Some Milwaukee Roots in the Current Mifepristone Litigation

By Schuyler Frautschi[1]

On April 14, 2023, Wisconsin AG Josh Kaul joined New York AG Letitia James and 22 other states attorneys general in filing an *amicus* brief with the United States Supreme Court, asking it to stay a nation-wide preliminary injunction issued by a federal judge in Texas that would itself have stayed the FDA's approval in 2000 of mifepristone, most commonly used as one of two parts in a regimen for medication-induced abortions.

On April 21, the Supreme Court effectively allowed the approval status and thus the availability of mifepristone to remain unchanged, pending consideration of the case in the United States Court of Appeals for the 5th Circuit. Oral argument in that court was heard on May 17, and its decision is pending.

As Wisconsinites and others are well aware, the Supreme Court's decision last summer in *Dobbs*, overturning the Constitutional right to abortion afforded 50 years ago in *Roe v. Wade*, brought long-dormant abortion-related laws from the 19th and early 20th centuries back to the fore, including Wisconsin's abortion laws and the federal Comstock Act, this latter of which prohibited the use of the mail to spread anything deemed "obscene," including information and materials relating to abortion.

The preliminary injunction on mifepristone in Texas and many of the courts' briefs and materials thus invoke the abortion-related pieces of the Comstock Act. At issue at trial and on appeal, among several other matters, is the precedential meaning of court interpretation of the Comstock Act over the course of more than 100 years. U.S. District Court Judge Matthew J. Kacsmaryk in Texas cites approvingly in his preliminary injunction that the Comstock Act "indicates a national policy of discountenancing abortion as inimical to the national life," quoting these words from a 7th Circuit decision in 1915 in an appeal called *Bours v. United States*. The former personal lawyer for Donald J. Trump, Jay Sekulow, quoted the same passage in his group's *amicus* filing with the Supreme Court on April 17, in building an argument that the Comstock Act today constitutes a federal prohibition on mailing abortion drugs and devices.

But who was this Bours, and what was his case about?

Thomas Robinson Bours

Thomas Robinson Bours was born in Stockton, California in 1860.

His father Allen Lee Bours was from a blue-blood East Coast family, and Allen and his brothers Thomas R. and Benjamin W. had moved to Stockton in the 1840s; Thomas and Benjamin were bankers, investors and capitalists, while Allen worked as a notary in a law office. Allen married, but evidently he and his wife lost their first two sons. Eventually the couple had two other sons in Stockton who survived, and these brothers were named after Allen's brothers, Benjamin Walker and Thomas Robinson. In 1867 or

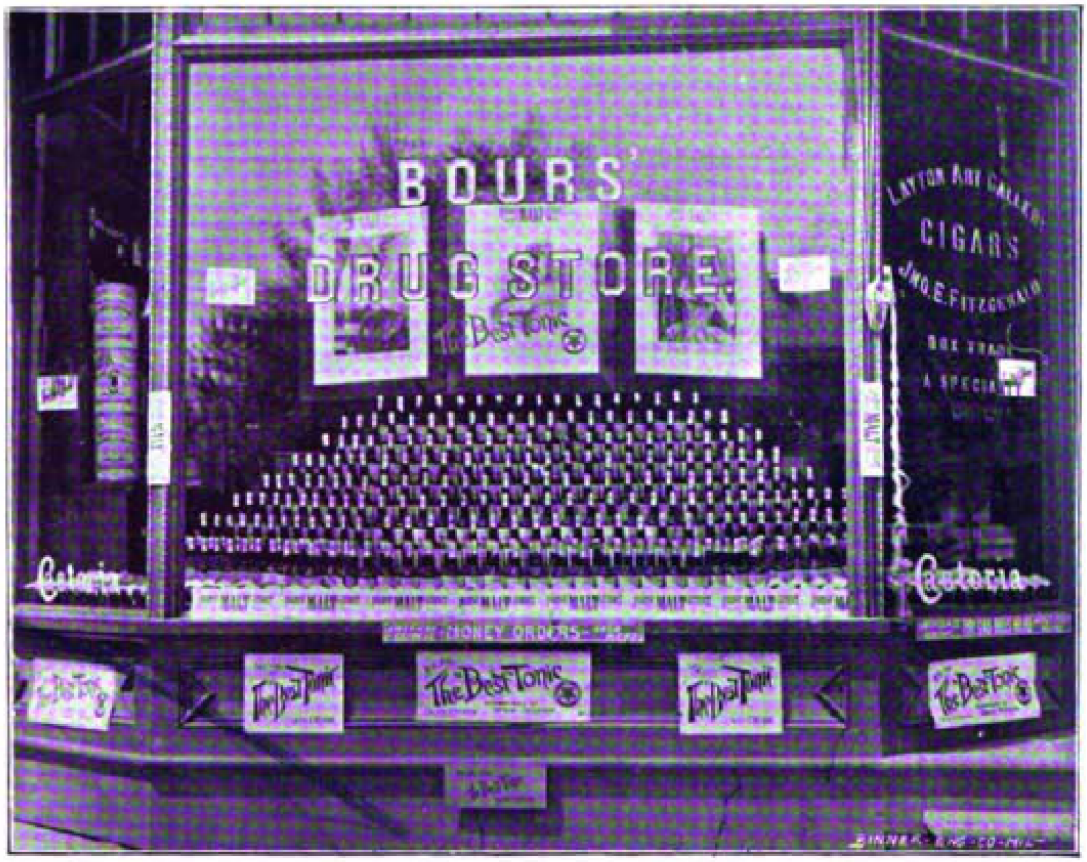
[1] The author writes very occasionally about intersections between sexual and reproductive health, on the one hand, and the law, on the other. See e.g., *Understanding the Public Health Policies Behind* Ferguson and *Understanding HIV-Specific Laws in Central America*. He grew up in the Bours House in Milwaukee. In connection with this article, he would like to thank Kate Currie, Jeremy M. Farmer (and the National Archives at Chicago), Pam and Tim Frautschi, Michael Horne (and Urban Milwaukee), Joyce Page and her son Brian Page, Lynn Paltrow (and Pregnancy Justice), and Melissa Shriver (and the Milwaukee Public Library).

1868, Allen and his family moved to Michigan, because his wife's father was seriously ill there. Allen was involved in building the third Michigan State Capitol building, as the Secretary of the State Board of Building Commissioners.

(The young Thomas Robinson Bours' namesake uncle would also leave Stockton and move to Mexico at the invitation of his uncle John Alfred Robinson. In Mexico, the Robinson Bours progeny would go on to found Bachoco, the poultry company, and today the Robinson Bours family is amongst the wealthiest in Mexico.)

Our Thomas Robinson Bours graduated from the Ann Arbor School of Pharmacy and worked for a time in Detroit for Brown's Drug Store. His father[2] and older brother[3] were also druggists in the Detroit area. T.R. Bours came to Milwaukee as a young man, and worked with E.A. Bours as a druggist at N. 21st and W. Wells streets.[4] He married Eva Taylor in Milwaukee in 1887,[5] and they would go on to have two sons. He became a physician in 1901, graduating from the Milwaukee Medical College, which became the Medicine Department at the newly chartered Marquette University in 1907. In the Wisconsin State Census of 1905, Thomas Robinson Bours appears as the head of household, living with wife Eva, their two sons, and his mother-in-law. But by the national census of 1910, Eva is listed as a "widow," living with her sons, mother, and a German boarder; at that time, women often held themselves out as widows rather than say they were divorced. Thomas Robinson Bours cannot be found in the 1910 census.

[2] Detroit_Free_Press_Sat_Sep_1_1883_gas can explosion.pdf
[3] Detroit_Free_Press_Tue_Sep_6_1881_BW Bours suicide.pdf
[4] 1890 Milwaukee Directory for EA Bours.pdf
[5] Bours marriage 1887 to Eva.pdf



E. A. BOURS' DISPLAY, MILWAUKEE, WIS.—FIFTH PRIZE.

Caption: Photograph printed in *The Pharmaceutical Era*, Vol. 12, 1894

Eventually, Thomas Robinson Bours would spend some time in Arizona. He bought ranches[6] there in 1908,[7] 1909[8] and 1910.[9] He was married in Phoenix to Anna Patulski of Milwaukee on February 4, 1910.[10] Alarmingly, on Nov. 1, 1912, the *Milwaukee Sentinel* would report that "Dr. Thomas R. Bours secured an absolute divorce from his wife, Mrs. Anna R. Bours [***] Ten days after the marriage, Mrs. Bours disappeared from her home and the doctor has not seen her since."[11] But Anna did reappear: she's listed as a "widow" in the Milwaukee City Directory in 1914, directly above Dr. Bours' number.[12]

Arrest!

On the morning of November 20, 1912, Dr. Bours was one of two physicians and three midwives arrested in Milwaukee and charged under the Comstock Act with soliciting abortion business through

[6] Arizona_Republican_Sat__Feb_20__1909_.pdf,
[7] Arizona_Republican_Sun__Feb_21__1909_.pdf
[8] Arizona_Republican_Sun__Mar_7__1909_.pdf
[9] 1910_06_18_Clayson_Ranch_Sold.pdf
[10] Bours Patulski marriage cert Phoenix 1910.pdf
[11] Bours__Milwaukee_Sentinel__November_1_1912__p2.pdf
[12] Anna R Bours wid 1914 Mke Directory.pdf

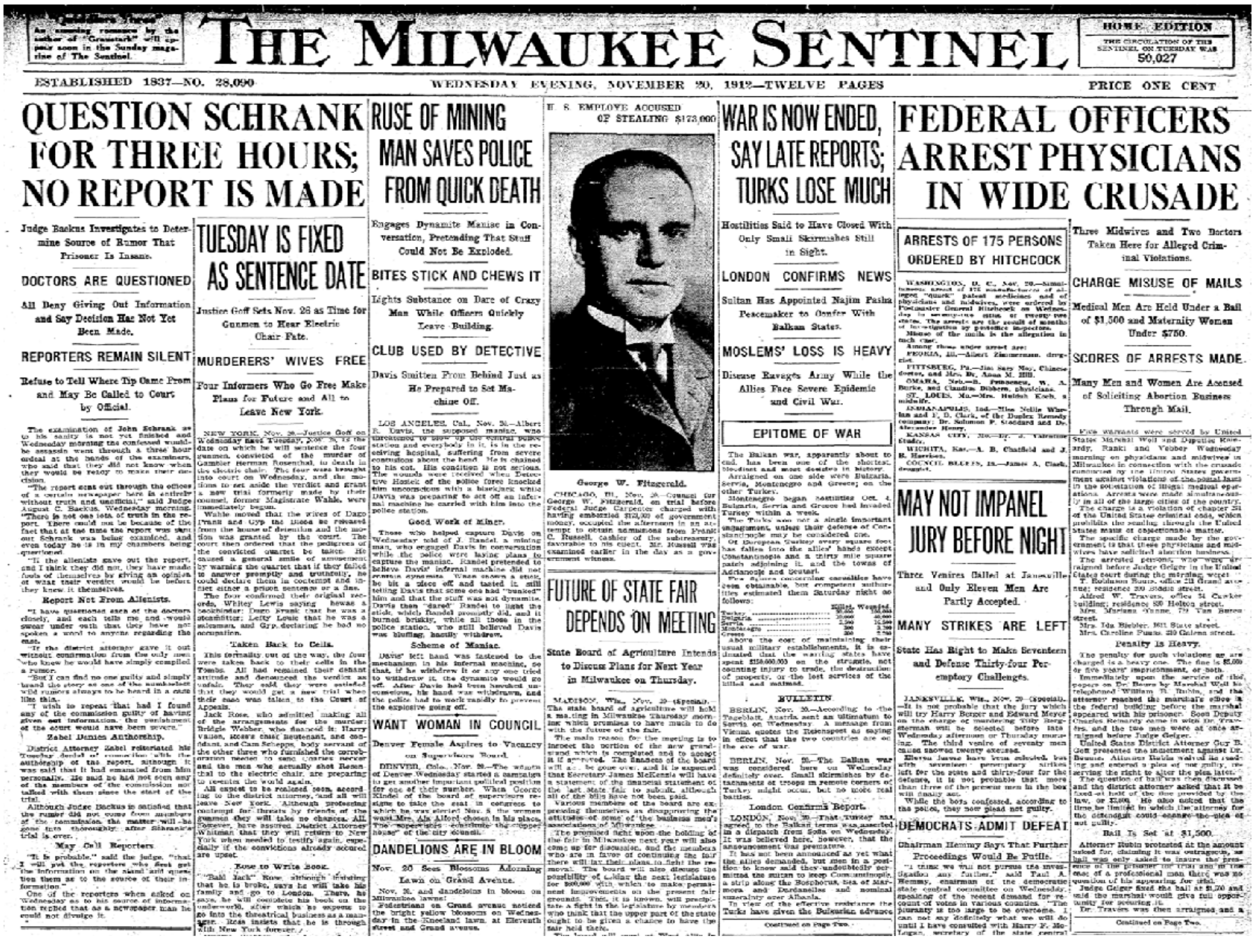
the mail. By that evening, the *Milwaukee Sentinel* was reporting on its front page, right side above the fold, that this was a part of a nation-wide round-up of 173 people ordered by Postmaster Frank Harris Hitchcock.[13] The raid was, as other papers around the country were reporting, "the most extensive and far reaching ever made by any department of the government."[14]

Dr. Bours was arraigned by Judge Ferdinand A. Geiger, who would handle the entire trial in federal court for the Eastern District of Wisconsin, in Milwaukee. Geiger had been in private practice for over 20 years before being appointed to the bench by President Taft in the spring of 1912.

Bours was represented at his arraignment by William B. Rubin, a Russian-born labor lawyer and stockholder in the *Social Democratic Herald*, a socialist paper in Milwaukee. It is unclear when the lawyer-client relationship had formed, but a few years earlier both had had offices in the Cawker Building, still standing on Wells and Plankinton, Bours at #46, Rubin at #22.[15] Rubin's partner at the firm of Rubin & Zabel was German-born Winfred C. Zabel, who had been elected District Attorney on the Socialist ticket in 1910. The Socialist Party had taken a drubbing in the elections in the spring of 1912, and so Zabel had adopted an anti-vice line to get publicity in June, moving to shut down the city's brothels, in preparation for the fall elections. As it would turn out, Zabel would have no need of that particular publicity, because on October 14, 1912, a German-born New York City bartender named John Flammang Schrank would shoot the Progressive Party presidential candidate Teddy Roosevelt in front of Milwaukee's Gilpatrick Hotel on North 3rd Street, now part of the site of the Grand Avenue Mall.

So Zabel as D.A. was actually featured in the left-hand column above the fold in the evening *Sentinel,* with his private practice partner W.B. Rubin and Dr. Bours featured on the right. In Roosevelt's attempted assassination case, Judge Backus was trying to quash the day's rumors, possibly spread by D.A. Zabel himself, that Schrank had been deemed insane. (Zabel and Rubin would eventually end up before Judge Backus as prosecutor and defense attorney, respectively, in connection with the 1917 riot and bombing in Milwaukee's Bay View neighborhood, which involved the nation's largest loss of police lives prior to 9/11.)

[13] Bours_Milwaukee_Sentinel_November_20_1912_pp1-2
[14] _Take_Chicagoans_in_Federal_War_on_Race_Suicide___Chicago_Trib__21_Nov_1912_.pdf
[15] Young_Co_s_Business_and_Professional_Dir Bours Rubin.pdf



THE MILWAUKEE SENTINEL

HOME EDITION — THE CIRCULATION OF THE SENTINEL ON TUESDAY WAS 50,027

ESTABLISHED 1837—NO. 28,090 — WEDNESDAY EVENING, NOVEMBER 20, 1912—TWELVE PAGES — PRICE ONE CENT

QUESTION SCHRANK FOR THREE HOURS; NO REPORT IS MADE

Judge Backus Investigates to Determine Source of Rumor That Prisoner Is Insane.

DOCTORS ARE QUESTIONED

All Deny Giving Out Information and Say Decision Has Not Yet Been Made.

REPORTERS REMAIN SILENT

Refuse to Tell Where Tip Came From and May Be Called to Court by Official.

TUESDAY IS FIXED AS SENTENCE DATE

Justice Goff Sets Nov. 26 as Time for Gunmen to Hear Electric Chair Fate.

MURDERERS' WIVES FREE

Four Informers Who Go Free Make Plans for Future and All to Leave New York.

RUSE OF MINING MAN SAVES POLICE FROM QUICK DEATH

Engages Dynamite Maniac in Conversation, Pretending That Stuff Could Not Be Exploded.

BITES STICK AND CHEWS IT

Lights Substance on Dare of Crazy Man While Officers Quickly Leave Building.

CLUB USED BY DETECTIVE

Davis Smitten From Behind Just as He Prepared to Set Machine Off.

WANT WOMAN IN COUNCIL

DANDELIONS ARE IN BLOOM

U. S. EMPLOYE ACCUSED OF STEALING $173,000

George W. Fitzgerald.

FUTURE OF STATE FAIR DEPENDS ON MEETING

State Board of Agriculture Intends to Discuss Plans for Next Year in Milwaukee on Thursday.

WAR IS NOW ENDED, SAY LATE REPORTS; TURKS LOSE MUCH

Hostilities Said to Have Closed With Only Small Skirmishes Still in Sight.

LONDON CONFIRMS NEWS

Sultan Has Appointed Najim Pasha Peacemaker to Confer With Balkan States.

MOSLEMS' LOSS IS HEAVY

Disease Ravages Army While the Allies Face Severe Epidemic and Civil War.

EPITOME OF WAR

BULLETIN

FEDERAL OFFICERS ARREST PHYSICIANS IN WIDE CRUSADE

ARRESTS OF 175 PERSONS ORDERED BY HITCHCOCK

MAY NOT IMPANEL JURY BEFORE NIGHT

Three Venires Called at Janesville and Only Eleven Men Are Partly Accepted.

MANY STRIKES ARE LEFT

State Has Right to Make Seventeen and Defense Thirty-four Peremptory Challenges.

DEMOCRATS ADMIT DEFEAT

Three Midwives and Two Doctors Taken Here for Alleged Criminal Violations.

CHARGE MISUSE OF MAILS

Medical Men Are Held Under a Bail of $1,500 and Maternity Women Under $750.

SCORES OF ARRESTS MADE

Many Men and Women Are Accused of Soliciting Abortion Business Through Mail.

Penalty is Heavy.

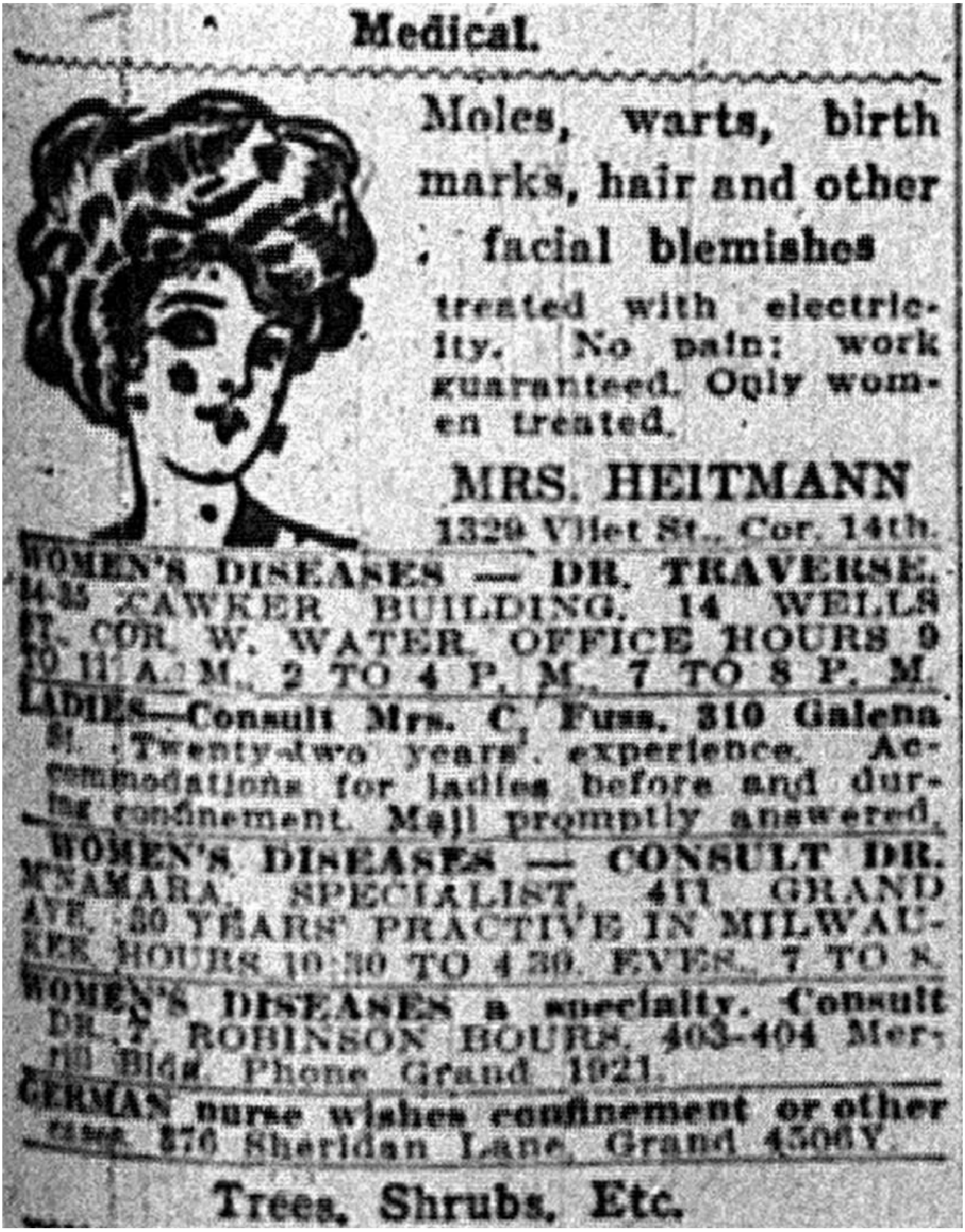
Bail Is Set at $1,500.

Caption: The front page of the evening *Milwaukee Sentinel* on November 20, 1912 featured stories involving Dr. Bours' lawyers Rubin and Zabel on both the top left and top right. District Attorney Zabel was the prosecutor in the case about the attempted assassination of Teddy Roosevelt, and he would also act as one of Bours' defense attorneys.

Both the *Sentinel*'s original reporting and subsequent reporting on Dr. Bours' case would stress how high his bail was set. Upon arraignment and pleading not guilty, bail was set at $1,500, equivalent to roughly $45,000 today. Dr. Bours was discharged from custody and told to return to court on January 6, 1913.

At this point, Bours and his attorney knew from the indictment[16] the nature of three pieces of evidence that had been presented to the grand jury. The first was an ad Bours had run in the *Milwaukee Journal*:

[16] Bours indictment.pdf



Medical.

Moles, warts, birth marks, hair and other facial blemishes

treated with electricity. No pain; work guaranteed. Only women treated.

MRS. HEITMANN

1329 Vliet St., Cor. 14th.

WOMEN'S DISEASES — DR. TRAVERSE, 44-45 ZAWKER BUILDING, 14 WELLS ST. COR. W. WATER. OFFICE HOURS 9 TO 11 A. M., 2 TO 4 P. M., 7 TO 8 P. M.

LADIES—Consult Mrs. C. Fuss, 310 Galena St. Twenty-two years' experience. Accommodations for ladies before and during confinement. Mail promptly answered.

WOMEN'S DISEASES — CONSULT DR. McNAMARA, SPECIALIST, 411 GRAND AVE. 30 YEARS' PRACTICE IN MILWAUKEE. HOURS 10:30 TO 4:30. EVES., 7 TO 8.

WOMEN'S DISEASES a specialty. Consult DR. T. ROBINSON BOURS, 403-404 Merchants' Bldg. Phone Grand 1921.

GERMAN nurse wishes confinement or other case. 876 Sheridan Lane. Grand 4306Y.

Trees, Shrubs, Etc.

Caption: From these ads, appearing on August 23, 1912 in the *Milwaukee Journal*, the government would go on to prosecute at least Dr. Alfred W. Traverse, Caroline Fuss, and Dr. T. Robinson Bours.

The second piece of evidence was a copy of a letter it was alleged a Mrs. Chas. C. Wilson had sent to Dr. Bours, reading as follows:

Sparta, Wis. Sept. 16, 1912.

Dr. T. Robinson Bours,

403-404 Merrill Bldg.,

Milwaukee, Wis.

My Dear Doctor:

I am at a loss as to begin to tell you my troubles. I am about worried to death of the recent discovery of the condition of my only daughter. The dear girl has had the misfortune to repose to implicated confidence of a man who took advantage of her innocence and tried to ruin her, and now that she is in a family way the hound has deserted her. We are willing to make any sacrifice to preserve her good name and reputation. Will you take the girl and relieve her of her disgrace so she can once more face the world. How long would she have to remain there before it would be safe to move her? And what would the cost of the operation be, as well as all other charges? Please answer soon.

Very respectfully,

Mrs. Chas. C. Wilson,

Box 352.

The third piece of evidence transcribed in the indictment was the letter Dr. Bours had posted back to this Mrs. Chas. C. Wilson, as follows:

Milwaukee, Wis. Sep. 25th/12.

Mrs. Chas. C. Wilson,

Sparta, Wis.

Dear Madam:

Your letter of the 24th I just received, and believe me I feel very sorry for you. The operation yon speak of would cost from $50.00 to $100. Would have to first see the patient before determining whether I would take the case or not. She could stop at a Hotel near by; she would be here about three days. Hotel bill about $10.00. No other expense. (should come right away.)

Sincerely yours,

T. Robinson Bours, M. D.

The text of the 4-page indictment included the grand jury's findings about the criminal nature of these acts and facts, and was signed by United States Attorney for the Eastern District of Wisconsin, Guy D. Goff, whom Taft had appointed to that office in 1911. The cover of the indictment and the arrest warrant indicated they were for a violation of Section 211 of the U.S. Criminal Code – one part of the Comstock Act.

But when Rubin and Bours showed up for his court date on January 6, 1913, Rubin moved for the court to strike out from the indictment material that was "immaterial, irrelevant, or redundant;" for the indictment to be broken down into "proper counts;" and for "Bills of Particulars" (i.e., in the criminal context, a formal, detailed statement of the charges brought by a prosecutor, usually in response to the defendant's request for a more specific complaint) to be given, with reference to "wherein and whereby" the elements of the counts "are in contravention of the laws of the United States." Bours signed a statement saying "That deponent is advised by said counsel and believes that he will be aggrieved by being compelled to plead on the merits of the indictment in its present form, as the same contains many averments that are immaterial, irrelevant and redundant; and that the indictment in its present form is indefinite, uncertain, lurid and confusing, in that it does not specify the counts."

As this point, the case materials available through the National Archives at Chicago go silent until subpoenas were issued on October 15, 1913, for witnesses to appear for trial on October 20.

In the meantime, as perhaps a sign of what other trouble was occurring and would come, the *Milwaukee Sentinel* on page 4 of its September 6, 1913 edition,[17] under the headline "DOCTOR UNDER ARREST – Death of Girl Charged to Physician and Her Sweetheart." As follows:

> Dr. Thomas R. Bours, with offices at 405 Merrill building, was arrested Friday afternoon charged with manslaughter in connection with the death of Anna Buchleiter, which was the result of an operation. Joseph Schmid, the girl's sweetheart, is also held on the same charge. Bail for $1,000 was furnished for Bours' release by his attorney, Frank X. Boden. Schmid is still in the county jail.
>
> The warrants were issued by District Attorney Yockey after the coroner's jury laid the blame on Dr. Bours. The physician's defense at the inquest was that an operation was necessary to save the young woman's life.
>
> Schmid testified that he paid Dr. Bours $75 for the operation, which was performed in the doctor's office.
>
> The charge against Bours and Schmid has been set at fourth degree manslaughter.

The *Milwaukee Sentinel* would follow up briefly on September 18, 1913 as follows: "At a night session of District court Dr. T. R. Bours and Alex. Schmidt, charged with manslaughter in connection with the death of Ada Buchleiter, were freed after a preliminary hearing. Judge Page held that no evidence had been introduced showing that a criminal operation had been performed. Attorney Edward A. Mock appeared for the defendants."[18]

This would not, however, be the end of the matter. On October 28, 1914, roughly a year after Dr. Bours went on trial in federal court for his letter to "Mrs. Chas. C. Wilson," the *Milwaukee Sentinel* ran a story on its front page: "SUES FOR $10,000 FROM DR. S.T. LEWIS AND DR. T.R. BOURS – Father of Anna Buchleitner, 23 Years Old, Alleges Her Death Was Due to Operation – PHYSICIANS ARE BLAMED – Manslaughter Case Growing Out of Charges is Dismissed in Judge Page's Court.":

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[17] Bours_Milwaukee_Sentinel_September_6_1913_p4 arrested Dr and sweetheart.pdf
[18] Bours__Milwaukee_Sentinel___September_18_1913__p4.pdf

> Suit for $10,000 against Dr. S.T. Lewis and Dr. T.R. Bours was filed in Circuit court Wednesday afternoon by Joseph Buchleitner, administrator of the estate of Anna Buchleitner, his daughter, 23 years old. It is alleged in the suit that the latter came to her death as the result of an operation performed on or about Aug. 30, 1913, by the defendants "in total disregard of their duties as physicians" and performed "in grossly and willfully wrongful, ignorant, negligent, careless and unskillful manner and in utter disregard of the ordinary practice and means used in such operation."
>
> [***]

The story went on to describe how the manslaughter case had been dismissed a year earlier, and discussed how Dr. Bours had fared in his federal case, to which we turn below. The story ended as follows:

> Attorney B.W. Sangor, representing Joseph Buchleitner, the father of the dead girl, declared on Wednesday that he had deferred filing the complaint until then because he did not wish to be the means of prejudicing the juries in the cases of Drs. Bours and Lewis during the recent trials of the two physicians.

Trial

United States v. Bours[19] had gone to trial[20] on October 20, 1913, fitfully: Bours formally withdrew his plea of not guilty, and Rubin filed a Demurrer to the indictment. The Demurrer (the formal mode of disputing the sufficiency in law of the pleading of the other side) argued that "several causes of action have been improperly united," and "the indictment fails to state facts sufficient to constitute an offence know to the law of the land provided for, either by Acts of Congress, or by Common Law." Judge Geiger overruled the Demurrer, and Bours re-entered a plea of not guilty. A jury was empaneled, and the court adjourned for the day.

On October 21, the meat of the trial commenced.

On the matter of the ad, Bours testified matter-of-factly at one point "I was gone a year and a half in Arizona, and when I returned I advertised as shown by Exhibit 1." In the available trial record, there is no discussion that Dr. Bours would have been aware that the American Medical Association had long frowned upon such advertising. The AMA's 1847 Code of Medical Ethics, such as might have been discussed when Bours was in medical school, stated that "It is derogatory to the dignity of the profession, to resort to public advertisements […] These are the ordinary practices of empirics, and are highly reprehensible in a regular physician." The AMA's 1903 Principles of Medical Ethics noted "It is incompatible with honorable standing in the profession to resort to public advertisement […] or to employ any other methods of charlatans." The 1912 revision restated: "Solicitation of patients by circulars or advertisements […] is unprofessional." (By 1914, the AMA Judicial Council's words would become more forceful: "The refraining from or the employment of advertising is the clearly defined difference between a reputable physician and a quack.")

But in the trial record, the only other exchange about the ad was as follows:

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[19] Bours trial record.pdf
[20] Bours trial docket.pdf

During the argument, Mr. Goff told the jury:
Mr. Goff: Do they put in the newspaper "We produce abortions?" No, they put in the newspapers "Women's diseases a specialty. Consult Dr. T. Robinson Bours."
Mr. Rubin: I object to any such violent statement.
Court: You may proceed.

Regarding the letter to Dr. Bours, the prosecution called James M. Woltz, who like Anthony Comstock himself had been a post-office inspector in 1912, having been appointed in 1899, and he testified that he had, in the office of the Past-master General, at Washington, D.C., seen the ad, and himself hand-wrote the letter addressed to Dr. Bours, pretending to be Mrs. Chas. C. Wilson.

Such a letter was referred to as a "decoy letter" – a letter prepared and mailed for the purpose of detecting a criminal, particularly one who is perpetuating frauds upon the postal or revenue laws, and they were commonly used to enforce the Comstock Act. At the trial date in 1913, the doctrine of entrapment was still in its nascent phases, and in fact entrapment would not be used successfully as a defense until *Woo Wai v. United States*, in 1915.

The question of whether the letter to Dr. Bours as entered into evidence as Exhibit 2 was a copy of the one he actually received was hotly contested. The prosecution called Fred T. Brandt, the post-master at Sparta, who testified that he didn't post-mark Inspector Woltz' letter (posing as Mrs. Wilson, and dated September 16) until September 24, because Brandt had been away at Mercer, Wisconsin from September 16-24. That was offered to explain why Bours' return correspondence, entered into evidence as Exhibit 3, referred to "Your letter of the 24th," but Bours would insist he'd never seen a letter dated the 16th, as discussed in his testimony later.

The prosecution also called Charles H. Clarahan, who testified as follows:

> I reside at Oask {sic} Park, Illinois; I am Post-office inspector, assigned to the Chicago division and that was my occupation in September, 1912; I have seen Government's Exhibit 3 in evidence and Government's Exhibit 2 for identification, before at Chicago post-office; after seeing them, I went to the office of Dr. Bours in Milwaukee, on the 8th day of October, 1912, at about 11:35 A. M. I saw Dr. Bours, no one present but he and myself. His office was located on the fourth floor of the Merrill Building, there were at least two rooms, I had a conversation with him; I introduced myself as Charles C. Wilson, and produced a letter, the one he wrote, and I told him that I had come in reply to that letter, and handed him the letter. He read the letter, and first he asked me what the age of the girl was, and I told him she was 18, and then he asked me how far gone she was and I told him she was about three months gone; then he said "I will fix her up in about 48 hours;" and I asked him what the charge would be and he told me it would be $100, and he told me to go over to the Davidson Hotel and get rooms on the same floor that he was on, that he was the house physician at the Davidson Hotel; and then he said he would go over with me. He said concerning Government's Exhibit 2 for identification, he couldn't write in reply to Mrs. Wilson's letter as plain as he could talk because the business was unlawful and he did not know what minute someone would be laying a trap for him. We started towards the Davidson Hotel and on the road over, a question of operation came up and he told me the girl would suffer about as a woman would in

childbirth, but not quite so much and we went on over to the hotel and I was introduced to a young man named Hutto, Dr. Bours, told me that Hutto was clerk of the hotel and then Dr. Bours told Hutto that I wanted rooms for my wife and daughter for the following Tuesday. The doctor made a remark to Mr. Hutto that he would have another patient there tomorrow and Mr. Hutto said all right. I believe I related to the court and jury all that has transpired between the doctor and myself on October 8, 1912.

The prosecution also called Albert T. Hutto, who briefly corroborated Clarahan's narrative as far as he witnessed it at the Davidson Hotel.

The defense called Dr. Bours, who testified as follows:

I am 53 years of age, a physician and surgeon, have lived in Milwaukee 25 years. I was gone a year and a half in Arizona, and when I returned I advertised as shown by Exhibit 1. My offices are at 405-406 and not 403-404 Merrill Building. I never in my life, saw the letter, in evidence, as Exhibit 2, which starts "Sparta, September 16, 1912," I never received such a letter. I did receive a letter from a person purporting to be signed "Mrs. Wilson," on September 25, 1912, - the letter was dated September 24, 1912; I threw the letter in the waste basket, after Mr. Wilson was in my office, I can't just recall the time when.

Q Can you recall the contents of that letter that you received.
A I think so.
I received a letter in my office on September 25, in the forenoon, it was from Sparta, Wisconsin, a plain envelope, lady's handwriting, a lady's masculine hand, large, entirely different from the handwriting, large handwriting. I kept it until I saw Mr. Wilson, I keep all letters for a few days, that is I clean up my desk once in a while; maybe a week or ten days, maybe two weeks, when the letters accumulate, after I clean up my desk I destroy them, throw them away in the basket. I did not exhibit the letter to Mr. Clarahan, when he called upon me; he showed me a letter, like this, with his hand on it. I never read that letter, or he never permitted me to read that letter. He says, "I have a letter here that you wrote to my wife," like this, only like that. He told me he was Mr. Wilson and I presumed that he was and I saw a letter, but did not see my handwriting. The letter that I have received from Mrs. Wilson was in my desk, but I did not take it out, - it didn't occur to me to take it out, - didn't occur to me to destroy it any more than it occurred to me to destroy any letters that had accumulated, after a certain length of time; I destroyed it possibly a week or ten days after I saw Mr. Wilson, I threw it in the waste basket with other letters, in cleaning up my desk. I do not keep letter files and I never keep old letters at all. To the best of my recollection, the contents of that letter was as follows:
"Sparta, Wisconsin,
September 24, 1912.
Dr. T. Robinson Bours,
Dr. Doctor:

Our daughter-"Oh-" I write to you in regard to our daughter, who has been disgraced by a scoundrel who has left her in a family way. We are sure that she has done something

to herself for she is now quite sick. Will you take the case, and how much will you charge and what will be the other expenses, and how long will she have to stay in Milwaukee?"

Q What did you understand by the statement in that letter, that she bad done something to herself and is now very sick?

Mr. Goff: Objected to as incompetent, irrelevant and immaterial and calling for the opinion of the witness. - Objection sustained. - Exception.

Q What did you understand that to mean, Doctor, "she had now done something to herself?"

Mr. Goff: Objected to for the same reason, - Objection sustained. - Exception.

I wrote the letter, Exhibit 3.

Q And when you said of the operation you spoke of, what operation did you refer to, Doctor?

Mr. Goff: I object to that as incompetent, irrelevant and immaterial.

A An operation to save life.

Mr. Goff: I object to that as incompetent, irrelevant and immaterial. The letter is clear and does not call for interpretation.

Court: You have the facts; as to what he referred to in that letter, the letter being plain, that is not for him to testify to. Exception.

Mr. Rubin: Now, Doctor, when you said – Still another question; What did you mean when you said "would have to first see the patient before determining whether I would take the case or not."?

Mr. Goff: Objected to as in competent, irrelevant and immaterial, and calling for an opinion upon his own letter and his own testimony.
Objection sustained. - Exception.

After writing that letter, I saw Mr. Wilson at my office, 405 Merrill Building, at about 11:30; I had a talk with him in my office. Mr. Wilson came into my private office, Room 405 Merrill Building, and I can remember quite distinctly he sat on the left hand side of my desk, and put his hand into his pocket like this (indicating), pulled out a letter, and he says "I came to see you regarding the letter that you wrote to my wife in regard to our daughter, who has been ruined by a scoundrel"; and he went on to tell me the disgrace they felt, and how the family was disgraced and so on. I said to him, "Mr. Wilson, I understand that this case that you speak of, your daughter had already been operated on, or something has been done to her, she has done something to herself, it is a legal case, and that is the only way I could take the case." He started to cry, and then he says,

"Well, I don't understand it that way, I am a traveling man and I have been away from home for some thime {sic} and I have not seen my wife and daughter and I don't know just what condition they are in." "Well," I says, "Mr. Wilson, I couldn't take your case unless it was a case to save life, if your daughter was already aborting, having hemorrhages, or infection, or something of that kind, and I deemed it was an operative case, a legal case, I would have to call in another reputable physician and he examine the case, and after his examining the case, if we decided the case was legitimate, then we would have to call in witnesses to properly note it, and that is the only way I could take your case." Then Mr. Wilson started to cry and offered me $100, $150.00, $200.00, and I said "No Mr. Wilson, I couldn't take your case; I would not take the case if you offered me $1,000.00." This crying got on my nerve and I said, "Come on, we will go over and get a drink." And I took him over to the Davidson Hotel, and we went out to the bar; he took a whiskey and I took a glass of beer. He took what you call a "three-finger," a big glass, kind of ashamed of it. We weren't there but a few minutes, because he didn't buy back; I remember that quite will {sic}.

I didn't have any conversation with the assistant manager of the hotel; I remember it was raining; I bad my umbrella and we walked as far as 3rd and Grand Avenue, covered with my umbrella. I said "Goodbye," and he said "Goodbye" to me. I have not seen him since until now. I wouldn't know him now; he looked different to me then. I did not agree to commit an abortion upon his daughter upon any terms; I didn't tell him I would charge him $100 to operate upon his daughter; he never said she was strong and healthy; I never told him that I couldn't write as plain as I would like to talk because the business was unlawful; I did not know there was a trap set for me; there was no conversation had, as Clarahan relates, he was in my office a half an hour and quite a time was consumed in his pretended crying and appealing to get me to do an unlawful act. He was quite a time getting my goat.

Cross-Examination.

I have no fixed price for the operation of abortions; I don't know anything about it at all, - $50, to $100, is the price I made at that time. Mr. Clarahan cried about ten minutes in my office, he used his handkerchief, - put his face in his handkerchief like a man does when he really feels sorry, I thought he had trouble on his mind, he cried for ten minutes, I think he was a pretty good actor; I may have been deceived, crying gets on my nerves; in this instance we took a drink. When I said I charged $50.00 to $100.00 for an operation, I meant a legal operation.

Q Doctor, if a woman is in a family way and has done something to herself, what are the immediate consequences?

Mr. Goff: Objected to as incompetent, irrelevant and immaterial, it has no place in the issue in this case.
Objection sustained. - Exception.

Mr. Rubin: To explain the conversation.
Court: No.
Exception.

The defense also crossed examined Clarahan, who testified on cross as follows:

> I knew the Government's Exbibit 2 for identification, was fiction, so far as the contents are concerned; I knew there was no Mrs. Wilson in existence at that time, or had a daughter in the condition supposed to be set forth in the Exhibit 2, and I represented myself to be the husband of Mrs. Wilson, knowing it to be false and fiction, and the father of the girl, 18 years of age and that she was in that condition, knowing it to be fictitious too; there was no discussion between him and myself that the girl had done something to herself; I told him that I was a traveling man and hadn't been home regularly. As to the full details of the case, they were never brought up, -the conversation lasted about a half an hour, we talked fast and walked fast over to the hotel and had some little talk over there. I wouldn't say that I repeated all that was said, the question of whether she had aborted was never brought up, - I did not cry, he came right out in the open and said he would do it for me, did not make any pretense about it at all, he never told me to "cheer up, old man, I will take you over and buy you a drink," he took me over and bought me a drink, I took a drink of whiskey, - well I am almost a total abstainer, I drank but a very little bit for civility only.

The defense rested, and the Government offered in rebuttal that the witness Clarahan testified as follows: "I din't {sic} cry at all; I didn't have any talk with Dr. Bours about calling in another physician."

And so the testimony closed.

The trial also involved extended discussion of what instructions the judge would give to the jury. Rubin suggested 21 different jury instructions, all of which were refused by Judge Geiger. Some of the proposals went to the question of what intent was involved, some went to a physician's role in saving life. One, number 13, read: "I instruct you further that the law does not look with favor upon persons who are engaged in the business of decoying others into the committing of an offence," and another, number 18, read: "I instruct you further that in weighing the testimony of the several Government witnesses, it is your right and duty to take into consideration their business, their methods of procuring evidence, the interested they may have had in fastening the responsibility for this offence upon the defendant." These proposed jury instructions were likewise refused by Judge Geiger.

Conviction

Judge Geiger read 10 pages of his own instructions to the jury. When they returned after 15 minutes of deliberations,[21] they entered a verdict of guilty. Rubin moved for a new trial, and Bours was released on $5000 bail (more than $150,000 today) pending the order on the motion for a new trial. The *Milwaukee Sentinel* announced these developments on Oct. 22, quoting Assistant District Attorney Otto Breidenbach as saying Bours' was "the first prosecution under the section of the statute that declares it a felony to use the mails to solicit or accept cases in which a criminal operation is involved." The story also noted that in another of the 5 Milwaukee cases, that of Caroline Fuss, also before Judge Geiger, she had plead guilty, and was fined $200.

When Rubin's motion for a new trial was denied on November 1, Bours was sentenced to two years at the United States Penitentiary at Leavenworth, Kansas. He was released again, this time on $7500 bail

[21] Bours__Milwaukee_Sentinel___October_22_1913__p7.pdf

(about $230,000 today), pending his appeal. This was once again back to front page news in the *Milwaukee Sentinel* that day.[22]

On November 2, he was back on the front page of the *Milwaukee Sentinel*, which ran a headline: "DENIES SHE BROKE ENGAGEMENT WITH CONVICTED DOCTOR – Miss Erma Rotz, Fiancée of Dr. T. Robinson Bours, Insists Wedding Was Not Canceled. – ADMITS POSTPONEMENT – Declares She Still Loves Physician and Rejected His Offer to Recall Engagement. – SENTENCED TO TWO YEARS – Medical Man, Accused by U.S. Government, Found Guilty of Misusing Mails.:"[23]

> That she has not broken her engagement with Dr. T. Robinson Bours and has no intention of doing so, was the statement of Miss Erma Rotz, 1605 Green Bay avenue, fiancée of the physician who on Saturday was sentenced to two years in Fort Leavenworth for using the mails to defraud.
>
> The young woman's angry denial came in the face of an afternoon newspaper story which quoted her as saying that because her fiancé had been found guilty invitations for the wedding which was to have taken place on Nov. 20 had been recalled and the engagement broken.
>
> Says Wedding Postponed.
>
> However, the wedding has been postponed indefinitely, Miss Rotz admitted. She would not say when it will take place.
>
> "I am still true to Dr. Bours and love him as much as I ever did, although he has been sentenced to prison," declared the young woman Saturday night. "I did not break the engagement, and the reason for the wedding postponement has been at the request of my intended husband.
>
> "Dr. Bours is my ideal of a man, and when all this trouble descended upon him he declared that rather than see me suffer he would call everything off.
>
> Refused Doctor's Offer.
>
> "I refused to do this, because I love him and I know how much of self-sacrifice it took for him to make that request.
>
> "I will marry him if he does go to the penitentiary. The fact that he may be in prison will not lessen my love for him. Besides, I know he is not guilty of what they charge him with. The story in the paper Saturday afternoon was an untruth, pure and simple."
>
> Miss Rotz is a hairdresser and manicurist and has for years been one of the social belles of the north side. She is in partnership with Ms. Nellie Dacey at 405 Merrill building.
>
> [***]

[22] Bours__Milwaukee_Sentinel___November_1_1913__p1.pdf
[23] Bours__Milwaukee_Sentinel___November_2_1913__p1.pdf

Rotz' beauty salon was in the very same building where Bours' office was located, at Wisconsin and 3rd. They were in fact married on January 23, 1915, when she had just turned 23, and he was 55. Their eventual niece Joyce Page explained that Rotz' father (Page's grandfather) was opposed to the marriage, because Bours was two years older than Rotz' dad. Page speculates that the couple never had children because she enjoyed her life as a socialite, and he was so much older than her.

Appeal

Rubin got to work right away on the appeal, which would be known as *Bours v. United States*.[24] By November 14, he had completed a "Bill of Exceptions," which was a formal written statement – signed by the trial judge and presented to the appellate court – of a party's objections or exceptions taken during trial and the grounds on which they were founded; these bills have largely been replaced by straight appeals under the Federal Rules of Civil Procedure. Rubin's Bill of Exceptions is the source of all of the above information on what happened at trial, prepared in connection with the court stenographer's transcript.

By November 25, the 7th Circuit Court of Appeals had received the Bill of Exceptions, and the parties appeared before it on November 28 to discuss scheduling.[25] Rubin would have two months to put together his brief. Goff would have another month to file his. Oral arguments were scheduled another month after that, in late April of 1914. This was several months ahead of Margaret Sanger and her husband's indictments under the Comstock Act, and their attendant publicity that may have helped or hindered Bours' case.

Much of Rubin's brief covered material that the Court of Appeals would essentially ignore in its analysis of the case as written in its eventual opinion. As Judge Mack, one of the members of the 3-judge panel that heard the case, wrote in the first sentence of the opinion: "While errors have been assigned on the admission and rejection of testimony and on portions of the charge to the jury, we shall confine ourselves to the error based on the overruling of a demurrer to the indictment."

As limited to Rubin's discussion of the demurrer in his February brief to the Court, Rubin wrote in relevant part that:

> The defendant's demurrer to the indictment should have been sustained. [***]
>
> [P]ertinent to this consideration is that [Section 211 of the Criminal Code includes the following text],
>
> > "Every written … letter … giving information directly or indirectly, where, or how, or from whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, or where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed."

[24] Bours appellate record.pdf
[25] Bours appeals docket.pdf

> The following are elementary propositions governing the judicial consideration of this indictment:
>
> (a) Both letters to and from defendant must be read together and their meaning jointly construed.
> (b) That from two letters, a criminal intent, must be proven beyond a reasonable doubt, - the intent being to violate the law by the giving information "where, how and by whom" operation for the producing of an abortion will be done.
>
> [***]
>
> Now can this court say, with that accuracy and certainty with which it is expected, that at the time the defendant wrote the letter he intended to take the case. That he intended to commit an abortion. That he intended to and did convey to the person to whom he addressed the letter, the information carrying belief to that degree of certainty, that the operation sought by such person to be performed would be performed by the defendant, and that the letter received by such person had a tendency to and did open the mind of the person receiving the same to actual assurance that the operation sought to be performed would be done. If it merely opened the mind to a possibility or belief, or even a probability of belief that if she went to defendant in response to that letter, the operation which was sought would be done, is not sufficient. The Court must be satisfied beyond a reasonable doubt, from a fair and honest reading of the defendant's letter that its recipient came and could come to but one honest conclusion, - that is; of an assurance to a degree of certainty that the operation sought to be done would be done.

In somewhat oblique reference later in the section of his brief on his demurrer, Rubin quoted from a case much discussed in other Comstock Act cases of the era, *United States vs. Grimm,* involving "fancy photos" of actresses, which at an early stage had held as follows:

> "If it was deemed essential to set out the letters in full, then, as they do not on their face purport to give information such as the statute prohibits, the pleader should have set out the other extrinsic facts upon which the government relies, to show that they conveyed information denounced by the statute. Such seems to have been the mode of pleading adopted in *U.S. vs. Whittier,* 5 Dill. 35, and I think it is correct.
> The demurrer will be sustained."

Whittier, the case cited in the *Grimm* decision, was yet another Comstock Law case dating to 1878, regarding contraception, and was also the first case to grapple with the potential problems of entrapment. But it dealt more immediately with the problem that the decoy letter tactics of the Post Office were inherently fictitious, and therefore it was legally tortuous to find how the alleged criminals could actually "give" (to use the word in the statute), the prohibited information to anyone. In *Whittier*, the return letter from the alleged criminal did not on its face actually even give prohibited information (much as it was suggestive of a willingness to do so), so the case failed. In *Grimm*, once the indictment was amended, the case resulted in a guilty verdict, which the Supreme Court would confirm in 1895.

In March of 1914, Goff filed his brief, sounding like he could scarcely believe he was in appeals court: the Bours case was indistinguishable from so many other successful Comstock Act prosecutions:

In *Knowles v. United States* and *United States v. Dempsey*, obscenity cases, demurrers to the indictments failed because the judges ruled that it was properly left to the jury to decide if the mailed material was obscene.

In 1913 in *U.S. v. Kline*, in U.S. District Court for the Eastern District of Pennsylvania, an abortion case in which Dr. Kline had responded to a decoy letter saying "Dear Sir: Yours received, and I advise that you see me any day this week, concerning your rupture and talk the matter over," Dr. Kline had been found guilty too. Goff commented as follows:

> The letters in *U.S. v. Kline, supra*, cannot be said to give the prohibited information with any greater degree of certainty, or definiteness, that the letters in the instant case. The indictment is sustained on the broad ground, that both letters read together, come within the purview of the statute, and present a question for the jury. It is for this reason that the indictment in the case at bar, must be held to state facts constituting an offense under the statute.

Regarding a 1912 case in *Clark v. U.S.*, in the 8th Circuit, in which the doctor had been convicted upon mailing a response reading in part "Her case could be treated with perfect success and that if she had no place to stay, she could come direct to his office," Goff dismissed Rubin's attempt to distinguish that response as having a greater degree of certainty than Bours', arguing again that that is for a jury to decide:

> It is of no avail to say in a discussion of the demurrer that the defendant did not intend to commit or perform an illegal operation, and in that connection point to *Section 4352, R. S., Wis. 1898*, which permits such operation under the conditions specified. In support of the strained construction to which defendant's letter is subjected, counsel points to the following sentence: "Would have to see the patient before determining whether I would take the case or not." This sentence is relied upon to negative criminal intent on the part of the writer. It is needless to say, that the letter taken in its entirety, is clear, and utterly devoid of doubt. The sentence considered with its context, does not create a situation, where it can be said that the prohibited information is not given, or where reasonable minds might *not* reach different conclusions.
>
> Furthermore, defendant's motive in writing the letter is wholly immaterial upon demurrer to the indictment. On page 11 of counsel's brief, the following statement is made:
>
> > "We must infer also innocence on behalf of the doctor, and if the doctor upon examination had said that it was not a case of saving life, he would not take the case, he certainly would not be guilty of an act condemning him under the law."
>
> We submit that any such consideration is not at all germane to a discussion of the demurrer to this indictment.

Goff in this latter regard would go on to point to several obscenity-predicated cases, including *Knowles*, in which the senders' motives were deemed irrelevant. But he did not attack Rubin's argument that intent had been relevant in the abortion-predicated case: *Kline*.

There is no record of what happened at oral argument on these briefs before the 7th Circuit's 3-judge panel on April 21, 1914, but we do know that a week later, on April 28, Goff filed a motion for leave to file a supplemental brief, which the court granted. Had Goff been given reason to worry at oral argument? We can only guess.

Goff submitted a 51-page supplemental brief another week later, on May 7. In his first paragraph, he wrote "The indictment, in the usual form, charged the knowingly mailing a letter which gave information where, or by whom, an operation or abortion will be done or performed." This sentence, tracking the "will be done or performed" text of the statute, but not the "could be" or "might be" language actually used in the indictment, can be seen as attempting to put substance over form.

Ten pages later, Goff would write:

> The words "will be done or performed" certainly do not imply an intention to either do or perform the act or operation referred to in the statute. It will be noted that "will" as used in the statute, being in the third person, expresses *simple futurity*, or a condition beyond the control of the actor. In fact, the use of the word "will" in the third person clearly indicates an intention on the part of Congress to negative either *promise* or *determination*, otherwise the statute would have read, "shall be done or performed." *In fact, Congress aimed at preventing the giving information, directly or indirectly, of places where abortions will be – that is, are performed, and of persons by whom abortions will be produced*.

And given his understanding of the word "will" in the stature, Goff described in minute detail over numerous pages how Bours' letter put him squarely within the meaning of the statute. He insisted, again, that Bours' intent with respect to whether he would actually perform an abortion had no bearing on whether the statute was violated. Likewise, consideration of his "motive" was barred:

> Motive has no more place in this case than intention. It is clear that there may be, in offenses such as those which are created by Section 211 of the Criminal Code, a guilty mind, though the motive behind the act may seem to the individual, and even to history, of the best. Thus, many of the martyrs have suffered because they did acts which they knew to be contrary to law. History has judged their motives to have been of the highest, yet they had done knowingly what the criminal law had forbidden, and that in the eye of the law constitutes a guilty mind.

At this point, it was Rubin who adopts a tone that he can scarcely believe he need reply at all, when he filed his 4-page reply brief on May 13: He will reply to certain technical procedural matters Goff raised in his supplemental brief, but "Otherwise there is NOTHING in said Supplemental Brief that is new or that has not been said in the original brief, nor discussed in the oral argument before this Honorable Court."

<u>Opinion of the 7th Circuit panel</u>

Circuit Judge Mack delivered the panel's opinion on October 5, 1915. After quoting the text of the Comstock Act, Bours' ad, transcribing the "Wilson" letter and Bours' response letter, as well as the Grand Jury's conclusions that the law had been violated, he began by noting that opinion would be limited to the trial judge overruling the demurrer to the indictment. The analysis began:

> On the adoption of the Penal Code, March 4, 1909, the clauses "where or by whom any act or operation of any kind for the procuring or producing of abortion will be done or performed or how or by what means conception may be prevented or abortion produced" were introduced into the Act. Before that, the statute forbade the use of the mails for obscene literature or writings, for articles and things adapted to prevent conception or produce abortion, and for printed or written matter giving information as to where, how, from whom, or by what means such articles or things might be obtained or made. It aimed to keep out of the mails (1) obscene matter; (2) articles or things designed or intended for a use denounced by the act as immoral; and (3) written or printed matter in respect to such articles. Until the amendment, however, a letter or other written or printed information in respect, not to the articles excluded from the mails, but to the act of abortion itself, did not fall within the statute. We cannot concur in the contrary views expressed in *United States v. Somers* (D. C.) 164 Fed. 259, under which the word "thing" in the original act was held to cover such a letter.
>
> While the indictment charges that the letter of September 25th gave information both as to conception and abortion, it is properly conceded in the supplementary brief that, if it be unmailable, it must be because it comes within the clause prohibiting the mailing of a letter giving information "where or by whom any act or operation of any kind, for the procuring or producing of abortion will be done or performed," and not "how or by what means conception may be prevented or abortion produced," or within any other clause of the act.
>
> What significance, if any, has the use of the word "will" in this clause, as contradistinguished from "may," in the other clauses? The government insists that it indicates merely futurity; that information as to where or by whom such acts are done, irrespective of any indication that any specific act will be done, is thereby forbidden. Defendant contends that, to be unmailable, the letter must contain an express or implied obligation that the illegal operation will actually be performed.
>
> Neither position is to be upheld. The amendment, closing the mails to written or printed information "where or by whom any operation for producing abortion will be performed," was adopted by Congress under the same power that was exercised in passing the original section, the national power of controlling the mails. Congress has no power to penalize or to legalize the act of producing an abortion. That is a matter for the states. In applying the national statute to an alleged offensive use of the mails at a named place, it is immaterial what the local statutory definition of abortion is, what acts of abortion are included, or what excluded. So the word "abortion" in the national statute must be taken in its general medical sense. Its inclusion in the statute governing the use of the mails indicates a national policy of discountenancing abortion as inimical to the national life. Though the letter of the statute would cover all acts of abortion, the rule of giving a reasonable construction in view of the disclosed national purpose would

> exclude those acts that are in the interest of the national life. Therefore, a physician may lawfully use the mails to say that if an examination shows the necessity of an operation to save life he will operate, if such in truth is his real position. If he use the mails to give information that he elects, intends, is willing to perform abortions for destroying life, he is guilty, irrespective of whether he has expressly or impliedly bound himself to operate.

This last paragraph is the one that yields quotables to both sides in the current mifepristone litigation. But the syntax of the paragraph should be noted: the Court is describing how "neither position' (i.e., "will" meaning mere futurity (to Goff), or an express or implied obligation, to Rubin) "is to be upheld." Rubin is barred from pointing to Wisconsin abortion law as the basis permitting Bours to save a life, but a "reasonable construction" must counter Goff's insistence that a physician be martyred under the law even if his intention is to save a life. The next few paragraphs of the opinion elaborate on these points:

> The information may be given as well by a third person as by the prospective operator; if by the former, there surely need be no implied obligation. A statement that X will perform the operation would suffice. On the other hand, the bare statement that hundreds of illegal abortions are performed or will be performed every year in the city of Chicago, or even by Dr. X., would not make the letter per se unmailable.
>
> But while an obligation, promise, or assurance is not essential, the language of the act, in our judgment, requires that there must be the indication of a positive intent that the act will be done, not merely that it might perhaps be performed. This intent need not be apparent from the document itself; a letter, however innocent on its face, may, by proper allegations, be shown to convey, and to have been intended to convey, the prohibited information. *Grimm, v. United States*, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550. The single word "Yes," if charged and proven to have been written and mailed in answer to an inquiry whether the writer would perform an illegal operation would be sufficient.
>
> No disguise or subterfuge will be of any avail. The word "rupture" may be shown to have been used to indicate abortion to the knowledge of both parties (*United States v. Kline* [D. C.] | 201 Fed. 954); the general statement that X performs abortions, or an advertisement by X "Women's Diseases a Specialty," may be proven to have been used and understood as meaning that X will perform a certain definite abortion, or an abortion for any woman in trouble.
>
> The indictment, however, must charge that the apparently innocuous words were used and intended to be understood in the wrongful sense, and must allege such matters as justify the charge.
>
> While the Government offered evidence that the letter of the 16th, a decoy letter, was in fact mailed on the 24th, thereby tending to prove that the reference in the letter of the 25th to one of the 24th was a mistake, and that in fact the letter of the 25th was in answer to that of the 16th, and not, as defendant testified, in answer to another letter, dated the 24th, and stating that the girl had done something to herself and was then in a dangerous condition, the indictment contains no allegation whatsoever to support the evidence or the inference therefrom; it does not even state that the letter of the 25th was in answer to that of the 16th; it merely avers the receipt of the latter and the

> mailing of the former; neither directly nor indirectly does it charge that the sentence, "Would have to first see the patient before determining whether I would take the case or not," was designed merely to disguise, in a form recognizable by the addressee, the prohibited information of a willingness to perform the illegal act.
>
> The letter of the 25th, construed as written by one who had received the letter of the 16th, but as intended to be in reply to some letter of the 24th, the contents of which are not set out, conveys information that an abortion might possibly be produced, not that the act would be done. If in fact the defendant intended to operate, and to have Mrs. Wilson understand that he would operate only under such circumstances as would make it the duty of any reputable physician, to perform the act, as, for example, only if an examination disclosed the conditions stated in the letter which defendant testified was dated the 24th, concededly he could not be found guilty.
>
> The indictment is fatally defective in charging that the defendant by his letter intended to give information only as to where or by whom an abortion *might* be produced, not as to where or by whom it *would* be produced and in failing to allege facts that would support a construction of the letter of September 25th as conveying and intending to convey information that the act would be performed.
>
> Judgment reversed, and cause remanded.

In some ways, the Bours decision is easiest to understand if it is read from back to front. The 7th Circuit lays out a roadmap by which the indictment could be fixed (indeed, "cause remanded" means that the panel is inviting the case to be retried), as had happened in the successful prosecution in the *Grimm* case. The real holding of the opinion is that if an indictment does not track the actual language of the statute, it must allege the facts as to how the statute was violated. Along the way, a jury must assess a physician's intent in what information is conveyed through the mail.

Given the above, it may come as a surprise that some would argue that the precedential meaning of *Bours* is that state law is irrelevant in understanding the Comstock Act, that a Circuit Court has correctly inferred a Congressional intent that there is a "national policy of discountenancing abortion as inimical to national life," when there is nothing in the trial record or appellate briefs to indicate that either the complex interplay of federal and state law, much less Congressional policy, was ever debated before the appeals panel. Previous textualist Supreme Courts would have looked at legislative intent with a gimlet eye; the current Supreme Court, however, might buck at effectively reading the word "abortion" in the statute as meaning "unlawful abortion." As *The New York Times* noted recently, there was an effort in 1996, when the Comstock Act was last amended, to remove the provision about mailing abortion materials, but that effort failed. Abortion politics has morphed since *Dobbs*, but the legal debate is very much alive.

"Cause remanded"?

The 7th Circuit's opinion vacated the guilty verdict on the basis of the fatal defect it found in the indictment, but it also invited the U.S. Attorney to fix the indictment and pursue a new trial. On October 7, 1915 – nearly 9 months after Dr. Bours had married Erma Rotz – the *Milwaukee Sentinel* ran a small headline on page 5: "NEW TRIAL FOR DR. BOURS ORDERED BY U.S. COURT: Attorney W. B. Rubin

received word Wednesday morning from the United States Court of Appeals in Chicago that the verdict in the case of Dr. T. Robinson Bours of Milwaukee, convicted of the fraudulent use of mail in the federal court here, during the 1914 term had been set aside and a new trial ordered. Dr. Bours was sentenced by Judge Geiger to serve two years in the federal penitentiary at Fort Leavenworth."

But Goff had been replaced by H.A. Sawyer as U.S. Attorney in August.[26] His Assistant U.S. Attorney Otto Breidenbach had been elected as a judge in April.[27] There is no record of any conference between Judge Geiger and the United States Attorney's office. Left to languish, on March 14, 1917, the Mandate of U.S. Circuit Court of Appeal reversing was filed in the Eastern District of Wisconsin, and on May 23, 1918, doing housekeeping for several dead cases, the docket has the following entry: "This day the Court on its own motion entered a *nolle prosegui* of this indictment." Case abandoned.

Building a House

In 1916, Milwaukee Alderman Frederick C. Bogk had hired Frank Lloyd Wright to design a Prairie School style house to be built on Terrace Avenue. Bogk had also hired George Mann Niedecken to design the interior, and Russell Barr Williamson was enlisted as the general contractor, to build the house.

Niedecken had also been hired in 1911 by Bours' attorney W.B. Rubin to design the interior of another modern structure that is now known as the W.B. Rubin Duplex on Summit Avenue.

Dr. and Mrs. Bours may have been impressed by the features of these houses, because by 1921 they had hired Russell Barr Williamson to build them a Prairie School style house on Newberry Boulevard.

Caption: Photocopy from Erma K. Bours' album, in the possession of her niece Joyce Page in 1999. Pictured on the front patio of the house Erma and Dr. Thomas Robinson Bours had built in 1921-22 at

[26] Baraboo_Republic_Thu__Aug_12__1915_Goff replaced.pdf
[27] The_Sheboygan_Press_Wed__Apr_7__1915_Breidenbach elected.pdf

what is now 2430 E. Newberry Blvd. are, from right to left, Erma K. Bours, Dr. Thomas Robinson Bours, their German Shepherd "King," their architect Russell Barr Williamson, and Nola Mae Williamson.

The house on Newberry Blvd., now just over 100 years old, would feature in at least one other abortion-related scandal in the early 1920s.

A Death…and a Party

On August 25, 1922, the *Milwaukee Journal* reported on page 4, under the headline "Dr. Bours Must Face Manslaughter Charge," that:

> Dr. T. Robinson Bours, 211 Grand av., was held in $5,000 bond for preliminary hearing in district court on a charge of manslaughter, Sept. 29, when arraigned Friday before Judge Michael Blenski. Dr. Bours was named in a warrant upon the recommendation of Henry Grundman, deputy coroner, at the end of the inquest into the death of Mrs. Alma Verden, Wauwatosa, who died of blood poisoning following an operation.

On February 19, 1923, the *Milwaukee Journal* reported again on page 4, under the headline "Pick Jury for Bours' Trial," that:

> A jury was selected Monday morning in circuit court before Judge Walter Schinz to try the case of Dr. T. Robinson Bours, 500 Newberry blvd. Dr. Bours is charged with manslaughter as the result of the death of Mrs. Alma Verden, 38, wife of Theodore J. Verden, 4727 Woodlawn st. Wauwatosa, upon whom he is alleged to have performed an illegal operation Aug. 12, 1922.

By February 28, there was a verdict, and the *Milwaukee Sentinel* had moved the story to the front page:

> JURY FREES BOURS IN WOMAN'S DEATH
>
> Ten Men and Two Women Give Doctor Verdict After One Hour
>
> Dr. T. Robinson Bours was acquitted of a charge of manslaughter by a jury at 9:30 Tuesday night after one hour of deliberation.
>
> Dr. Bours was charged with performing an illegal operation on Mrs. Alma Berden, wife of Peter Berden, which was alleged to have resulted in her death on Aug. 12, 1922.
>
> The case went to the jury at 8:30 following arguments by attorneys for the defense in Judge Walter Schinz' branch of the Circuit court. Ten men and two women comprised the jury.
>
> A civil suit by Peter J. Berden against Dr. Bours, seeking to collect heavy damages for the death of his wife, probably will be dropped as a result of the verdict, it was indicated Tuesday night.

A much longer story ran on the front page of the *Milwaukee Journal* on March 1, under the headlines "Judge Probes Party Given Bours Jurors – Men and Women Are Entertained at Home of Doctor Following His Acquittal:"

An investigation into the conduct of jurors who attended a celebration at the home of Dr. T. Robinson Bours, 500 Newberry blvd., on the night he was acquitted of a manslaughter charge, was made by Judge Gustave G. Gehrz in circuit court Thursday.

According to testimony heard before Judge Gehrz the entire jury, including two women, was taken to Dr. Bours' residence and treated to a lunch and refreshments. One of the jurors testified that wine was served. The party was attended by Attorney Raymond J. Cannon, who represented Dr. Bours in the case, which was on trial before Judge Walter Schinz for seven days.

Orders Jurors Excused

Judge Gehrz ordered all of the jurors not serving on cases now on trial to be immediately excused from further service and continued all cases in which the law firm of Cannon, Bancroft & Waldron is interested until the new jury reports fore service next Wednesday. […]

The jurors, interrogated by the court Thursday, said only the Bours case had been discussed at the celebration over the acquittal […]

Cannon Orders Cabs

[…] Attorney Cannon said he ordered taxicabs at the request of his client and those who were not accommodated in the cabs were driven to the Newberry blvd home by Dr. Bours. […]

Talks to Judge

[…] The lawyer, who is under two indictments by the grand jury, said he had ordered chop suey for the party at the request of Dr. Bours, because "there was no bread or meat at the house." […]

Judge Scores Party

"Legally, there is no contempt of court here," said Judge Gehrz after the testimony had been heard, "but I desire to express my decided disapproval of it. Parties of this kind are not proper. They are not consistent with what I believe the correct administration of justice. Parties of this kind can very readily be misunderstood and they are always misunderstood."

The court ordered the matter held open until further investigation could be made.

Mr. Cannon is counsel for Ben Jasnieki, charged with violation of the Severson act. This case was up for trial Thursday, but was put over with other cases in which he appears until the new jury reports.

The line about wine being served was relevant both because Prohibition had been in effect for two years, and because Bours' lawyer Cannon was representing a man to be tried before the same jury for violating the local Prohibition ordinance – the Severson Act.

Like the Anna Buchleitner civil case for money damages discussed above, there is no public record of how the Verden civil case ended.

The End

The scandals ended in 1923. On March 3, 1926, the *Journal of the American Medical Association* -JAMA would report, 14 pediatricians met at the Milwaukee Children's Hospital "for the purpose of organizing the Milwaukee Pediatric Society; Dr. Thomas R. Bours was made temporary chairman, and the committee was appointed to draw up a constitution and by-laws."

Dr. Bours died of cerebral hemorrhage at age 70 in June of 1931. His obituary makes no mention of any of his legal travails, nor indeed of his progeny, instead focusing on his professional development, and his 33-year membership with Milwaukee Elks Lodge No. 46.[28]

[28] Bours obituary and Marquette ltr.pdf