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The Constitutionality of Anti-Birth Control Legislation

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The tort cases mentioned heretofore have significance only in so far as they show that the person damaged by the delinquent child's conduct may seek redress in a civil action and recover damages for the injuries if the child's parents are financially responsible defendants, and if the conduct falls within one of the exceptions to the rule that "the parent is not liable for the torts of his child."

In conclusion, contemporary violations of law by children are not admissible in evidence in prosecutions of the parents under the Criminal Neglect Statutes of this state. Such admissisons were possible back in the days of Henry I, when it was recognized that although the lunatic and infant would not be held liable for their wrongful acts, those responsible for their custody could not escape. Guilt has become more personal and individual since that time.[42]

The authorities of Rawlins, aware of the problem of delinquency in their community, are not complacently waiting for a Moses to lead them out of the wilderness, but are doing something about it. The wisdom of their plan of action may not be readily or accurately ascertained, but results might show a decrease in delinquency and reformation of parents arrested, even if the amount of deterrence is unknown.

In their consideration of the costs incurred by the county, the economic loss resulting to the jailed parents and the loss of status by the children in the community where the people know their parents are jailed, may incline the authorities to change their plan to one of re-education of the offenders under the skilled guidance of Welfare workers. By giving a suspended sentence, the offenders would be under the control of the court without the loss of characater and the other harmful results which ensue when the family is broken up. This plan might be less expensive, and give more protection to society than the punitive procedure employed at present.

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THE CONSTITUTIONALITY OF ANTI-BIRTH CONTROL LEGISLATION

The general statutes of Connecticut forbid the use by any person of drug, medicinal article or instrument for the purpose of preventing conception.[1] The statutes make liable to prosecution and punishment any person who shall assist, abet or counsel another to commit such an offense. The purpose of this article is to determine the constitutionality of the Connecticut statute and others of the same type. If such statutes are un-

42. Holdsworth, History of Englishs Law (Vol. II, 3rd Ed. 1923) 53.

1. "Any person who shall use any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not more than six months or both." Sec. 6246, General Statutes of Connecticut.

constitutional, the holding could be based on the ground that they amount to a violation of the due process provision of the Federal and State Constitutions, more particularly those portions dealing with personal rights of the individual.

Probably the best known United States Supreme Court case involving such a statute is *Tileston v. Ullman.*[2] The plaintiff in that case, a Connecticut practicing physician, brought an action to determine whether or not it would be lawful for him to prescribe contraceptive devices for married women whose lives would be seriously endangered by pregnancy. The plaintiff claimed that physicians should be excluded from the provisions of the law. The Connecticut Supreme Court held that no one was excluded from the terms of the Act, and that the doctor would be in violation of the statutes if he were to advise the use of contraceptives under any conditions.

The court also held that such a statute was a valid expression of the state's police power. It stated: ". . . under the police power the legislature might take the view that the use of contraceptives would not only promote sexual immorality but would expose the Commonwealth to other grave dangers."

The plaintiff appealed the decision to the United States Supreme Court[3] on the ground that the state law would deprive his patients of health and life without due process. The Supreme Court dismissed the appeal, holding that the plaintiff had no standing in court to raise the question. The sole basis for the attack, the Court said, was deprivation of life, and since it was not the plaintiff's life involved, he was not a proper party to bring the challenging suit.

In *Commonwealth v. Gardner,*[4] a Massachussets case, a physician was convicted of violating a statute similar to that involved in the Connecticut case. The state court construed the statute the same as the Connecticut court and held that no exceptions would be implied where none were furnished by the legislature.

This case was also appealed to the United States Supreme Court[5] on the grounds that it violated the Federal Constitution, but the appeal was dismissed for lack of a substantial federal question. In this case, as in the *Tileston*[6] case, the appeal was made on behalf of the physician and not of the patient, whose life was allegedly in danger as a result of the statutes. The United States Supreme Court on both occasions has refused to look at the merits on appeal and has on both occasions dismissed on jurisdictional points. Apparently no other case involving such birth control statutes has reached the United States Supreme Court.

2. Tileston v. Ullman, 129 Conn. 84, 26 A.2d 582 (1942).
3. Tileston v. Ullman, 318 U.S. 44, 63 S.Ct. 493, 87 L.Ed. 603 (1943).
4. Commonwealth v. Gardner, 300 Mass. 372, 15 N.E.2d 222 (1938).
5. Garnder v. Commonwealth, 305 U.S. 559, 59 S.Ct. 90, 83 L.Ed. 353 (1938).
6. See Note 3 Supra.

There is a Federal statute similar to the Connecticut and Massachussets laws, but it has been construed differently by a Federal court. By Federal code, "all persons are prohibited from importing into the United States . . . any article whatever for the prevention of conception."[7] In spite of the all-inclusive wording of that statute, a lower federal court has held that importation by a medical practitioner was not prohibited: in *U.S. v. One Package,*[8] the Court of Appeals of the Second Circuit reached the conclusion that it was not the intention of Congress to require the suppression of such articles so widely advocated by the medical profession. This holding was based on the theory that there was an implied exception in the Federal statute, allowing importation of these articles for legitimate purposes. The state courts in the cases discussed previously have refused to imply such an exception saying, "If any exception had been intended to the broad prohibition enacted, it would have been easy to give expression to it in the statute."[9]

The constitutionality of the Connecticut statute was again challenged in *State v. Nelson,*[10] and the state court again upheld the validity of the law in question. Referring to the appeal in the *Gardner*[11] case which was dismissed by the United States Supreme Court, the Connecticut court said: "We infer that this action may not be interpreted otherwise than as confirming the constitutionality of the Massachussets statute." This is not a proper inference since the Supreme Court did not consider the merits of the statute at all, but dismissed the case without hearing the merits.

The state courts in upholding the statutes in question have relied heavily upon the Supreme Court decision in *Jacobson v. Massachussets.*[12] In that case a state statute providing compulsory vaccination was upheld as a valid exercise of the state's police power. The Supreme Court in that case said: "There is, of course, a sphere within which the individual may assert the supremacy of his own will . . . but it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members, the rights of the individual in respect of his liberty many at times, under the pressure of great dangers, be subjected to such restraint, as the safety of the general public may demand." Thus the police power was held paramount to the due process clause.

In the *Jacobson* case, however, an exception was made in favor of children who presented a doctor's certificate stating that they were not proper subjects for vaccination.[13] The distinguishing feature of the two cases then is that in the *Jacobson* case the opinion of the doctor is recognized and honored, the same being true in *U.S. v. One Package;* in the *Nelson*

7. U.S.C.A. Sec. 1305.
8. United States v. One Package, 86 F.2d 737 (C.C.A. 2nd Cir. 1936).
9. See Note 4 Supra, at 223.
10. State v. Nelson, 126 Conn. 412, 11 A.2d 856 (1940).
11. See Note 5 Supra.
12. Jacobson v. Massachusetts, 197 U.S. 11, 255 S.Ct. 358, 49 L.Ed. 643 (1904).
13. Massachussets Revised Laws, Chap. 75, Secs. 137, 139.

and *Garnder* cases the opinion of the medical profession is ignored by applying a device of statutory construction. This distinction weakens the *Jacobson* case as authority for upholding the constitutionality of the Massachussets and Connecticut laws pertaining to contraceptive devices.

The state courts have upheld the anti-contraceptive statutes as an exercise of the state's police power, to conserve the public health and morals.[14] This same principle was applied in upholding the Virginia sterilization statute.[15] It is difficult to understand how this power could be used to sustain the questioned legislation. As to the health factor involved, the health of the individual is jeopardized rather than protected by this legislation. It is an established fact in the medical profession that pregnancy is very dangerous to some women.[16] It is strange that a statute impairing the health and life of such women could be justified on the ground that it is a valid exercise of the state's right and duty to protect the health of its people.

If the underlying purpose of the statute is to protect the *morals* of the public, the Supreme Judicial Court of Massachussets rendered an opinion that is difficult to explain, *Commonwealth v. Corbett.*[17] The defendant in that case was prosecuted for violating the statute forbidding the sale of contraceptive devices—the same statute involved in *Commonwealth v. Gardner.*[18] The judgment was for the defendant on the theory that the same article that would prevent conception would also tend to prevent the spread of veneral diseases. Since, the court said, the legislature did not intend to permit the uncontrolled spread of diseases by the statute preventing the sale of contraceptives, the defendant could not be convicted. It is puzzling to see why the court felt constrained to imply such an intent to the legislature under these conditions and steadfastly refuse to imply any exception in the situations discussed previously. The Massachussets court has applied contradictory reasoning in deciding the above cases and appears to have reached illogical results.

The situation in Massachussets then under the present law and its interpretations is as follows: Under *Commonwealth v. Gardner,*[19] a physician cannot prescribe a contraceptive for his patient even though pregnancy would result in certain death to her. *Commonwealth v. Corbett,*[20] decided by the same court two years later, does not purport to overrule or question the decision reached in the *Gardner* case, and yet it does permit the sale of contraceptives to prevent diseases among those who engage in illicit sexual intercourse. These decisions seem obviously inconsistent. The law of Massachussets will not allow a doctor to protect the lives of his patients, but through the sale of the very same article will protect the health of illicit participants. It would seem logical that any concession by

14. People v. Byrne, 163 N.Y.S. 683 (1917); Note 9 Supra.
15. Buck v. Bell, 274 U.S. 200, 47 S.Ct. 584, 771 L.Ed. 1000 (1927).
16. See Note 2 Supra, at 584.
17. Commonwealth v. Corbett, 307 Mass. 7, 29 N.E.2d 151 (1940).
18. See Note 4 Supra.
19. See Note 4 Supra.
20 See Note 17 Supra.

the court would be made in favor of the medical profession, but such is not the law in Massachussets today.

From the previous discussion it is apparent that the grounds on which constitutionality has been upheld in the state courts are subject to much doubt. The public health and morals argument is considerably weakened by the *Corbett* case decided by the Massachussets court. With this fallacy appearing, and the fact that the *Jacobson*[21] case may be distinguished on its facts, the case for the validity of the statutes is weak. One of the weakest links in the chain of validation reasoning is, of course, the reliance placed by the Connecticut court on the dismissal of the *Gardner* appeal.[22]

In view of the fact that at least one Federal court has held that the medical profession may import into the United States and use the United States mail[23] for transporting devices for the prevention of conception, the United States Supreme Court might well hold that the statutes of Massachussets and Connecticut, as presently interpreted by the courts of those states, invalid and unconstitutional. This statement can only be speculation as there can be found no Federal case authority dealing with the validity of state laws on the particular subject.

There is a sound basis ready at hand upon which the United States Supreme Court could rely if it decided to strike down the state laws in question. As the New Jersey court announced: "Under that section of the Constitution dealing with natural and inalienable rights a person has the right to the legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation."[24] The rights granted by the Constitution should certainly include the right for a physician to advise his patients on professional matters involving health and life.

Considering the statutes, their interpretation and the purpose to be accomplished by them, it would seem reasonable to exclude from their provisions the members of the medical profession, either expressly or by implication. A Federal court has done this in construing a Federal statute and many states have followed this procedure. If there is such an exceptino, there is much more likelihood that such statutes are constitutional. The two states still adhering to a flat prohibition with no exception would appear to be in violation of the United States Constitution.

Wyoming has a statute on this subject but it excepts from its provisions doctors and druggists.[25] There is much less question that such a statute with these exceptions is valid and constitutional than if it were like the all-inclusive statutes of Massachussets and Connecticut. DUDLEY D. MILES

21. See Note 12 Supra.
22. See Note 5 Supra.
23. See Note 8 Supra.
24. Bednarik v. Bednarik, 18 N.J. Misc. 633, 16 A.2d 80 (1940).
25. Wyo. Comp. Stat. 1945, Sec. 9-513. "Whoever sells or lends, or offers to sell or lend, or gives away, or offers to give away, or has in his possession with or without intent to sell . . . an instrument or article for procuring abortion, or for self-pollution, or medicine for procurring abortion or preventing conception, shall be fined . . .; but nothing in this section shall be construed to affect . . . the practice of regular practitioners of medicine or druggist in their legitimate business."