

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 6

FEBRUARY 1939

NUMBER 2

BOARD OF EDITORS

RITCHIE G. DAVIS, *Editor-in-Chief*

IRVING I. AXELRAD

JOHN A. ECKLER

PAUL M. BARNES

AARON LEVY

Associates

MELVIN A. GOLDSTEIN

CHARLES I. LONGACRE

RICHARD HALL

HERTA F. PRAGER

SIDNEY Z. KARASIK

MARY M. SHAW

ALVIN I. WEINSTEIN

EDWARD H. HARSHA

Business Manager

E. W. PUTTKAMMER

Faculty Adviser

NOTES

CONTRACEPTIVES AND THE LAW

I

Few statutory restrictions on the advertisement and distribution of contraceptives in the United States appeared until the Civil War period.¹ The enact-

¹ See Ohio Laws 1862, p. 63; N.Y. Laws 1868, c. 430. Although contraceptive techniques were applied in the ancient western world, no legal problems appear to have been raised prior to an inconclusive discussion of the use of the sponge as a contraceptive which is found in the Talmud and dated in the second or third century. See Himes, *A Medical History of Contraception* c. 2-4 (1936). The Catholic prohibitions are traced to the writings of Aquinas. Ryan, *Aquinas*, 2 *Enc. Soc. Sci.* 147, 148 (1930). The socio-philosophical justification of the birth control movement in modern times is founded on the writings of Malthus. See Malthus, *Essay on Population* (1803). The earliest attempt in England to check the distribution of contraceptive information by bringing it within the category of obscene libel was the case of *Bradlaugh v. The Queen*, L.R. 3 Q.B. 607 (1878) reversing L.R. 2 Q.B. 569 (1877). The conviction was reversed on the ground that the indictment failed to set out the exact words of the

ment by Congress of the Comstock Act² in 1873 gave impetus to state legislation, some of which was modeled after the federal act. The principle purpose of the statutes was generally to suppress the traffic in pornographic materials, and apparently the restrictions as to contraceptives were thought to be incidental to this purpose. Today, a majority of the states have statutes restricting in terms the distribution of contraceptives;³ almost every state has an obscenity law which may be interpreted to apply.⁴

In its original form, the Comstock Act prohibited the mailing or importation of contraceptive articles. In 1897 the prohibition was extended to the deposit of such articles with a common carrier.⁵ The broad powers of Congress, to exclude from the mails articles or publications deemed injurious to health or morals, sustain the first prohibition.⁶ Insofar as contraceptive articles are immoral or harmful it seems clear that they may be excluded from interstate commerce⁷ and *a fortiori*, their importation may be prohibited.⁸ Where articles are not harmful or immoral, there is authority that they may not be excluded.⁹ State regulation is based on the general power to make regulations of public morals.¹⁰

Whether such statutes, if they prohibited physicians from giving advice necessary to maintain the health of their patients, would contravene guaranties

libel, and later prosecutions on this ground have been rare. But see Himes, *A Medical History of Contraception* 240 (1936). See also *Albutt v. General Council of Medical Education and Registration*, L.R. 23 Q.B. 400 (1889). For a summary of the laws of various foreign countries as to contraceptives see Gaylord, *Laws for Regulation of Births*, Nat'l Conference of Social Work, 136 (1931).

² 17 Stat. 598 (1873), 18 U.S.C.A. §§ 334, 512 (1927). The circumstances surrounding the enactment are discussed in *Dennett*, *Birth Control Laws* 21-3 (1926).

³ For an analysis of the statutes, see 45 Harv. L. Rev. 723 (1932). The statutes are collected in *Committee on Federal Legislation for Birth Control, Laws Concerning Birth Control* (1929) and in *Ruppenthal, Criminal Statutes on Birth Control*, 10 *Journal of Criminal Law and Criminology* 48, 51-61 (1919).

⁴ *Lanteen Laboratories v. Clark*, 294 Ill. App. 81, 92, 13 N.E. (2d) 678, 682 (1938).

⁵ 29 Stat. 512 (1897), 18 U.S.C.A. § 396 (1927).

⁶ *Ex parte Jackson*, 96 U.S. 727 (1877). See especially at 736 the *dictum* sustaining the then recently enacted Comstock Act. See also 2 *Willoughby, Constitution of the United States* § 658 (2d ed. 1929).

⁷ *United States v. Popper*, 98 Fed. 423 (Cal. 1899). The court assumed in this case that the power to exclude articles from interstate commerce was as broad as the regulatory power. Although this view may be questioned, the power to prohibit interstate commerce in immoral or dangerous articles, or for immoral purposes has often been sustained: *Lottery case*, 188 U.S. 321 (1903) (lottery tickets); *Hipolite Egg Co. v. United States*, 220 U.S. 45 (1911) (adulterated eggs); *Hoke v. United States*, 227 U.S. 308 (1913) (white slave traffic).

⁸ 2 *Willoughby, op. cit. supra* note 6 at § 417.

⁹ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁰ *Commonwealth v. Allison*, 227 Mass. 57, 116 N.E. 265 (1917). See also *McConnell v. City of Knoxville*, 172 Tenn. 190, 110 S.W. (2d) 478, 113 A.L.R. 966 (1937).

of the Fifth or Fourteenth Amendments with respect to deprivation of life or liberty without due process of law, is a more difficult constitutional question. In construing the federal statutes, it has not been necessary to pass upon this question because the courts have implied an exception to the general prohibition in favor of legitimate medical practice.²¹ That the words of the statute justify such an exception has been questioned.²² It is perhaps significant that an exemption in favor of medical practice was deleted from the original Comstock Act prior to its enactment.²³ The exception is probably best explained as a recognition by the courts that it is unwise to hamper physicians in this manner.²⁴ But such considerations did not move the court in *Commonwealth v. Gardner*.²⁵ This was a prosecution of a physician, nurse, and social workers employed by a birth control clinic, for the sale of a contraceptive device contrary to the state statute.²⁶ Although the language of the Massachusetts statute is similar to that of the Comstock Act, the court found that the state law was "plain, unequivocal, and peremptory"²⁷ and that hence no exception was justified. The federal cases were in part distinguished and in part disapproved.²⁸ The constitutional question with regard to physicians was brushed aside by citation of *Commonwealth v. Allison*²⁹ where that specific question does not appear to have been raised and by citing two Supreme Court cases³⁰ in which it was questioned whether there was a legitimate medical use for intoxicating liquors.

In dismissing the appeal,³¹ for want of a substantial federal question, the Supreme Court also cited one of the latter cases³² and in addition *Jacobson v. Massachusetts*.³³ There the court held a compulsory vaccination statute constitutional, but said that it could not be applied against individuals whose health would thereby be injured.³⁴ If contraceptives are generally conceded by physicians to have a legitimate medical use and their denial to a patient would involve injury to health,³⁵ it is believed that these cases indicate that a

²¹ *Bours v. United States*, 229 Fed. 960 (C.C.A. 7th 1915); *Davis v. United States*, 62 F. (2d) 473 (C.C.A. 6th 1933). Prior to the recent federal cases, the Comstock Act was generally thought to apply to medical practice. Cf. *Dennett, op. cit. supra* note 2, at 5-6.

²² See the concurring opinion of L. Hand, J., in *United States v. One Package*, 86 F. (2d) 737, 740 (C.C.A. 2d 1936) cited in *Commonwealth v. Gardner*, 15 N.E. (2d) 222, 224 (Mass. 1938).

²³ *Cong. Globe*, Feb. 20, 1873, p. 1525. But the short discussion there shows that the effect of the amendment was not clearly understood.

²⁴ Abortion statutes have been similarly interpreted. See 6 *Univ. Chi. L. Rev.* 109 (1938).

²⁵ 15 N.E. (2d) 222 (Mass. 1938).

²⁶ *Mass. Gen. Laws 1932, c. 272 § 21.*

²⁷ *Commonwealth v. Gardner*, 15 N.E. (2d) 222, 223 (Mass. 1938).

²⁸ *Id.* at 224.

²⁹ 227 Mass. 57, 116 N.E. 265 (1917).

³⁰ *Evarard's Breweries v. Day*, 265 U.S. 545 (1924); *Lambert v. Yellowley*, 272 U.S. 581 (1926).

³¹ 59 Sup. Ct. 90 (1938).

³² 197 U.S. 11 (1905).

³³ *Lambert v. Yellowley*, 272 U.S. 581 (1926).

³⁴ *Id.* at 38-39.

denial to a physician of the right to prescribe contraceptives is a deprivation of life or liberty within the Fourteenth Amendment.

There are state statutes which in terms exempt medical practice,²⁶ teaching in medical colleges,²⁷ or "just cause."²⁸ If the wording of the Comstock Act and the state statutes derived from it does not require such an exemption as a matter of constitutional law, it may still be justified on the ground that their purpose was the suppression of obscenity rather than the restriction of medical practice.²⁹ That such was the primary purpose is clear not only from the wording of the statutes but also from their general classification under the heading of "obscenity."

The scope of the prohibitions as to contraceptives under the various obscenity statutes has not been well defined. It has been suggested that the discussion of sex matters is in itself obscene. There appears to be a tendency in the federal courts to narrow the application of the law.³⁰ It is hence improbable that contraceptive information as such will generally be held obscene.³¹

What is a contraceptive article within the meaning of the statutes is also difficult to ascertain. The number of mechanical and chemical products of greater or less efficiency in the prevention of conception is large.³² The condom,³³ probably the most common and efficient of male devices is usually sold "for prevention of disease." Where such a device is sent through the mail, even in the absence of any defense of medical purpose, it must affirmatively be shown that there was an intention that it be used for purposes of illegal contraception in order to make out a violation of the Comstock Act.³⁴ The exist-

²⁵ See Bromley, *Birth Control* 128-32 (1934). See also 108 *Journal of the American Medical Ass'n* 2217 (1936) but *cf.* 110 *id.* 1479 (1938).

²⁶ Cahill's N.Y. Cons. Laws 1930, c. 41, § 1145.

²⁷ Colo. Ann. Stat. 1935, c. 48, § 217.

²⁸ N.J. Rev. Stat. 1937, c. 2, §§ 105-13. *Cf.* Tremear's [Can.] Ann. Criminal Code 1929, § 207; *Rex v. Palmer*, 68 Can. Crim. Cas. 20 (1937) (the activities of a social worker engaged in the commercial distribution of contraceptives were held within a provision of the statute, Tremear's [Can.] Ann. Criminal Code 1929, § 207, that "no one shall be convicted of any offense in this section if he proves that the public good was served by the act alleged to be done").

²⁹ *United States v. One Package*, 86 F. (2d) 737 (C.C.A. 2d 1936) noted 37 *Col. L. Rev.* 854 (1937) and 50 *Harv. L. Rev.* 1312 (1937).

³⁰ *Dysart v. United States*, 272 U.S. 655 (1926); *United States v. Dennett*, 39 F. (2d) 564 (C.C.A. 2d 1930); *United States v. One Obscene Book Entitled "Married Love"*, 48 F. (2d) 821 (N.Y. 1931); *United States v. Himes*, 97 F. (2d) 510 (C.C.A. 2d 1938). See also Balter, *Some Observations Concerning the Federal Obscenity Statutes*, 8 *So. Cal. L. Rev.* 267 (1935).

³¹ But see *Lanteen Laboratories v. Clark*, 294 Ill. App. 81, 92, 13 N.E. (2d) 678, 682 (1938) to the effect that under the Comstock Act contraceptives are articles of indecent or immoral use and hence within the provisions of the Illinois Obscenity Act, Ill. Rev. Stat. 1937, c. 38, § 468, which does not mention them.

³² See Sanger and Stone, *The Practice of Contraception* (1931).

³³ See Himes, *op. cit. supra* note 1, c. 8 (1936).

³⁴ *Davis v. United States*, 62 F. (2d) 473 (C.C.A. 6th 1933).

ence of such an intention is not made out by a showing that the volume of the defendant's sales was so great that he must have been aware of the use of a considerable part of his output for contraceptive purposes.³⁵ So also although it is common knowledge that antiseptics advertised "for feminine hygiene" are generally used as contraceptive douches or jellies³⁶ they have never been held within prohibitory statutes. But the vaginal diaphragm, probably the most generally approved contraceptive device,³⁷ cannot be brought within these exceptions.³⁸

Many statutes which prohibit the distribution of contraceptives are drawn so as to prohibit also the giving of information as to where such devices or even instructions concerning their use may be obtained. But apparently no statute, strictly construed, prohibits the giving of oral information as to methods of preventing conception if the person receiving it is obliged to seek out his own source of supply—probably a task of little difficulty in any American city despite restrictive laws. If such is the case, "birth control" clinics may continue restricted operations even under the law as interpreted in *Commonwealth v. Gardner*.³⁹ It has however been held within the discretion of a health commissioner to refuse a license for a free birth control clinic.⁴⁰ It was also held to be within the discretion of a police commissioner to prevent the exhibition of moving pictures portraying the activities of Margaret Sanger in the birth control movement although no contraceptive information was given.⁴¹

It has been argued that the statutes have made the manufacture and distribution of contraceptives contrary to public policy and that hence contract and property rights arising therefrom should be unenforceable. *Youngs Rubber Co. v. C. I. Lee & Co.*⁴² was a suit for trade-mark infringement by one manufacturer of condoms against another in which the defense was urged that the plaintiff's sales in interstate commerce were illegal, hence not within the protection of the trade-mark law.⁴³ It was held that in order successfully to maintain such a defense, the plaintiff's intention to violate the law must appear, since the

³⁵ *Youngs Rubber Co. v. C. I. Lee and Co.*, 45 F. (2d) 103 (C.C.A. 2d 1930). But see *State v. Arnold*, 217 Wis. 340, 258 N.W. 843 (1935) where the sale of condoms by vending machine in a gasoline station toilet was held to show an intention that they be used for contraception, a prevention of disease label to the contrary notwithstanding.

³⁶ *The Accident of Birth*, 17 *Fortune* 83, 110 (Feb. 1938).

³⁷ *Id.* at 85.

³⁸ But see *id.* at 112.

³⁹ 15 N.E. (2d) 222 (Mass. 1938).

⁴⁰ *People v. Dever*, 236 Ill. App. 135 (1925). See the opinion of the lower court reported in 40 *Medico-Legal J.* 122 (1923). The result of the case was the establishment of the clinic on the basis of a nominal charge for its services so that a license for a "free" clinic was unnecessary.

⁴¹ *Message Photo-Play Co. v. Bell*, 179 App. Div. 13, 166 N.Y. Supp. 338 (1917); *People v. Schuettler*, 209 Ill. App. 588 (1918). Cf. *Silverman v. Gilchrist*, 260 Fed. 564 (C.C.A. 2d 1919).

⁴² 45 F. (2d) 103 (C.C.A. 2d 1930).

⁴³ 33 Stat. 729 (1905), 15 U.S.C.A. § 101 (1927).

articles had a legitimate medical use. In sharp contrast are the *dicta* in *Lanteen Laboratories v. Clark*⁴⁴ where the plaintiff sued for specific performance of a contract under which the defendant was to assign to the plaintiff any patents arising out of the defendant's research in the development of contraceptive diaphragms. Although the decision was based on the finding that the patent involved was not covered by the contract, the court devoted the bulk of a long opinion to show that the contract was contrary to public policy. The court apparently ignored the fact that the Illinois statute,⁴⁵ although it had been amended⁴⁶ subsequent to the enactment of the Comstock Act and displays similar language, omits any mention of contraceptives. It seems also to have been overlooked that the article in question was clearly within the class of articles having a legitimate medical use as in the *Youngs* case or in *United States v. One Package*⁴⁷ both of which were cited without disapproval. The court made much of the fact that the contraceptive sought to be developed was one which could be sold without a physician's prescription or fitting.⁴⁸ Clearly such is also the case with respect to condoms and there is no suggestion in the *One Package* case that with respect to articles usable as contraceptives alone, a distinction is to be drawn between those which must be fitted by a physician and those which a physician might prescribe without a fitting. The language of the court with respect to "sordid traffickers in contraceptives" is to be contrasted to that in *Slee v. Comm'r of Internal Revenue*⁴⁹ where it was held that the purposes of the American Birth Control League "to maintain health without profit by lawful means . . . has been a recognized kind of charity from time immemorial."

II

It has been estimated that under the present law, the annual expenditure on contraceptives is \$250,000,000,⁵⁰ the number of abortions despite even more stringent restrictions⁵¹ between 700,000 and 2,000,000 yearly,⁵² and that between 42% and 95% of all married persons use some contraceptive during their marriage.⁵³ If the purpose of the statutes be to minimize the use of contraceptives, the rapid growth of the industry,⁵⁴ particularly in recent years, shows clearly that such a purpose is not being achieved. An investigation of the underlying policy of the laws is indicated to determine whether they should be implemented or abandoned. It appears on analysis of the great mass of

⁴⁴ 294 Ill. App. 81, 13 N.E. (2d) 678 (1938). ⁴⁶ Ill. L. 1873, p. 128.

⁴⁵ Ill. Rev. Stat. 1937, c. 38, § 468.

⁴⁷ 86 F. (2d) 737 (C.C.A. 2d 1936).

⁴⁸ *Lanteen Laboratories v. Clark*, 294 Ill. App. 81, 86, 13 N.E. (2d) 678, 680 (1938).

⁴⁹ 42 F. (2d) 184 (C.C.A. 2d 1930).

⁵⁰ *The Accident of Birth*, *op. cit. supra* note 36, at 84.

⁵¹ See 35 Col. L. Rev. 87 (1935).

⁵² Bromley, *op. cit. supra* note 25, at 135-6.

⁵³ Himes, *op. cit. supra* note 1, at 343.

⁵⁴ *The Accident of Birth*, *op. cit. supra* note 36, at 108.

controversial literature which has been generated by the "birth control" issue⁵⁵ that the argument for the statutes is the discouragement of immorality, the interest of the state in an increasing or at least a stable population, and the protection of the public against articles dangerous to health.

The view has been taken that the use of contraceptive devices whether within or outside of the marriage relation is immoral.⁵⁶ It is difficult to reconcile this with the permission to use the so called "safe period" as a "natural" means of contraception.⁵⁷ The papal position is that it is immoral to use any "artificial" method whereby sexual intercourse may be had but conception prevented. The prevalence of sterilization statutes⁵⁸ clearly shows that this position is not generally accepted. Connecticut, for example, has a sterilization law⁵⁹ and also an absolute prohibition upon the use of contraceptives.⁶⁰ Two such statutes may be reconciled by a distinction between a contraceptive technique which prevents presumably defective offspring and one which prevents merely those which are undesired by the parties to the sex act. It must be noted, however, that such a distinction could not be based on the proposition that the use of contraceptives is immoral in an absolute sense because wicked or against nature, but solely on the ground that the interests of the state require the unrestricted propagation of all healthy persons engaging in sexual relations.

The spread of contraceptive information and articles may also be in contravention of the policy underlying fornication statutes⁶¹ to the extent that the main deterrent to extra-marital relations, *i.e.*, the fear of conception, is thereby removed. The argument is often urged particularly with respect to the possible use of contraceptives by minors. It may be the reason for statutes which prohibit only the general advertising⁶² of contraceptives or their sale by vending machines⁶³ or through means other than drug stores or physicians.⁶⁴

It is thought that fear of the depopulation of the country was a prime motivation of the post-war French statute.⁶⁵ The argument is sometimes made in the United States also. In answer are cited the official figures showing a continued growth of population despite the increasing use of contraceptives.⁶⁶ But it is said that figures as to the crude rate of population increase fail to take into account factors of age-level, and that when the proper corrections are

⁵⁵ See the collection in Johnson, Selected Articles on Birth Control (1925).

⁵⁶ Pope Pius XI, On Christian Marriage, 17 (1936).

⁵⁷ *Id.* at 18. See Latz, The Rhythm of Sterility and Fertility in Women (1932).

⁵⁸ 17 Boston U. L. Rev. 246, 260 (1937).

⁵⁹ Conn. Gen. Stat. 1930, § 2683.

⁶⁰ *Id.* at § 6246.

⁶¹ Ill. Rev. Stat. 1937, c. 38, § 46; Mass. Gen. Laws 1932, c. 272, § 18. Many states have similar legislation.

⁶² Mich. L. 1931, No. 328, § 40.

⁶³ Wis. Stat. 1937, § 351.235 (3).

⁶⁴ Idaho L. 1937, c. 72, § 5.

⁶⁵ Code Pénal 1938, art. 317, at p. 155.

⁶⁶ See World Almanac 1937, 242.

made, it appears that the population is not reproducing itself.⁶⁷ Even if this be admitted, it is said that the effect of present laws is disproportionately to increase the birth rate among such groups in the population as are most likely to become public charges.⁶⁸ It has been suggested that a more appropriate method of maintaining the level of population is a legislative subsidy for such purposes to those families deemed particularly desirable.⁶⁹

Restrictions on contraceptives are probably most easily justifiable as protecting the public against dangerous or misleadingly advertised drugs. Although there are statements by physicians, particularly in earlier articles, that all contraceptives are dangerous,⁷⁰ it is believed to be generally accepted among physicians who have made a study of the subject that certain methods are neither dangerous nor inefficient.⁷¹ It is generally admitted that no contraceptive technique hitherto devised is always effective. Some articles are actually dangerous to health.⁷² Others which are used as contraceptives are inefficient for such purposes, and are misleadingly advertised.⁷³ General prohibitions against contraceptives often operate to allow the distribution of many of the less efficient articles which can be sold as antiseptics or "for prevention of disease" while barring the open distribution of the more efficient articles which cannot be used for such purposes.

Recent statutes, on analogy with pure food and drug legislation, have provided for the licensing of dealers in contraceptives and prohibited the sale of all those which do not comply with standards set up by a state officer.⁷⁴ The term "contraceptive" has been defined with sufficient latitude so as to include for purposes of regulation articles generally used as contraceptives but which have hitherto been considered beyond the scope of prohibitory statutes because they were capable of other uses.⁷⁵ Under such statutes it would be appropriate to require the testing of condoms⁷⁶ and statement of the spermicidal

⁶⁷ Charles, *The Menace of Under-population* c. 2 (1936).

⁶⁸ See Glassberg, *What Should a Family Agency Do about It*, 54 *Survey* 230 (1925).

⁶⁹ Myrdal, *Population Problems and Policies*, 197 *Annals of the American Academy* 200, 207 *et seq.* (1938).

⁷⁰ See Marchant, *Medical Views on Birth Control* 48-68 (1926). But *cf.* Haire, *Some More Medical Views on Birth Control* (1928).

⁷¹ See Sanger and Stone, *op. cit. supra* note 32. ⁷² Bromley, *op. cit. supra* note 25, at c. 7.

⁷³ *Id.* at c. 8. *Cf.* *The Accident of Birth*, *op. cit. supra* note 36, at 110, 112.

⁷⁴ "Only such goods of the class specified [contraceptives] . . . shall be sold in this state as specifically identify the manufacturer thereof by firm name and address on the appliance or on the container . . . nor shall any such goods be sold in this state unless the same shall comply with the standards as to such goods, respecting grade and quality, which may be prescribed by the state board of pharmacy and approved by the state board of health." Ore. Code Ann. Supp. 1935, § 68-2067. A similar provision is found in Idaho L. 1937, c. 72, § 6.

⁷⁵ The definition for both statutes cited note 74 *supra* is "appliances, drugs, or medicinal preparations intended or *having special utility for the prevention of conception*" (italics added).

⁷⁶ See Himes, *op. cit. supra* note 1, at 202-6.

qualities of antiseptics for so-called "feminine hygiene."⁷⁷ Such requirements, coupled with trade-mark protection⁷⁸ and common law liability for defective products should adequately safeguard the consumer. By making available reliable contraceptives they might operate to reduce the number of abortions which, in addition to their illegality, are generally agreed to be dangerous to health.

If policy arguments against the use of contraceptives were to prevail, however, the question would be presented whether more stringent laws could be framed or enforced. In 1937 there were in operation 310 birth control clinics in forty-one states,⁷⁹ including some which have the most stringent statutory prohibitions yet devised.⁸⁰ Even should these statutes be extended to cover all articles of special utility as contraceptives, and should exemptions for medical practice be abolished, constitutional questions aside, it is suggested that the volume of the present traffic shows a demand which would be satisfied by home-made⁸¹ and bootleg articles. The enforcement of an anti-use statute⁸² is not without practical difficulties.

Legislative action is indicated to resolve the inconsistencies in operation of the present laws and to regulate the traffic in contraceptives with regard to the needs of the individual and the interests of the community. Prerequisite to clear thinking on the subject may be the dissolution of the statutory tie between contraceptives and obscene articles. The failure of attempts to repeal or modify the federal law⁸³ has been attributed to considerations of political expediency. In view of the widespread practice of contraception,⁸⁴ it is suggested that the importance of such considerations has been exaggerated.

If legislatures can be induced to act, examples of a more reasonable solution of the problem are available in the recent Oregon and Idaho statutes.⁸⁵

⁷⁷ See *The Accident of Birth*, *op. cit. supra* note 36, at 112.

⁷⁸ *Youngs Rubber Co. v. C. I. Lee and Co.*, 45 F. (2d) 103 (C.C.A. 2d 1930).

⁷⁹ Wood, *Birth Control's Big Year*, 46 *Current History* 55, 56 (Aug. 1937).

⁸⁰ Kan. Gen. Stat. 1935, c. 21, § 1101; Mass. Gen. L. 1932, c. 272, § 21; Mo. Rev. Stat. 1929, § 4275.

⁸¹ See Himes, *op. cit. supra* note 1, at 182-3.

⁸² Conn. Gen. Stat. 1930, § 6246. "*Use of drugs or instruments to prevent conception. 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 less than sixty days nor more than one year or be both fined and imprisoned.*" (Italics added).

⁸³ See Dennett, *op. cit. supra* note 2, at 95-109 for a full discussion of the legislative history of the Cummins-Vaile Bill which sought to delete all provisions of the federal statutes referring to contraception. Later measures which proposed to make exemptions for medical practice were likewise unsuccessful. See Hearings before a Subcommittee of the Committee on the Judiciary on S. 4582 (1931); *id.* on S. 4436 (1932); *id.* on S. 1842 (1934). But the objective of these measures was practically achieved as a matter of statutory construction in United States v. One Package, 86 F. (2d) 737 (C.C.A. 2d 1936).

⁸⁴ See Himes, *op. cit. supra* note 1, at 343, 414-17.

⁸⁵ See the statutes cited note 74, *supra*. See also *McConnell v. City of Knoxville*, 172 Tenn. 190, 110 S.W. (2d) 478, 113 A.L.R. 966 (1937).

A model statute could provide for minimum standards in contraceptives to be fixed by some medical authority and should prohibit misleading advertising of inefficient articles. There may also be good ground for prohibiting sales to minors. But it is suggested that with respect to advertising, no restrictions in addition to those of the general obscenity statutes are necessary or appropriate.

NECESSITY OF APPLICATION TO SHAREHOLDERS IN DERIVATIVE SUITS

Since the purpose of a shareholder's *derivative* action is to remedy injuries to the shareholders as a corporate group rather than to them as individuals,¹ one of the cardinal requirements is that the plaintiff exhaust all means of redress through the corporation itself before bringing suit in its behalf.² To satisfy this condition the plaintiff must allege a demand for action upon the "corporate authorities,"³ or facts clearly indicating that such request would be futile or impossible.⁴ The term "corporate authorities" as used in this connection, of course, includes the corporate officers and the board of directors, but whether or not it also includes the body of shareholders is not conclusively settled by the decisions or text books.

"The fact that a demand has been made upon the directors and they have refused to act, does not . . . *ipso facto* relieve the plaintiff from seeking corporate redress from the shareholders."⁵ Having been frustrated in proper demands for action upon the officers and board of directors, to what extent and

¹ For a lucid discussion of the distinction between a shareholder's direct and individual cause of action and a shareholder's derivative suit for the enforcement of a corporate right, see Stevens, Corporations § 162 (1936). It is possible for a shareholder to institute a class or representative action of either type. See also Moore, Federal Practice c.23 (1938); 13 Fletcher, Cyclopedia Corporations §§ 5939-5965 (rev. ed. 1932); 4 Cook, Corporations §§ 740-759 (8th ed. 1923).

² "In addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated effort, with [*sic*] the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains." Hawes v. Oakland, 104 U.S. 450, 460 (1881).

³ Hawes v. Oakland, 104 U.S. 450 (1881); Rathbone v. Parkersburg Gas Co., 31 W.Va. 798, 8 S.E. 570 (1888); Miller v. Murray, 17 Colo. 408, 30 Pac. 46 (1892); Latimore v. Richmond Ry., 39 S.C. 44, 17 S.E. 258 (1893); Stedtfeld v. Eddy, 45 Idaho 584, 264 Pac. 381 (1928); Caldwell v. Eubanks, 326 Mo. 185, 30 S.W. (2d) 976 (1930).

⁴ "And he [the stockholder] must show a case, if this is not done, where it could not be done, or it was not reasonable to require it." Hawes v. Oakland, 104 U.S. 450, 461 (1881). 13 Fletcher, *op. cit. supra* note 1, at 263.

⁵ 2 Moore, Federal Practice 2269 (1938).