Michigan Law Review

Volume 37 | Issue 2

1938

CRIMINAL LAW AND PROCEDURE - PHYSICIANS AND SURGEONS - CONTRACEPTIVE STATUTES AND IMPLIED EXCEPTIONS THERETO

Thomas K. Fisher
University of Michigan Law School

CRIMINAL LAW AND PROCEDURE — PHYSICIANS AND SURGEONS — CONTRACEPTIVE STATUTES AND IMPLIED EXCEPTIONS THERETO — A Massachusetts statute made the selling of any drug, medicine or instrument for the prevention of conception a criminal offense. The defendants, a doctor, a nurse, and two social workers, all connected with a charitable association, prescribed and sold contraceptives to non-pregnant, married women. Defendants' offer of proof, admitting the facts charged, but contending that the statute did not apply where the sale was made under a physician's prescription for the preservation of life or health, was found by the trial court to constitute no defense. *Held*, that the wording was plain and unequivocal allowing for no implied exception. *Commonwealth v. Gardner*, (Mass. 1938) 15 N. E. (2d) 222, appeal dismissed (U. S. 1938) 59 S. Ct. 90.

The statute involved [1] is similar to those of seven other states [2] and the

[1] Mass. Gen. Laws (Ter. Ed. 1932), c. 272, § 21: "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 . . . shall be punished by imprisonment . . . or by a fine. . . ." Provisions substantially similar to these are to be found in the first Massachusetts statute on the subject. Acts (1879), c. 159.

[2] Conn. Gen. Stat. (1930), § 6246; Kan. Rev. Stat. (1935), § 21-1101; Miss. Code Ann. (1930), § 1057; Mo. Rev. Stat. (1929), § 4275; Neb. Comp. Stat.

federal laws [8] where the legislative words in their literal connotation apparently attempt a complete suppression of all birth control literature and techniques. The remaining state laws, less rigorous in denouncing controlled conception, range from expressly permitting the use of contraceptives under medical prescription in certain limited situations [4] to prohibiting merely the distribution of obscene and indecent literature.[5] Contemporary literature is voluminous relative to the contraceptive item in the "Comstockian" laws, and definitely voices a severe disapproval founded on medical and socio-economic reasons.[6] Whatever the value of these criticisms may be, the courts can do nothing about the policy of the laws.[7] But the function of the courts is vitally concerned when

(1929), § 28-426; 18 Pa. Stat. Ann. (Purdon, 1930), §§ 777, 778; Wash. Comp. Stat. (Remington, 1922), § 2460.

[3] 19 U. S. C. (1935), § 1305a, prohibiting the importation into the United States; 18 U. S. C. (1935), § 334, prohibiting the mailing; 18 U. S. C. (1935), § 396, prohibiting the importing or transporting in interstate commerce of articles "intended for preventing conception, or producing abortion." These federal laws, as well as those of the eight states (supra, notes 1 and 2) are modeled after the original Comstock Act, 17 Stat. L. 598 (1873), entitled, "An Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use." That the language used by the state legislatures and the Congress in these sweeping statutes makes no distinction between salacious and filthy literature, or the use of contraceptives by the unmarried, and the employment of conception control methods among married women for the protection of life and health is hardly to be gainsaid.

[4] For example, 39 N. Y. Consol. Laws (McKinney, 1917), § 1145, which provides: "An article or instrument, used or applied by physicians . . . for the cure or prevention of disease, is not an article of indecent or immoral nature or use within this article." The court in the instant case placed much emphasis upon the fact that had the legislators intended an exception they would have expressly provided for one. Such reasoning loses its force when we consider the causes and purpose of the original federal statute from which this act was modeled.

[5] Twenty-one states have such statutes. Not infrequently the courts hold literature concerning, or articles of, contraception to be within the meaning of these statutes. For a summary of the legislative aspects of birth control prevention, see 45 HARV. L. REV. 723 (1932).

[6] 14 FORTUNE 158 (July 1936); "The Accident of Birth," 17 ibid., 83 (Feb. 1938); Kingsley, "Parents Go on Strike," 245 N. AM. REV. 221 (1938); "Is Birth Control a National Menace?" 33 READERS DIGEST 90 (July 1938); Stone, "Birth Control Wins," 144 NATION 700 (1937); ibid. 34 (1937); Tyson, "Social Work and Birth Control," 72 SURVEY 137 (1936); 16 WORLD TOMORROW 174 (1933); Sanger, "The Status of Birth Control: 1938," 94 NEW REPUBLIC 324 (1938). It is interesting to speculate whether any laws attempting to raise or protect the general morality of a people can be successful in the long run. Experience under the Volstead Act would suggest a negative reply to the conjecture, as well as suggesting the difficulties encountered in enforcing "moral" laws. See 17 FORTUNE 83 (Feb. 1938), for an account of the $250,000,000 contraceptive industry flourishing under present Comstockian laws. For some of the proposed changes in the contraceptive laws, see DENNETT, BIRTH CONTROL LAWS 200, 280-287 (1926).

[7] The constitutionality of such laws are uniformly upheld by the courts. Commonwealth v. Allison, 227 Mass. 57, 116 N. E. 265 (1917); State v. Arnold, 217 Wis. 340, 258 N. W. 843 (1935); People v. Sanger, 222 N. Y. 192, 118 N. E. 637

cases, such as the instant one, come before them requiring a determination of the true intent of the legislatures in passing these broad statutes. The basis for construing a statute rests with discovering the common meaning of the language used, considered in connection with the cause of its enactment, and the evil to be eliminated.[8] That exceptions may be found to the literal wording of a criminal statute is an accepted rule of construction.[9] It is submitted that the court failed to follow in all respects its own canon of interpretation, when applying the law to the particular facts of the immediate case. Though the literal wording of such statutes might suggest no exceptions were to be implied, an understanding of the circumstances surrounding the enactment of the original "Comstock" law and the purposes sought to be accomplished thereby can leave little doubt but that the medical activities engaged in here by the defendants were not meant to be included in the legislative ban.[10] Since the statute of this state, as well as many others, was modeled after the original federal law of 1873, the same and only reasons for the passage of the latter can be safely

(1919); United States v. One Book, (D. C. N. Y. 1931) 51 F. (2d) 525; Knowles v. United States, (C. C. A. 8th, 1909) 170 F. 409. On October 10, 1938, the Supreme Court of the United States declined to review the instant case, defendants urging the unconstitutionality of the contraceptive statute.

[8] The court here adopted this as its rule of interpretation. See also, United States v. Kirby, 7 Wall. (74 U. S.) 482 at 486-487 (1868), where the court says: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character."

[9] State v. Gorham, 110 Wash. 330, 188 P. 457 (1920); State v. Burton, 41 R. I. 303, 103 A. 962 (1918); Patrilo v. United States, (C. C. A. 8th, 1925) 7 F. (2d) 804; State v. Lambert, 100 W. Va. 377, 130 S. E. 520 (1925); Lilly v. West Virginia, (C. C. A. 4th, 1928) 29 F. (2d) 61; Guardians of the Poor v. Greene, 5 Binn. (Pa.) 554 (1813); Regina v. Tolson, 23 Q. B. Div. 168 (1889).

[10] That a court may have recourse in construing a statute to the history of the times in which it was enacted, and the evils to be eliminated, is well established. Commonwealth v. S. S. Kresge Co., 267 Mass. 145 at 148, 166 N. E. 558 (1929); United States v. Union Pacific Ry., 91 U. S. 72 at 79 (1875). Salacious and deleterious literature was being distributed among the youths of the 1870's. Because of this, Anthony Comstock lobbied for the bill finally enacted into law. 17 Stat. L. 598 (1873). An illuminating chapter on the causes and purpose of the Comstock Act can be found in DENNETT, BIRTH CONTROL LAWS 19 (1926). The following federal cases hold that exceptions are to be read into the broad federal statutes. United States v. Clarke, (D. C. Mo. 1889) 38 F. 500; United States v. Smith, (D. C. Wis. 1891) 45 F. 476; Young Rubber Corp. v. Lee, (C. C. A. 2d, 1930) 45 F. (2d) 103; Davis v. United States, (C. C. A. 6th, 1933) 62 F. (2d) 473; United States v. Dennett, (C. C. A. 2d, 1930) 39 F. (2d) 564; United States v. One Package, (C. C. A. 2d, 1936) 86 F. (2d) 737 at 739, where the court says: "Its [the original Comstock Act] design, in our opinion, was not to prevent the importation, sale, or carriage by mail of things which might intelligently be employed by conscientious and competent physicians for the purpose of saving life or promoting the well being of their patients." See Dennett, op. cit. 41, as to the attitude of Anthony Comstock toward the use by patients of contraceptives prescribed by physicians.

ascribed to the enactment of the former.[11] Further, if the court finds no exceptions were intended under the statute, it is accrediting the legislators with a grave inconsistency: for in the one instance legalized abortion is permitted to save the life of a woman, while in this instance the very means by which that serious operation may be obviated is disallowed.[12] In construing statutes prohibiting the sale and distribution of intoxicating liquors, or permitting the same only under a duly executed license, the courts have frequently read into seemingly "all-inclusive" statutes implied exceptions.[13] And a case involving a Massachusetts statute requiring all persons to be vaccinated where the public safety demanded it has strong dictum to the effect that if the vaccination would impair the health or life of a person, he would be excepted from the statutory provisions.[14] Certainly the court would not have been lacking in judicial precedents had it found an exception to the literal words of the contraceptive statute. The court also relied upon the marginal administrative enforcement theory in finding against defendants.[15] In certain situations this principle is quite applicable.[16] But here where the need of these medically-advised acts is so great, and where the court refuses to analyze realistically the statute, more evil may be perpetrated by the court's interpretation of the statute than the mischief sought to be eliminated thereby.[17]

Thomas K. Fisher

[11] DENNETT, BIRTH CONTROL LAWS 10 (1926). Note the dates of the passage of the federal and state laws, and the wording employed.

[12] Seven of the eight states with the "all-inclusive" contraceptive statutes expressly permit abortions when necessary to preserve the woman's life. Massachusetts and the federal laws do not expressly except the acts of physicians relative to performing abortions for the preservation of life. But the word "unlawful" modifies "abortion" in both statutes, and judicial construction has excepted such medical acts from the proscriptions of the statutes in both jurisdictions. Commonwealth v. Sholes, 95 Mass. 554 (1886); Bours v. United States, (C. C. A. 7th, 1915) 229 F. 960.

[13] United States v. Katz, 271 U. S. 354, 46 S. Ct. 513 (1925); Sorrells v. United States, 287 U. S. 435, 53 S. Ct. 210 (1932).

[14] Jacobson v. Massachusetts, 197 U. S. 11 at 39, 25 S. Ct. 358 (1904). See, Church of Holy Trinity v. United States, 143 U. S. 457, 12 S. Ct. 511 (1892), for a similar exception read into an apparently "all-inclusive" statute.

[15] The principle that though a prohibitory statute includes within its provisions acts otherwise innocent, in order to effectuate the enforcement of the prohibition against the evil aimed at, it is not a violation of the due process clause.

[16] Booth v. Illinois, 184 U. S. 425, 22 S. Ct. 425 (1902); Otis v. Parker, 187 U. S. 606, 23 S. Ct. 168 (1903); Motlow v. State, 125 Tenn. 547, 145 S. W. 177 (1912).

[17] Medical authorities are in agreement that, for the preservation of their health or life, women should not bear children when afflicted with ailments such as diabetes, active pulmonary tuberculosis, chronic Bright's disease, pernicious anemia, or syphilis. 1 DAVIS, GYNECOLOGY AND OBSTETRICS, c. 5, p. 36, c. 9, pp. 12, 20 (1935); 3 ibid., c. 14, p. 19; DE COSTA, A HANDBOOK OF MEDICAL TREATMENT 97 (1919).