



THE UNITED STATES VERSUS ONE PACKAGE

If it hadn't been for Angus MacDonald and Morris Ernst, 1936 would have been a bad year for Margaret. She was fifty-seven, and hated it. Her unsuccessful Russian and Indian journeys had so shaken her that she craved love more than ever. A short while back she had sent Harold one of Angus' letters in an attempt to make him jealous. Harold had not swallowed the bait. "Margaret, darling," he had answered, "Your Scotchman is a man of genius! It is the best description of you I ever heard. The man is a wit, a poet and a psychologist. You really are a great soul, you know."

Later she wrote him that the Catholics were still hammering away at her. "Father Coughlin called me a 'renegade Catholic' & I'd like to sue for libel. I never was a Catholic of any kind."

Since her Catholic baptism and confirmation are matters of record, this denial of her childhood religion was one of her fibs. Another was a statement she made to the Reverend William Scarlett, Episcopal Bishop of Missouri. When she wrote thanking him for using her *Motherhood in Bondage* as a sermon topic, she assured him that "my husband and I have been good Episcopalians for fifteen years, while my sons have been for almost as long." Actually Stuart was an agnostic and Grant a Presbyterian, but the letter was designed to improve her image with a Bishop who had helped her cause. Yet she was risking that image when she went openly dancing and dining with Angus, the kind

of things she had never done close to home since she had become a public figure

In addition, stressing her devotion to Angus, she irritated him by popping in and out of his life without notice, often disappearing for days. She apologized for this sort of behavior "You can never believe my office, as no one there *always* knows the facts of my activities. Were that the case I should have even less freedom than I have now. So I keep my personal activities as dark as possible in a spot-light world." Then she scrawled across the bottom of one of his letters "Angus, a glorious dancer and would-be husband or lover, who finds me 'impossible' "

Yet Angus understood when she had to break a date because of an emergency at the Research Bureau. She explained her breaking of dates this way "There is simply no use, Angus dear, I'm out of the race. Time is crowded for the winter ahead & it's no use hoping—I'm not for play. I've made a strict program for myself in order to get done what must be done."

She also confessed to J. Noah that she would never return to the "garden of love" as she had once so blithely promised. "There is no use scolding and nagging me. Be cheerful, go to your club a few days a week, go to visit your friends. Take in the movies. Stop feeling sorry for yourself and be happy over what you have had and still have in the way of deep & abiding affection."

But J. Noah had not married to spend his time at his club or the movies. When they met for a short reunion in Florida he became childish and irritable. She described the scene "You jumped in the air and shouted and began to abuse me and talk about calendars to keep track of time spent with you and not spent with you and finally ended by telling me to go and not come back. That, of course, was pure temper."

Actually, she was too distracted to think about anything except her congressional defeat, and a way to achieve her goal in a different manner. She was beginning seriously to listen to Morris Ernst who had been telling her for years that laws pertaining to morals had almost never been repealed in the United States, they had either died of neglect or been declared unconstitutional by the courts. Only Prohibition had been so universally flouted it had been repealed. It was through the courts, Ernst reminded her, that Mary Dennett's conviction had been reversed. In Dennett's case, the United States Circuit Court of Appeals had declared that the proof of obscenity must lie within the

text itself "The Comstock law must not be assumed to have been designed to interfere with serious instruction regarding sex-matters unless the terms in which the information is conveyed is clearly indecent," the court had said. As a result, articles in medical journals had been circulating without interference for a long time. Condoms had been sold too, on the premise they were to be used by men "for the cure or prevention of disease." The main block was the customs, which still seized female contraceptives and so-called dirty books. Yet even here there had been exceptions. With Ernst acting as attorney, James Joyce's *Ulysses* had been declared a serious work of art and allowed to come in. So had Marie Stopes' *Radiant Motherhood* and *Wise Parenthood*, books that followed her *Married Love*. He was ready to get the same permission now for pessaries or diaphragms on their way to the Research Bureau, if Margaret agreed.

In fact, he had anticipated Margaret's congressional defeat. Two years before he had ordered a package containing one hundred and twenty pessaries, sent from Japan to Hannah Stone at the Bureau, and notified the customs they were on their way. When they arrived, he had asked the customs officials not to destroy them, but to hold them until he could take the case to court. The officials had agreed. Now if Margaret could raise five hundred dollars for the basic paperwork, he would go ahead.

Reluctantly—she told him she would cooperate. She raised the money, and Ernst was able to start.

First, he got the case put on the calendar of the United States Circuit Court of Appeals under the title of "The United States versus One Package of Japanese Pessaries." Next, he set about rounding up a group of doctors who would agree to testify on the Bureau's behalf. The last was by far the harder job. A federal case, especially on a "hot" subject like this, is held in a great glare of publicity, the kind from which most doctors shy away. To make the task still more difficult, he wanted not only gynecologists and internists but specialists in other areas of medicine so that he could include more reasons for legalizing contraceptives than the standard ones.

After months of scouting, he found nine doctors who promised to help. But at the last minute three backed down, telling Ernst frankly that they feared losing their hospital connections. Of the six who stood firm, the first was Dickinson. The second was Ira S. Wile, former Commissioner of Education and now an associate in pediatrics at Mt. Sinai.

Hospital Third was Louis I Harris, a former Health Commissioner who was working in Public Health and had no hospital affiliations to lose Fourth was Alfred M Hellman, a gynecologist and a cousin of Ernst's, whom he told he would never talk to again if he didn't show up Fifth was Frederick C Holden, attending gynecologist at eleven hospitals, who was on the brink of retirement Last was the internationally famous Dr Foster Kennedy, a specialist in nervous and mental diseases who had testified for Margaret after the Bureau raid Kennedy was the most difficult to get but the most prestigious, he was Ernst's trump card

The trial was set for December 10, 1935, before Judge Grover H Moscovitz, and though Ernst hadn't planned it that way, Moscovitz was sitting on the bench alone Besides, he was young, liberal, and Jewish, while the other judges before whom Margaret or the clinic had appeared were mainly middle-aged, conservative, and Catholic For a trial of this kind, Margaret was in luck

The case got going on the date set, before an eager group of spectators John F Davidson, assistant United States Attorney, was the prosecutor for the government, which bore the burden of proof Davidson's planned strategy was to hammer home only one point the pessaries were contraceptives and the law forbade the importation of contraceptives "All persons are prohibited from importing contraceptives," he kept repeating at the opening session "Congress has so decreed, and Congress makes the laws "

"Do you think Congress could say it would be unlawful to import a surgical instrument which is necessary for an operation?" Judge Moscovitz asked

"Yes," said Davidson firmly "Yes, I think there is no question about this "

Davidson made a simple opening address to the jury

The government has said through Congress, in a statute which is passed, that all persons are prohibited to import into the United States articles for the prevention of conception The claimant in this case imported certain articles which were seized by the Collector of the Customs and he gave notice of that to the United States Attorney's office

The claimant, Dr Hannah Stone, comes in here and admits

that she imported these articles into the United States, admits that they were seized in this district, but denies that they are articles for the prevention of conception and denies that their importation is a violation of this statute. This statute says that if articles that are prohibited are brought in, then the government may come into the court, as it has come in, and get a decision that the article which is brought in violates the statute and that therefore these articles should be destroyed. That is all there is before you.

This is not a criminal proceeding, it is a proceeding which is brought really against these articles to determine whether they are prohibited by the statute or whether they are not. The government will have just one witness to put on the stand, a very eminent doctor who will describe this article to you and will show you that it is an article for the prevention of conception, that therefore the government says that this is clearly the type of article that is banned by the statute and you should find a verdict in favor of the government.

That is all there is to the Government's case.

Ernst jumped up and responded:

Just one remark I want to make. This is an unusual case. It is the People of the United States against a little bit of an object. It is the people of the United States against this box (Holding it up). It is not against a human being, but that doesn't mean that it is not punitive because if the government wins, this is destroyed. Our evidence is going to be directed to the defense of this article which, from my point of view, is far more important than the defense of any human being, because there is not any human being in the world, barring none, who can relieve as much misery and add as much to the health of the population as this article or articles like it.

There is only one other bit of evidence, and that is that we are going to put in evidence other articles that you or I, anybody could go into any drug store and buy that could be used both for contraception and for other purposes. We are going to show that soap and all kinds of drugs can also be used for birth-control purposes and for other purposes, and then we are going to raise the issue

that if an article can be used for the protection of the health of the nation it should not be banned just because it might be used illicitly or illegally

When Ernst was finished, the prosecuting attorney put his only witness Dr Frederic W Bancroft on the stand Under Davidson's direct examination, Dr Bancroft testified that the exhibit under question was indeed a contraceptive device, he also explained how it worked Then Ernst cross-examined Dr Bancroft "Doctor, you stated that you have prescribed pessaries or similar articles Now, I would like you to set forth as fully as you please the medical indications upon which you have found it necessary to make such prescriptions?"

Dr Bancroft "I think there are many medical needs "

Mr Ernst "For example?"

Dr Bancroft "Tuberculosis, threatened tuberculosis, heart disease of the mother—many similar medical conditions "

Mr Ernst "It could be cases of kidney diseases?"

Dr Bancroft "Yes "

Mr Ernst "It could be cases of pelvic deformities which make childbirth arduous?"

Dr Bancroft "Not necessarily, with a Caesarian incision "

Mr Ernst "Diabetes cases?"

Dr Bancroft "Yes "

Mr Ernst "Toxic goiter where pregnancy places a great strain upon the thyroid and may seriously endanger the woman's life?"

Dr Bancroft "It could be, but the condition could be removed She should be operated on for the thyroid, and then the pregnancy is a simple condition "

Mr Ernst "Cases where they are suffering from insanity and epilepsy?"

Dr Bancroft "Yes "

Mr Ernst "How about neurological disorders, disorders of the nervous system?"

Dr Bancroft "I am not a nerve specialist, therefore I don't feel that I am in any way capable to speak "

Mr Ernst "How about the very basic use for the proper spacing of childbirth in relation to the mortality of the offspring and, with regard to the mother, might there not be medical indications for a prescription

of some such article in order to prevent the birth of a child if there had been a child born to the same woman within a few months?"

Dr Bancroft "That is right "

Mr Ernst "For the sake of the offspring possibly you would find cases where you would prescribe the use of this article to prevent syphilis and gonorrhoea through infection at the time of birth or even transmission?"

Dr Bancroft "Yes "

Mr Ernst "How about a case where the mother has four or five children and the husband has been out of work or has a six- or eight-dollar income? Would the health of the family be imperiled if there were another child and if that is so, because of lack of food, nutrition, decent home, decent housing, would there not be such cases where the health of the family would be benefitted by such a prescription?"

Dr Bancroft "I think that is a sociological problem, your Honor That is not of itself medical and is something which sociology itself should take up "

Judge Moscovitz "Can you answer it, Doctor?"

Dr Bancroft "No "

Mr Ernst "In addition to pessaries there are a great number of other articles that you prescribe for the prevention of birth, that consist not only of devices made of rubber but also possibly of chemicals that are applied by douche?"

Dr Bancroft "Yes "

Mr Ernst "Or jellies?"

Dr Bancroft "Yes "

Mr Ernst "Doctor, these articles that you describe, other than pessaries, can be purchased by any layman without a doctor's prescription in any drug store, or a good many of them?"

Dr Bancroft "I presume so "

Mr Ernst "I show you this bottle and ask you whether that is one of the prescriptions that may be prescribed by the medical profession? (handing it to the witness)

Dr Bancroft "It might "

Judge Moscovitz "What is it?"

Dr Bancroft "Liquor Creosol Compound "

Mr Ernst "That, Doctor, that might be used by the patient through the use of douche bag or a syringe and an article such as this can also

be purchased without a doctor's prescription in any drug store?"

Dr Bancroft "Yes "

Mr Ernst "Now, if your Honor please, I would like to have marked for identification that bottle and this box containing a syringe, known as 'Compacto Red Folding Fountain Syringe ' That is all, your Honor "

Mr Davidson next re-cross-examined Dr Bancroft "Dr Bancroft, when you have testified that you have prescribed the use of pessaries or vaginal diaphragms in order to prevent conception where it might injure the health of a woman who had tuberculosis or heart trouble and that list of diseases to which Mr Ernst had reference, will you state whether or not it is not the fact that the use of such article is effective to prevent those diseases only by virtue of the fact that it prevents conception? Have I made myself clear?"

Dr Bancroft "Yes "

Mr Davidson "Leaving out syphilis and gonorrhoea?"

Dr Bancroft "Yes "

Mr Davidson "So that again, leaving aside syphilis and gonorrhoea, all the diseases which you testified the use of this article might prevent could be prevented only by virtue of the contraception quality or effect of the article?"

Dr Bancroft "Yes "

Mr Davidson "That is all "

At this point, Ernst jumped up again "Doctor, just one more question I am going to read you a statement made by a Catholic doctor, Dr Leo J Latz, which appeared in a volume called *The Rhythm*, and see whether you will agree with this as stated by a brother doctor He says on page 113 'Burdens that test human endurance to the utmost limit, and to which all too many succumb, will be lightened I speak of economic burdens, the burdens of poverty, of inadequate income, or unemployment, which make it impossible for parents to give their children and themselves the food, the clothing, the housing, the education and the recreation they are entitled to as children of God ' Now I ask you whether you agree with that medical opinion stated by Dr Latz in the book *The Rhythm* "

Mr Davidson "If your Honor please, I object to that question That is entirely improper "

Judge Moscovitz "I will let him answer the question if he can "

Dr Bancroft "Your Honor, my opinion of that is that that is a purely

sociological state thing, that the state should have a committee to investigate economics of people in relation to pregnancy I don't think that is a medical problem I think that is a state sociological problem that the state should handle itself "

Mr Ernst "I understand you do not see eye to eye with Dr Latz?"

Dr Bancroft "I see eye to eye with him, but not his means "

Mr Ernst "I see, so you see eye to eye with him as to the relation of the economics of a family to the number of children, but you doubt the method he suggests for preventing the birth?"

Dr Bancroft "Yes "

Mr Ernst "That is all Thank you "

Dr Bancroft left the stand, and the prosecuting attorney Mr Davidson offered in evidence Hannah and Abraham Stone's *Marriage Manual*, stressing the fact that it described pessaries or diaphragms as articles for the prevention of conception, concluding that therefore the Japanese pessaries sent to Hannah Stone were things that, according to present law, could not be imported The customs had been right in seizing them

Having made this point, Davidson rested his case

The first witness for the Research Bureau, Dr Holden, was now called to the stand and duly sworn, after which Mr Ernst said "May I suggest, your Honor, there are quite a number of other doctors in the court room, all busy men, and it might be easier to proceed if I will ask the other doctors who are in the courtroom to step forward, listen to all the questions and then it will save your time after Dr Holden is finished, in case they happen to agree with his answers, we could then incorporate in the record the agreement or where their particular views are divergent from his "

Judge Moscowitz "All right "

Ernst asked Dr Holden to state his medical credentials, ending with the pointed question, "How long have you been practicing, Dr Holden?" to which the answer was "Forty-three years "

Ernst then got ready to question Dr Holden but Davidson objected on the grounds that there was only one matter to be determined by the court Were or were not the imported Japanese pessaries articles for the prevention of conception? If they were, he repeated, they were illegal and the government had the right to seize them

It was the same when Ernst put his other witnesses on the stand All had impeccable medical connections and years of medical experience

All agreed that there were many instances in which they had prescribed contraceptive articles to their patients for the sake of preserving the woman's health, and would do so again if the law permitted them

But Davidson merely kept using the same questions to all of them "Were the devices seized by the customs contraceptives?" And as they of course answered yes, he used the same argument "Then they are prohibited by a law passed by Congress from coming in "

At this point Ernst asked the judge for permission to do something he admitted was a little unusual, that is, to put Dr Stone herself on the stand He said matters had come to a sorry state when doctors had to be asked to testify that articles in their possession, whether a scalpel or any other piece of medical equipment were being either tested or used legally for the cure or prevention of disease He made the point that the oath doctors took when receiving their medical degrees made them use such articles or test all articles only with the best interest of their patients in mind

Judge Moscowwitz gave permission and Hannah Stone took the stand

She stated firmly that the pessaries sent to her from Japan were to be tested and used by her, if she found them valuable for the prevention of conception when in her opinion there were indications that pregnancy would be harmful to a woman's health That indeed she had nothing but the patient's interest in mind

Mr Davidson had nothing to say to that except to repeat, monotonously by this time, that articles for the prevention of contraception could not be legally imported, and therefore the customs had had the right to seize them and they could be destroyed

Ernst now jumped to his feet to ask Dr Stone a final question "The use of this type of contraceptive when used by the patient does not result in destruction of human life, does it, in the sense that by the use of such articles there is no joinder of the sperm in the ovum?"

Dr Stone "There is no joinder that would prevent a living thing That would prevent the meeting of it "

Mr Ernst "So that in the use of your article there is no destruction of the human life in the philosophical or theoretical sense being made such as after the joinder of the sperm and the ovum?"

Dr Stone "There is no destruction because there is no beginning of human life "

Ernst concluded "That is all, we rest "

Judge Moscowitz decided that, since "there is no question of fact for the jury, no issue will therefore be submitted to the jury. There are only questions of law remaining and the court will reserve decision on the questions of law."

The jury was excused.

On January 6, 1936, Morris Ernst opened his mail and found in it the judge's opinion, which he read with growing jubilation.

It said that in Judge Moscowitz' opinion the pessaries had been imported for a lawful purpose. That Congress had never intended to prevent such importation. That if physicians were stopped from bringing in contraceptive materials, or any other materials to be used for legitimate medical reasons, then doctors might be hindered from prescribing articles that not only would cure or prevent disease, but save human lives. He therefore issued a decree directing the customs officials to return the pessaries to Hannah Stone.

Ernst excitedly phoned the newspapers and told them about the winning judgment. They were so impressed that the *New York Times*, *Post*, and *Herald Tribune* gave the story prominent space, and the *Tribune* even ran Judge Moscowitz's picture.

When Ernst phoned Margaret, however, he was surprised to find she had received the news with mixed emotions. She tacitly admitted she had won her battle, to be sure, birth control was now in doctors' hands. But she hadn't won it alone or in the way she had planned. Ernst was sharing the glory which she wanted to keep to herself. In fact, as soon as she hung up on him, she complained to her family that he had charged too much for his services, when as a matter of fact, except for actual expenses, he had charged nothing at all. And the next day she went so far as to lose her temper and call him "a cheap Tammany politician" when he told her in the course of their conversation that he was trying to keep both Mary Ware Dennett's friendship and her own.

But she calmed down and apologized with generous insistence when he admitted that her dramatic tactics had proved far better than Dennett's cautious ones in hastening the victory. Ernst then became generous too. He gave a general press interview in which he said "The law process is a simple one. It is a matter of educating the judges to the mores of the day. It is perfectly easy to win a case after Margaret Sanger had educated the judges, and she has educated many of them."

Of course, government appealed the One Package decision. The appeal was directed to the Second Circuit Court where three judges sat—

Learned Hand, his brother August Hand, and Thomas Swan. All of them confirmed Judge Moscowitz's ruling that the contraceptives be admitted, and the matter was closed, especially after a further appeal by the government to the Supreme Court was refused because no legal errors could be found in the way it had been handled in the first place. The victory became a victory with no ifs, ands, or buts.

Ernst gave a victory dinner at an Italian restaurant in Greenwich Village, including among his guests Margaret's anarchist friends Carlo Tresca and Elizabeth Gurley Flynn, and as a special surprise Harold Content, the man who had been the prosecuting attorney at the original *Woman Rebel* trial. Content cheerfully admitted that he had only been doing his duty at the time, he had secretly admired Margaret all along.

Equally warming was a telegram from Angus. He and his new wife had moved to Orange, Virginia, to raise beef cattle and start a wood-working shop. When he heard of the victory, he wired Margaret a corsage with the message "I envy the flowers because they will be worn next to your heart." Margaret answered in another burst of self-realization.

You are a perfect dear to let me know you give me a thought at all at all. No woman in this life can be more unsatisfactory as a wife, mother & friend than M S has been & still is & doubtless forever will be. The wife & mother part has long ago been settled as hopeless. But there are still a few faithful optimistic friends like A MacD who inspire me to "wake up & live."