her exposure to the damages done to women by repeated childbirths and self-induced abortions, led to Sanger's decision to devote herself entirely to the birth control movement. By 1914 she had separated from her husband, written a pamphlet entitled Family Limitation which coined the term "birth control," traveled to Europe to research new contraceptive methods, and set out to establish a system of advice centers where women throughout the U.S. could obtain reliable birth control information.

Sanger's use of radical tactics to educate women about birth control, especially her publication of the radical journal The Woman Rebel, brought her once again to the attention of the U.S. Postal Service. When the U.S. government brought charges against her, Sanger fled to Europe where she befriended the sex reformer Havelock Ellis, who encouraged her to avoid radical political rhetoric and reframe her writings in the language of the social sciences. The pneumonia death of five-year-old Peggy Sanger, which occurred shortly after her mother's return to the New York in October 1915, devastated Margaret Sanger. But Peggy's death, in tandem with William Sanger's arrest for distributing a copy of Family Limitation, aroused considerable public sympathy for Sanger, which, in turn, led the U.S. government to drop its earlier charges against her. More convinced than ever of the need to legalize birth control, Sanger and her
her work, Margaret Sanger became a national figure. On appeal, Sanger won a clarification of the New York law forbidding the dissemination of contraceptive information. The Judge, Frederick Crane, rejected Sanger's argument that, because it forced women to risk death in pregnancy, the law was unconstitutional. Nevertheless, Crane did establish doctors' right to provide women with contraceptive advice for "the cure and prevention of disease."

Interpreting Crane's decision broadly as a mandate for birth control clinics staffed by doctors, Sanger completed the strategic and tactical transformation she had begun at Havelock Ellis's suggestion. Sanger minimized her radical past and began to stress eugenic arguments for birth control over feminist ones. In doing so, she gained increasing support from both medical professionals and philanthropists; in 1921 such backing allowed her to organize the American Birth Control League, which would become the Planned Parenthood Federation of America in 1942. In 1923, aided by her second husband, millionaire J. Noah Slee, Sanger opened the first doctor-staffed contraceptive clinic in the U.S., the Birth Control Clinical Research Bureau in New York City, under the direction of Dr. Hannah Stone. In addition to dispensing birth control information and devices, the Bureau trained hundreds of physicians in contraceptive techniques and served as a model for the national network of 300 clinics Sanger and her supporters would establish over the next fifteen years. In 1925 Sanger convinced her old friend Herbert Simonds to found the Holland Rantos Company, which became the first American company to produce the diaphragm. Between 1929 and 1936 Sanger and her lobbying group, the Committee on Federation legislation for Birth Control, waged a series of court battles which culminated in United States v. One Package, which overturned the old statutes by permitting the mailing of contraceptive devices intended for physicians. Sanger's victory in this case led the American Medical Association to endorse contraception as a legitimate medical service and a vital component of medical education in 1937.

After the U.S. v. One Package Victory Sanger retired to Tucson, Arizona determined to play less central role in the birth control movement, yet her influence continued. In 1952 Sanger helped found the International Planned Parenthood Federation and served as the organization's first president. Also in the 1950s she won philanthropist Katharine Dexter McCormick's financial support for Gregory Pincus's work on the development of the birth control pill. Margaret Sanger died of congestive heart failure in Tucson on September 6, 1956.
03.05.15

#STANDWITHWOMEN: Murray, Boxer, Mikulski Announce New Bill to Advance Women’s Health Care

*Through increased information and access, the 21st Century Women’s Health Act empowers women across the country to take charge of their health care and their futures.*

*The 21st Century Women’s Health Act challenges elected leaders to stand on the right side of history when it comes to women’s health, equality, and opportunity.*

(Washington, D.C.) – Today, Senate Health, Education, Labor, and Pensions (HELP) Committee Ranking Member Patty Murray (D-WA), Senator Barbara Boxer (D-CA), and Senator Barbara Mikulski (D-MD) announced the 21st Century Women’s Health Act, a new bill that would protect and build on progress made on women’s health care. The 21st Century Women’s Health Act invests in women’s health clinics and the primary care workforce, and promotes critical preventive services like contraception coverage. The bill also works to provide compassionate assistance for survivors of rape by ensuring all hospitals provide emergency contraception, spreading awareness, and working with community-based groups to help prevent sexual violence.

In a call with reporters and advocates, Murray highlighted that at a critical time in the fight to protect a woman’s right to make her own choices about her own body, the 21st Century Women’s Health Act would challenge elected officials to be on the right side of history when it comes to women’s health, equality, and opportunity. Murray was joined on the call today by Dana Singiser, Vice President for Public Policy and Government Affairs, Planned Parenthood Federation of America and Dr. Laurel Kuehl, Planned Parenthood of the Great Northwest’s Washington Medical Director.

“I am so proud today to be introducing the 21st Century Women’s Health Act. As we continue to fight back against those who miss the Mad Men era, the 21st Century Women’s Health Act lays out important ways we can and should move forward on women’s health, from maternity care, to preventive health services, to continuing to expand access to birth control, to ensuring survivors of rape have access to emergency contraception in every hospital. Period,” Senator Murray said. “The 21st Century Women’s Health Act would mean that more women across the country have the information and access they need to be in the driver’s seat about their own health care and their own futures.”

“At a time when the GOP congress is trying to drag women back to the last century, we are offering a bold agenda to strengthen women’s health in this century,” said Senator Boxer.
“Fighting for women’s health has been one of my life-long priorities,” Senator Mikulski said. “When I first came to the Senate, women’s health wasn’t a national priority. We’ve changed that paradigm but there’s more to be done. I’ll continue to fight for women to get the preventive care and treatment they need to live healthy lives. We must raise awareness, raise consciousness, and raise hell so that women are not left behind when it comes to their health.”

“We applaud Senators Murray, Mikulski, and Boxer for the introduction of the 21st Century Women’s Health Act in Congress today. This aptly-named bill not only brings women into the 21st century — it launches us forward,” said Cecile Richards, President, Planned Parenthood Federation of America. “At Planned Parenthood, we’ve seen the progress that comes when women can make their own health care decisions, without politicians standing in the way. Together, through this bill and other efforts, we will keep working to ensure that women across the country have the information and access they need to make decisions about their health care and their futures.”

“Women deserve to be treated with dignity and respect and this bill helps give them the tools they need to lead happy, healthy lives,” said Dr. Laurel Kuehl, Washington Medical Director, Planned Parenthood of the Great Northwest. “I’m lucky to practice in a state where elected officials understand that it’s best when decisions are left between me and my patients. I know that for my colleagues across the country — things aren’t that easy. That’s why it is so important that we have champions in Congress like Senator Murray working to expand access to health care instead of standing in the way. From contraception to childbearing, a woman’s reproductive well-being is a major part of her health and her economic well-being.”

“The 21st Century Women’s Health Act is the right approach at the right time to improve and protect women’s health,” said Debra L. Ness, President, National Partnership for Women & Families. “This legislation would promote prevention and make it possible for more women to control their reproductive health and make their own health care decisions. By doing so, it would enhance the economic security of women and families. We commend Senators Patty Murray, Barbara Boxer and Barbara Mikulski for championing this vitally important bill.”

“It is time for Congress to strengthen – not obstruct – women’s access to health care, and the 21st Century Women’s Health Act does just that. This bill takes a number of important steps to advance women’s health and well-being. Access to health care, including reproductive health care, is critical to the health and economic security of women and their families,” said Gretchen Borchelt, Acting Vice President for Health and Reproductive Rights, National Women’s Law Center.

Key excerpts from Senator Murray’s bill announcement today:

“I really believe that for women across the country, we are at a critical moment. We’ve made incredible progress when it comes to advancing women’s health and expanding access to reproductive care. As a result, teen pregnancies are now at a 40-year low. At the same time, we’ve seen women become an incredible economic force in our country. The vast majority of women are now breadwinners or co-breadwinners for their families. And more women are taking on positions of leadership, from boardrooms to the Senate floor. That’s not only good for women—it’s good for our country.”

“…we’ve come a long way—but there’s no question there is a lot more we need to do. Especially because unfortunately, some elected officials are laser-focused on taking us backwards. They want to make it harder for women to access critical health care services…They are dead set on interfering...
with personal decisions that should be made between a woman, her doctor, and her partner. And this isn’t just in Congress—there are efforts across the country that would have these very same consequences.”

“I am so proud today to be introducing the 21st Century Women’s Health Act. As we continue to fight back against those who miss the Mad Men era, the 21st Century Women’s Health Act lays out important ways we can and should move forward on women’s health, from maternity care, to preventive health services, to continuing to expand access to birth control, to ensuring survivors of rape have access to emergency contraception in every hospital. Period. The 21st Century Women’s Health Act would mean that more women across the country have the information and access they need to be in the driver’s seat about their own health care and their own futures.”

“...Today I’m calling on elected leaders to stand with women—and on the right side of history—and support the 21st Century Women’s Health Act. Now, I know there are those who will say “no” right off the bat. And my message to them is: I’ve heard that before. It hasn’t stopped me. And it won’t stop women across the country either.”

FACT SHEET: The 21st Century Women’s Health Act

Our country is stronger today because more women are empowered to make their own health care choices. We need to protect that progress and keep building on it. That’s why, at a critical moment in the fight to protect a woman’s right to make her own choices about her own body, Senator Murray is introducing the 21st Century Women’s Health Act and challenging elected leaders to put themselves on the right side of history when it comes to women’s health, equality, and opportunity. The 21st Century Women’s Health Act would help break down outdated barriers to a woman’s reproductive freedom, ensure deeply personal health care choices are put back where they belong—in the hands of American women—and in doing so, help expand opportunity for women across the country.

The 21st Century Women’s Health Act would:

Expand comprehensive preventive health services, including full access to contraceptive coverage for all women served by Medicaid. All private health insurance plans are now required to cover all U.S. Food and Drug Administration (FDA)-approved forms of contraception and all services like breast pumps and breast feeding counseling. To ensure coverage equity across programs, this legislation would extend this requirement to women, men, and families who are served by Medicaid.

Establish a women’s health nurse practitioner training program to expand access to primary care. Nearly two-thirds of Americans see a nurse practitioner (NP) for their primary care health needs. NPs are critical to ensuring access and play an increasingly important role in meeting demand for primary care. To expand access to primary care providers, the 21st Century Women’s Health Act provides training grants for NPs in Title X clinics who specialize in women’s health care. The grants are for a three-year period and can be made permanent or replicated nationally as a model that works to increase quality and lower the cost of care for women and their families.

Improve maternal safety and quality of care. The 21st Century Women’s Health Act grants states the power to start or enhance existing Maternal Mortality Review (MMR) Committees. MMRs examine pregnancy-related and pregnancy-associated deaths to identify ways to prevent future
deaths. Only about half of all states have active committees today, creating a significant knowledge gap. Incentivizing the creation and improvement of MMRs will improve data collection and help eliminate disparities in maternal health outcomes.

Create a new ombudsperson role to support women's access to health services. The Affordable Care Act made great progress in expanding women's access to health care services. But too often state policies, high costs to patients, and the ongoing need for clinician training in contraceptive methods continue to hinder women from accessing the forms of contraception that have the lowest rates of failure and highest rates of adherence. There have been numerous attempts to allow insurance companies and employers with personal objections to deny women coverage for all FDA approved contraceptive methods, and due to misinformation from insurance companies and pharmacies, many women are struggling to access critical health benefits. As a result, one in 20 women has been denied access to care by a health care provider because of a religious, moral, or personal objection. The 21st Century Women’s Health Act will create a Women’s Health Ombudsperson who can advocate for women, be their voice, and enforce their right to access the best health care services for their needs.

Provide compassionate assistance and awareness for survivors of rape. Although the American College of Obstetricians and Gynecologists recommends that doctors routinely discuss emergency contraception with women of reproductive age during their annual visit, only half of OB/GYNs offer emergency contraception to all of their patients. Unfortunately, emergency contraception remains an underused prevention method in the United States, especially for survivors of sexual assault. It is estimated that 25,000 to 32,000 women become pregnant each year as a result of rape or incest. If used correctly, emergency contraception in conjunction with prompt medical treatment could help many of these rape survivors avoid the additional trauma of facing an unintended pregnancy. However, only 13 states and the District of Columbia require hospital emergency rooms to provide emergency contraception upon request to survivors of sexual assault. Additionally, nine states have enacted restrictions on emergency contraception, including six states that allow pharmacists to refuse to dispense emergency contraception.

The 21st Century Women’s Health Act would ensure that when survivors of sexual assault present at hospitals and clinics, they are provided with free emergency contraception, period, no matter where they live or who owns the hospital. In addition, the Act provides for prevention partnerships with community-based organizations to prevent sexual violence.

Help women report instances of inappropriate charges for birth control and other critical health care needs. The 21st Century Women’s Health Act would help ensure that women are not wrongly forced to pay more for health care services now covered under the Affordable Care Act by creating a reporting database for women to inform Health and Human Services of inappropriate charges.

Examine reproductive health access across the country. Some women in the U.S. must travel 50 miles or more for access to reproductive health services like abortion. Eighty-nine percent of counties lack abortion clinics, and hundreds of laws have been passed at the state and federal level to restrict a women’s access to reproductive health services and family planning services. These developments make it harder for a woman to access her constitutionally protected rights in the 21st Century. This Act would study the harmful effects of trends across the country to restrict access on a woman’s overall health and morbidity.
Launch a public awareness campaign for women’s preventive services. The Affordable Care Act made preventive services, like mammograms, immunizations and contraception coverage, breastfeeding counseling, domestic violence screening, and others available at no cost to women and their families. To ensure women are fully informed about their rights and health care options, the Act would launch a public awareness campaign among community-based organizations, pharmacists, providers and other stakeholders.

###
Labor force participation rates
women ages 25-54 by marital status
1950-2000 Census & 2011 American Community Survey
Narrator: Wompers Wickets is an enduring large American corporation. We will look into job interviews by three generations of women, each named Justine Nogetta. Justine Nogetta seeks a secretarial job at Wompers' Portland office in 1940. Her daughter seeks a secretarial job in 1960, and her granddaughter seeks administrative assistant position in 2008. In each case, Justine has heard about an available position in the company through a male friend who works there. Each Justine speaks with HR officers at Womper. The three sets of HR officers coincidentally just happen to have the same names: Rich U. Betcha and Pluto Kratzinski.

We start in 1940, coming in towards end of Justine's job interview. She has been speaking Rich and Pluto. Justine has impressed them, and they are ready to offer a job. The subject of pay comes up.
Rich: So, you would start out in the secretarial pool, along with the other ladies.

Justine: Ladies? They’re not all women, are they? I mean, the friend who let me know about the position is male.

Pluto: It’s secretarial work, dearie. They’re all ladies to us. [Pluto and Rich chuckle]

Justine: I see. Okay, what is the pay rate?

Rich: It's 30 cents and hour. Plus one week's vacation after four years.

Justine: 30 cents an hour? My friend started at $1.00 an hour. And he got three weeks' vacation and sick leave his first year.

Rich: Well, of course sweetie. [as if explaining to a child]. He is an M-A-L-E.

Pluto: Heck, we're offering you more than the 25 cent minimum wage under the Fair Labor Standards Act.

Rich: Yeah, like you could be a housekeeper and get half that.

Pluto: Count your blessings we’re not the federal government. The National Recovery Act of 1935 says women doing government jobs get 25% less than men.

Rich: And be glad you're not married. The 1932 Federal Economic Act says that you'd be first on the layoff list if your husband were employed.

Pluto: You are unmarried, right?
Justine: I, um, I'm unmarried now.

Pluto: Whatcha think Richie? Gal's got nice legs, eh?

Rich: He he he.

Narrator: Justine took the job. She had to. She was raising her daughter Justine by herself after her husband had died in a work accident. Little Justine grows up to find herself in 1960 following in her mother's footsteps to a secretarial job at Wompers. Again, we come in when the interview discussion turns to pay.

Pluto: Wompers doesn't hire just anyone as a secretary, you know.

Rich: That's right. We're selective. We want our memos typed right. You know, purdy-looking.

Pluto: But we are talking secretarial work. So the starting pay is $1.25 an hour.

Justine: $1.25 an hour? I was hoping for a bit more.

Rich: Heck, little lady, that's more than the federal minimum wage. By a whole quarter!

Justine: But my male friend who works here started at $2.00 an hour.

Pluto: So?

Justine: There's the Oregon Equal Pay Act. It's been around since 1955. It says you can't pay women employee at a wage rate less than that you
pay to women for work of comparable character, the performance of which requires comparable skills

*Rich:* Well, you're as smart as you're good-looking, little lady.

*Pluto:* That law don't matter. Your friend, his work isn't comparable. Your job would be in our in-house secretarial pool. Your friend goes on the road with Wally Womper, III, our President.

*Rich:* In a Cadillac.

*Pluto:* And they play golf together. That just ain't comparable.

*Rich:* That's right. Don't expect any court 'round here to say otherwise. You ever heard of summary judgment?

*Narrator:* As job opportunities for single women in 1960 were few, Justine goes to work for Wompers. She rises in the company, eventually becoming a vice president in 1975. Her salary is about half what other vice presidents earn.

Years, later, during the middle of the Recession in 2008, Justine's daughter, fresh out of college, finds the Portland job market challenging enough that she decides to apply for an administrative assistant job at Wompers after a male friend, an administrative assistant with the company, tells her about an opening. Once again, we come in to the interview when the discussion turns to pay.

*Rich:* Wompers is committed to helping its employees advance, although you got to realize that advancement means sacrifice. You don't start out here sitting in high cotton.
Pluto: That's right. We love our employees, but it's tough love, you see. Our starting wages are structured with that tough love in mind.

Rich: So the starting pay is $8.00 an hour.

Justine: But that's barely above minimum wage.

Pluto: Well, we do include two weeks' paid leave and an official Wompers stuffed teddy bear.

Rich: Oh, yeah, the teddy bear. That's right nice.

Justine: But my male friend here started out at over $11.00 an hour.

Pluto: What's the problem? I mean, you'd be getting about 70 cents for every dollar your friend got. That's the norm for women in Oregon.

Justine: Just because it's the norm doesn't mean it's legal. I mean, there's the Equal Pay Act of 1963 and Title VII.

Rich: [to Pluto] Oh, my, don't we have a smart one here.

Pluto: Those federal laws - they don't apply.

Justine: What do you mean they don't apply. Of course they apply.

Rich: He means we're not violating them.

Justine: You're telling me that you're offering to pay me nearly a third less than my male friend, and you wouldn't be violating the law?

Pluto: That's right. The Equal Pay Act don't change things. Your friend's job ain't equal work to the one we're talking about.
**Justine:** What do you mean not equal? He's an administrative assistant.

**Pluto:** I mean different. You know. Richie, what's *Websters* say?

**Rich:** Different. Means "not the same."

**Pluto:** Yeah. Not the same. And you don't seriously think that a company of such long standing as Wompers Wickets intentionally would discriminate against the ladies, do you?

**Rich:** I mean, *really*!

**Pluto:** And, besides, who in his right mind sues a company like Wompers because of job interview chitter chatter?

**Rich:** I guess, Ms. Nogetta, you have choices to make.

**Pluto:** That's right. So you want the Wompers experience or not?

**Narrator:** Because it is in the midst of the Recession, Justine takes the job without further pressing the pay issue. Research shows that women in general, even highly educated women, are less likely than men to negotiate about pay. This may play a role in the fact that significant pay inequality persists in the US. As of 2013, women on average made only 78 cents for every dollar men earned.

Solutions have been proposed to fight this inequality, including the Paycheck Fairness Act, eliminating pay secrecy, and raising the minimum wage. These solutions are discussed in the written materials.

So how are you feeling now Womanhood?
Outline of Select Legal and Topical Issues

For

“Women’s Issues: Everything Old is New Again”

Subtopic: Pay Equity

I. Pay Equity – Up To 1950

- Backdrop: From 1912 to 1923, minimum wage laws covering women and children were enacted in 15 states, the District of Columbia, and Puerto Rico. Then, in 1923 the U.S. Supreme Court in *Adkins v. Children’s Hospital*, declared that the District of Columbia’s minimum wage law violated the right of contract under the due process clause of the Fifth Amendment.

- 1932 – Federal Economic Act passed in response to job shortages during the Great Depression. Includes provision prohibiting wives of federal employees from holding government positions and declares that women with employed husbands be first on the lists for firing/layoff.

- 1935 – National Recovery Act passes, again in response to job shortages in the Great Depression. The Act provided that women holding jobs with the government receive 25% less pay than men in the same jobs.

- 1938 – Fair Labor Standards Act. Drafted by Senator Hugo Black in 1932 (he was later appointed to the Supreme Court in 1937). The Act established an eight-hour work day and a forty-hour work week, and allowed workers to earn overtime wages. Set a minimum wage of 25 cents per hour.
  
  o Impact on women workers was limited due to the exclusion of several key job sectors (initially excluded agriculture, domestic work, retail, laundry, hotel and restaurant work, government employment and food processing).

  o It covered 14% of employed women vs 39% of employed men.

- 1942 – War Labor Board rules enacted providing for voluntary “adjustments which equalize wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations.”
  
  o Most employers ignored the voluntary request and at war’s end most women were pushed out of their jobs to make room for returning veterans.

I. Pay Equity – 1950-1980s

FEDERAL LAW:
Equal Pay Act of 1963 - 29 USC §206(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against an employee in violation of paragraph (1) of this subsection.

(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter.

(4) As used in this subsection, the term “labor organization” means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Act was an amendment to the Fair Labor Standards Act. Congress intended to remedy the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S. Rep. No. 176, 88th Cong., 1st Sess., 1.

EPA limitations:

- Applies only to employees covered by the FLSA. Excludes certain retail sales, agriculture, and other work.
- Applies only to "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."
- EPA's four affirmative defenses exempt any wage differentials attributable to seniority, merit, quantity or quality of production, or "any other factor other than sex."
Pertinent cases:

- **Corning Glass Works v. Brennan**, 417 US 188 (1974): Under the Equal Pay Act, the allocation of proof in a pay discrimination case requires the plaintiff to prove that an employer pays an employee of one sex more than an employee of the other sex for substantially equal work. The application of an exception under the EPA is an affirmative defense.

- **Stanley v. Univ. of S. Cal.**, 178 F3d 1069 (9th Cir. 1999) and **Maxwell v. City of Tucson**, 803 F2d 444 (9th Cir. 1986): Once the plaintiff establishes a *prima facie* case under the EPA, the burden shifts to the employer to demonstrate that the wage disparity is attributable to one of four statutory exceptions: (1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (3) a differential based on any other factor other than sex. These exceptions are affirmative defenses which the employer must plead and prove. The final exception for "any other factor other than sex" is a catch-all provision that covers legitimate business reasons for discriminating as to pay. If the employer establishes one of the affirmative defenses, the burden shifts back to the plaintiff to show that the employer's proffered nondiscriminatory reason is a pretext for discrimination. EPA claims are also cognizable as disparate treatment claims under Title VII, since both statutes render it unlawful to differentiate "in wages on the basis of a person's sex." Title VII also incorporates the Equal Pay Act's affirmative defenses. Hence, a defendant who proves one of the defenses cannot be held liable under either the Equal Pay Act or Title VII.

- **Title VII, 42 USC § 2000e et seq.** – Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice” to discriminate “against any individual with respect to his [sic!] compensation ... because of such individual's ... sex.” 42 USC § 2000e–2(a)(1). An individual wishing to challenge an employment practice under this provision must first file a charge with the EEOC. § 2000e–5(e)(1).

Discriminatory pay can be the subject of a Title VII sex discrimination case, i.e., where a woman is paid less than a man because of her sex.

The key distinction between the EPA and Title VII is that the former requires a showing of intent. In practical effect, if the trier of fact is in equipoise about whether the wage differential is motivated by gender discrimination, Title VII compels a verdict for the employer, while the EPA compels a verdict for the plaintiff. Sullivan, M. Zimmer, & R. White, *Employment Discrimination: Law and Practice* § 7.08[F][3], p. 532 (3d ed.2002).
The Bennett Amendment, which incorporates the four affirmative defenses of the Equal Pay Act (EPA) into Title VII, does not limit Title VII pay discrimination claims to EPA claims, i.e., that the work involved is "equal work." Title VII wage claims can be broader than EPA claims because Title VII, unlike the EPA, is "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

**Ledbetter v. Goodyear Tire & Rubber Co.,** 550 US 618 (2007), a 5/4 majority held that a claim for disparate treatment in the form of pay must be presented to the EEOC within the 180 day period prescribed by statute. Majority rejected argument that unequal payments made within 180-day period "carried forward" discriminatory actions before period that that resulted in Lily Ledbetter being paid disparately compared to males. Because the discriminatory actions occurred outside the 180-day period, her Title VII claim was time-barred (Ledbetter also had filed an Equal Pay Act case, but that claim had been dismissed on summary judgment). Congress subsequently passed the Lily Ledbetter Fair Pay Act in 2009. The Act amended Title VII. It provides that the 180-day statute of limitations for filing an equal-pay lawsuit regarding pay discrimination resets with each new paycheck affected by that discriminatory action. President Obama signed it in 2009, the first statute he signed into law.

**STATE LAW:**

- **Fajardo v. Morgan, 15 Or App 454 (1973):** Appeal from a decision of the Employment Appeals Board denying a claim for unemployment compensation. The Court of Appeals, Foley, J., held that claimant was not required to bring action against employer under Civil Rights Act prior to seeking unemployment compensation and that discrimination against female employee on the basis of sex constituted ‘good cause’ for her voluntarily leaving employment so that she was entitled to benefits.

- The above case cites to an older Colorado case: “In Indust. Com. v. McIntyre, 162 Colo. 227, 425 P.2d 279 (1967), the claimant was transferred from the mail room to the file room so that she could be replaced by a man. She considered this a demotion. In the file room she was forced to stand all day while other employees had desks and chairs. She resigned and the court held that she was entitled to unemployment benefits since she was forced to work under conditions not prevailing among her peers.”

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1 The Bennett Amendment provides:

"It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206 (d) of title 29." 42 U.S.C. 2000e-2 (h).
City of Portland v. Bureau of Labor and Industries, 298 Or 104 (1984): City petitioned for judicial review of order of Commissioner of Labor which found that city had committed unfair employment practice by virtue of wage discrimination on basis of sex and had awarded female employee back pay and damages for mental suffering. The Court of Appeals, 61 Or.App. 182, 656 P.2d 353, found no sex discrimination, but, on reconsideration, 64 Or.App. 341, 668 P.2d 433, upheld damages for emotional distress resulting from unlawful retaliation for filing complaint. On review, the Supreme Court, Lent, J., held that: (1) claim of wage discrimination on basis of sex stated cause of action under Fair Employment Practices Act, notwithstanding that city was excluded from coverage of Equal Pay Act; (2) fact that city civil service board which established wage rates was not subject to control by city council did not preclude city’s liability; (3) fact that female employee was in different classification from male employees did not preclude finding of discrimination; and (4) evidence that female employee at lower classification performed essentially same duties as male employees who received higher wage afforded rational basis for finding of unlawful disparity of pay by reason of sex.

Portland Police Ass'n v. Civil Service Bd. of Portland, 292 Or 433 (1982): City police association brought action against city civil service board and its individual members seeking a declaration that the rule relating to certification of minority and women candidates for classified civil service positions and adopted by the board was beyond the board’s authority to adopt and therefore invalid. The Circuit Court, Multnomah County, Clifford B. Olsen, J., entered judgment for the association, and board appealed. The Court of Appeals, 52 Or.App. 285, 628 P.2d 421, reversed. On review, the Supreme Court, Peterson, J., held that although the affirmative action rule conflicted with the city charter requirement that hiring be merit based, the rule was not invalid on its face.

Smith v. Bull Run School Dist. No. 45, 80 Or App 226 (1986): Female school teachers commenced action for damages under state and federal Equal Pay Acts. The Circuit Court, Clackamas County, Howard J. Blanding, J., entered judgment for school district, and teachers appealed. The Court of Appeals, Warren, J., held that judgment was supported by substantial evidence notwithstanding ambiguities in memorandum opinion indicating possibility of requiring teachers to prove discrimination based on sex.

Bureau of Labor and Industries v. City of Roseburg, 75 Or App 306 (1985): Bureau of Labor and Industries brought action against city, alleging discrimination in compensation of female transit coordinator because of her sex. The Commissioner of Bureau of Labor and Industries entered order finding that city had committed unlawful employment practice, and city brought petition for review. The Court of Appeals, Newman, J., held that: (1) allowing Bureau to amend charges was not error; (2) evidence was sufficient to sustain Commissioner’s finding that female transit coordinator’s job was substantially similar to work performed by three male employees of city; (3) Bureau proved prima facie case of employment discrimination; (4) city’s assertions that merit system and job classification system were reasons for pay disparity were insufficient to overcome inference of unlawful sex discrimination.
City of Portland v. Bureau of Labor and Industries, 64 Or App 341 (1983): City petitioned for judicial review of an order of the Commissioner of Bureau of Labor and Industries which found that city had committed unfair employment practices and awarded claimant back pay and damages for mental suffering. The Court of Appeals, 61 Or.App. 182, 656 P.2d 353, affirmed in part, reversed in part and remanded. On reconsideration, the Court of Appeals, Van Hoomissen, J., held that a $15,000 award to claimant for emotional distress was proper where it was intended to compensate claimant for damages she suffered due to unlawful retaliation against claimant, and where the award was not compensation for claimant’s discrimination claim which was reversed. Reconsidered granted; affirmed as modified.

III. Pay Equity – Present

- Some current issues

Women earned on average $0.78 to every $1 earned by men in 2013 (78%) for annual earnings. No matter what their race/ethnicity, age, occupation, or education, all women are impacted by the gender wage gap, and the gap doesn't close the higher women go. In 2014, the median weekly earnings for women in full-time management, professional, and related occupations was $981 compared to $1,346 for men.

To put the wage gap in perspective, women will need to work more than 70 additional days each year to catch up to men. Another way to think about it is that the average full-time working woman will lose more than $460,000 over a 40 year period in wages due only to the wage gap. To catch up, she will need to work 12 additional years.

At the current rate of change, it will take 45 years (until 2058) for women and men to reach parity. Some studies predict that change will take 100 years because the rate of change has slowed down over the past 10 years.

- Explanations for the wage gap?
  - Family Responsibilities

Motherhood is associated with a wage penalty. Yet men continue to earn more even after they have children. While economists have long speculated that these different experiences reflect household decisions about specialization and women with children do work fewer hours and are more likely to take parental leave, more recent research has documented patterns of discrimination against women with children.

In fact, once they have children, women do earn less and are more likely to leave the labor force. However, not all women who do so are doing it by choice. Research shows that when women have access to paid maternity leave, a year later they work more and have commensurately higher earnings. A lack of access
to leave or affordable quality childcare prevents some women who would like to work from doing so.

- **Negotiations and Promotions**

  In general, women, even highly-educated women, are less likely to negotiate their first job offer than men. But even when women do negotiate, if the norms of negotiation and salary expectations are not transparent, they are likely to receive less than men.

  Even though negotiation can lead to greater career prospects and higher wages, it can also be detrimental, particularly for women. Studies show that women are more often penalized for initiating negotiations, largely because female negotiators, while perceived as technically competent, were also viewed as socially incompetent.

- **Discrimination**

  It is difficult to isolate how much of the pay gap is due to discrimination. Discrimination and implicit bias can impact the pay gap through many channels. It can influence what women choose to study in school, the industry or occupation that they choose to work in, the likelihood of a promotion or a raise, and even the chances that they stay working in their chosen profession.

  Yet even when we ignore these forms of discrimination and hold education, experience, employment gaps due to children, occupation, industry, and job title constant, there is a pay gap. This “unexplained” pay gap leaves little beyond discrimination to explain it. Some research has found that this unexplained portion is a sizeable share of the total gap – 41 percent.

  While it is difficult to get a measure of discrimination from data sets, more experimental research is starting to show evidence of discrimination in hiring, pay, and advancement. Resume studies have shown that, among identical resumes where only the name differs, gender affects whether the candidate is hired, the starting salary offered, and the employer’s overall assessment of the candidate’s quality.

- **Policy Solutions**

  - **The Equal Paycheck Act**

    The Paycheck Fairness Act would amend the portion of the Equal Pay Act.
The bill would revise the exception to the prohibition for a wage rate differential to education, training, or experience. Defenses for an employer shall apply only if the employer demonstrates that such factor: (1) is not based upon or derived from a sex-based differential in compensation, (2) is job-related with respect to the position in question, and (3) is consistent with business necessity. Defense would be inapplicable where the employee demonstrates that: (1) an alternative employment practice exists that would serve the same business purpose without producing such differential, and (2) the employer has refused to adopt such alternative practice.

The bill would also revise the prohibition against employer retaliation for employee complaints by prohibiting retaliation for inquiring about, discussing, or disclosing the wages of the employee or another employee in response to a complaint or charge, or in furtherance of a sex discrimination investigation, proceeding, hearing, or action, or an investigation conducted by the employer.

For damages, the bill would make employers who violate sex discrimination prohibitions liable in a civil action for either compensatory or (except for the federal government) punitive damages. It would state that any action brought to enforce the prohibition against sex discrimination may be maintained as a class action in which individuals may be joined as party plaintiffs without their written consent and allow the United States Secretary of Labor (Secretary) to seek additional compensatory or punitive damages in a sex discrimination action.

The bill would also require state agencies to collect gender equity pay data and make grants available for negotiation skills training for girls and women.

- **Eliminating Pay Secrecy**

  A pay gap stemming from discrimination is particularly likely to exist under conditions of pay secrecy, where workers do not know whether they are being discriminated against. In order to improve pay transparency and ensure fair pay, workers should be allowed to discuss compensation without fear of retaliation. The Paycheck Fairness Act could make it law to protect workers who discuss their compensation without fear of retaliation from their employers.

- **Raising the Minimum Wage**

  Raising the minimum wage and the tipped minimum is particularly important for women since women are disproportionately represented in lower-wage sectors. Although women are 47 percent of the labor force, they represent about 56 percent of workers who would benefit from increasing the minimum wage and indexing it to inflation.

- **Family Friendly Work Environments**
Family-friendly workplace policies and paid maternity leave can also better enable workers to choose jobs in which they will be most productive. Work-life balance policies are associated with higher productivity, and a survey of California employers found that 90 percent reported that paid maternity leave did not harm productivity, profitability, turnover, or morale.

**Written Materials:**

1. Attached 1935 National Recovery Act
3. Attached Unemployment by Gender 1930 to 1940
12. For further study – [https://www.whitehouse.gov/sites/default/files/docs/equal_pay_issue_brief_final.pdf](https://www.whitehouse.gov/sites/default/files/docs/equal_pay_issue_brief_final.pdf)
SCRIPT FOR EARLY HISTORY OF PLANNED PARENTHOOD

NARRATOR (JENNIFER)
The year is 1916. Margaret Sanger, her sister Ethel Byrne, and Fania Mindell open the first birth control clinic in the U.S. in the Brownsville section of Brooklyn, New York. All three women are arrested and jailed for violating provisions of the Comstock Act, accused of distributing "obscene materials" at the clinic. Sanger and her co-defendants are convicted on misdemeanor charges, and they appeal their convictions through two subsequent appeals courts. While the convictions are not overturned, the judge that issued the final ruling also modifies the law to permit physician-prescribed birth control. Their campaign leads to major changes in the laws governing birth control and sex education in the United States.

Fast forward to 1923. One doctor in Oregon wants to know what the legal landscape looks like, and seeks help from his favorite attorney.

ATTORNEY (AUSTIN)
Welcome, Dr. Carson. How can I help you today?

DOCTOR (CHRIS)
Well, Ms. Batalden, I’m here for advice. As you may know, I am a family-practice physician, and I provide family-planning planning services (including abortions) to my patients. I’ve been hearing about doctors around the country having legal troubles with regard to abortions. I’ve been thinking about
moving out of Oregon, but I wonder where it is safest to practice medicine.

**ATTORNEY (AUSTIN)**

Good question Dr. Carson. Oregon is currently one of only 20 states where abortion is not *completely* illegal. However, under Section 1900 of Oregon Law, you could be convicted of manslaughter if you perform an illegal abortion.

**DOCTOR (CHRIS)**

And what makes an abortion illegal?

**ATTORNEY (AUSTIN)**

Well, it comes down to the simple fact that Oregon law criminalizes all abortions unless the abortion is necessary to save the mother’s life.

**DOCTOR (CHRIS)**

I keep reading in the local Oregon newspapers that prosecutors statewide are charging many physicians with manslaughter or “criminal operation” for performing abortions. Should I be worried about being charged criminally for providing abortions? Will prosecutors be second-guessing my judgment about what is necessary to save the life of a mother when I provide abortions?
ATTORNEY (AUSTIN)
You’re right to be concerned, but actually prosecutors in Oregon are having a very difficult time winning those cases. Judges are finding that the prosecutors lack sufficient evidence, and the anti-abortion law itself is ambiguous enough that it protects most doctors. So I’d say your risk of being convicted of criminal abortion in Oregon is actually quite low, despite the number of prosecutions. Where were you thinking about moving, if you do leave Oregon?

DOCTOR (CHRIS)
Well, I’m considering moving back to New York, where I have family. What is the landscape like there for doctors who provide family-planning services?

ATTORNEY (AUSTIN)
Actually, there have been exciting developments in New York lately. Have you heard of this new group called the American Birth Control League?

DOCTOR (CHRIS)
No, no – I haven’t. Tell me more.

ATTORNEY (AUSTIN)
The American Birth Control League just this year opened the first doctor-staffed contraceptive clinic in the United States – The Birth Control Clinical Research Bureau, in New York City.
It’s only in the last five years that the courts in New York established doctors’ rights to provide women with contraceptive advice. So you will have a fair amount of freedom to practice family-planning with respect to advice on contraception, but the New York law that criminalizes abortion is the same as that of Oregon – it is considered manslaughter and is punishable by up to twenty years in prison.

NARRATOR (JENNIFER)
Womanhood – don’t look so glum! Prepare yourself for a time warp. Flash forward with me to 1970, where certainly things will have improved.....

SCRIPT FOR PLANNED PARENTHOOD IN THE 1970S

NARRATOR (AUSTIN)
The date is November 17, 1970. An Oregon doctor is considering providing abortion services in the Willamette Valley. The doctor consults her favorite attorney.

ATTORNEY (CHRIS)
Welcome Dr. Morrissey. I see from your phone message that you’re considering providing abortion services as part of your family-planning practice.
DOCTOR (JENNIFER)
Yes, so what’s the situation with abortion services in Oregon? Some of my patients, mostly married women with unplanned pregnancies, have asked.

ATTORNEY (CHRIS)
And well you should ask. In Oregon, abortion can be legal or illegal, depending on the circumstances. In 1969 the Legislature limited abortion during the first 150 days of pregnancy. A licensed physician may perform an abortion on an Oregon resident if:

- The baby has a physical or mental handicap
- The baby was conceived by rape or other criminal intercourse
- The pregnancy poses a substantial risk to the mother’s physical or mental health.

All abortions must be performed by a physician and in a hospital. A woman has to get two physicians had to certify in writing that the circumstances justified the abortion.

The 1969 law was based on the American Law Institute 1959 model criminal code. These are the same people who write the Restatements.

DOCTOR (JENNIFER)
Most of my patients are not in those circumstances. Some are, but others are not. Seems to me it should be up to them, not the government.

ATTORNEY (CHRIS)
Well, I am pretty good at predicting the future, and I predict things will change.
DOCTOR (JENNIFER)

What do you think will happen, exactly?

ATTORNEY (CHRIS)

I’m glad you asked, so let me tell you what I think will happen. You can plan accordingly.

On January 22, 1973, the Supreme Court will hold that a woman's right to an abortion is within the right to privacy (recognized in Griswold v. Connecticut) protected by the Fourteenth Amendment. A woman will have total autonomy, for a while, over the pregnancy during the first trimester and the Court will allow different levels of state interest for the second and third trimesters. As a result, the laws of 46 states, including Oregon’s, will be affected.

DOCTOR (JENNIFER)

Does this mean you think I should open a clinic soon?

ATTORNEY (CHRIS)

Like I said, prepare yourself for the future. The Republican presidential platform in 1976 will call for ratification of the Equal Rights Amendment and for a constitutional amendment to ban abortion. The Democrats will oppose a constitutional amendment to overturn Roe v. Wade. 45 years from now, we’ll still be arguing over Roe v. Wade.

And you need to be careful. In March 1976, the first documented attack against an abortion clinic will happen at a Planned Parenthood clinic in Eugene. A guy named Joseph Stockett will set fire to the building and be sentenced to five years in prison.
DOCTOR (JENNIFER)

You’re not really answering my question! Do you think I should open a clinic?

ATTORNEY (CHRIS)

Go ahead, but be advised. Get plenty of insurance and for decades to come, watch and see if a right can be regulated out of existence.

NARRATOR (AUSTIN)

Hey Womanhood! Now’s when it gets really exciting – we’re going to jump to present day – wait until you see what’s happening in the here and now!

SCRIPT FOR CURRENT STATUS OF PLANNED PARENTHOOD

NARRATOR (JENNIFER)

The date is November 17, 2015. The legal landscape for reproductive health, abortion care in particular, is very state specific. One Oregon doctor who practices family planning medicine wants to continue to provide abortion services and is considering moving out of state. The doctor has met with his favorite attorney to find out what his practice would look like if he moved out of state.

ATTORNEY (AUSTIN)

Welcome, Dr. Carson. How can I help you today?

DOCTOR (CHRIS)

Well, Ms. Batalden, I’m here for advice. As you may know, I am a family-practice physician, and I provide family-planning services (including abortions) to my patients. I have been considering moving out of state, but
I would like to know what the legal landscape looks like elsewhere before I give a move more consideration.

ATTORNEY (AUSTIN)

I am glad you came into discuss your options before you signed a contract. I am sure you’ve heard about the various laws impacting the practice of abortions, from being forced to read a script with medically inaccurate information to providing vaginal ultrasounds to patients before procedures can be performed. Do you have any specific states in mind?

DOCTOR (CHRIS)

Wait, I am confused. Did you say some states required physicians to read a script with medically inaccurate information?

ATTORNEY (AUSTIN)

Yes. There was a case out of the 8th circuit, originating in South Dakota that requires physicians to read a script written by legislators that states, “one of the known medical risks of the procedure and statistically significant risk factors is an increased risk of suicide ideation and suicide”.

DOCTOR (CHRIS)

I have never read any journal or seen any statistically significant studies that support that statement.

ATTORNEY (AUSTIN)

I’m aware of that, as is the 8th circuit, however, Planned Parenthood lost the case and the 8th circuit upheld that physicians have to continue to read the script and provide that information to their patients.
DOCTOR (CHRIS)

Okay, so South Dakota is off the list. I’ve heard some states offer a vaginal ultrasound, but none require it, right? I mean it is medically unnecessary. A state can’t force a physician to perform it. Can they?

ATTORNEY (AUSTIN)

Oh they can, and nine states require that a vaginal ultrasound be performed. Two of those states require that the physician display the image as well, the others only require the physician to offer to display the image.

DOCTOR (CHRIS)

What if my patient doesn’t consent to the ultrasound in one of those states?

ATTORNEY (AUSTIN)

Then you can’t perform an abortion.

DOCTOR (CHRIS)

I would like to avoid the states that require a vaginal ultrasound before a patient can have an abortion.

ATTORNEY (AUSTIN)

Okay. How do you feel about requiring a patient to meet with you and then having a waiting period in place before you can perform the abortion, or laws that require the patient attend counseling before she can receive the procedure? Sometimes more than 24 hours have to pass before you can provide an abortion.
DOCTOR (CHRIS)
I currently practice in Portland, and sometimes women have to drive several hours to get to my office. I can’t imagine sending them home to come back later to receive the procedure that they want, which happens to be rather time sensitive.

ATTORNEY (AUSTIN)
Well, 24 states have mandatory waiting periods in place. 28 states require counseling.

DOCTOR (CHRIS)
I can override the waiting period and counseling on an as needed basis if I deem it in my patient’s best interest, right?

ATTORNEY (AUSTIN)
No. That is wrong. Mandatory means mandatory. If you like your medical license, you have to comply.

DOCTOR (CHRIS)
Okay, so ultrasounds, scripts, waiting-periods, counseling... what else stands in my way to provide patient care? What about providing abortions to minors.

ATTORNEY (AUSTIN)
In 36 states you would be required to inform at least one of the minor’s parents before you could provide the minor with an abortion, and 22 of those states require that at least one parent consents to the procedure.
DOCTOR (CHRIS)

What if one of her parents assaulted her, or she is homeless?

ATTORNEY (AUSTIN)

In those situations the minor could seek intervention from the court.

DOCTOR (CHRIS)

Are those hearings expedited due to the nature of the matter?

ATTORNEY (AUSTIN)

Not in most counties. Court systems are backed up so expedited hearings are not always that “expedited”.

DOCTOR (CHRIS)

Okay, at this point what states would allow me to practice with the protections I have in Oregon without requiring ultrasounds, inaccurate scripts, counseling, waiting periods, or parental involvement?

ATTORNEY (AUSTIN)

Oregon’s state constitution protects abortion. You would have to move to New Mexico, Montana, Vermont, Connecticut, or California if you want the same freedoms to practice without state interference and the same protections.

DOCTOR (CHRIS)

What about access for low income patients?
ATTORNEY (AUSTIN)

Well, Oregon’s Supreme Court ruled in *Planned Parenthood v. Department of Human Resources* that the state could not arbitrarily limit the number of elective abortions a woman could receive through medical assistance programs as the needs of the individual and the individual’s circumstances has to be considered. The Oregon state legislature then updated statute 411.404 to reflect the need base assessment for medical assistance.

DOCTOR (CHRIS)

Thank you for sharing your time, and depressing knowledge. Is there anything else I should know?

ATTORNEY (AUSTIN)

Yes, the Supreme Court has agreed to hear Whole Woman’s Health v. Cole, the issue before the court will be Texas House Bill 2. The bill requires abortions in Texas to be performed at surgical facilities and that the physicians performing the procedures have privileges at a hospital not more than 30 miles away.

DOCTOR (CHRIS)

So what does that mean for me?

ATTORNEY (AUSTIN)

I think that means you should stay put until the Supreme Court decides the matter. The main issue will be about what creates an “undue burden” on a woman gaining access to abortion services.
DOCTOR (CHRIS)

Doesn’t requiring waiting periods, counseling, parental consent etcetera create an undue burden?

ATTORNEY (AUSTIN)

Perhaps, and that is why you should probably wait to see what the court defines as an undue burden before you pack up your practice.

NARRATOR (JENNIFER)

Womanhood! Womanhood! Are you ok? Are you still alive???

END
Unemployment by Gender, 1930 - 1940
(Source: U.S. Census Bureau data, adjusted for 1930 to be consistent with 1940 methodology)