

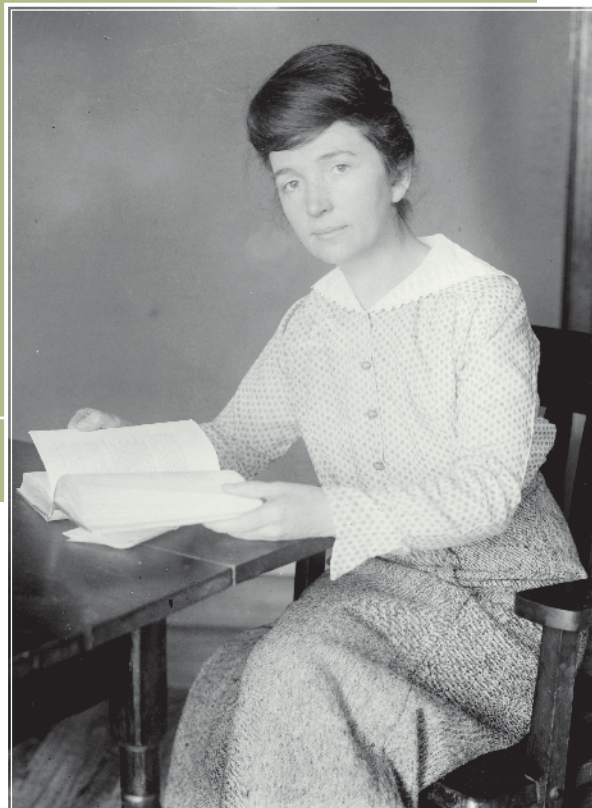
People v. Sanger and the BIRTH of FAMILY PLANNING CLINICS in AMERICA

MARIA T. VULLO

IN 1916, IN THE BROWNSVILLE NEIGHBORHOOD of Brooklyn, New York, Margaret Sanger opened the first birth control clinic in the United States. Just a few days into the operation of the Brownsville Clinic, the New York Police Department raided the clinic, closed it down and arrested Sanger.¹ Sanger was convicted of “obscenity” under New York’s “Little Comstock” law for disseminating information relating to contraception. In the celebrated court case that followed, the New York Court of Appeals, while affirming Sanger’s conviction, granted legal protection to physicians and pharmacists prescribing contraceptives “for the cure or prevention of disease,” paving the way for the establishment of family planning clinics in New York State. The Court’s decision also marked the first step in the battle for establishing the constitutional right of privacy nationwide.

Margaret Sanger and the Birth Control Movement

Margaret Sanger was born in Corning, New York in 1879. As a nurse caring for women who had succumbed to self-induced abortion, Sanger became active in the social reform movement that, among other things, sought to make contraception legal in New York. Influenced by European thinkers like Thomas Malthus and John Stuart Mill, Sanger’s reform movement connected many of society’s ills to the plight of poor, often immigrant, women who



Margaret Sanger

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were forced to choose between too-frequent child-birth and self-induced abortion.

Sanger personally understood the troubles of a contraceptive-free society: her mother had 18 pregnancies, bore 11 children, and died in 1899 at the age of 40, when Sanger was 17 years old. For the rest of her life, Sanger was galvanized by the horrors she encountered that resulted from unwanted pregnancy and illegal abortion, including the harsh fact that a large number of maternal deaths were caused by infections resulting from illegal or self-induced abortion.²

Well ahead of her time, Sanger challenged notions of female domesticity by advocating for a woman’s right to control her reproductive cycle as a “basic freedom.”³ Birth control, she argued, would allow all women to develop their own self-consciousness and acquire skills that would guide society to greatness.⁴ In 1914, Sanger sounded a battle cry in her

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newspaper, *The Woman Rebel* (tagline: “No Gods, No Masters”):

*Is there any reason why women should not receive clean, harmless, scientific knowledge on how to prevent conception? . . . The woman of the upper middle class has all available knowledge and implements to prevent conception. The woman of the lower middle class is struggling for this knowledge.*⁵

As her writings reflect, Sanger sought to equalize access to contraception for all women, regardless of wealth or social class. Despite their prohibition, various forms of contraception and information about contraception were quietly available to women who had both good medical contacts and financial means. But poor women without contacts or the means to pay for a private physician either were denied access to these services or could access them only under exceptionally unsafe circumstances. Many women who could not obtain birth control from their doctors relied on household products as contraceptives, which often caused infections, burns, or worse. And, when contraceptives failed or were unavailable, women resorted to self-induced or black-market abortion. Many women died from such procedures, a disproportionate number of them poor women desperate to control the size of their families.

Sanger also urged the medical community to take ownership of the development and distribution of safe, reliable contraception. At the time, the American Medical Association (“AMA”), founded in 1847, shunned what was considered unscientific birth control practices.⁶ Sanger hoped that physicians would become the primary means through which women could obtain birth control. As Sanger explained in one of her many speaking tours:

In my opinion the proper authorities to give advice on birth control are the doctors and nurses. . . For though the subject is largely social and economic yet it is in the main physical and medical, and the object of those advancing the cause is to open the doors of the medical profession, who in turn will force open the doors of the laboratories where our chemists will give the women of the twentieth

*century reliable and scientific means of contraception hitherto unknown.*⁷

Anthony Comstock and His War on “Obscenity”

Sanger’s social reform agenda collided with that of the infamous morality crusader, Anthony Comstock.⁸ As an active worker in the Young Men’s Christian Association (“YMCA”), Comstock built his name as an anti-vice crusader by demanding that the police compel saloons to abide by Sunday closing laws.⁹ Later, he led the New York Society for the Suppression of Vice, assuming responsibility for “the enforcement of laws for the suppression of trade in and the circulation of obscene literature, illustrations, advertisements, and articles of indecent or immoral use.”¹⁰ Convinced that official law enforcement was



Anthony Comstock

Anthony Comstock, Fighter, by Charles Trumbull
(New York: Fleming H. Revell Co., 1913), frontispiece

ineffective, Comstock assembled a vice squad that assumed quasi-governmental functions, performing arrests and seizing evidence for use in criminal prosecutions, all in order to protect Comstock's self-proclaimed code of morality. Contributions from wealthy New Yorkers—including mining millionaire William E. Dodge, Jr., financier J.P. Morgan and industrialist Samuel Colgate—funded Comstock's salary and expenses.¹¹

Comstock's greatest triumph was securing passage of the 1873 federal law, named the Comstock Act, that prohibited the delivery or transportation of "obscene, lewd or lascivious" material as well as any methods of, or information pertaining to, birth control.¹² Notably, the draft initially considered by the United States Senate contained an exemption for physicians.¹³ Without much discussion on the floor, however, the physician exemption was removed from the bill, which passed the United States House of Representatives on March 1, 1873 by a vote of 100 to 37.¹⁴

The federal Comstock Act was limited in its scope to materials sent through the mail. As a result, in the year following its passage, twenty-four state legislatures enacted mirror laws criminalizing contraceptive "obscenity" within state borders. These "Little Comstock laws" allowed so-called moral purity crusaders like Comstock to work with state and local police to close down distributors of "obscene" materials.¹⁵ New York's statute, prohibiting both the manufacture and the sale of contraceptives, was the

first to be passed by any state.¹⁶

Unabashed by Comstock's declaration of war, Sanger took on Comstock in 1912 with the publication of her first two articles in the *New York Call*, entitled "What Every Mother Should Know" and "What Every Girl Should Know."¹⁷ Although neither article contained information about birth control, Sanger's explicit discussion of venereal disease so upset Comstock that he used his power as a postal inspector to have the publication banned from the mails. In response, Sanger's next edition of the *New York Call* contained an empty

page together with the notice "WHAT EVERY GIRL SHOULD KNOW: NOTHING! BY ORDER OF THE POST OFFICE DEPARTMENT."¹⁸

Sanger's next encounter with Comstock came when an agent of Comstock made an unannounced visit to the Sanger family home in 1915. Representing himself to Margaret Sanger's husband, William, as an impoverished father in search of aid, the agent purchased a birth control pamphlet, thereby providing evidence for obscenity charges. A month later, Comstock personally arrested William. Margaret Sanger was absent at the time of these events, as she earlier had fled to Europe to avoid prosecution on federal charges under the Comstock Act stemming from her distribution of *The Woman Rebel*. Comstock personally attended and testified against William at his trial, and William was convicted under New York's Comstock law for disseminating his wife's pamphlets.

MOTHERS!

Can you afford to have a large family?
Do you want any more children?
If not, why do you have them?

DO NOT KILL, DO NOT TAKE LIFE, BUT PREVENT
Safe, Harmless Information can be obtained of trained
Nurses at

46 AMBOY STREET
NEAR PITKIN AVE. — BROOKLYN.

Tell Your Friends and Neighbors. All Mothers Welcome
A registration fee of 10 cents entitles any mother to this information.

מוטערס!

וויס איז פערמעגליך צו האבען א גרויסע פאמיליע?
וויילט איזר האבען נאך קינדער?
אויב ניט. ווארום האט איזר זיי?
מערדערט ניט. נעמט ניט קיין לעבען. נור פערדעם זיך.
ווערן אינאנצליכע אריינגעשטעלט קעגן איזר פנקסען פון פראדוקטע טוישען אן

46 אמבוי סטריט נער פיסקן עוועניו **ברוקלין**

סאפט האט בעקאנט צו איינעם פריינד און שטודענט. יעדער מוטער איז ווילקאמם
פאר 10 סענט איינשטעלענדיג זייער איזר פנקסען צו דינען אינאנצליכע

MADRI!

Potete permettervi il lusso d'avere altri bambini?
Ne volete ancora?
Se non ne volete piu', perche' continuate a metterli
al mondo?

NON UCCIDETE MA PREVENITE!
Informazioni sicure ed innocue saranno fornite da infermiere autorizzate a
46 AMBOY STREET Near Pitkin Ave. Brooklyn
a cominciare dal 12 Ottobre. Avvertite le vostre amiche e vicine.
Tutte le madri sono ben accette. La tassa d'iscrizione di 10 cents da diritto
a qualunque madre di ricevere consigli ed informazioni gratis.

Flyer for 46 Amboy Street clinic in four languages, Brownsville, Brooklyn, NY, undated
Margaret Sanger papers, Sophia Smith Collection, Smith College (Northampton, Massachusetts)

People v. Sanger



Brownsville Clinic at 46 Amboy Street, Brooklyn, NY, 1916
New York World, Telegram and Sun Corp.
Sophia Smith Collection, Smith College (Northampton, Massachusetts)

Two weeks later, Comstock died; in his obituary, the pneumonia that killed him was linked to his exertions at William's trial. Shortly thereafter, in October 1915, Margaret Sanger returned to New York to face the charges against her and to gain media attention for her cause.¹⁹

The Brownsville Clinic and Sanger's Challenge to New York's Comstock Law

Sanger believed that a legislative approach to challenging the Comstock laws was "a slow and tortuous method of making clinics legal; we stood a better and quicker change by securing a favorable judicial interpretation through challenging the law directly."²⁰ After a lecture tour throughout the United States, Sanger concluded that "a practical test of the law would have the moral endorsement of all thinking people in this country."²¹ Sanger planned to open a birth control clinic in each borough of New York City as a means of openly challenging the Comstock laws.²²

Sanger and her sister Ethel Byrne, a registered nurse at Mt. Sinai Hospital, chose the impoverished, largely immigrant community of Brownsville, Brooklyn for the opening of America's first birth control clinic on October 16, 1916.²³ Handbills in English, Yiddish and Italian advertised the clinic throughout the neighborhood:

MOTHERS!

Can you afford to have a large family?

Do you want any more children?

If no, why do you have them?

*DO NOT KILL, DO NOT TAKE LIFE,
BUT PREVENT.*²⁴

Sanger was anything but reticent about her willingness to be arrested in order to challenge the law. Four days prior to her eventual arrest, Sanger told the *Washington Post* that public officials "might just as well forget their moss-grown statutes and accept birth control as an established fact."²⁵ Sanger also defied the police to interfere with the Brownsville Clinic, which did not distribute contraceptives (or perform abortions) but simply provided factual information about birth control:

*The police are hunting my clinic today. . . .
They can't find it. If they should, they can't hurt it. It is an oral clinic and the law says nothing about not spreading birth control information orally. If they do try to interfere I am legally prepared to carry a hard and bitter fight to the highest tribunal in the land with the best legal talent there is.*²⁶



Margaret Sanger (standing) at the Brownsville Clinic
Library of Congress, Print & Photographs Division, LC-DIG-ggbain-23218

The Arrest

For ten days after it opened, the Brownsville Clinic provided contraceptive information and sex education to 464 recorded clients, charging ten cents apiece.²⁷ As Sanger described it:

*From the first day, the little outer waiting room was crowded. The women came in pairs, with their neighbors, with their married daughters and their husbands. Some came in groups with nursing babies clasped in their arms. Some came from the far end of Long Island, from Connecticut, Massachusetts, Pennsylvania, New Jersey. They came from near and from far to learn the "secret" which they said the rich women all possessed and the poor women could not obtain.*²⁸

Sanger's arrest was a planned police operation. On the ninth day of the Brownsville Clinic's operation, an undercover New York Police Department ("NYPD") detective named Margaret Whitehurst visited the Brownsville Clinic, claiming to be in search of birth control information. Sanger, busily making preparations for a second clinic on Avenue A, was not there.²⁹ Dressed as a washerwoman and pushing a borrowed baby in a stroller,³⁰ Whitehurst immediately aroused the staff's suspicion, but they nonetheless gave her an informational session and a sex education pamphlet, for which Whitehurst left a two-dollar donation (the bill was promptly pinned to the wall with a note reading "received from Whitehurst of the Police Department as her contribution").³¹

The next day, Whitehurst returned to the clinic with three plainclothes NYPD officers. Sanger did not endure the raid quietly. When told that she was being placed under arrest, "[f]or a moment, Mrs. Sanger only stared at the detectives. Then she screamed at Whitehurst: 'You dirty thing! You're not a woman! You're a dog!'"³² Sanger and her assistant were "dragged from the clinic and dumped unceremoniously into a patrol wagon, after they had refused to walk to the Brownsville police station."³³ Refusing her \$500 bail, Sanger spent the night in Brooklyn's unsavory Raymond Street Jail.³⁴ Her sister Ethel was arrested at her home the same evening.³⁵ In a two-count

information filed on November 13, 1916, Kings County District Attorney Harry E. Lewis charged Sanger with exhibiting and offering to sell "instruments, articles, recipes, drugs and medicines for the prevention of conception" and "instruments of indecent and immoral use,"³⁶ in violation of Section 1142 of New York's Penal Law, set forth in the chapter titled "[i]ndecent exposure, obscene exhibition, books and prints and bawdy and other disorderly houses." Section 1142 had been amended several times, and from 1887 read as follows:

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

MRS. SANGER FIGHTS AS POLICE SEIZE HER IN RAID ON 'CLINIC'

Birth Control "Specialist" Arrested and Dragged From
Amboy Street House.

CARRIED OFF IN THE PATROL.

Calls Woman Officer Names, Compels
Forcible Removal to Police
Station.

Mrs. Margaret Sanger, the birth control advocate who recently opened the first birth control clinic in the United States, at 46 Amboy street, Brownsville, was placed under arrest shortly before 2 o'clock this afternoon, and a half hour later was dragged, protesting, into a patrol wagon by Detectives Mooney and Boylan. Mrs. Sanger was in a towering rage and generally abusive. She refused point blank to walk to the station house. When the patrol wagon arrived she hung back and was dragged to the steps of the vehicle.

There she paused and asked permission to make a speech. It was denied her. As the detectives again began to use force she cried out:

"Is this what you call America?"

The rest of her tirade was lost in the whirr of the motor as the police chauffeur threw on the clutch and the wagon rushed through the protesting crowd.

Miss Fanny Mindell, Mrs. Sanger's assistant, was also arrested. Both are charged with a violation of Section 1142 of the Penal Laws.

Mrs. Sanger and her assistant were taken directly to the Brownsville police station house where they were entered upon the books. The police declare they have additional information against the woman in that they saw her exhibiting and offering for sale a box of pills. She has maintained she only gave verbal information but this, the law holds is a violation also.

Mrs. Sanger Arrested Upbraids Woman Sleuth.

It was at 1:30 o'clock this afternoon that Magistrate Walsh in the New Jersey avenue police court issued two Jane Doe warrants for the arrest of two women alleged to be violating section 1142 of Article 106 of the Penal Laws, which relates to the imparting of information on birth control. Immediately Mrs. Margaret Whitesouse, the woman detective, started for Mrs.

Brooklyn Daily Eagle
October 26, 1916

Courtesy Old Fulton NY Postcards
fultonhistory.com

out representations that it can be so used or applied, or any such descriptions 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 manufactures any such instrument, article, recipe, drug or medicine, is guilty of a misdemeanor[.]³⁷

If convicted, punishment entailed a term of incarceration ranging from ten days to a year, a minimum fine of fifty dollars, or both.

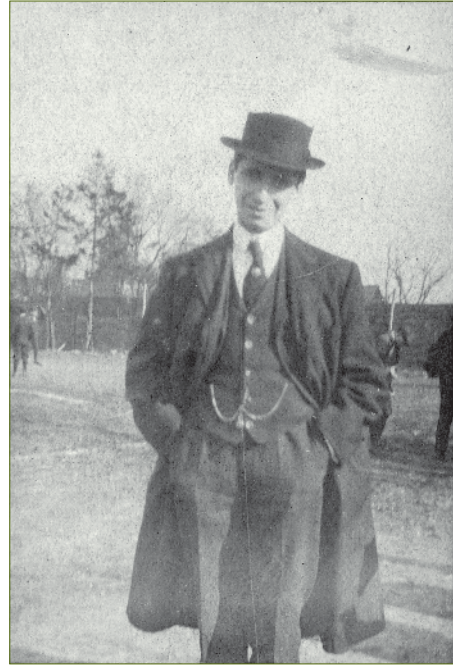
Notably, Section 1145 of the Penal Code—enacted in 1881, and therefore predating the Comstock amendments to Section 1142—exempted physicians from prosecution, at least for “obscenity”:

*Section 1145. Physicians’ Instruments. 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.*³⁸

By Comstock’s reading, this provision only protected “reputable physicians” and not “infamous doctors who advertise or send their foul matter by mail.”³⁹ As it turned out, the *Sanger* case became the impetus for physicians to be at the forefront of the birth control movement.

The Trial

Both Sanger and Ethel chose as their counsel the progressive young lawyer Jonah J. Goldstein. Born in Canada but raised on the Lower East Side, Goldstein graduated from New York University School of Law in 1911 and began his career as secretary to Alfred E. Smith, then majority leader of the State Assembly and later Governor of New York.



Jonah J. Goldstein
Counsel to Margaret Sanger & Ethel Byrne
American Jewish Historical Society

Goldstein would go on to become a distinguished judge, a committed reformer of the family courts, and a lay rabbi. In his obituary, Goldstein was lauded as “a leading figure in New York’s Jewish community and in the city’s philanthropic and civic activities.”⁴⁰

The prosecution decided to try Ethel and Sanger separately, both misdemeanor charges, before a three-judge panel in the Court of Special Sessions.⁴¹ The People, represented at trial by Edward W. Cooper, sought to try them as hastily as possible so that Sanger would be unable to marshal medical experts and social workers to testify in her defense.⁴² Fighting this rush to judgment, Goldstein made a series of pre-trial motions in an effort to get Sanger a jury trial, or at least a fair judicial panel. Sanger testified in pre-trial hearings that she would refuse to attend her own trial if Justice J.J. McInerney, a notorious enemy of birth control advocates, remained on the panel, because “[i]n every birth control case which has come before him he has exhibited a relentless prejudgment of the case.”⁴³ Indeed, during the sentencing hearing of her husband’s trial, McInerney had stated:

This community, like many others, suffers from a lack of children. The trouble is that many women are too selfish. I think that a lot

*of those who are devoting their time to equal suffrage as Christian women ought to go about advocating childbirth. It would be better for the community.*⁴⁴

Goldstein's pre-trial motions were denied,⁴⁵ but Justice McInerney agreed to have another judge sit in his place.⁴⁶

The press was hungry to cover the "Sanger Cases," and coverage was often sympathetic, describing Sanger as a "heroine" and suggesting that the progressive movement backing Sanger's crusade would one day overtake the conservative status quo.⁴⁷ Sanger's arrest also sparked discussions within the medical and religious communities about women's rights.⁴⁸ The press repeatedly reported on the large numbers of women who came to court in support of Sanger.⁴⁹ One newspaper noted that "[r]arely has the little courtroom of the Special Sessions held such a large feminine element among its 'benchers' as were present today in the much-discussed case."⁵⁰

But, as Sanger would later write, "some came for selfish interests, some to inquire, some to exploit."⁵¹ Gender stereotypes prevailed. Reporters commented on the "American beauties" of all social classes in attendance, including "society and club women in the front rows of seats and limousines waiting outside," describing the trial as a "reception, with Mrs. Sanger the guest of honor."⁵² Coverage was filled with descriptions of "young, willowy and good-looking women."⁵³ One report described a "pretty, fluffy haired little woman in brown fox furs, who had a lot of trouble convincing everybody that she was the wife of a scientist."⁵⁴

Sanger's appearance also was a key detail in press accounts: "Mrs. Sanger wore a blue dress and a yellow coat trimmed with black fur at the neck and sleeves. Her hat was of brown cloth. Her brown hair was gathered up in a knot at the back and as she took her seat she removed her veil and smiled. She is a good-looking woman."⁵⁵ Sanger "looked the part [of a guest of honor] rather than that of lawbreaker, as she sat there, a demure, rather shy looking young woman, with soft brown eyes and hair."⁵⁶

The Trial of Ethel Byrne

Sanger's sister Ethel was tried first, on January 4, 1917. The first "Sanger Case" was attended by a coterie of upper-class birth control advocates, and by 15 Brownsville women who had been summoned as the People's witnesses.⁵⁷ In addition to urging constitutional protection for women's privacy, Goldstein argued that the medical exception under Section 1145 infringed the constitutional rights of the poor, denying them the right to choose the number of children they would have, a right enjoyed by middle-class citizens who could afford the services of private physicians.⁵⁸ Goldstein attempted to call Sanger's personal doctor as an expert witness, but the justices ruled the doctor's testimony inadmissible.⁵⁹ Ethel was found guilty and sentenced to one month's imprisonment in a workhouse on Blackwell's Island.⁶⁰

Capitalizing on the national attention, Ethel announced—just a week before her sister Margaret's trial was to begin—that she would undertake a hunger strike.⁶¹ Goldstein attempted to free Ethel by petitioning for a federal writ of habeas corpus, but then-District Judge Augustus Noble Hand denied the petition.⁶² Ethel's hunger strike was front-page news throughout the country.⁶³ And it worked: after 11 days, she was pardoned by Governor Charles Whitman. As Ethel was leaving prison, the prison's physician threw an invoice for \$100 at her, yelling "Here, you notoriety faker, you'll pay this bill before I get through with you!"⁶⁴

The Trial of Margaret Sanger

With her sister's hunger strike in the backdrop, Sanger's trial got underway on January 29, 1917, before a three-judge panel consisting of Justices John J. Freschi, George G. O'Keefe, and Moses Herrman. Before the prosecution called its first witness, Goldstein moved to dismiss the information, arguing that the Comstock law was an unconstitutional abridgement of free speech and women's "free exercise of conscience and the pursuit of happiness."⁶⁵ Goldstein's motion was summarily denied.

The People presented its case against Margaret Sanger with testimony by Margaret Whitehurst, the undercover "police matron" who had visited



Margaret Sanger outside of the Brooklyn Court of Special Sessions, 1917
Planned Parenthood of New York City

the Brownsville Clinic to collect evidence;⁶⁶ Davis Roelsky, a chemist who verified the chemical content of the boxes of vaginal suppositories, "rubber articles," boric acid pills, and "Mizpah"-brand pessaries,⁶⁷ all introduced into evidence by the prosecution;⁶⁸ Sergeant David Barry and Officer Boylan, police officers on the scene of the raid, who testified that they saw Sanger exhibiting rubber articles to three women;⁶⁹ Joseph Rabinowitz, the landlord of the Brownsville clinic, who testified in Yiddish that Sanger told him she intended to operate a "private dispensary";⁷⁰ and Alice Cohen, a Brownsville mother who, despite being called by the prosecution, swore that she neither had been to the clinic nor ever had seen Sanger.⁷¹

Goldstein offered no witnesses, and Margaret Sanger did not take the stand. Instead, Goldstein renewed his pre-trial motion to dismiss. Although the panel did not reach the constitutional issues, Presiding Justice Freschi was skeptical that the prosecution had proven its case, challenging the prosecution to demonstrate that Sanger had sold or had the articles in her possession for "illegitimate purposes."

The prosecution responded that the contraceptive articles introduced into evidence should "speak for themselves," but Justice Freschi admonished: "I think a physician can in proper cases prescribe these articles under the law" pursuant to the medical exception.⁷² Justice Freschi mused that contraceptives might, according to the law, be used under a physician's prescription and that the mere possession of the articles was not conclusive proof that Sanger intended them to be used illegally.⁷³ Noting that "this is a very close case," the panel reserved decision on the ground that articles that might be employed for birth control might also be employed for "legitimate purposes."⁷⁴

The next evening, Sanger made a speech at Carnegie Hall before 3,000 people, announcing that "she had devoted her life to the cause of voluntary motherhood, and would continue to fight for birth control, courts or no courts, workhouse or no workhouse."⁷⁵

When the court re-convened on the second day of Sanger's trial, the prosecution moved for permission to reopen the case to submit additional evidence of Sanger's intent. Over Goldstein's objection, the court granted the request, and the People called additional witnesses, including reluctant reporters forced to testify about their interviews of Sanger and an officer who attended the Carnegie Hall speech.⁷⁶ Remarkably, the prosecution also called Jonah Goldstein himself to the stand, to be questioned about a magazine distributed at the Carnegie Hall rally, in which he had submitted an article.⁷⁷

Following this additional testimony, Goldstein argued that the People had still failed to meet its burden of proof.⁷⁸ The motion was denied, and Sanger was found guilty as charged.⁷⁹

At sentencing, Justice Freschi offered "extreme clemency" if Sanger promised "to obey the law faithfully in the future."⁸⁰ To the applause of women assembled in the courtroom, Sanger refused, telling Justice Freschi that "I cannot respect the law as it exists today."⁸¹ Sanger was sentenced to 30 days in prison, which she spent in a penitentiary for women in Queens.

Upon Sanger's release from prison, Sanger's champions serenaded her with flowers, "three cheers," and the *Marseillaise*, the victory song of the day.⁸²



Margaret Sanger and Ethel Byrne in the courtroom, 1917
Planned Parenthood of New York City

Even the “women prisoners who gathered at the windows of the cells gave echo to the cheers.”⁸³ A Russian Jewish immigrant by the name of Rose Halpern presented Sanger with a bouquet of flowers, “the gift of devoted Brownsville mothers.”⁸⁴ Sanger thanked her supporters: “To the women of New York I am grateful, especially to the mothers of Brownsville. . . . Other duties were put aside while they stood beside us in the fight for birth control, for woman’s right of ownership and dominion over her own body.”⁸⁵

The Appellate Division Affirms

Sanger appealed to the Appellate Division, Second Department, which affirmed the conviction in conclusory fashion on July 31, 1917.⁸⁶ The Appellate Division wrote only that “[t]he considerations which [Sanger] urges against the wisdom and justice of section 1142 of the Penal Law . . . as to preventing conception, are for the Legislature rather than for this court. There is no doubt of the constitutional power to stop public ‘clinics,’ where such articles are furnished and given out in the manner here shown.”⁸⁷

The New York Court of Appeals Hears the Case

The opportunity to challenge the constitutionality of Section 1142 had arrived, and both Sanger and Goldstein seized the moment. Goldstein submitted a searing legal brief to the Court of Appeals. He spent little time discussing the evidence, and instead spent 65 pages challenging the legality of Sanger’s conviction, and the statute itself, on common law and constitutional grounds.⁸⁸

In his brief, Goldstein examined the history of the crime of “obscenity” at common law, concluding that in the courts of England, obscenity was not a criminal offense unless it disturbed the peace or tended to be “a discredit of the prevailing religion.” Goldstein argued that the dissemination of information about birth control, if “chaste, instructive, and creative,” was not indecent, and that the “prevention of conception” and the dissemination of information relative to “prevention of conception” was never classified as obscene at common law.⁸⁹ Goldstein further argued that the prohibition of information concerning birth control was beyond the Legislature’s police powers because it was not “related to the public health, morals, or welfare.”⁹⁰ Additionally, he countered the argument that the dissemination of information about reproductive health will lead to the immorality of women.⁹¹

Foreshadowing Supreme Court jurisprudence 50 years ahead of his time, Goldstein argued that Section 1142 violated the constitutional right of women to determine whether they shall conceive, a “fundamental right” that implicated women’s right to “liberty” as guaranteed by the U.S. Constitution. Personal liberty, he argued, includes not only freedom from physical restraint, but also the right “to be let alone, to determine one’s mode of life and includes the right to exist and the right to the enjoyment of life while existing”⁹²

Unwilling to rely solely on Goldstein’s briefing, Sanger penned her own 250-page supplement for the Court’s consideration, titled “*The Case for Birth Control: A Supplementary Brief and Statement of Facts.*” The book, published in May of 1917, compiled articles by leading thinkers and presented a series of medical arguments in favor of birth control.⁹³

The People's brief stuck resolutely to the facts and argued that Section 1142 was both constitutional and within the power of the Legislature to regulate the health and morals of the public: "The common belief or opinion that the general dissemination of information on the subject of birth control might lead to greater

immorality, is undoubtedly the basis and reason for legislation of this character."⁹⁴ Notably, conceding that a physician's exception already existed when Section 1142 was read together with Section 1145, the People argued that the question of an exemption for physicians was not ripe for review, since Sanger was not a physician.⁹⁵

The Court of Appeals rendered its decision on January 8, 1918, affirming Sanger's conviction. Writing for the Court was Brooklyn-born Judge Frederick Crane, who would become Chief Judge in 1934 and serve a total of twenty-two years on the Court.⁹⁶ Judges Cardozo, Collin, Chase and Hiscock concurred; Judge Hogan concurred in the result, and no Judge dissented.⁹⁷

The Court began with the premise that "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."⁹⁸ Judge Crane dismissed *A Case for Birth Control*, concluding that "much of the argument presented to us . . . touching social conditions and sociological questions are matters for the Legislature and not for the courts."⁹⁹

But Judge Crane went further, addressing the physician exemption.¹⁰⁰ Although the Court found that because Sanger was not a physician she did not



Mothers meet Margaret Sanger after her arraignment in Brooklyn Court of Special Sessions

Planned Parenthood of New York City

have standing to plead the unconstitutionality of the law on this basis,¹⁰¹ the Court explicitly held that Section 1145 exempted physicians from prosecution under the Comstock law. The Court further held that while the exception did not permit advertising or "promiscuous advice to patients irrespective of

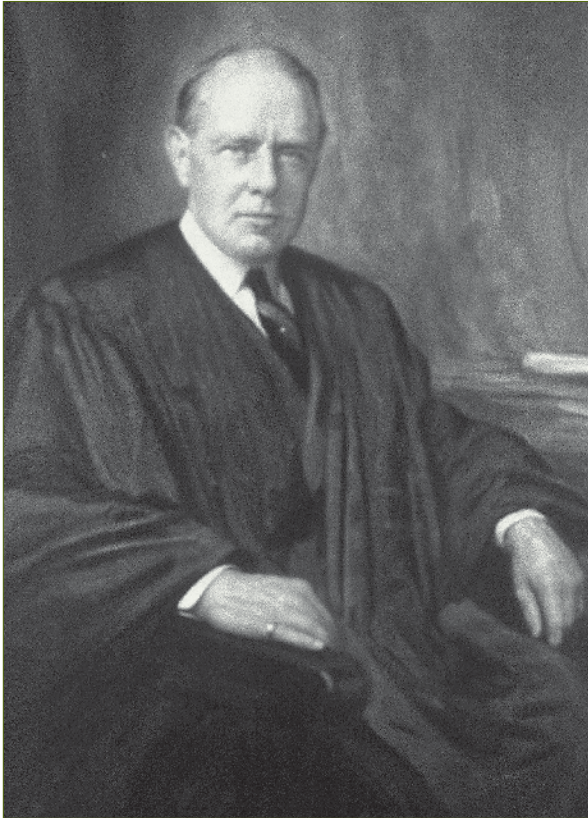
their condition," it was "broad enough to protect the physician who in good faith gives such help or advice to a married person to cure or prevent disease" as well as "the druggist, or vendor, acting upon the physician's prescription or order."¹⁰²

The Court addressed the scope of the exception by tackling a central question: what is "disease"? Judge Crane adopted the definition of "disease" from Webster's International Dictionary: "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."¹⁰³ This definition was broad enough to include pregnancy itself.

Thus, while the Court of Appeals affirmed the State's right to prohibit laypersons from distributing contraceptive information, it at the same time enabled physicians to prescribe contraception for general health reasons, paving the way for the development of birth control clinics that soon followed.¹⁰⁴

The Aftermath of *People v. Sanger*

By reaffirming a physician's right to prescribe contraceptive devices to treat "disease," the New York Court of Appeals' decision in *People v. Sanger* fundamentally altered the way in which contraceptives were delivered to the public and established the



Chief Judge Frederick E. Crane
New York State Court of Appeals collection

medical community as the primary purveyors of birth control.¹⁰⁵

Sanger thus continued her mission, establishing the Birth Control Clinical Research Bureau in New York City in partnership with a female physician.¹⁰⁶ On the heels of the *Sanger* decision, the American Gynecological Society began to display professional interest in birth control.¹⁰⁷ Within a mere decade of the Court of Appeals decision, birth control clinics staffed with physicians, nurses, social workers, administrative personnel and volunteers emerged across the nation. By 1941, the Birth Control Federation of America—whose name was changed the following year to “Planned Parenthood”—was operating over 200 clinics across the country, servicing over 40,000 people, many of them poor women.¹⁰⁸

Moreover, the adoption of birth control by the medical community led to scientific breakthroughs in contraceptive research and technology. During the 1920s, various research programs, such as those

sponsored by the Rockefeller-supported Bureau of Social Hygiene, led to the discovery and isolation of estrogen and progesterone, two hormones responsible for reproduction. With these discoveries, the scientific principles necessary for the manufacture of synthetic hormonal contraceptives were in place.¹⁰⁹ The official announcement of the scientific breakthrough—the birth control pill—was published in a 1956 article in *Science* magazine.¹¹⁰ On June 23, 1960, and after clinical trials and Sanger’s lobbying efforts, the United States Food and Drug Administration approved the first hormonal contraceptive pill for use in the United States. Subsequent scientific improvements in the birth control pill have led to an affordable method of contraception that is widely available to the public, again as Sanger had envisioned.

Sanger also set in motion a series of cases that would render the Comstock laws obsolete. In 1936, in *United States v. One Package*,¹¹¹ the defendant physician was charged under the Comstock laws with importing obscene material for her patients’ use. Writing for the United States Court of Appeals for the Second Circuit, and citing *Sanger*, Judge Augustus Noble Hand—who 20 years earlier had denied Ethel Byrne’s petition for a writ of habeas corpus—ruled in favor of the defendant, holding:

While it is true that the policy of Congress has been to forbid the use of contraceptives altogether if the only purpose of using them be to prevent conception in cases where it would not be injurious to the welfare of the patient or her offspring, it is going far beyond such a policy to hold that abortions, which destroy incipient life, may be allowed in proper cases, and yet that no measures may be taken to prevent conception even though a likely result should be to require the termination of pregnancy by means of an operation. It seems unreasonable to suppose that the national scheme of legislation involves such inconsistencies and requires the complete suppression of articles, the use of which in many cases is advocated by such a weight of authority in the medical world.¹¹²

Following *One Package*, the American Medical Association officially recognized birth control as part

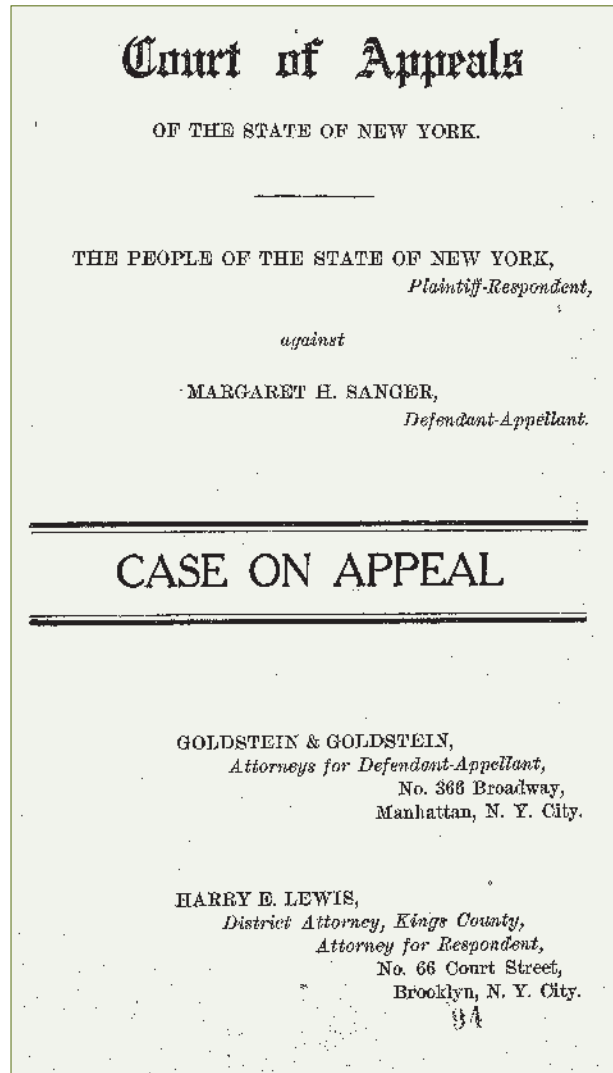
of a doctor's medical practice. Sanger praised the AMA's decision as "the close of a twenty-year struggle for medical recognition of birth control as a legitimate practice."¹¹³

The *Sanger* decision also paved the way for such seminal cases as *Griswold v. Connecticut* in 1965,¹¹⁴ *Eisenstadt v. Baird* in 1972,¹¹⁵ and *Roe v. Wade* in 1973.¹¹⁶ *Griswold's* facts were eerily similar to those in *People v. Sanger*, nearly 50 years earlier. Griswold, the Executive Director of the Planned Parenthood League of Connecticut, gave information, instruction, and other medical advice to married couples concerning birth control. Griswold and her colleague were convicted under an 1879 Connecticut law that criminalized the use of "any drug, medicinal article or instrument for the purpose of preventing conception." In a 7-2 decision, the United States Supreme Court invalidated the law on the ground that it violated the right to marital privacy, legalizing birth control throughout the country.¹¹⁷ In *Eisenstadt v. Baird*, the Court extended this constitutional right to unmarried persons.¹¹⁸

Margaret Sanger died on September 6, 1966, a year after *Griswold*. Her long career merited an extensive front-page obituary in *The New York Times*. In attendance at her funeral was 80-year-old Rose Halpern, one of the Brownsville Clinic's first patients. Fittingly, Dr. Alan F. Guttmacher, then president of the Planned Parenthood World-Wide Association, credited Sanger as the person "who convinced America and the world that control of conception is a basic human right and like other human rights must be equally available to all." Sanger's obituary also provided details on the sociological impact of *People v. Sanger*:

*Mrs. Sanger's American Birth Control League, established in 1921, became the Planned Parenthood Federation of America in 1946 and led to the establishment of more than 250 Planned Parenthood Centers in 150 cities throughout the country. The movement is now worldwide, with 38 member organizations and projects in 88 countries.*¹¹⁹

It all started in Brownsville in 1916. 



Cover of Court of Appeals Brief in *People v. Sanger*
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ENDNOTES

1. *Police Arrest Mrs. Sanger In Her New Clinic*, N.Y. Call, Oct. 27, 1916, at 1.
2. Gloria Feldt, Op-Ed., *Margaret Sanger's Obscenity*, N.Y. Times, Oct. 15, 2006.
3. Margaret Sanger, *The Pivot of Civilization* 209–10 (1922); Margaret Sanger, *Woman and The New Race* [hereinafter *Sanger, Woman*] 6, 8 (1922).
4. Sanger, *Woman*, *supra* note 3, at 54–56, 60–61, 203–04.
5. Margaret Sanger, *The Prevention of Conception*, *The Woman Rebel*, Mar. 1914.
6. *Id.*
7. Ellen Chesler, *Woman of Valor: Margaret Sanger and the Birth Control Movement in America* 146 (1992).
8. Margaret Blanchard & John Semonche, *Anthony Comstock and his Adversaries: The Mixed Legacy of this Battle for Free Speech*, 11 Comm. L. & Pol'y 317, 320 (2006).
9. *Id.*
10. *Id.* at 326.
11. *Id.*
12. 42 Cong. Ch. 258, 17 Stat. 598 (1873); *see also* Peter Smith, *The History and Future of the Legal Battle Over Birth Control*, 49 Cornell L.Q. 275, 275–76 (1964).
13. Cong. Globe, 42d Cong., 3d Sess. 1436 (1873).
14. Smith, *supra* note 12, at 275–76.
15. Blanchard & Semonch, *supra* note 8, at 327–28.
16. Mary Alden Hopkins, *Birth Control and Public Morals: An Interview with Anthony Comstock*, *Harper's Weekly*, May 22, 1915.
17. Blanchard & Semonch, *supra* note 8, at 353.
18. *Id.*
19. *Anthony Comstock Dies in His Crusade: Labor and Worry Incident to War Against Vice Bring Fatal Illness at 71 Years*, N.Y. Times, Sept. 22, 1915; *Disorder in Court as Sanger is Fined*, N.Y. Times, Sept. 11, 1915.
20. *Margaret Sanger is Dead at 82; Led Campaign for Birth Control*, N.Y. Times, Sept. 7, 1966.
21. Margaret Sanger, *Clinics, Courts and Jails*, *Birth Control Rev.*, Apr. 1918, at 3, available at <http://www.nyu.edu/projects/sanger/webedition/app/documents/show.php?sangerDoc=236476.xml>.
22. *Id.*
23. Chesler, *supra* note 7, at 59, 63, 148.
24. *Id.* at 150.
25. *Spread Birth Control*, *Wash. Post*, Oct. 22, 1916.
26. *Id.*
27. Chesler, *supra* note 7, at 150–51.
28. Sanger, *supra* note 21, at 3.
29. *Id.*
30. *Birth Control Clinic Is Raided*, N.Y. Trib., Oct. 27, 1916, at 1.
31. Chesler, *supra* note 7, at 151; *Birth Control Clinic Is Raided*, *supra* note 30, at 1.
32. *Birth Control Clinic Is Raided*, *supra* note 30, at 1.
33. *Id.*; *Police Arrest Mrs. Sanger in Her New Clinic*, N.Y. Call, Oct. 27, 1916, at 2.
34. *Police Arrest Mrs. Sanger in Her New Clinic*, *supra* note 33, at 2.
35. *Id.*
36. Information, *People v. Sanger*, No. 28,735 (N.Y. Ct. Spec. Sess. Nov. 13, 1916).
37. N.Y. Penal Law § 1142 (1887).
38. N.Y. Penal Law § 1145 (1881) (emphasis added).
39. Hopkins, *supra* note 16, at 490.
40. *Jonah Goldstein, Ex-Judge, Is Dead*, N.Y. Times, July 23, 1967.
41. Between 1732 and 1962, the Court of Special Sessions was vested with jurisdiction over inferior crimes. It was statutorily abolished in 1962; since then, the Criminal Court of the City of New York has had jurisdiction over misdemeanors and lesser offenses, as well as preliminary proceedings in felony cases. *See* New York State Archives, http://www.archives.nysed.gov/a/research/res_topics_legal_trials_crimcourt.shtml (last visited Jan. 31, 2012).
42. *Judges May Try to Rush Sanger Trial*, N.Y. Call, Nov. 22, 1916, at 3.
43. *M'Inerney May Not Try Her Case*, N.Y. Call, Nov. 28, 1916, at 28.
44. *Id.*
45. *Court Rules Against Mrs. Sanger*, N.Y. Times, Dec. 5, 1916.
46. *M'Inerney May Not Try Her Case*, *supra* note 43, at 29.
47. *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial*, N.Y. Trib., Jan. 5, 1917, at 5.
48. *Id.*
49. *Judges May Try To Rush Sanger Trial*, *supra* note 42, at 3.
50. *Mrs. Sanger At Bar; Women Fill Court; One Brings Knitting*, *Brooklyn Daily Eagle*, Jan. 29, 1917.
51. Sanger, *supra* note 21, at 3.
52. *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial*, *supra* note 47.
53. *Mrs. Sanger At Bar; Women Fill Court; One Brings Knitting*, *supra* note 50.

54. *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial, supra* note 47.
55. *Mrs. Sanger At Bar; Women Fill Court; One Brings Knitting, supra* note 50.
56. *Disciples of Mrs. Sanger, Rich and Poor, Watch Trial, supra* note 47.
57. *Birth Controllers Up Early for Trial*, N.Y. Times, Jan. 5, 1917.
58. Chesler, *supra* note 7, at 153.
59. *Id.*
60. *Mrs. Byrne Must Go to Workhouse*, N.Y. Times, Jan. 23, 1917; *Mrs. Sanger's Aid is Found Guilty*, N.Y. Times, Jan. 9, 1917.
61. *Mrs. Byrne Must Go to Workhouse, supra* note 60.
62. *Mrs. Byrne Starts Lots of Strikes*, N.Y. Times, Jan. 24, 1917. Twenty years later, Judge Hand would write the opinion in *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936), which freed physicians to import contraceptives.
63. *Mrs. Byrne Fast in Workhouse Cell*, N.Y. Times, Jan. 25, 1917.
64. *Mrs. Byrne Freed by Whitman Pardon*, N.Y. Call, Feb. 2, 1917, at 1.
65. Trial Tr. 10, Jan. 29, 1917.
66. *Id.* at 10–26. Like many of Sanger's critics, the prosecution attempted to ascribe malevolent motives to Sanger's distribution of contraceptives to poor immigrants. See Don Sloan, Letter to the Editor, *Margaret Sanger, Eugenicist*, N.Y. Times, Aug. 9, 1992.
67. The Mizpah Pessary was available for purchase at pharmacies, not as a contraceptive device, but as a "womb support" for women suffering from prolapsed uteruses, a frequently diagnosed condition resulting from multiple pregnancies. It also was an effective contraceptive. Chesler, *supra* note 7, at 151.
68. Trial Tr. 26–29, Jan. 29, 1917.
69. *Id.* at 29–41.
70. *Id.* at 43.
71. *Id.* at 42.
72. *Id.* at 39. Called in his obituary "the most patient of men," Justice Freschi was a first-generation Italian-American who would serve on the General Sessions Court for 34 years. See *J.J. Freschi Dead; A Jurist 34 Years*, N.Y. Times, July 30, 1944.
73. *Justices in Doubt in Sanger Case*, N.Y. Times, Jan. 30, 1917.
74. *Id.*
75. *Mrs. Sanger Defies Courts Before 3,000*, N.Y. Times, Jan. 30, 1917.
76. Trial Tr. 81–88, Feb. 2, 1917.
77. *Id.* at 89.
78. *Id.* at 89.
79. *Id.* at 90; *Mrs. Sanger Guilty, Faces Prison Term*, N.Y. Times, Feb. 3, 1917.
80. *Mrs. Sanger Gets 30 Days*, N.Y. Times, Feb. 6, 1917.
81. *Id.*
82. *Mrs. Sanger: No Fingerprinting*, Brooklyn Standard Union, Mar. 1917, at 1.
83. *Id.*
84. *Id.*
85. Sanger, note 21.
86. *People v. Sanger, supra* 166 N.Y.S. 1107, 179 A.D. 939 (N.Y. App. Div. 1917).
87. *Id.*
88. Appellant's Brief at 1–2, *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).
89. *Id.* at 17–30.
90. *Id.* at 37.
91. *Id.* at 38–39.
92. *Id.* at 45–56.
93. Margaret Sanger, *The Case for Birth Control: A Supplementary Brief and Statement of Facts* (1917).
94. Respondent's Brief at 8, *People v. Sanger*, 179 A.D. 939 (N.Y. App. Div. July 31, 1917).
95. *Id.* at 19–21.
96. *F.E. Crane, 78, Dies; Led State Jurists*, N.Y. Times, Nov. 22, 1947.
97. *People v. Sanger*, 118 N.E. 637, 222 N.Y. 192 (1918).
98. *Id.* at 193.
99. *Id.* at 195.
100. *Id.* at 192, 194.
101. *Id.*
102. *Id.* at 192, 194–95.
103. *Id.* at 195.
104. On January 20, 1918, Sanger appealed the New York Court of Appeals decision to the U.S. Supreme Court to seek a broader decision that would allow nurses, as well as doctors, to prescribe contraceptives. Justice Louis Brandeis, a recent appointee, accepted the petition. Because of various delays, including America's entry into World War I, the hearing was not held until November 13, 1919. Four days later, the U.S. Supreme Court dismissed the case for want of jurisdiction, without issuing an opinion. *Sanger v. New York*, 251 U.S. 537 (1919) (per curiam).
105. Carole R. McCann, *Birth Control Politics in the United States: 1916–1945*, at 64 (1997).
106. Margaret Sanger, *Birth Control Crusade Marches On*, The Clubwoman, Aug. 1936, at 6.
107. Chesler, *supra* note 7, at 273.

People v. Sanger

108. *Id.* at 391.
109. *Id.* at 430.
110. *Id.* at 434.
111. *United States v. One Package*, 86 F.2d 737 (2d Cir. 1936).
112. *Id.* at 737.
113. Margaret Sanger, *At Long Last, New Masses*, July 6, 1937, at 19–20.
114. See Brief for Appellee, *Griswold v. Connecticut*, 381 U.S. 479 (1965) (No. 496), 1965 WL 115613, at *13–14 (“Of the few jurisdictions that have ruled on the constitutionality of contraceptive statutes all seem to be in agreement with the Connecticut Court that the regulation of contraceptives is a legitimate exercise of the state’s police power to regulate public morals . . . *People v. Sanger*, 222 N.E. 192, 118 N.E. 637 (1918), appeal dismissed for want of jurisdiction, 251 U.S. 537, 64 L.Ed. 403, 40 S. Ct. 55 (1919).”).
115. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding that Massachusetts statute permitting married persons to obtain contraceptives to prevent pregnancy but prohibiting distribution of contraceptives to single persons for that purpose violates the Equal Protection Clause).
116. See Motion for Leave to File Brief Amici Curiae on Behalf of Organizations and Named Women in Support of Appellants in Each Case, and Brief Amici Curiae, *Roe v. Wade*, 410 U.S. 113 (1973) (Nos. 70-18, 70-40), 1972 WL 126045, at *28 (“A New York statute patterned after the *Comstock Act* served as the basis for conviction of Margaret Sanger when she opened the first birth control clinic in New York and attempted instruction of women regarding their reproductive systems.” (citing *People v. Sanger*, 222 N.Y. 192, 118 N.E. 637 (1918).) (footnotes omitted)).
117. *Griswold*, 381 U.S. at 486.
118. *Eisenstadt*, 405 U.S. at 453.
119. *Margaret Sanger is Dead at 82*, *supra* note 20.

