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JUSTIFIABLE ABORTION—MEDICAL AND LEGAL FOUNDATIONS*

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INTRODUCTION

For some time now there has been an agitation for loosening of the statutory bans on criminal abortion. Many respected and influential voices have been raised in support of this movement but there is no indication that it has originated in any ground swell of discontent with the existing laws. Unlike the penal code lifted out of Exodus in the Connecticut Blue Laws,¹ the abortion laws of the states generally were adopted in a moderate first form and, for the most part, have had no substantial amendment except to tighten them. The relevant sections of the Model Penal Code, tentatively approved by the American Law Institute in 1959, are a violent departure from all existing laws.

Section 207.11. Abortion and Related Offenses.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if:

- (a) he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or the pregnancy resulted from rape by force or its equivalent as defined in Section 207.4(1) or from incest as defined in Section 207.3; and

* This is the first installment of a two-part article; the second part will appear in the spring issue.

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¹ Conn. Gen. Stat. tit. 53, §§ 29-32 (1958).

- (b) two physicians, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and have filed such certificate prior to the abortion in the licensed hospital where it was to be performed, or in such other place as may be designated by law.

Justification of abortion is an affirmative defense.²

Enactment of this section, so different in form from existing laws and employing terms new to the law of abortion, would build up a large body of case law, if only by way of definition.

The full content and implications of this proposed statute are startling; its undeclared purpose, or that of its framers, is even more so. To make possible an appraisal of the whole argument offered for its adoption, it will be necessary not merely to analyze section 207.11 and to compare it with existing abortion laws, but also to trace the history of such legislation, to consider the status of abortion as a common-law crime, to look at the biological concepts which gave it definite form in the common law, as well as the Aristotelian philosophy and Christian moral concepts which inspired them. We shall look for evidence of a Natural Law against abortion in the laws and common thought of peoples who have gone before us, so that we may determine whether the proponents of the new law are correct in saying that the only opposition to induced abortion is that of dogmatic religion and a population minority.³ In doing so we will glance at the Roman Law of Rome and the Roman Law of the Codex, and the development of the Canon Law which grew up in its shadow. We will see that none of the modern legislation in the United States and England can be traced to any political influence of the Catholic Church but that on the contrary much of it was the product of a political system in which members of that church were allowed no part.

To make such a review possible we have found it necessary to bring together in their present form the existing abortion laws of all the States and of England and the text of the initial legislation in each.⁴

I

The first word which stands out in section 207.11 is "justified." Existing abortion statutes, as will be seen hereafter, commonly use a negative in dealing with the protection of the life of the mother: the statute shall

² Model Penal Code § 207.11(1), (2) (Tent. Draft No. 9, 1959).

³ Model Penal Code § 207.11, comment (Tent. Draft No. 9, 1959).

⁴ Discussion of the legislative background of the abortion laws as well as a collection of such statutes will appear in Part Two.

not apply if, the act shall be punished unless, and so on. Here, however, we have a declaration in positive terms. The circumstances set out will justify the act, but *justify* is not defined.

We may assume that the term is not used in the early sense, preserved in Scottish law, to punish by death, or arbitrarily.⁵ Certainly the definition of the Council of Trent would not be applied in an American statute, but the meaning assigned by the Reformers might be: "Justification is thus a forensic term To justify, signifies not to make the offender righteous, but to treat him as if he were righteous, to deliver him from the accusation of the law by the bestowal of a pardon."⁶ As we still have pleas in justification, a judicial definition under this (proposed) statute would more probably be a showing of facts exculpating or furnishing adequate grounds for what one has done.

However, a new, uniform penal statute will be far more widely read than any of its predecessor laws. Most important, it will at once become required reading for medical practitioners and students who, like the doctors' patients, will hardly recognize "justified" as a legal term of art, but can be expected to take it in what has become its most common sense, *i.e.*, to show an action to be just, reasonable and righteous. We cannot shut our eyes to the fact that Americans today are looking more and more to Government to define right and wrong for them. One who reads the mass of quotations hereinafter collected from representative medical writers must be impressed by the frequency with which medical writers and practitioners withhold approval of some abortions, only because not authorized by existing laws. These laws, while withholding their operation from therapeutic abortions (in varying degrees), do not commit any state to an ethical judgment upon them. There are many considerations which do, and should, restrain the state from undertaking to punish by penal law various offenses against commonly recognized morality.

Another term which is not defined is "grave" or "gravely." There would be an extremely wide range of definition by medical men, and we could scarcely expect that all, or even most, state courts would find and adopt the sense intended by the architects of the Model Penal Code.

More than one conservative legislature sought to hold divorce in check by authorizing decrees only in cases of proved adultery or of persistent physical abuse by husbands. The latter was meant to be ground for a

⁵ Jamieson, Dictionary of the Scottish Language 302 (abr. & rev. 1910).

⁶ Fisher, The Reformation 461 (1873).

decree when it was shown that such cruelty was habitual and had been made a part of the couple's manner of life. An apt term to describe it was the *adjective* "repeated"—happening again and again indefinitely.⁷ The state courts quickly decided that they preferred to make it a participle in the phrase "extreme and repeated cruelty," so that the second cruel act was "repeated cruelty" and ground for divorce.

What would "gravely" impair health? What would be a "grave" physical or mental defect? The *Oxford Dictionary* says: "Of diseases or symptoms, threatening a fatal result, serious."⁸ The *Century* makes it "weighty, important."⁹ *Webster* is substantially the same.¹⁰ By the most commonly used medical dictionary it is made only "severe or serious."¹¹ Obviously the proposed statute would give remarkable leeway to the judgment of the individual medic.

Donnelly has emphasized the increasing tendency to include as valid indications such reasons as any threat to the general health of the mother or a remote threat to the life of the mother. It has been said with a certain element of truth that any pregnancy actually could be considered as a threat to the mother's health or life or both; hence, it is easy to see how rationalization can be over-used and how physicians may vary widely in their opinion.¹²

"Health" is defined by Dorland as "a normal condition of body and mind, *i.e.*, with all the parts functioning normally"; but "normal" is defined only as "agreeing with the regular and established type."¹³ *Oxford* defines health as "soundness of body; that condition in which its functions are duly discharged"¹⁴ and "normal" as regular, usual. *Webster* makes health the state of being hale or sound in body, mind or soul, especially freedom from physical disease or pain.¹⁵ But when we come to "mental health" and, more emphatically, "mental defect" (congenital), we are really lost. Until legislature or court decides in favor of analyst or of organicist, there can be no authoritative definition, and every individual practitioner will be left to define for himself.

⁷ 2 The New Century Dictionary of the English Language 1524 (rev. ed. 1957).

⁸ 1 The Shorter Oxford English Dictionary on Historical Principles 825 (2d ed. 1936).

⁹ 2 Century, *op. cit.* supra note 7, at 680.

¹⁰ 2 Webster's New International Dictionary of the English Language 1095 (2d ed. 1958).

¹¹ Dorland, *The American Illustrated Medical Dictionary* 630 (20th ed. 1945).

¹² Nelson and Hunter, *Therapeutic Abortion: A Ten-Year Experience*, 9 *Obst. & Gynec.* 284-85 (1957).

¹³ Dorland, *op. cit.* supra note 11, at 645, 995.

¹⁴ 1 Oxford, *op. cit.* supra note 8, at 878.

¹⁵ 2 Webster's, *op. cit.* supra note 10, at 1150.

II

The foregoing objections to undefined terms could probably be met by reshaping the language of the section. We should now like to consider more fundamental ones.

The American medical profession is a distinguished one. In spite of occasional errors and lapses it has held to its lofty traditions remarkably well—better perhaps than the legal profession. It has worked hard to repress quacks and criminal abortionists, and in general to separate the sheep from the goats. But the goats, unable to get admission to any medical society, can still pass qualifying examinations, obtain and keep state licenses to practice medicine so long as they avoid successful prosecution for any misconduct giving ground for revocation of license.

The Model Code makes no distinction between these two groups, and probably no legislature could do so. A Chicago quack, who could have made his mark in legitimate practice, but not as large an income, was for years a target of the decent profession; but he beat every effort to revoke his license and died several years ago in control of the biggest medical office in Chicago. He and others of his type would be given the same authority to do therapeutic abortions as the most respected leader of the profession. They could supply all the signatures asked for any statements to be filed. They have access to licensed hospitals, some of them well equipped. They would not even have to examine the patient who came to them for an abortion, since the Model Code does not require that the certificate filed state any ground for the belief in the justifying circumstances. One charged with a capital offense must be indicted, the indictment tested for sufficiency, an attorney provided for any defendant who cannot hire his own, time given for preparation of defense, must confront his accusers, have an open trial and a record made. The child in the womb, against whom no charge is made, is given no defender, no time, no hearing, no specifications to support the demand for his destruction. And the appeal, given as of right by most constitutions? Under section 207.11(2)(b), the unborn child could have no appeal even could he in some way have a recognized defender because there would be no record—no allegations and findings—to review.

There have always been evils from which men recoiled because they felt them to be evil and on consideration thought them to be evil, and which human communities have sought to prevent by penal laws, because their effect on the community was thought to be bad. There have always been and always will be violations of all these laws. There will always be murders, thefts, and other crimes known from the early

days of man. It is reasonable to expect that there will always be abortions, even though in some times and places they seem not to have been a problem and even though their frequency may again recede.

Protecting the life of the unborn child has been a major concern of the earliest laws known to us. It has continued to be an object of law-making in every subsequent civilization which has contributed to our own because it springs from a universal feeling which in the past has ceased to move men only when a nation was in decay.

The mere fact that a thing is wrong does not require legislation to ban and punish it. Various considerations could make initiation of such laws unwise. Repeal of existing laws is another matter. When the common judgment of moral laws and of the welfare of the social and political community have been embodied in penal statutes which have over the years proved their place in the popular consciousness by judicial interpretation, re-enactments, codification, amendments to clarify, strengthen and improve procedurally, the moral judgment becomes identified with the statutes. In that situation repeal takes on the character of a vindication of the acts which had previously been condemned. Today far too many look to the statute as their moral determinant; the morality of an act is determined by Government and moral laws are recognized only as embodied in penal codes. And the remarks of medical writers over the last century (as quoted hereinafter) show convincingly that a vocal part of the medical profession has been thinking in the same terms—in terms of the statutory ban alone, and making no further inquiry into moral values.

The earliest English writer on medical jurisprudence, in his lectures under the Acts of 1803, 1822, 1828 and 1837, would have no truck with any induced abortion.¹⁶ After the enactment of the Offences against the Person Act of 1861,¹⁷ his reprobation was contracted to the terms of the statute, and he was ready to urge further loosening of the legal restrictions.¹⁸

Many medical practitioners, as shown by statements of Dr. Alan Guttmacher¹⁹ and others in this country, and Dr. Bourne in England²⁰

¹⁶ Taylor, *Medical Jurisprudence* 594 (1844).

¹⁷ 24 & 25 Vict., c. 100.

¹⁸ Taylor, *The Principles and Practice of Medical Jurisprudence* 790-94 (1865).

¹⁹ *Scope Weekly*, April 2, 1958, p. 9; *Therapeutic Abortion, Doctor's Dilemma*, 21 *J. Mt. Sinai Hosp.* 111, 118-19 (1954).

²⁰ *The King v. Bourne*, [1939] 1 K.B. 687 (1938). This case will be discussed in Part Two of this article.

openly perform what they consider therapeutic abortions according to their own judgment, in violation of existing statutes.

No profession is a guarantee of character. One who is ruthless, mercenary and dishonest will be ruthless, mercenary and dishonest whether he makes his profession medicine or law or physics or embezzlement. He can be counted on to exploit fully any weakening in law enforcement effected by honest and able medical men who step out of their character as medical men to work social justice in individual cases.

In commenting on the terminology of section 207.11 we made no reference to the phrase "substantial risk." The reason is that, somewhat like the therapeutic abortionist, we can see no cure but excision.

Would the determination of substantial risk be made on a statistical basis? If so, what percentage of mortality and morbidity would establish substantial risk? The obstetrician does not abort statistics, but a living fetus. No statistics in medicine are complete or really integrated. Figures for a specific area over a specific period of time, especially if based on uniformly correct methods of observation and reporting, can give us averages which will have value for a variety of purposes. But an average is not an individual human being. If statistics showed that an average of 99 in every 100 died of a certain condition, it would not mean that the chances of living were 99 to 1 against any particular one of those patients.

A patient's doctor may benefit by familiarity with the available statistics, which may serve as an alert and move him to special preparations, but each doctor must determine from his own study of his own patient whether his patient will be the one survivor or one of the 99 if the averages remain unchanged. If his observation suggests a poor prognosis if pregnancy be continued, just how poor must it be to create a "substantial risk"? Neither the Model Penal Code nor any professional code fixes any standard—it is all left to the individual judgment of two men, who may have no judgment at all, or no experience with the complication on which a therapeutic abortion would be based.

The two physicians required to file their opinion are not required to be specialists; the Code does not even specify an obstetrician; and it contains not even a suggestion that one be a qualified internist or one with any knowledge or experience in the complicating disease or condition, although the complication is the heart of the matter.

Section 207.11(2)(a), in addition to authorizing induced abortion to protect the mother—the only "therapeutic abortion"—goes on to provide

for legal abortion to avoid risk of a defective infant, a eugenic consideration; and to abort any fetus or embryo resulting from rape, a social consideration; or from incest, a combination of social and eugenic considerations. None of these could constitute a medical indication for abortion, but some medical literature has a bearing on them. They will be considered hereafter, but first we should like to discuss the basic medical element and Therapeutic Abortion (hereinafter designated as TA).

When a permission to procure an abortion or to destroy fetal life is stated or implied in an American statute, it is invariably based upon a supposed medical necessity. It would be reasonable then to expect that a movement to facilitate TA would bespeak a growing demand by the medical profession—a general demand for more general use of such therapy in the complications of pregnancy already recognized as medical “indications” for emptying the womb, or for recognition of new medical indications. We find on the contrary that medical opinion is ever more sceptical, more critical of the therapy of abortion and embryotomy.

III

In 1860 Pennsylvania enacted its first statute defining and punishing abortion.²¹ Its terms followed closely those of the British Act of July 17, 1837.²² At that time Hugh L. Hodge, M.D., had been giving a course of lectures at the University of Pennsylvania in which he declared the idea of induced abortion to be unthinkable for decent medical men; he made a single exception, in the case of a contracted pelvis making a normal delivery impossible.²³ These lectures were reprinted a number of times, as late as 1872. In 1844 Alfred S. Taylor, M.D., published in London his *Medical Jurisprudence*, in which his views on abortion seemed very similar to those of Dr. Hodge. In 1865, after passage of the Offences against the Person Act of 1861,²⁴ he published *The Principles and Practice of Medical Jurisprudence*. He then declared that the use of the word “unlawfully” in the Act of 1861 impliedly authorized abortion to save the life or health of the mother. He never was able to support this contention by any authority.²⁵

²¹ Pa. Sess. Law 1860, ch. 382, § 87.

²² 7 Will. 4 & 1 Vict., c. 85, § 6.

²³ Foeticide, or Criminal Abortion: A Lecture Introductory to the Course on Obstetrics (4th ed. 1872); *Principles and Practice of Obstetrics* 301 (1864).

²⁴ 24 & 25 Vict., c. 100.

²⁵ See 1 Russell, *Crime—Felonies and Misdemeanors* 517 (9th ed. 1936).

The artificial interruption of pregnancy because of anatomical impediments to normal delivery was early supplanted by Caesarean section. So, the first "indication" to obtain respectable support in modern times was also the first abandoned. Meanwhile, however, German medical men were asserting their right to induce abortions whenever they thought it necessary for the protection of the mother's life. Specifically, they declared that a surgical emptying of the womb in advance of viability was "indicated" in a list of complicated ailments which had grown by the turn of the century to include all tuberculosis, and heart and kidney defects.²⁶ That was a period of strong German influence on American medicine, and reputable medical men in this country began to speak and write of TA as indicated by every complication of pregnancy, and then by ailments having no direct relation to pregnancy, which could be thought of as endangering the life of the mother.

As a lawyer, and not a physician, I shall confine myself to calling medical writers as witnesses. Explanation of certain terms* repeatedly used by them may be of help to the average reader. *Expectant treatment* is essentially waiting and watching. *Conservative* means directed at preserving. *Parity* has no relation to equality but indicates a woman's status as to pregnancies: one never pregnant is nullipara, one who has had a number of pregnancies multipara, or specifically para-2, para-3 et cetera. *Trimester*, for a period of 3 months, is not a medical term but seems to be used chiefly by medical men.

The pregnant woman may suffer from any of the diseases which might be contracted by the nonpregnant, but the effect on her may not be the same. There are other ailments peculiar to pregnancy: ectopic pregnancy, hydatidiform mole (rapid growth fills uterus), (poly-) hydramnios (accumulation of amniotic fluid), and hyperemesis gravidarum (excessive vomiting); abruptio placentae (premature separation), placenta praevia (blocking the outlet from the uterus); preeclampsia, eclampsia, toxemias and hemorrhages peculiar to pregnancy, with uncertain elements as to their cause and relationship.

The first edition of Williams' *Obstetrics* appeared in 1903. It listed²⁷ the recognized indications for TA as follows:

Hyperemesis Gravidarum "is the best recognized";

Chorea of grave type;

²⁶ Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* 278 (1936).
* Appended to this article is a Glossary containing the more frequently used medical terms.

²⁷ Williams, *Obstetrics* 338-45 (1st ed. 1903).

(Cardiac lesions may call for *premature labor*);
Early Hemorrhage, if not followed by expulsion of ovum;
Late Hemorrhage, most often due to Placenta Praevia; to be done at once;
Acute Nephritis not responding to treatment, regardless of fetus;
Toxemia not responding to treatment, regardless of fetus;
Infected Uterus, from an incomplete abortion;
Hydramnios, always; urgent;
Placenta Praevia, as soon as diagnosis certain;
Hydatidiform Mole (occasional) to be done at once regardless of pregnancy;
Diabetes, if condition is alarming, as pregnancy sometimes had bad effect on Diabetes;
Carcinoma of Cervix;
Uterine Myomata.
(Eclampsia considered only as a danger of final months, and as calling for *accouchement forcé*, not TA; Pernicious Anemia and Leukemia occasionally call for induction of *premature labor*);
(Neither Contracted Pelvis nor Incarceration of Retroflexed Uterus is now recognized as an indication).

This list does not include tuberculosis. Ten years later DeLee first published his textbook.²⁸ He commented on the improvement in general therapy and the lessening occasions for TA, then listed the indications given by Williams, with the exception of diabetes and placenta praevia (listed by DeLee as reasons for premature labor) and tumors and uterine infection. He added tuberculosis and toxic goiter; and he made leukemia and pernicious anemia indications for TA instead of for premature labor only—an important change since premature labor means a viable infant. In general terms he added "other diseases" jeopardizing the mother.

Ten or fifteen years later, we are told in a much cited report,²⁹ the commonly used indications for TA included hyperemesis, chorea and other nervous disorders, heart disease in general, nephritis, diabetes, cancer and other neoplasms, anemias, thyroid dysfunction and tuberculosis, and also hypertension, myasthenia gravis and psychiatric conditions.

Taussig tabulated a number of German, Italian and Czech reports for the period from 1917 to 1925, to show TA in 507 cases, divided among Tuberculosis (268), Heart (82), Kidney (36), Nervous and Mental (36), Hyperemesis (9), and other indications (76).³⁰

²⁸ DeLee, *Principles and Practice of Obstetrics* (1st ed. 1913).

²⁹ Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 *Linacre Q.* 11 (1952).

³⁰ Taussig, *op. cit.* supra note 26, at 282.

Thirty years ago Professor E. Cova declared in the principal address to the Italian Congress of Obstetrics and Gynecology meeting in Milan, that the recognized indications for TA had been greatly reduced, but that any use of it represented a failure of medical science. He urged all possible effort towards its early complete abandonment.³¹

But Taussig expanded the earlier lists, extending them to diseases, systemic and of various organs, such as the liver, which had seldom been thought of as having any relation to pregnancy;³² and in the 1940's, according to a report cited by Te Linde, the New York Lying-In Hospital listed 44 separate indications.³³

In 1931 the Margaret Hague Maternity Hospital had opened in Jersey City as one of America's great hospitals. Dr. S. A. Cosgrove, head of Obstetrics at Columbia University, was medical director from its opening until a few years ago. He had 1 TA among the first 4,000 deliveries. When he reported this, other hospitals were doing from 1 in 600 to 1 in 100. His report jolted the medical profession into serious inquiry and resulted in abandonment of many of the indications accepted up to that time.

Greenhill in his 1951 revision of DeLee reduces the original DeLee list: "Therapeutic abortion is rarely indicated and medical therapy has improved so much that few affections justify its performance. The following are considered indications" for TA: (1) hyperemesis, with hepatic and renal involvement; (2) advanced TB (rarely); (3) heart disease (rarely); (4) disease of kidneys; (5) German measles; (6) record of previous erythroblastotic babies, if husband homozygous; (7) some neurologic disorders such as Huntington's Chorea; (8) nervous diseases such as multiple sclerosis (rarely); (9) diseases of ovum, such as hydatidiform mole.³⁴

He also declares however: "There is hardly any condition affecting the pregnant woman that may not be an indication for emptying the uterus."³⁵

Others were drastically reducing the list of indications, chiefly by confining more general ones to rare forms, to rare occasions, to special conditions, syndromes et cetera.³⁶

³¹ Address at Congress of Societa Italiana di Ostetricia e Ginecologia, Milan, Jan. 30, 1932, as reported in 98 J.A.M.A. 1393 (1932).

³² Taussig, op. cit. supra note 26, at 292-307.

³³ Te Linde, *Operative Gynecology* 477-78 (1946).

³⁴ DeLee, *Principles and Practice of Obstetrics* 976-77 (10th ed. Greenhill 1951).

³⁵ Id. at 972.

³⁶ Heffernan and Lynch, supra note 29.

Meanwhile the Hague Maternity Hospital was delivering over 100,000 babies, with only 8 TA, and had abandoned the use of TA entirely in 1939. Its influence was being felt. In 1951 Dr. R. J. Heffernan, of Tufts, had declared to the Congress of the American College of Surgeons: "Anyone who performs a therapeutic abortion is either ignorant of modern medical methods of treating the complications of pregnancy or is unwilling to take the time to use them."³⁷ And in a recent conversation with the author Dr. Heffernan reiterated this view with renewed emphasis.

One writer after another testified to the need for more serious inquiry as to the recognized indications, and one after another of the indications began to disappear from the lists: "In conclusion, our experience at the University of Virginia Hospital, a general hospital of 600 beds, is that there are a certain number of pregnant women who must be aborted. The major proportion of these will have renal disease. Persons with cardiac disease and tuberculosis can now be carried through to term by means of skillful handling. Neuropsychiatric disease is not necessarily an indication"³⁸

Eastman's revision in 1956 of the *Williams Obstetrics* listed the best established indications for TA: rheumatic heart disease with a history of previous decompensation; advanced hypertensive vascular disease; and carcinoma of the cervix. "Other indications are more debatable."³⁹

Willson in 1958 approves TA only in extreme cases of chronic hypertension, cancer requiring hysterectomy, degenerative changes from diabetes, and certain conditions in tuberculosis and heart disease which appear to be non-medical.⁴⁰

At an early date we find this broad statement:

Thus we may think it our duty to induce an abortion: (1) as a direct means of saving the life of the mother; (2) to do away with a condition which may threaten her life if gestation continues; and (3) to avoid certain dangers which may supervene if pregnancy is allowed to progress to full term.⁴¹

This seems hardly to accord with Hippocratic tradition. However, it does not seem to have had any immediate effect, at least on the utterances of other writers.

Any real understanding of the changing practice as to TA requires

³⁷ As reported, *id.* at 24.

³⁸ Wilson, *The Abortion Problem in the General Hospital*, in Rosen, *Therapeutic Abortion* 189, 197 (1954).

³⁹ Williams, *Obstetrics* 1077 (11th ed. Eastman 1956).

⁴⁰ Willson, Beecham, Forman and Carrington, *Obstetrics and Gynecology* 165 (1958).

⁴¹ Williams, *Obstetrics* 338 (1st ed. 1903).

consideration of the work and the writings on the individual indications which have at different times been recognized by the medical profession generally or by groups within it. We will take them up, roughly, in the order of their importance in the past, tracing in each instance the development of medical thought by noting, in text, both the writer and the period in which he wrote.

1. *Tuberculosis*

While labor should never be prematurely induced on the mother's account, in some cases it should be induced to save the child before the death of the mother.⁴² Williams, 1903.

Taussig says a group of German, Italian and Czech reports from 1917 to 1925 show 496 TA, of which 268 were for TB: "The most significant indication for therapeutic abortion in point of frequency, is tuberculosis of the lungs. The common observation that a tubercular process grew markedly worse in the course of a pregnancy . . . led, at the beginning of the century, to the almost unanimous opinion that patients who showed any evidence of tuberculosis . . . should be aborted without fail at the earliest possible moment. In the last three decades, however, more careful observations . . . have greatly modified this viewpoint.

"The gradual limitation of indications for interference has been partly the result of more accurate methods of diagnosis, partly due to improved methods of treatment, . . . and partly the outcome of a more careful follow-up of cases after abortion and after full-term pregnancy pointing to the questionable value of interference in many cases."⁴³ Taussig, 1936.

"In fact the question of therapeutic abortion in tuberculosis of the lungs is intimately bound up with the social-economic status of the patient. In a poorly nourished *woman with a large family, we must regard the saving of fetal life with less concern than in the woman who can and will carry out sanatorium treatment* for the required period of time during and after her pregnancy, and *for whom the saving of the child is a matter of great concern*. . . . To summarize, then, it would seem reasonably certain that: (1) Pregnancy has an unfavorable effect on tuberculosis. (2) Latent tuberculosis does not justify interruption. (3) Active or progressive tuberculosis is an indication for interference. (4)

⁴² Id. at 344.

⁴³ Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 292-93 (1936).

Therapeutic abortion, in two-thirds or more of these cases, will diminish the harmful effects of the pregnancy on the tubercular process."⁴⁴ Tausig, 1936.

TA is indicated in some cases.⁴⁵ Williams, ed. Stander, 1941.

"[I]f the patient with active tuberculosis becomes pregnant, abortion is not indicated; proper care will enable the patient to go through her pregnancy unharmed."⁴⁶ DeLee, ed. Greenhill, 1943.

"When pregnancy gives evidence of activating the tuberculosis, therapeutic abortion is to be advised."⁴⁷ Osler, ed. Christian, 1944.

"During the past decade there has been a definite swing to conservatism in the consideration of abortion in tuberculosis."⁴⁸ Te Linde, 1946.

"If it [abortion] is to have any scientific justification, *evidence must be sought showing that in general the harmful effects are avoided if the pregnancy is being interrupted. A study of the literature will soon convince any impartial person that no such evidence exists.*"⁴⁹ Jacobs, 1946.

Recognized indications for TA: "(1) Tuberculosis—A most vehement controversy centers over tuberculosis as an indication for therapeutic abortion."⁵⁰ Perlmutter, 1947.

In a group of tubercular mothers studied, mortality for those who went full term was 19.2%; that for those aborted in the first trimester was 38.5%.⁵¹ Barone, 1947.

"The preponderance of evidence indicates that pregnancy exerts no harmful effect on the course of tuberculosis and that abortion is of no therapeutic value."⁵² Bowles & Domzalski, 1949.

At Hague Maternity 128 tuberculosis cases showed no evidence that

⁴⁴ Id. at 296-97. (Emphasis added.)

⁴⁵ Williams, *Obstetrics* 1113 (8th ed. Stander 1941).

⁴⁶ DeLee, *Principles and Practice of Obstetrics* (8th ed. Greenhill 1943), as quoted in Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 *Linacre Q.* 11, 13 (1952).

⁴⁷ Osler, *The Principles and Practice of Medicine* 254 (15th ed. Christian 1944).

⁴⁸ Te Linde, *Operative Gynecology* 478 (1946).

⁴⁹ Jacobs, *Pulmonary Tuberculosis and Pregnancy*, 53 *J. Obst. & Gynaec. Brit. Emp.* 368, 371 (1946). (Emphasis added.)

⁵⁰ Perlmutter, *Analysis of Therapeutic Abortions, Bellevue Hospital 1935-1945*, 53 *Am. J. Obst. & Gynec.* 1008, 1012 (1947).

⁵¹ Barone, *Fino and Hetherington, Pregnancy Complicating Tuberculosis*, 54 *Am. J. Obst. & Gynec.* 475, 487 (1947).

⁵² Bowles and Domzalski, *Changing Indications for Therapeutic Abortion in Pulmonary Tuberculosis*, 9 *Hawaiian Med. J.* 17, 21 (1949).

pregnancy had any deleterious effect.⁵³ Kruger, Cosgrove & Cosgrove, 1951.

A common indication around 1922-1927; discredited by elaborate studies 1930-1943.⁵⁴ Heffernan & Lynch, 1952.

Study of 63 tuberculosis cases showed those who had TA to have a higher mortality than those going on to normal delivery.⁵⁵ Schaefer & Epstein, 1952.

Of all (283) TA at Los Angeles County Hospital, 1931-1945, 61.5% were for tuberculosis. Of 295 TA at Los Angeles County Hospital, 1931-1950, 59.5% were for tuberculosis; but only 2 of the 12 TA done from 1946 to 1950 were for tuberculosis.⁵⁶ Russell, 1953.

"As for pulmonary tuberculosis, countless recent studies demonstrate that pregnancy per se does not affect this disease process and as a consequence interruption of pregnancy on this account has been declining for some time. The development of thoracic surgery and antibiotic medication is giving this conservative trend additional impetus."⁵⁷ Eastman, 1954.

"Even before the advent of the 'miracle drugs', the practice of allowing pregnancy to continue in women with pulmonary tuberculosis had become general. It had been determined that if the tuberculous pregnant woman was treated like the non-pregnant, with pneumothorax or even surgery if indicated, she did well. Therapeutic abortion was considered only for patients less than twelve weeks pregnant, with very active lesions. Since the introduction of streptomycin, para-amino salicylic acid and isoniazid, many of the very active, early cases will also be allowed to continue pregnancy. Today, tuberculosis only rarely necessitates abortion."⁵⁸ Guttmacher, 1954.

"Advanced tuberculosis in the early months which does not respond

⁵³ Kruger, Cosgrove and Cosgrove, *Pregnancy and Tuberculosis*, 78 Va. Med. Monthly 417, 421 (1951).

⁵⁴ Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 *Linacre Q.* 11, 13 (1952).

⁵⁵ Schaefer and Epstein, *Results Following Therapeutic Abortion in Pulmonary Tuberculosis*, 63 *Am. J. Obst. & Gynec.* 129 (1952).

⁵⁶ Russell, *Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital*, 151 *J.A.M.A.* 108 (1953).

⁵⁷ Eastman, *Obstetrical Foreword*, in Rosen, *Therapeutic Abortion* xx (1954).

⁵⁸ A. F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in Rosen, *id.* at 18.

to treatment is considered to be an indication by some obstetricians, but this indication should be rare."⁵⁹ Greenhill, 1955.

"There is no clear evidence that pregnancy per se affects pulmonary tuberculosis unfavorably. Nevertheless evaluation must be made of the additional strain of pregnancy, parturition and neo-natal care. . . . Termination of pregnancy because of active pulmonary tuberculosis is indicated in but relatively few patients."⁶⁰ Watson, 1955.

TA for tuberculosis was never done at Margaret Hague Hospital; the hospital has found no evidence of any bad effect of pregnancy on tuberculosis, and has had no death from tuberculosis in its last 56,000 deliveries to the end of 1954.⁶¹ Donnelly, 1955.

Study of 401 full term pregnancies of 149 mothers with minimal tuberculosis, treated and arrested for a year or more before pregnancy, showed they "did best during and after pregnancy and had an excellent prognosis. . . . It was of interest that the number of children in the family did not appear to be an important factor"⁶² Meakins, 1956.

Of 64 TA at Mayo Clinic, 1945-1954, 6 (or 9%) were for tuberculosis. "Pulmonary tuberculosis is becoming a less common indication for therapeutic abortion. This is because of recent work showing that the tuberculous pregnant woman should be treated exactly like the non-pregnant tuberculous woman and the pregnancy itself has no deleterious effect on tuberculous lesions. [Kruger, Cosgrove and Cosgrove, *Pregnancy and Tuberculosis* (1951); Schaefer and Epstein, *Results Following Therapeutic Abortion in Pulmonary Tuberculosis* (1952)] Some still think that selected patients with tuberculosis should be aborted if they are seen in the first trimester."⁶³ Nelson & Hunter, 1957.

Of 550 wives with tuberculosis of genitals, 74.3% were sterile, 18.4% had had a normal child, 5.3% had had an abortion, and 1.9% had had an ectopic pregnancy.⁶⁴ Kovács & Gavallér, 1958.

⁵⁹ Greenhill, *Obstetrics* 329 (11th ed. 1955). (This is the 11th ed. of DeLee, *Principles and Practice of Obstetrics*.)

⁶⁰ Watson, *Outlines of Internal Medicine* 88 (1955).

⁶¹ Donnelly, *Are There Medical Indications for Therapeutic Abortions?*, 52 *J. Med. Soc. N.J.* 112, 114 (1955).

⁶² Meakins, *The Practice of Medicine* 131 (6th ed. 1956).

⁶³ Nelson and Hunter, *Therapeutic Abortion: A Ten-Year Experience*, 9 *Obst. & Gynec.* 284, 287 (1957).

⁶⁴ Kovács und Gavallér, *Klinische Erfahrungen In 550 Fällen Weiblicher Genitaltuberkulose*, XI *Acta Medica-Acad. Sci. Hung.* 257 (1958).

New York City TA for tuberculosis were 10.5% of all TA from 1943 to 1947; 9.5% of all from 1951-1953.⁶⁵ Calderone, 1958.

"This has been a disappearing indication for therapeutic abortion since the monumental work of Schaefer *et al.* [Schaefer and Epstein, Results Following Therapeutic Abortion in Pulmonary Tuberculosis, 63 Am. J. Obst. & Gynec. 129 (1952); Schaefer, Douglas and Dreishpoon, The Obstetric Management of the Tuberculous Patient, 1 Obst. & Gynec. 245 (1953)], showing so definitely that these patients get along as well or better than their nonpregnant sisters."⁶⁶ Scherman, 1958.

"Women suffering from active tuberculosis often grow worse during and after pregnancy if they are not properly treated. For this reason early diagnosis is essential. . . . Because of these added difficulties, therapeutic abortion was recommended by most of the older authorities, [Citations omitted.] Recently, however, extensive joint studies by obstetricians and phthisiologists have cast considerable doubt on the wisdom of this advice [citing Kruger, 78 Va. Med. Monthly 417 (1951); Hill, 17 Am. Rev. Tuberc. 113 (1928); Beckman and Kirch, 135 Arch. Gynäk. 438 (1928); Mariette, 203 Am. J.M. Sc. 866 (1942)]." Follow-up records show the same course followed by tuberculosis among pregnant and non-pregnant women. "It may therefore be said that those qualified to render an opinion on the subject are skeptical of any good that may result from therapeutic interruption of pregnancy. *Probably more women would be saved if greater care were given to the treatment of the tuberculosis and less attention paid to the complicating pregnancy.*"⁶⁷ Beck & Rosenthal, 1958.

"This infection [pulmonary tuberculosis] is ordinarily not affected by pregnancy, and can be treated as successfully in gravid as in nonpregnant women. Therapeutic abortions therefore are not often necessary and should be *considered only for the occasional patient who, because of poverty and a large family, cannot treat her TB properly.* Under such circumstances the additional responsibility of caring for a new baby day and night may produce exacerbation of the infection."⁶⁸ Willson, 1958. (This exception obviously represents not a series of clinical studies—a really impossible thing—but an inference in aid of a socio-economic reason for abortion.)

⁶⁵ Calderone, Abortion in the United States 78 (1958).

⁶⁶ Scherman, Therapeutic Abortion, 11 Obst. & Gynec. 323, 329 (1958).

⁶⁷ Beck and Rosenthal, Obstetrical Practice 683 (7th ed. 1958).

⁶⁸ Willson, Beecham, Forman and Carrington, Obstetrics and Gynecology 165 (1958). (Emphasis added.)

There is little evidence that pregnancy itself has a deleterious effect on pulmonary tuberculosis so long as the disease has been diagnosed and reasonable precautions are taken.⁶⁹ Willson, 1958.

"With the success of chemotherapy, therapeutic abortion is seldom necessary. . . . There is little point in carrying out therapeutic abortion after the end of the third month of pregnancy. After that the operation involves as much strain as parturition."⁷⁰ Crofton, 1958.

2. Heart

The quotations from 1903 to 1959 tell the story of the one-time indication of Heart Disease.

"Cardiac diseases occasionally demand the induction of premature labor."⁷¹ Williams, 1903.

Heart disease is an indication for TA only when the muscle is "badly" inefficient, as in advanced myocarditis and decompensation. Other heart conditions may call for *induction of premature labor*.⁷² DeLee, 1913.

Taussig says a group of German, Czech and Italian reports covering the period from 1917 to 1925 show 496 TA, of which 82 were based on heart diseases.⁷³

A common indication around 1922-1927, but discredited earlier than tuberculosis as an indication for TA.⁷⁴

"The conduct of pregnancy and labor complicated by heart disease has undergone much change in the last 10 years, since the cardiologists have taken a hand in the matter. They have shown us obstetricians that the heart can be treated successfully even though the woman is carrying the added burden of pregnancy."⁷⁵ DeLee, 1928.

A report on 196 organic heart cases by Sloan Hospital for Women (N.Y.C.) concluded: "It is our experience that the response to medical treatment of the pregnant women with heart disease and circulatory stasis is satisfactory; often quite as satisfactory as in like conditions in the nonpregnant. . . . In a case in which compensation cannot be restored with thorough medical treatment, a grave situation is present. . . .

⁶⁹ Id. at 214.

⁷⁰ Crofton, Textbook of Medical Treatment 142 (7th ed. 1958).

⁷¹ Williams, Obstetrics 343 (1st ed. 1903).

⁷² DeLee, Principles and Practice of Obstetrics 1014, 1018 (1st ed. 1913).

⁷³ Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 282 (1936).

⁷⁴ Heffernan and Lynch, Is Therapeutic Abortion Scientifically Justified?, 19 Linacre Q. 11, 15-17 (1952).

⁷⁵ DeLee, Yearbook of Obstetrics and Gynecology 50 (1927).

In this medical impasse, it is usually best to trust nature more and art less."⁷⁶ Corwin, 1927.

A report on a study of the records of 45,320 deliveries in three hospitals concludes: "Prognosis is affected by the care given and the skill used in the treatment of an individual patient. . . . Undue pessimism as regards the prognosis of all cardiac patients who are pregnant is not justified by the facts; there appears to be too little faith in the ability of the heart to withstand pregnancy" ⁷⁷ Reid, 1930.

Heart disease is rarely an indication.⁷⁸ Cova, 1932.

A study of the records of 29 nulliparae and 41 parae-1 to -10 showed the average age at death for the former was 42.1 years, for the latter 42.0 years. The difference was called insignificant. However the authors went on to speculate that perhaps only the fittest rheumatic cardinals married and had children, and so they should show a longer average life than the nulliparae.⁷⁹ Gilchrist & Murray-Lyons, 1933.

A review of pertinent literature showed the same average age at death for primiparae and multiparae. "[W]hatever method is used, it fails to show conclusively that pregnancy *materially* alters the course of rheumatic heart disease."⁸⁰ Jensen, 1938.

TA is indicated for some cardiovascular ailments.⁸¹ Williams, ed. Stander, 1941.

A report on 568 cases of rheumatic heart with pregnancy, handled without TA, declares: "[I]t is probable that practically every pregnancy encountered in a patient with heart disease can be brought to a successful spontaneous termination if adequate prenatal care is instituted and if absolute bed rest is enforced when indicated."⁸² Gorenberg, 1943.

"[H]eart disease remains one of the more common causes for abortion, but there is much difference of opinion concerning it by obstetricians and internists. Cosgrove, for example, interrupts pregnancy only when there is actual heart failure. This seems to us to be an extreme point of view when one considers the high obstetric mortality with car-

⁷⁶ Corwin, Herrick, Valentine and Wilson, *Pregnancy and Heart Disease*, 13 *Am. J. Obst. & Gynec.* 617-18 (1927).

⁷⁷ Reid, *Prognosis of Heart Disease in Pregnancy*, 19 *Am. J. Obst. & Gynec.* 63, 71 (1930).

⁷⁸ Cova, Address at Congress of Societa Italiana di Ostetricia e Ginecologia, Milan, Jan. 30, 1932, as reported in 98 *J.A.M.A.* 1393-94 (1932).

⁷⁹ Gilchrist and Murray-Lyons, *Does Pregnancy Hasten the Fatal Termination in Rheumatic Heart Disease*, 40 *Edinburgh Med. J.* 587, 588-96 (1933).

⁸⁰ Jensen, *The Heart in Pregnancy* 193 (1938).

⁸¹ Williams, *Obstetrics* 1116 (8th ed. Stander 1941).

⁸² Gorenberg, *Rheumatic Heart Disease*, 45 *J.A.M.A.* 835, 840 (1943).

diac patients. However, one should never lose sight of the fact that *these patients may be as poor surgical risks for abortion as they are obstetric risks.*"⁸³ Te Linde, 1946.

Cardiac disease was declared to be the complication recognized with "greatest unanimity" as an indication for TA.⁸⁴ Perlmutter, 1947.

"Likewise heart disease is a rare indication."⁸⁵ DeLee, ed. Greenhill, 1951.

"Heart disease should be a rare indication."⁸⁶ Greenhill, 1955.

"In some clinics it is now the leading cause of maternal death and in others is exceeded only by hemorrhage as the leading cause." Of 295 TA at Los Angeles County Hospital from 1931 to 1950, 34 (11.2%) were for cardiac indications, 32 of these being rheumatic. During the period of 1946-1950, they made up half of the 12 TA.⁸⁷ Russell, 1953.

The statistics of Corwin, Herrick, Valentine, and Wilson, 1927, bear out an opinion gained from seven years' experience that pregnancy and childbearing when properly supervised and safeguarded is not a great menace to the safety or life of the average ambulant case of heart disease. "The opinions of these eminent cardiologists support the contention that heart disease complicating pregnancy can be successfully managed by competent prenatal care. This involves an early evaluation of the cardiac status of the patient. In severe cases success depends upon teamwork."⁸⁸ Heffernan & Lynch, 1952.

"Rheumatic heart disease with a history of previous cardiac failure constitutes the main exception to the observation made in the previous paragraph that 'pregnancy seldom aggravates organic disease'. Indeed, were it not for this particular complication, the word 'seldom' in the statement could well nigh be changed to 'never'. It must be recalled, however, that these grave cases represent only a small minority of the total rheumatic group and that the majority of gravidae in this general category can, with judicious care, be carried through several pregnancies safely. In the severer cases, furthermore, valvulotomy is becoming a sound alternative to therapeutic abortion, although the place of the

⁸³ Te Linde, *Operative Gynecology* 478 (1946). (Emphasis added.)

⁸⁴ Perlmutter, *Analysis of Therapeutic Abortions, Bellevue Hospital 1935-1945*, 53 *Am. J. Obst. & Gynec.* 1008, 1012 (1947).

⁸⁵ DeLee, *Principles and Practice of Obstetrics* 977 (10th ed. Greenhill 1951).

⁸⁶ Greenhill, *Obstetrics* 329 (11th ed. 1955).

⁸⁷ Russell, *Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital*, 151 *J.A.M.A.* 108, 109-10 (1953).

⁸⁸ Heffernan and Lynch, *supra* note 74, at 15.

operation in pregnancy has yet to be completely established.”⁸⁹ Eastman, 1954.

“Cardiac Disease. Fewer and fewer patients are being aborted for cardiac disease. Careful medical supervision with intelligent use of a salt-poor diet, weight control, diuretics, digitalis, antibiotics, anticoagulants, rest and improved anesthesia for delivery have made it possible for many cardiacs to have children who yesteryear would have been aborted, or who, unaborting, would perhaps have died. The care the patient takes of herself, and the quality of the medical care she receives, are almost as important as the gravity of the organic lesion. Even if the organic lesion is severe, the patient’s desires should be given great weight, for no physician is astute enough to guarantee the performance of any serious cardiac in pregnancy, labor and puerperium. If the patient is extremely desirous of continuing the pregnancy, is able and willing to cooperate to the full, and knows the approximate risk involved, most obstetricians will allow pregnancy to continue. So far as we know, if the cardiac patient survives her accouchement, the disease is not rendered worse by the experience. On the other hand, *if the severe cardiac patient cannot avail herself of proper care*, or is resistant to undertaking the risk pregnancy implies, abortion is justified.”⁹⁰ Guttmacher, 1954.

N.Y. City Health Dept.: TA for circulatory complications from 1943 to 1947 were 17.3%; from 1951 to 1953, 10.9%.⁹¹

Margaret Hague Hospital had 2 TA for rheumatic heart disease, both in 1935; of these one mother died 4 days later. Since that time the hospital had over 500 cardiacs with no therapeutic abortions, and a maternal loss of 2 (.4%, as compared with 2.6% loss among all women, puberty to menopause), 1939-1952. A 10-year follow-up on all rheumatic cardiacs entering this hospital from 1937 to 1942 totalled 260, showed 188 still alive, those with most pregnancies having the longest life.⁹² Donnelly, 1955.

“[H]eart disease should be a rare indication.”⁹³ Greenhill, 1955.

“It is not often necessary to terminate pregnancy because of heart

⁸⁹ Eastman, Obstetrical Foreword, in Rosen, Therapeutic Abortion xix-xx (1954).

⁹⁰ A. F. Guttmacher, The Shrinking Non-Psychiatric Indications for Therapeutic Abortions, in Rosen, id. at 17-18.

⁹¹ Calderone, Abortion in the United States 78 (1958).

⁹² Donnelly, Are There Medical Indications for Therapeutic Abortions?, 52 J. Med. Soc. N.J. 112, 116-17 (1955).

⁹³ Greenhill, Obstetrics 329 (11th ed. 1955).

disease if the patient can be treated properly. Termination can be considered for those with advanced lesions *who can neither obtain sufficient rest nor follow an acceptable program of treatment.*"⁹⁴ Willson, 1958.

Mayo Clinic, 1945-1954, had 64 TA, of which 9 (14%) were on cardiac indications. "In general, fewer and fewer patients are being aborted for cardiac reasons. Modern use of digitalis, diuretics, salt-free diets, control of weight, rest, and cardiac surgical procedures provides obvious reasons. . . . [T]he judicious use of therapeutic abortion still has a place in severe cardiac disease It is generally true that a cardiac patient will not have her longevity adversely affected by pregnancy if she survives the pregnancy."⁹⁵ Nelson & Hunter, 1957.

A report on 210 cases of pregnancy with rheumatic heart disease shows that women with cardiac insufficiency tolerated labor well if properly attended before; bad effects, and sometimes death, if labor came on during an attack of heart failure.⁹⁶ K'ang Yang Chu, 1957.

"As I see it there are only two medical indications for abortion that still need serious discussion, notably cardiac and hypertensive diseases."⁹⁷ Donnelly, 1958.

Rheumatic heart disease is "the group which in the literature seems to be the most persistent. Even here many reports [Connell 1954; Glover, McDowell & O'Neill 1955; Gorenberg & Chesley 1953, 1954; Heffernan & Lynch 1953; Litzenberg 1955; Ullery 1954] have shown that with proper care, which might include constant hospitalization or bed rest, these patients can tolerate pregnancy with little or no resultant damage. It has been stated that even the most severely ill of these individuals when pregnant and at constant bed rest have no greater load or strain on the heart. Economically, of course, this becomes a problem, but are we to do a therapeutic abortion for socio-economic reasons?" Coronary artery disease is "a rare complication."⁹⁸ Scherman, 1958.

C. L. Mendelson, 1952, "has found that coronary disease and preg-

⁹⁴ Willson, Beecham, Forman and Carrington, *Obstetrics and Gynecology* 165 (1958). (Emphasis added.)

⁹⁵ Nelson and Hunter, *Therapeutic Abortion: A Ten-Year Experience*, 9 *Obst. & Gynec.* 284, 286-87 (1957).

⁹⁶ K'ang Yang Chu, *Rheumatic Heart Disease Complicating Pregnancy* (*Peking Med. Coll. Hosp.*), 5 *Chinese J. Obst. & Gynec.* 451-57 (1957).

⁹⁷ Donnelly, as recorded in Calderone, *op. cit. supra* note 91, ch. 6 (*Therapeutic Abortion in the United States*), 102.

⁹⁸ Scherman, *Therapeutic Abortion*, 11 *Obst. & Gynec.* 323, 326 (1958). (Footnotes omitted.)

nancy should be treated separately. He states that the pregnancy produces no increased strain on the coronary system and does not predispose to coronary occlusion. He thinks vaginal delivery is the best method."⁹⁹ Scherman, 1958.

"According to Ullery [67 *Am. J. Obst. & Gynec.* 834 (1954)], this complication [congenital heart disease] if not too severe and if not associated with cyanosis can be carried frequently to a successful termination. With cardiac surgery and antibiotics to prevent subacute bacterial endocarditis, much can be done for these individuals."¹⁰⁰ Scherman, 1958.

"Spontaneous Subarachnoid Hemorrhage. This uncommon complication is usually the result of rupture of a congenital cerebral aneurysm. . . . Mortality in these patients as in the unpregnant state is very high. . . . This condition always carries a high mortality in the non-pregnant state, and it is doubted that pregnancy not associated with hypertension adds materially to this risk. . . . It seems reasonable that these individuals should have cesarean sections" ¹ (It occurs usually near the end of term.) Scherman, 1958.

Calcific pericarditis is "usually not an indication for therapeutic abortion. . . . These cases are usually asymptomatic. They are usually the result of some past suppurative or tuberculous pericarditis" ² Scherman, 1958.

Mitral stenosis is the only cardiac complication often found in women under 45. "At one time, mitral stenosis was so feared that women with this lesion were warned to remain single. If they married, the prevention of conception was recommended and when they became pregnant, abortion was advised. This attitude, however, is not justifiable at present since 70 to 90% of all pregnancies complicated by mitral stenosis terminate spontaneously without difficulty [Hamilton 1947]." With proper care the death rate is about the same as for the non-pregnant. "While many obstetricians and cardiologists advise therapeutic abortion and artificial interruption of pregnancy for those who are grouped in these unfavorable classes [the wholly incapacitated and those who suffer distress from the past exertion], recent reports of carefully conducted series of cardiac patients indicate that better results can be obtained by complete rest in

⁹⁹ Ibid.

¹⁰⁰ Ibid.

Id. at 326-2*

Id. at 327.

bed with controlled cardiologic and obstetric management in a hospital than by the artificial termination of gestation."³ Beck & Rosenthal, 1958.

Heart, lung and kidney ailments are now of secondary importance for TA.⁴ Guttmacher, 1958.

A comparison of the mortality rate to 1951 of primiparae and multiparae delivered at Hague Maternity Hospital, 1937-1942, showed that mortality had not increased with the number of pregnancies, the highest being parae-1 and parae-5 (37% and 44%), with little difference among parae-2, -3, -4 and -6 (25%, 21%, 23%, 22%). Of the total 260, 129 had their first pregnancy during the period from 1937 to 1942. Their mortality rate decreased with each increase in parity, from 37.5% for parae-1 down to 11.1% for parae-4 and over.⁵ Donnelly, 1955.

"With due care and attention the great majority of cardiac patients can be safely shepherded through pregnancy." Davidson, 1959. Yet Davidson advises early TA in heart cases because of the extra burden imposed by pregnancy, and comments that care of another "toddler" may be a greater burden than pregnancy.⁶

3. *Kidneys*

The mention of Kidneys has always been frightening to Americans. However, we may expect to have continued mention of them by medical men through the foreseeable future, since they are both the source of many important diseases and a valuable indicator as to others.

Chronic nephritis was a common indication around 1922-1927.⁷

Chronic nephritis (Bright's Disease) is a real danger and indication for TA—one of a diminishing few left.⁸ Cova, 1932.

Some kidney ailments are indications for TA.⁹ Williams, ed. Stander, 1941.

Chronic nephritis or hypertension frequently causes spontaneous

³ Beck and Rosenthal, *Obstetrical Practice* 695, 698 (7th ed. 1958).

⁴ *Scope Weekly*, April 2, 1958, p. 9.

⁵ Donnelly, *supra* note 92, at 116.

⁶ Davidson, *Principles and Practice of Medicine* 209-10 (4th ed. reprint 1959). For further follow-up on certain Hague Maternity Hospital cardinals see Gorenberg and Chesley, *Rheumatic Heart Disease in Pregnancy: The Remote Prognosis in Patients With "Functionally Severe" Disease*, 49 *Annals of Internal Med.* 278, 304 (1958).

⁷ Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 *Linacre Q.* 11 (1952).

⁸ Cova, as reported in 98 *J.A.M.A.* 1393 (1932).

⁹ Williams, *Obstetrics* 1115 (8th ed. Stander 1941).

abortion. Most trouble, however, occurs after the fetus is viable and thus it creates no TA problem. Most chronic hypertensives go through several pregnancies to normal delivery of normal children without any deterioration in the condition of the mother.¹⁰ Browne, 1942.

"Disease of the kidneys . . . is a definite indication."¹¹ DeLee, ed. Greenhill, 1951.

Chronic nephritis and glomerulonephritis were said to cause hypertension and kidney damage. The authors quote Browne, 1942, that there-in lies no TA indication; apparently these ailments are not affected by pregnancy. Mortality rates for England and Wales from 1911 to 1922 showed more deaths of men than of women from chronic nephritis. Women up to the age of 55, married and unmarried, showed the same mortality rate. Therapy is more effective than TA and avoids the danger of hemorrhage or infection.¹² Heffernan & Lynch, 1952.

There was one TA for porphyrinuria (1932) among 295 TA at Los Angeles County Hospital, 1931-1950; 37 (12.5%) renal & hypertensive, including toxemias after nephrectomy, pyelitis (none since 1939) and renal tuberculosis.¹³ Russell, 1953.

"Kidney Lesions. The previous surgical removal of one kidney, or its congenital absence, does not interfere with pregnancy provided only that the remaining kidney has normal function. If, on the other hand, careful investigation shows even moderate impairment of the solitary kidney, pregnancy presents a serious hazard.

"Pyelitis. Before the sulfa and antibiotic era, intractable pyelitis often necessitated interruption of pregnancy. However, today this is almost never necessary.

"Nephrolithiasis [kidney stones] is usually not a serious complication of pregnancy. If, however, the condition is bad enough to necessitate surgical removal of the renal calculi, it is safer to terminate the pregnancy first.

"Acute Glomerulonephritis is a rare complication of pregnancy. Pregnancy may be allowed to continue without altering the prognosis for recovery."¹⁴ Guttmacher, 1954.

¹⁰ Browne, Pregnancy in the Patient With Chronic Hypertension, 49 J. Obst. & Gynaec. Brit. Emp. 1, 13 (1942).

¹¹ DeLee, Principles and Practice of Obstetrics 977 (10th ed. Greenhill 1951).

¹² Heffernan and Lynch, *supra* note 7, at 11.

¹³ Russell, Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital, 151 J.A.M.A. 108, 110 (1953).

¹⁴ A. F. Guttmacher, The Shrinking Non-Psychiatric Indications for Therapeutic Abortion, in Rosen, Therapeutic Abortion 19 (1954).

Pyelitis problems were for many years very difficult. However, since the introduction of sulfa drugs and other antibiotics, these former difficulties no longer seriously complicate pregnancies. There is now no need for TA at Margaret Hague Hospital.¹⁵ Donnelly, 1955.

Of 64 TA at Mayo Clinic, 1945-1954, 6 (9%) were due to renal disease. "Certain renal indications for abortion are accepted universally. Six (9 per cent) of our patients had renal disease. When grossly demonstrable renal impairment is present . . . therapeutic abortion should be seriously considered. . . . All 3 of the patients who had renal insufficiency have died of the renal disease. . . . Active renal tuberculosis constitutes a justifiable reason for interruption of pregnancy."¹⁶ Nelson & Hunter, 1957.

Psychiatric and eugenic indications and past or present malignancy have relegated "the old orthodox trio—heart, lung and kidney—to secondary importance."¹⁷ Guttmacher, 1958.

"Chronic nephritis is one of the most widely accepted reasons for therapeutic abortion. Even here, the available information has not crystallized completely. Some authors [Heffernan and Lynch, *What is the Status of Therapeutic Abortion in Modern Obstetrics?* (1953)] have shown that the feared 'decrease' in the kidney's performance, which was thought to occur in about 50% of pregnant nephritis patients, is in reality attributable to a recognized downward trend in nephritis in general and frequently has no connection with pregnancy.

"Hydronephrosis can usually be treated by ureteral or kidney pelvic catheterization without considering the pregnancy.

"Polycystic Kidneys. Most . . . can be brought to a successful termination with the use of antibiotics to control infection as shown by Millar [60 J. Obst. & Gynaec. Brit. Emp. 868 (1953)]

"Single Kidney. . . . It is well known that hypertrophy and compensation of a remaining kidney occurs shortly after nephrectomy. Certainly . . . [if no malignancy] there exists no indication for therapeutic abortion. . . .

"Renal Stones. Medicine has progressed to the state where renal calculi can be treated by methods far superior to therapeutic abortion . . . with surgery and antibiotics. . . .

¹⁵ Donnelly, *Are There Medical Indications for Therapeutic Abortions?*, 52 J. Med. Soc. N.J. 112, 113 (1955).

¹⁶ Nelson and Hunter, *Therapeutic Abortion: A Ten-Year Experience*, 9 Obst. & Gynec. 284, 287-88 (1957).

¹⁷ *Scope Weekly*, April 2, 1958, p. 9.

"Pyelonephritis. . . [G]enerally no longer acceptable by most authors as an indication for therapeutic abortion. Here again more practical means of therapy have been devised."¹⁸ Scherman, 1958.

Nephritis with prolonged and marked albuminuria and tendency to anemia, edema and uremia may be aggravated by pregnancy, and the fetus may die. If these changes do not respond to treatment, TA is indicated.¹⁹ Beck & Rosenthal, 1958.

"The immediate danger to the mother is not very great. A fairly large percentage of pregnancies, however, terminate prematurely or the fetus dies—death of the fetus and premature labor coming earlier and earlier with each successive pregnancy. . . . It is thought that pregnancy has a deleterious effect in nephritis and, accordingly, somewhat reduces the life expectancy of the mother. . . . Pyelitis complicates pregnancies about once in one hundred cases. . . . Pyelitis usually responds well to treatment without any ill effect on the mother or the child. . . . Rarely, the condition progresses in spite of all therapeutic measures and spontaneous premature labor follows.

"Many cases of pregnancy after nephrectomy have been reported and in most of them no great difficulty was encountered, aside from the occurrence of a slight albuminuria in the latter months. Pregnancy and labor, accordingly, should be allowed to take their natural courses, but under strict supervision. If renal insufficiency or infection develops, or symptoms of preeclampsia appear, the uterus should be emptied."²⁰ Beck & Rosenthal, 1958.

Kidney diseases not discussed as an indication, except in relation to hypertension.²¹ Willson, 1958.

4. *Hypertension*

Hypertension has been the subject of much study in connection with certain cardio-vascular and kidney ailments and diseases or symptoms peculiar to pregnancy, with reference particularly to identifying cause and effect.

"Essential or hormonal hypertension is a persisting, usually progressing, elevation of blood pressure due to constriction, at first functional, later organic, of arterioles widely distributed in the body, according to many investigators primarily of hormonal origin from renal

¹⁸ Scherman, *Therapeutic Abortion*, 11 *Obst. & Gynec.* 323, 327-28 (1958).

¹⁹ Beck and Rosenthal, *Obstetrical Practice* 916 (7th ed. 1958).

²⁰ *Id.* at 711-14.

²¹ Willson, Beecham, Forman and Carrington, *Obstetrics and Gynecology* 282-95 (1958).

ischemia (temporary lack of blood due to contraction of a blood vessel). It makes up a large percentage of patients with hypertension, some estimates rising to 95 per cent of patients seen in general medical practice. . . .

"Probably it is too early to say the mechanism of hypertension in man is understood, but much advance has been made from the fairly recent period of almost entire ignorance of the mechanism of essential hypertension. . . . However, at times autopsy study of patients, known to have had hypertension, fail to show other than very slight lesions in the arterial system.

"Consequently it is thought that in the beginning the vascular lesion is vasoconstrictive and so functional, not organic. Later the arterial lesions, just noted, appear and progress to make more permanent the peripheral resistance. . . . Lesions in the larger arteries appear to be the result of the strain on them by reason of the hypertension along with the degenerative influences that lead to arteriosclerosis without hypertension. The arteriolar lesions may be caused by inflammatory or degenerative toxic processes, or they may be the result of the hypertension; the latter seems now to be the more favored view. The trend of opinion is towards a hormone cause, the hormonal action originating in renal ischemia. . . .

"The cause of the hypertension should be discovered, if possible, for success of treatment of some forms depends in very large measure on cause."²² Osler, ed. Christian, 1944.

High blood pressure and hypertension were commonly taken as indications for TA around 1922-1927.²³

Hypertension (chronic vascular hypertension) is not a disease, but is one manifestation of an abnormal vascular system. It occurs in later months of pregnancy, producing edema and high blood pressure. The treatment is usually the simple treatment for both of these conditions. TA if necessary; but it seldom is necessary before viability, even with superimposed acute toxemia.²⁴ DeLee, ed. Greenhill, 1951.

A report on Los Angeles County Hospital from 1931 to 1950 lumps renal and hypertensive diseases as aggregating 37, or 12.5%, of the 295 TA. The group included toxemias after nephrectomy, pyelitis, renal

²² Osler, *The Principles and Practice of Medicine* 1127-29 (15th ed. Christian 1944).

²³ Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 *Linacre Q.* 11 (1952).

²⁴ DeLee, *op. cit.* *supra* note 11, at 357-61.

tuberculosis. Since 1940 pyelitis was not commonly listed as indicating TA.²⁵ Russell, 1953.

Chronic nephritis, or hypertension, frequently causes spontaneous abortion, but most trouble occurs after the fetus is viable. It creates no TA problem. Most chronic hypertensives go through several pregnancies to normal delivery of normal children, without any deterioration in the condition of the mother.²⁶ Heffernan & Lynch, 1952.

"Contrary to previous belief, it is now well established that the great majority of women with uncomplicated essential hypertension can go through pregnancy without appreciable hazard as far as they themselves are concerned; moreover, numerous follow-up studies on such patients show that the pre-existing level of hypertension is not permanently affected by childbearing. It is true that there are certain exceptions to this generalization and that fetal outlook in such cases is less favorable than usual; nevertheless, it can be said without exaggeration that for every ten hypertensive women who would have been aborted in 1930, nine are enjoying successful pregnancies today and without residua of any kind."²⁷ Eastman, 1954.

"Hypertensive-renal disease. The obstetrician is concerned with three forms of hypertension evidenced in pregnancy: preeclamptic toxemia, essential hypertension without evidence of renal involvement, and essential hypertension with evidence of renal involvement. It is rare for preeclampsia to necessitate therapeutic abortion, since it is notably a disease of the last trimester of pregnancy. In the exceptional case, the disease may be so severe at the 24th week, or even earlier, as to necessitate the interruption of pregnancy before viability. Not an insignificant proportion of these early cases of preeclampsia are associated with hydatidiform mole. Essential hypertension without renal involvement does not necessitate therapeutic abortion. Four out of every five such patients, when given good care, go through pregnancy satisfactorily with little additional rise of blood pressure. One patient in five will have a superimposed preeclampsia, but this does not usually occur until the 32nd or 33rd week; if pregnancy has to be interrupted then, the child is viable.

"On the other hand, cases of essential hypertension with evidence of renal impairment and associated vascular eyeground damage do badly

²⁵ Russell, *supra* note 13, at 110.

²⁶ Heffernan and Lynch, *supra* note 23, at 20.

²⁷ Eastman, *Obstetrical Foreword*, in Rosen, *op. cit.* *supra* note 14, at xix.

during pregnancy. The fetal salvage in such cases is poor: Many have an unexplained death in utero during the middle or later period of gestation, while others develop abruption of the placenta in the last trimester. In addition, this third form of pregnancy toxemia, hypertensive-renal disease[,] is aggravated by pregnancy and, if not interrupted early, patients are frequently much worse after delivery. Unless they insist on taking an extraordinary risk, interruption of pregnancy is not only warranted, but necessary."²⁸ Guttmacher, 1954.

"Patients with fixed hypertension sometimes present complications due to a superimposed toxemia of pregnancy which is an imminent threat to the mother's life. This is considered as an indication for the interruption of pregnancy."²⁹ Donnelly, 1955.

A study of 301 pregnancies of 218 hypertensives at Margaret Hague Maternity showed that two-thirds of them had no complicating preeclampsia and no TA, and no immediate maternal deaths. Among the other third, complicated by preeclampsia, there was a 7% maternal mortality. Half of the hospital's 8 TA were for hypertensive disease; 2 of the 4 died at once; one died of a cerebral hemorrhage after 6 years; the other (TA in 1931) subsequently had a normal full term baby in 1932, and thereafter an abortion and tubal ligation at another hospital, an ectopic pregnancy, and another normal birth, and in 1952, twenty-one years after the TA, she is still hypertensive, alive and well.

"We cannot expect to cure a patient of hypertension by abortion. The most we can do is to cure a patient of a superimposed preeclampsia by terminating pregnancy. Therefore, a hypertensive pregnancy should be allowed to continue until there is evidence of a superimposed toxemia of pregnancy. The pregnancy itself does not have a deleterious effect on hypertensive disease. Chesley, on a follow-up of 218 patients over a fourteen year period has shown that there is no increase in the annual death rate of those hypertensives who have had 4, 3 or 2 pregnancies over those who have had only one pregnancy. He concluded that repeated pregnancies in hypertensive women have not significantly increased their annual death rate. Therefore, we believe that if the patient has hypertensive disease she should be allowed to continue in pregnancy until there is a superimposition of preeclampsia—in other words until they develop proteinuria, edema, or a further rise in blood pressure."³⁰ Donnelly, 1955.

²⁸ A. F. Guttmacher, *supra* note 14, at 16-17.

²⁹ Donnelly, *supra* note 15, at 115.

³⁰ *Ibid.*

Hypertensive renal disease should be the most common indication, since few babies are ever salvaged and mothers are susceptible to serious complications, such as abruptio placentae.³¹ Greenhill, 1955.

Chronic hypertension. "If the systolic blood pressure is repeatedly over 200, if there is evidence of degenerative vascular change in the retinal vessels, and if renal function is considerably reduced, abortion should be considered."³² Willson, 1958.

Hypertensive cardiovascular disease. "Information regarding the effect of pregnancy on this disease is still in a state of confusion; however, much can be done for even the most severe cases with bed rest. A recent article by Taylor et al. covering a large group [4,432] seems to indicate that the fetal loss is not as severe as was originally thought."³³ Scherman, 1958.

Most of the work being done today is directed to some means of saving the child, with TA considered as of no demonstrated value to the mother. In 2,705 deliveries at Jackson Memorial Hospital, Miami, 204 mothers showed toxemias of pregnancy, including 22 chronic hypertension, 145 preeclampsia, 3 eclampsia, 3 renal disease. One mother died; fetal mortality was 6.88%. Treatment was with hypotensive drugs et cetera.³⁴ Novell & DeHaan, 1958.

Hypertensive vascular disease is very dangerous, inducing death in utero, abortions, premature deliveries and stillbirth. "After the fetus reaches a weight of 2500 gm., accordingly, it will be safer out of than in the uterus whenever preeclampsia develops or the hypertension increases or evidence of impairment of renal function is detected. As a consequence induction of labor or Caesarian section under local anesthesia frequently is indicated in the interest of the child. If preeclampsia or eclampsia are not superimposed on the hypertensive state, the risk to the mother is not greatly increased unless the condition has advanced sufficiently to cause cardiac and renal changes."³⁵ Beck & Rosenthal, 1958.

³¹ Greenhill, *Obstetrics* 329 (11th ed. 1955).

³² Willson, Beecham, Forman and Carrington, *op. cit. supra* note 21, at 165.

³³ Scherman, *supra* note 18, at 326.

³⁴ Novell and DeHaan, *Toxemia of Pregnancy: Treatment With Hypertensive Drugs and Relation to Anaphylaxis*, 12 *J. Obst. & Gynec.* 154-63 (1958).

³⁵ Beck and Rosenthal, *Obstetrical Practice* 700-01 (7th ed. 1958). For description of treatment of 331 cases of late toxemia with combination of hypertensive drugs, reducing mortality 50%, see Beck, *Lässt sich die kindliche Mortalität bei der Spätgestose durch die Behandlung mit blutdrucksenkenden Medikamenten verringern?*, 19 *Geburtshilfe und Frauenheilkunde* 407 (1959).

In Hypotensive drug therapy pregnancy should be terminated *as soon as fetus is viable*.³⁶ Dieckmann, 1958.

5. *Hyperemesis Gravidarum*

TA is recommended whenever hyperemesis gravidarum has persisted until the woman is emaciated and near starvation. But it usually stops of itself, improves under treatment.³⁷ Williams, 1903.

Therapeutic abortion is indicated by hyperemesis gravidarum and other forms of toxemia—a real but restricted indication.³⁸ DeLee, 1913.

This was a common indication for TA around 1922-1927.³⁹ Heffernan & Lynch, 1952.

Hyperemesis gravidarum is rarely an indication for TA.⁴⁰ Cova, 1932.

Pregnancy toxemias: hyperemesis. The reflex or neurotic type is seldom a real toxemia; mild and easily corrected. Toxic form: "The experience of all large clinics has been that, if the case is admitted early and glycogen balance restored promptly, no serious damage is done, and abortion will not ordinarily be indicated. . . . Furthermore, there is no doubt that a considerable number of cases are aborted that would not have required such radical measures, had they been placed in suitable institutions under the latest treatment for this condition." It usually occurs during the first half of pregnancy.⁴¹ Taussig, 1936.

Severe vomiting is an indication for TA.⁴² Williams, ed. Stander, 1941.

"Hyperemesis gravidarum, for which many abortions have been done in the past, rarely necessitates the termination of pregnancy today. The patient can be kept hydrated and fed intravenously and supplied with vitamins parenterally [*sic*] so that almost never is it necessary to terminate the pregnancy. In some cases in which the psyche plays an important role, the psychiatrist may persuade the patient to cease vomiting."⁴³ Te Linde, 1946.

³⁶ See Dieckmann and Harrod, Evaluation of Hypotensive Drug Therapy in Chronic Hypertensive Disease in Pregnancy, 76 Am. J. Obst. & Gynec. 374 (1958).

³⁷ Williams, Obstetrics, 460-62 (1st ed. 1903).

³⁸ DeLee, Principles and Practice of Obstetrics 1018 (1st ed. 1913).

³⁹ Heffernan and Lynch, Is Therapeutic Abortion Scientifically Justified?, 19 Linacre Q. 11 (1952).

⁴⁰ Cova, as reported in 98 J.A.M.A. 1393 (1932).

⁴¹ Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 285-86 (1936).

⁴² Williams, Obstetrics 1113 (8th ed. Stander 1941).

⁴³ Te Linde, Operative Gynecology 478 (1946).

"Hyperemesis gravidarum is a rare indication for abortion. When there is evidence of hepatic and renal involvement, one should not wait too long before emptying the uterus."⁴⁴ DeLee, ed. Greenhill, 1951.

The degree of hyperemesis gravidarum can make it dangerous. Most cases are due to neurological protest, others to toxemia; the third stage brings delirium, cyanosis, death. "During all this disturbance, local and general, the fetus is usually alive, and if delivered at term may be large and fat. The vomiting often ceases on the death of the fetus." Treatment is psychological and by feeding. If loss of weight reaches 20 pounds, or there is persistent jaundice et cetera or psychosis, TA is indicated.⁴⁵ DeLee, ed. Greenhill, 1951.

Nine of the total 295 TA at Los Angeles County Hospital from 1931 to 1950 were for hyperemesis gravidarum. All were done during the period 1931-1937. Since then it has been uniformly overcome with Dramamine or Thiamine.⁴⁶ Russell, 1953.

"Therapeutic abortion for hyperemesis gravidarum has undergone a spectacular decline, so much so that it is today an almost forgotten procedure. Here again there has been no overt policy to force these women to continue through pregnancy, and certainly there is no evidence that the slightest hazard has been imposed upon them by this curtailment of operative interference. The fact is that obstetricians in current practice rarely see severe cases of hyperemesis gravidarum. Life-threatening examples of this disorder are simply not developing as they did a few years ago; and the issue of therapeutic abortion rarely comes up. For instance, during the past fifteen years in our clinic [Johns Hopkins], in the course of some 30,000 pregnancies followed, not a single interruption has been performed on this indication; but even more amazing is the fact that in only one or two instances was the process worrisome enough to suggest even consideration of interference. This is a curious and dramatic change; and in view of the fact that hyperemesis is largely a psychosomatic disorder, it is a change that bespeaks a wholesome and welcome alteration in present day attitudes of young women towards childbearing."⁴⁷ Eastman, 1954.

"Vomiting of pregnancy, hyperemesis gravidarum, rarely requires

⁴⁴ DeLee, Principles and Practice of Obstetrics 796-97 (10th ed. Greenhill 1951).

⁴⁵ Id. at 336-37.

⁴⁶ Russell, Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital, 151 J.A.M.A. 108, 110 (1953).

⁴⁷ Eastman, Obstetrical Foreword, in Rosen, Therapeutical Abortion xx (1954).

therapeutic abortion today. Before it was known that the liver necrosis associated with it was due to starvation, avitaminosis and dehydration, therapeutic abortion was often a life-saving measure. However, in two hospitals with which I have been closely associated for many years, only one abortion has been done for hyperemesis since 1937. During the 15 year period there were approximately 75,000 deliveries. The patient with hyperemesis is rarely seen nowadays who does not react favorably to hospitalization, intravenous fluids, parenteral vitamins, tube feeding and suggestive therapy, and who therefore has to be aborted."⁴⁸ Guttmacher, 1954.

With the advent of antibiotic and hormonal therapy, hyperemesis gravidarum—or rather the pathophysiology underlying it—is now seldom to be considered a medical indication for the interruption of pregnancy.⁴⁹ Rosen, 1954.

Through 1955, there had been only one TA at Margaret Hague Hospital for hyperemesis gravidarum; this occurred in 1939. In 1941 the same woman in the same condition was treated medically instead. She had a full term baby, with no impairment of her health. The hospital then withdrew its recognition of hyperemesis as an indication for TA. The hospital has never had a death from hyperemesis gravidarum since the time of its last (and only) TA for this cause in 1939.⁵⁰ Donnelly, 1955.

"Hyperemesis gravidarum is now an extremely rare indication for terminating gestation, because nearly always it can be prevented or cured by medication and supportive therapy."⁵¹ Greenhill, 1955.

All of 360 cases of emesis in pregnant women were found due to neurosis and treated medically. Only 5.55% required TA. The stages were described as: (1) reflex changes; neurosis; (2) initial disturbance of nutrition and metabolism; toxemia; (3) profound disturbance of nutrition and metabolism; dystrophy.⁵² Lebedev, 1957.

Hyperemesis in almost every case is due to personality defects. Treatment, largely psychological, is discussed with no suggestion that TA be

⁴⁸ A. F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in Rosen, *id.* at 17.

⁴⁹ Rosen, *The Emotionally Sick Pregnant Patient: Psychiatric Indications and Contraindications to the Interruption of Pregnancy*, in Rosen, *id.* at 242.

⁵⁰ Donnelly, *Are There Medical Indications for Therapeutic Abortions?*, 52 *J. Med. Soc. N.J.* 112, 113 (1955).

⁵¹ Greenhill, *Obstetrics* 329 (11th ed. 1955).

⁵² Lebedev, *On Vomiting in Pregnancy*, Pirogov 2d Med. Inst. (Moscow) (1957).

considered. Treatment is usually successful.⁵³ Beck & Rosenthal, 1958. Hyperemesis not even discussed as an indication in Willson, 1958.⁵⁴

6. Cancer and Other Neoplasms

"It is licit to excise a diseased uterus which is gravely dangerous, even though the operation will indirectly kill the fetus which is enclosed in the womb If . . . the fetus is near viability and an immediate hysterectomy would only *probably*, and not *certainly*, diminish the danger of death to the mother, the operation would be illicit."⁵⁵ Suppose one 4 months pregnant has an ovarian tumor which her physician is convinced must be excised at once to save her life, but the operation may cause an abortion. "The physician may remove the ovarian tumor."⁵⁶ Healy, 1956.

Cancers were a common indication for TA around 1922-1927.⁵⁷

Taussig states in 1936 that neither myoma nor cervical cancer is ever an indication in itself for TA, and the patient should be treated just as if she were not pregnant. Ovarian dermoid requires TA because of danger of infection; a fibroid low on uterus requires TA because it would interfere with delivery; and TA is indicated for certain ovarian cysts because of the possibility of postpartum difficulties.⁵⁸

Ten years later, however, Te Linde maintained that: "Myomata [muscular tumors], because of their size and position, may make the course of pregnancy dangerous; therefore they may call for abortion. . . . Cancer of the cervix, cancer of the ovary and cancer of the breast discovered during early pregnancy should be treated without attempting to save the fetus"⁵⁹

Three of the 295 TA at Los Angeles County Hospital, 1931-1950, were for breast carcinoma—none since 1937; 1 for cervical carcinoma, in 1940; and 1 for sarcoma of the uterus in 1933.⁶⁰ Russell, 1953.

In 1954 Dr. Guttmacher wrote: "Malignancy is increasing in importance as an indication for abortion. If a recent operation for proved

⁵³ Beck and Rosenthal, *Obstetrical Practice* 641-48 (7th ed. 1958).

⁵⁴ Willson, Beecham, Forman and Carrington, *Obstetrics and Gynecology* (1958).

⁵⁵ Healy, *Medical Ethics* 214-15 (1956).

⁵⁶ *Id.* at 232-33.

⁵⁷ Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 *Linacre Q.* 11 (1952).

⁵⁸ Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* 292 (1936).

⁵⁹ Te Linde, *Operative Gynecology* 479 (1946).

⁶⁰ Russell, *supra* note 46, at 110.

carcinoma of the breast has been performed, termination of pregnancy is thought mandatory. After a 'five-year cure period' the woman who is extremely anxious for a child is sometimes allowed to go through pregnancy. When breast carcinoma is discovered during pregnancy, most authorities advise immediate breast amputation followed by evacuation of the pregnancy. However, some will allow a pregnancy approaching viability to continue.

"Thyroid malignancies also contraindicate continuation of pregnancy. Carcinoma of the cervix discovered during pregnancy is ordinarily treated locally with radium, and the pregnancy allowed to continue. Delivery by Cesarean section than becomes necessary."⁶¹

During the 10 years from 1945 to 1954 at the Mayo Clinic, 8 of the 64 TA done were for breast carcinoma. In a report by two staff members we find this comment: "Probably the best evidence that pregnancy may have a relatively unimportant effect on mammary carcinoma is Westberg's comparison of 224 pregnant and nursing women who had mammary carcinoma with a control group of 300 nonpregnant women with carcinoma of the breast. He concluded as follows: 'Nothing has been found to bear out the opinion that induced abortion should improve the prognosis. Nor does the prognosis seem to be dependent on the fact whether or not the patient nurses her offspring. It would thus seem that the pregnancy has no very great effect on the prognosis of breast cancer apart from the fact that the patients delay in consulting a doctor and that the doctor is inclined to postpone the surgery.'"⁶² Nelson & Hunter, 1957.

Five of the 64 TA at Mayo were for lymphoma. Of these the same authors say: "Two of the 5 were dead within six months. Therapeutic abortion is not justified in most cases of this type, but is in a few instances."⁶³ Nelson & Hunter, 1957.

"With carcinoma of the uterus, ovaries, or lower bowel it often is necessary to remove the pregnant uterus as part of the treatment of the tumor. In some patients with cancer of the rectum or rectosigmoid, adequate removal is possible without disturbing the gravid uterus."⁶⁴ Willson, 1958.

"Pelvic tumor was at one time considered an indication for therapeutic

⁶¹ A. F. Guttmacher, *supra* note 48, at 18.

⁶² Nelson and Hunter, *Therapeutic Abortion: A Ten-Year Experience*, 9 *Obst. & Gynec.* 284, 288 (1957).

⁶³ *Id.* at 289.

⁶⁴ Willson, Beecham, Forman and Carrington, *op. cit.* *supra* note 54, at 165.

abortion. Now recourse is had instead to surgical removal or Caesarean section."⁶⁵ Beck & Rosenthal, 1958.

There still has never been a TA for any cancer at Margaret Hague Maternity Hospital. Patients are given the same treatment as if they were not pregnant.⁶⁶ Donnelly, 1955.

7. *Toxemias of Pregnancy*

"The hypertensive type of toxemia constitutes the largest group requiring interruption. Since this type occurs most often in grand multiparae, the interruption is not as serious a calamity to the patient as when interruption becomes necessary in younger women with few or no children. It seems *reasonable also to permit the multiparity to bolster the indications* for abortions in this group."⁶⁷ Te Linde, 1946.

"The toxemias of pregnancy are in themselves on the decline in most parts of the United States because of the increased availability of antepartum care and the early treatment of the first signs of the disorder. Naturally a fall in the incidence of therapeutic abortion for this indication has followed."⁶⁸ Perlmutter, 1947.

At Mayo Clinic: "It appears significant that approximately two-thirds of the abortions for toxemia were done in the period representing the first half of this study (1945-1949), which indicates improving control and understanding of toxemia."⁶⁹ Nelson & Hunter, 1957. (Eleven TA [17%] for toxemia at Mayo, 1945-1954.)

Treatment of 331 cases of late toxemia with combination of hypertensive drugs reduced mortality by 50%.⁷⁰ Beck, 1959.

Of 2,705 deliveries at Jackson Memorial Hospital, Miami, 204 (7.5%) showed some toxemia of pregnancy, including 145 preeclampsia, 3 eclampsia, 22 chronic hypertension, 3 renal disease, others 3. Infant mortality was 6.88%, but only 1 mother died.⁷¹ Novell & DeHaan, 1958.

⁶⁵ Beck and Rosenthal, op. cit. supra note 53, at 916.

⁶⁶ Donnelly, Are There Medical Indications for Therapeutic Abortions?, 52 J. Med. Soc. N.J. 112, 114 (1955).

⁶⁷ Te Linde, op. cit. supra note 59, at 478. (Emphasis added.)

⁶⁸ Perlmutter, Analysis of Therapeutic Abortions, Bellevue Hospital 1935-1945, 53 Am. J. Obst. & Gynec. 1008, 1014 (1947).

⁶⁹ Nelson and Hunter, supra note 62, at 286.

⁷⁰ Beck, Lässt sich die kindliche Mortalität bei der Spätgestose durch die Behandlung mit blutdrucksenkenden Medikamenten verringern?, 19 Geburtshilfe und Frauenheilkunde 407, 413 (1959).

⁷¹ Novell and DeHaan, Toxemia of Pregnancy: Treatment With Hypertensive Drugs and Relation to Anaphylaxis, 12 Obst. & Gynec. 154, 155-59 (1958).

8. *Anemia*

A finding of anemia suggested a general weakness and inability to sustain any unusual burden. Pregnancy was considered such an unusual burden, and so it was thought that pregnancy and anemia were incompatible, and that removing this extra burden would substantially improve the patient's prognosis. On this theory, with no real clinical evidence to support it, anemia was for some time, by some obstetricians, taken as an indication for TA.

Heffernan and Lynch report that anemias were a common indication for TA around 1922-1927.⁷²

And the Stander edition of Williams in 1941 would still advise occasional TA for pernicious anemia.⁷³

Pernicious anemia, on which the Germans have done so much work, is probably the most deadly of the anemias. The question, however, is whether pregnancy makes it worse or whether an abortion will bring improvement.

Hypochronic anemias are the most frequent ones in pregnancy. They appear about mid-term, with fatigue and loss of euphoria (sense of well-being); the symptoms disappear with the termination of pregnancy. The proper treatment is medical.⁷⁴ Osler, ed. Christian, 1944.

Sickle-cell anemia is rather frequent among Negroes only.⁷⁵ Osler, ed. Christian, 1944.

It responds poorly to surgery. It is not influenced by pregnancy.⁷⁶ Heffernan & Lynch, 1952.

9. *Asthma*

One of the 295 TA at Los Angeles County Hospital, 1931-1950, was done for asthma. That was in 1936, and there have been none since.⁷⁷ Russell, 1953.

A more recent textbook on Obstetrics declares that bronchial asthma

⁷² Heffernan and Lynch, *supra* note 57, at 11.

⁷³ Williams, *Obstetrics* 1116 (8th ed. Stander 1941).

⁷⁴ Osler, *The Principles and Practice of Medicine* 948 (15th ed. Christian 1944).

⁷⁵ *Id.* at 944; Giorlando, Brandt and de Guzman, *Sickle Cell Anemia in Pregnancy*, 67 *West. J. Surg., Obst. & Gynec.* 253 (1959).

⁷⁶ Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 *Linacre Q.* 11, 21 (1952).

⁷⁷ Russell, *Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital*, 151 *J.A.M.A.* 108, 110 (1953).

is usually *relieved* by pregnancy; occasionally aggravated. Therapy is discussed with no suggestion of TA in any case.⁷⁸ Beck & Rosenthal, 1958.

10. Chorea

St. Vitus' Dance and other nervous ailments (often hereditary) were a common indication for TA around 1922-1927.⁷⁹

Chorea usually permits going full term without danger to the mother.⁸⁰ Cova, 1932.

Toxic chorea occurring for the first time in pregnancy is fatal to 17%. It usually requires TA, *although that gives relief to but a small percentage*. It usually appears during the first half of pregnancy. Chorea recurrent from childhood is usually not a serious complication, and rarely calls for TA.⁸¹ Taussig, 1936.

Chorea occasionally taken as an indication for TA.⁸² Williams, ed. Stander, 1941.

"A choreic patient may become pregnant; more frequently the disease occurs during pregnancy, sometimes after delivery. . . . [TA] should not be done as a rule."⁸³ Osler, ed. Christian, 1944.

Indications for TA include some neurologic disorders such as Huntington's chorea.⁸⁴ DeLee, ed. Greenhill, 1951.

Chorea is to be treated by rest and medicines. "Abortion is not to be considered in the mild cases and is of questionable value in the severe ones. The latter not only are not improved, but often rapidly progress to a fatal termination after the pregnancy is interrupted."⁸⁵ Beck & Rosenthal, 1958.

11. Diabetes

Diabetes was a common indication around 1922-1927.⁸⁶

Occasionally its presence requires TA.⁸⁷ Williams, ed. Stander, 1941.

"Diabetes. Ordinarily a diabetic patient does not require therapeutic abortion. The juvenile diabetic of long standing who shows marked

⁷⁸ Beck and Rosenthal, *Obstetrical Practice* 683-84 (7th ed. 1958).

⁷⁹ Heffernan and Lynch, *supra* note 76, at 11.

⁸⁰ Cova, as reported in 98 J.A.M.A. 1393 (1932).

⁸¹ Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* 287-88 (1936).

⁸² Williams, *op. cit.* *supra* note 73, at 1116.

⁸³ Osler, *op. cit.* *supra* note 74, at 107.

⁸⁴ DeLee, *Principles and Practice of Obstetrics* 797 (10th ed. Greenhill 1951).

⁸⁵ Beck and Rosenthal, *op. cit.* *supra* note 78, at 729.

⁸⁶ Heffernan and Lynch, *supra* note 76, at 11.

⁸⁷ Williams, *op. cit.* *supra* note 73, at 1116.

vascular pathology with ocular and renal involvement, may be the exception. Diabetics without extensive vascular damage are rarely made worse by pregnancy and delivery."⁸⁸ Guttmacher, 1954.

"Diabetes—Pregnancy should often be terminated if there are advanced vascular degenerative changes or severe hypertension. This is particularly true if toxemia has developed in other pregnancies."⁸⁹ Willson, 1958.

The indication set up by Guttmacher and Willson is actually not based on diabetes but on conditions of hypertension, toxemia et cetera ascribed to it.

Diabetes used to be regarded as a definite indication for abortion. Now, with the proper use of insulin and diet, TA in the interest of the mother "no longer is considered. Because the fetus tends to become excessive in size, and often dies *in utero*, pregnancy may be interrupted *before term in the interest of the child*."⁹⁰ Beck & Rosenthal, 1958.

Improvement in handling diabetics is giving more fetal salvage at Providence Lying-In Hospital. Over 31-year period the loss was 28%; more recently 25%.⁹¹ Jones, 1958.

Insulin made pregnancy safe for the mother, but for a long time the fetal loss was 40%. Now, with care and an early Caesarean, the loss is brought down to 20%.⁹² Dunlop, 1958.

In 81 deliveries, only one of 58 diabetic mothers was lost. She had come to the clinic only once, in her 30th week, and took no treatment. She returned when already in labor, in diabetic coma, had a stillbirth, and died. If diabetes is controlled, there is no appreciable danger to the fetus before the 36th week, and slightly premature labor induced.⁹³ Garnet, 1960.

12. Eclampsia

No therapeutic abortion on account of eclampsia; *accouchement forcé* (a premature birth) if condition of cervix permits.⁹⁴ Williams, 1903.

Eclampsia usually develops quite late; seldom suggests TA.⁹⁵ Taussig, 1936.

⁸⁸ A. F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in Rosen, *Therapeutic Abortion* 18 (1954).

⁸⁹ Willson, Beecham, Forman and Carrington, *Obstetrics and Gynecology* 165 (1958).

⁹⁰ Beck and Rosenthal, *op. cit. supra* note 78, at 916. (Emphasis added.)

⁹¹ Jones, *Management of the Pregnant Diabetic*, 7 *Diabetes* 439 (1958).

⁹² Dunlop, Davidson and Alstead, *Textbook of Medical Treatment* 313 (7th ed. 1958).

⁹³ Garnet, *Pregnancy Complicated by Diabetes*, 79 *Am. J. Obst. & Gynec.* 140-47 (1960).

⁹⁴ Williams, *Obstetrics* 343 (1st ed. 1903).

⁹⁵ Taussig, *op. cit. supra* note 81, at 302.

"Severe preeclampsia and eclampsia usually occur late in pregnancy, and when interruption becomes necessary, it often occurs after the fetus is viable."⁹⁶ Te Linde, 1946.

Eclampsia involves convulsions, edema, hypertension et cetera. In American hospitals maternal mortality is about 13%, fetal mortality 40%. Its cause is still debated. It is *never an indication for TA*.⁹⁷ DeLee, ed. Greenhill, 1951.

No reference to TA because of eclampsia in Donnelly, Heffernan and Lynch, Russell, Scherman or Willson.

Two thirds of eclampsia cases occur during the last 2 months. In Denmark, in a 10-year survey of 737,701 deliveries, there were found 1,282 cases of eclampsia. "Labor occurs spontaneously and progresses rapidly in a large percentage of the cases of antepartum eclampsia. While the condition often is aggravated during the process of delivery, improvement usually follows within a few hours after the birth of the child.

"Improvement also occurs when the fetus dies *in utero*, and it may follow treatment in many of the cases in which the fetus continues to live. . . . Sooner or later, however, the convulsions and other manifestations of eclampsia recur, unless the fetus dies or the pregnancy is spontaneously or artificially terminated."⁹⁸ Beck & Rosenthal, 1958.

13. *Ectopic Pregnancy*

"[I]f the tube is at present in a gravely dangerous condition and if its excision cannot be delayed without a notable increase of danger to the mother, this Fallopian tube may be removed at once."⁹⁹ Healy, 1956.

"If an ectopic pregnancy is clinging to an ovary or to the woman's viscera, may the surgeon remove it? . . . If at present the condition of the organ is actually pathological and if it is a grave threat to the mother's life, that part of her body may licitly be removed in order to preserve the rest of the body."¹⁰⁰ ("That part of her body" refers to the ovary or viscera, not to the fetus.) Healy, 1956.

"Thus, the possible terminations of tubal pregnancy are as follows:
1. Tubal abortion (4 to 6 weeks); 2. Tubal rupture (2 to 4 weeks);
3. Secondary abdominal pregnancy (may go to term); 4. Intraliga-

⁹⁶ Te Linde, *Operative Gynecology* 478 (1946).

⁹⁷ DeLee, *op. cit.* supra note 84, at 349-57.

⁹⁸ Beck and Rosenthal, *Obstetrical Practice* 659, 661-62 (7th ed. 1958).

⁹⁹ Healy, *Medical Ethics* 222 (1956).

¹⁰⁰ *Id.* at 266.

mentary (rare); 5. Spontaneous regression. . . . The treatment for tubal pregnancy consists of surgical removal of the involved tube and the replacement of the blood lost as a result of the lesion. The patient with ruptured tubal pregnancy and massive intraperitoneal hemorrhage must be operated upon as soon as she can be transported to the hospital and the operating room can be prepared. . . . The treatment of abdominal pregnancy is prompt operation with removal of the fetus. Because the procedure usually is accompanied by excessive bleeding . . . [blood supply must be provided]."¹ Willson, 1958.

Apparently there should be little difficulty in Catholic and non-Catholic medics working in harmony on tubal pregnancies which have not become abdominal. But that harmony does not extend to abdominal pregnancies, particularly as it is the abdominal which have a fair chance of going full term to delivery. A news service last July reported an abdominal pregnancy going full term to birth of a healthy infant in Des Moines.² Some keen medical minds, however, have of late been challenging the pessimistic attitude toward tubal pregnancies, now becoming very frequent, and it may be that both moralist and obstetrician will have to give ground.

"It is for physicians accurately to present the facts to the moralist. He depends on them for medical information. Given the medical information necessary, he will then apply the ethical principles to the case"³ Healy, 1956.

14. *Epilepsy*

Epilepsy is an occasional indication for TA.⁴ Williams, ed. Stander, 1941.

The proper treatment for epilepsy in pregnancy is dietetic and medicinal.⁵ Osler, ed. Christian, 1944.

Of the 295 TA at Los Angeles County Hospital 1931-1950, 4 were for

¹ Willson, Beecham, Forman and Carrington, op. cit. supra note 89, at 172-76.

² Assoc. Press Release, July 19, 1960, as reported in *The Chicago American*, dateline Des Moines.

³ Healy, op. cit. supra note 99, at 226. For recent work in this field see: F. Grosjean, *Chirurgie conservatrice dans grossesse extrauterine* (1956) (thesis); Jerold M. Rosenblum et al., *Treatment of Tubal Pregnancy*, 80 *Am. J. Obst. & Gynec.* 274 (1960); Vladimir Škulj, *Significance of Tubal Pregnancy in the Reproductive Life of Women*, 80 *Am. J. Obst. & Gynec.* 278 (1960).

⁴ Williams, *Obstetrics* 575 (8th ed. Stander 1941).

⁵ Osler, *The Principles and Practice of Medicine* 1368 (15th ed. Christian 1944).

epilepsy, but none have been done on account of epilepsy since 1942.⁶ Russell, 1953.

15. *Hydatidiform Mole*

Hydatidiform mole sometimes requires TA regardless of the stage of pregnancy.⁷ Williams, 1903.

This disease is an indication for TA.⁸ DeLee, 1913.

It nearly always means a dead fetus.⁹ Taussig, 1936.

"Diseases of the ovum, such as hydatidiform mole" indicate TA.¹⁰ DeLee, ed. Greenhill, 1951.

"A fully developed or typical hydatidiform mole is an uncommon entity, occurring about once in 2,000 deliveries. Hertig feels that this does not represent a true incidence figure . . ."¹¹ Willson, 1958.

A statistical survey showed 363 cases in 748,626 pregnancies. Of 55 cases only one had any embryo at all; generally there was no blood supply. The occasional normal fetus in a hydatidiform mole case is always a separate entity, meaning a twin pregnancy, with one placenta normal.¹² "The embryo is usually absent or dead when the diagnosis of Hydatidiform Mole is made. One should have no scruples about emptying the uterus, accordingly, whenever this condition is recognized."¹³ Beck & Rosenthal, 1958.

When this condition occurs, empty uterus completely and watch patient for at least one year. "The hazards of hemorrhage and perforation by curettage of the uterus are quite great and therefore no evacuation of the uterus should be attempted without ample blood on hand." Ten times as frequent in the Philippines, Japan and China as in the United States.¹⁴ Buxton, 1959.

⁶ Russell, Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital, 151 J.A.M.A. 108, 110-11 (1953).

⁷ Williams, op. cit. supra note 94, at 488-89.

⁸ DeLee, Principles and Practice of Obstetrics 1018 (1st ed. 1913).

⁹ Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 268 (1936).

¹⁰ DeLee, Principles and Practice of Obstetrics 977 (10th ed. Greenhill 1951).

¹¹ Willson, Beecham, Forman and Carrington, Obstetrics and Gynecology 178 (1958).

¹² Beck and Rosenthal, op. cit. supra note 98, at 568.

¹³ Id. at 915.

¹⁴ Buxton, Management of Patients With Hydatidiform Mole, 80 Ann. N.Y. Acad. Sci. 121-24 (1959).

16. *Leukemia*

Leukemia is an occasional indication for TA.¹⁵ Williams, ed. Stander, 1941.

In *acute* leukemia, 50% of fetuses die, and all mothers die within months after delivery; *but it works just as rapidly in the nonpregnant*. In *chronic* leukemia 75% of the infants survive, and two-thirds of the mothers survive more than a year after delivery. "Because pregnancy has little or no effect on the life expectancy of women afflicted with either acute or chronic leukemia, therapeutic abortion is not justifiable and premature interruption of pregnancy is not indicated, except to save the child when mother is moribund."¹⁶ Beck & Rosenthal, 1958.

There is no evidence that TA has any effect on leukemia. The placenta provides an absolute protection for the fetus.¹⁷ Flint, 1959.

17. *Liver*

No liver disease is listed as an indication for TA in Williams, 1903, or in DeLee, 1913.

Icterus, acute yellow atrophy of the liver, usually found in the first half of pregnancy, calls for TA.¹⁸ Taussig, 1936.

Infectious hepatitis requires nourishment et cetera, not TA.¹⁹ DeLee, ed. Greenhill, 1951.

Infectious hepatitis: "Therapeutic interruption of pregnancy should be discouraged in the interests of both the mother and the baby."²⁰ Greenhill, 1955.

Infectious hepatitis is characterized by progressive deterioration. Fetus frequently dies; may be expelled prematurely before death of the mother; but it does not inherit the disease.²¹ Beck & Rosenthal, 1958.

There is no obstetrical complication directly attributable to epidemic hepatitis. Pregnancy caused no increase in morbidity. Susceptibility of mother is not related to her parity. It does more harm to the fetus in the first trimester but is harder on the mother in the later months; pre-

¹⁵ Williams, op. cit. supra note 4, at 1123.

¹⁶ Beck and Rosenthal, *Obstetrical Practice* 692 (7th ed. 1958).

¹⁷ Flint, *Leukemia and Pregnancy*, 56 *Rocky Mt. Med. J.* 59 (July-Sept. 1959).

¹⁸ Taussig, op. cit. supra note 9, at 288.

¹⁹ DeLee, op. cit. supra note 10, at 339.

²⁰ Greenhill, *Obstetrics* 371 (11th ed. 1955).

²¹ Beck and Rosenthal, op. cit. supra note 16, at 709.

mature delivery seemed to increase the danger to the mother.²² Peretz, 1959.

18. *Nervous System: Myasthenia Gravis; Multiple Sclerosis*

Two disorders of the nervous system have been taken many times as indications for TA. One, myasthenia gravis, is a syndrome of fatigue and progressive paralysis, especially of the muscles of the neck and face, with no sensory disturbance and no atrophy of any part. It is caused by a *functional* defect interfering with transmission of nerve impulses. The patient alternates between remissions and relapses. The other, multiple sclerosis, is an organic disease, marked by sclerotic patches here and there in the brain and spinal cord. It produces weakness, loss of coordination, convulsive jerky movements and mental symptoms. Its cause is not finally determined. The prognosis is always gloomy: it may go on for years, with remissions and relapses, but is progressive overall and incurable.

Myasthenia gravis was called a common indication for TA around 1922-1927.²³

A standard textbook declared that the proper treatment is rest and medication. "Fewer things are more dramatic than the recovery of muscle power following injection of prostigmine."²⁴ Osler, ed. Christian, 1941.

In 1942 it was said that while TA was "frequently taken to be indicated" in myasthenia gravis the abortion was not necessary or advisable so long as the patient could be kept under prostigmine control.²⁵ Viets, 1942.

The effort to establish multiple sclerosis as an indication came later. "The two commonest neurologic indications for therapeutic abortion in most reports appear to be multiple sclerosis and epilepsy, both of which indications are controversial. Because of some German literature of many years ago, there has been a trend to interrupt all pregnancies in women who have multiple sclerosis. However, most physicians today

²² Peretz, Paldi, Brandstaedter and Barzilai, Infectious Hepatitis in Pregnancy, 14 Obst. & Gynec. 435, 436-37 (1959).

²³ Heffernan and Lynch, Is Therapeutic Abortion Scientifically Justified?, 19 Linacre Q. 11, 18 (1952).

²⁴ Osler, The Principles and Practice of Medicine 1191 (15th ed. Christian 1944).

²⁵ Viets, Schwab and Brazier, The Effect of Pregnancy on the Course of Myasthenia Gravis, 119 J.A.M.A. 236, 241-42 (1942).

favor a middle-of-the-road approach" One-third of all neurologic TA at Mayo were for multiple sclerosis.²⁶ Nelson & Hunter, 1957.

In the 1951 edition of DeLee-Greenhill it was stated that "nervous diseases such as multiple sclerosis" were rarely to be taken as indications for TA.²⁷

In 1952 Heffernan and Lynch declared that there was no evidence that either pregnancy or its termination had any effect on multiple sclerosis, good or bad.²⁸

One of the studies rejecting the German theory was that of Sweeney, 1953.²⁹

Donnelly, in reporting that there had never been a TA at Margaret Hague Hospital on this indication, said that it had been introduced solely on the authority of an article by Van Hoesselin in a German periodical of 1904, and that the recommendation of TA in that article was based on observation of only 4 cases. Subsequent American studies on a more adequate scale had not supported Van Hoesselin.³⁰ Donnelly, 1955.

The 1958 edition of Beck and Rosenthal cites Sweeney in saying that "the former opinion that multiple sclerosis is an indication for abortion is open to question."³¹

19. Preeclampsia

Preeclampsia seems to be a sort of end product peculiar to pregnancy, a vicious combination of disorders threatening the mother ordinarily after the fetus has become viable.

Preeclampsia sometimes calls for TA.³² Williams, ed. Stander, 1941.

Preeclampsia usually occurs during the *last 3 months*. There is toxemia with violent effects. "The toxemia may affect the child *in utero* and result in spontaneous expulsion of a premature, stillborn baby." To be treated by prophylaxis. If not controlled, *induce delivery of live child*.³³ DeLee, ed. Greenhill, 1951.

²⁶ Nelson and Hunter, Therapeutic Abortion: A Ten-Year Experience, 9 Obst. & Gynec. 284, 288 (1957).

²⁷ DeLee, Principles and Practice of Obstetrics 977 (10th ed. Greenhill 1951).

²⁸ Heffernan and Lynch, *supra* note 23, at 19-20.

²⁹ Sweeney, Pregnancy and Multiple Sclerosis, 66 Am. J. Obst. & Gynec. 124-29 (1953).

³⁰ Donnelly, Are There Medical Indications for Therapeutic Abortions?, 52 J. Med. Soc. N.J. 112, 114 (1955).

³¹ Obstetrical Practice 730 (7th ed.).

³² Williams, Obstetrics 1115 (8th ed. Stander 1941).

³³ DeLee, *op. cit.* *supra* note 27, at 341-43.

No reference to TA for preeclampsia was found in Donnelly, Heffernan and Lynch, Russell, Scherman or Willson.

Commonly treated only as an involvement or result of hypertension or toxemias. "It is rare for preeclampsia to necessitate therapeutic abortion, since it is notably a disease of the last trimester of pregnancy. In the exceptional case, the disease may be so severe at the 24th week, or even earlier, as to necessitate interruption of pregnancy before viability. Not an insignificant proportion of these early cases of preeclampsia are associated with hydatidiform mole."³⁴ Guttmacher, 1954.

"A sudden, pronounced rise in blood pressure, a marked increase in the proteinuria or the observation of greater edema of the fingers and face, indicate the necessity for the interruption of pregnancy. . . . Because the fetus frequently dies in severe preeclampsia, it usually is unwise to postpone the interruption in the interest of the child. If the fetus is not too premature it will have a better chance for survival out of, than in the uterus."³⁵ Beck & Rosenthal, 1958.

A New Zealand team reported on the handling of 169 pregnancies with preeclamptic toxemia. There had been no TA, and the whole effort had been made to determine the optimum date for the delivery of viable infants.³⁶ Carey & Liley, 1959.

20. *Thyroid*

Baselow's Disease (toxic goiter) is an indication for TA, as a disease jeopardizing the mother.³⁷ DeLee, 1913.

Commonly taken as an indication for TA around 1922-1927.³⁸

Goiter is rarely an indication for TA.³⁹ Cova, 1932.

"Thyrotoxicosis can be treated medically or surgically during pregnancy as though no pregnancy existed; therefore abortion is not required."⁴⁰ Guttmacher, 1954.

Thyrotoxicosis "can no longer be considered an indication for therapeutic abortion. The disease is treated as in the nonpregnant state, even including the use of radioactive iodine [Golpitto, Trends in

³⁴ A. F. Guttmacher, The Shrinking Non-Psychiatric Indications for Therapeutic Abortion, in Rosen, Therapeutic Abortion 16 (1954).

³⁵ Beck and Rosenthal, Obstetrical Practice 657-58 (7th ed. 1958).

³⁶ Carey and Liley, The Assessment of the Risk of Intra-uterine Death in Pre-eclampsia, 58 N.Z. Med. J. 450 (1959).

³⁷ DeLee, Principles and Practice of Obstetrics 1018 (1st ed. 1913).

³⁸ Heffernan and Lynch, *supra* note 23, at 11.

³⁹ Cova, as reported in 98 J.A.M.A. 1393 (1932).

⁴⁰ A. F. Guttmacher, *supra* note 34, at 19.

Therapeutic Abortion (1954); Dailey and Benson, Hyperthyroidism in Pregnancy (1951)]."⁴¹ Scherman, 1958.

IV

A re-evaluation as to all of these complications of pregnancy is at first view encouraging. Yet as the incidence of recognized medical TA is reduced and effective medical treatment substituted, we find new indications of a wholly different sort being urged. Psychiatric indications had long been suggested without getting much attention. In recent years they have been widely invoked, but by obstetricians, rather than by psychiatrists. The judgment of the latter has been against induced abortion for psychotics and personalities which might easily become psychotic.

Psychiatric Indications

"The statistics presented show evidence of a very important trend in regard to therapeutic abortion. All major organic illnesses have shown a considerable decrease in frequency as indications. It shows, that, even in face of the serious complicating diseases, with competent care, disease and pregnancy are compatible in most instances.

"Only in the case of psychiatric indications has there been a failure to recognize this concept, and as a result there has been a continuous loss of fetal life due to this least severe of all indications. There has been a marked rise in psychiatric indications in the past few years."⁴² Scherman, 1958.

TA is not indicated for psychoses; they can usually go full term.⁴³ Cova, 1932.

"At the present time there is no indication for performing therapeutic abortion in psychopathy per se. . . . There exist very few, if any, psychiatrists who . . . would feel a therapeutic abortion is indicated in any of the psychoneurotic reaction types."⁴⁴ Ebaugh & Heuser, 1947.

If economic or social pressures, or bodily or mental disease, result in TA, then there follows a change back to hormonal levels, physiologic processes and emotions; then through psychosomatic processes, ideas of guilt and the like all "might well disturb a poorly integrated personality even to psychotic proportions."⁴⁵ Ebaugh & Heuser, 1947.

⁴¹ Scherman, Therapeutic Abortion, 11 Obst. & Gynec. 323, 330 (1958).

⁴² Id. at 333.

⁴³ Cova, as reported in 98 J.A.M.A. 1393, 1394 (1932).

⁴⁴ Ebaugh and Heuser, Psychiatric Aspects of Therapeutic Abortion, 2 Postgrad. Med. 325, 330-31 (1947).

⁴⁵ Id. at 327.

Recognized indications for TA: neurology and psychiatry. "The trend in the evaluation of these disorders as an indication for therapeutic abortion has swung from comparative liberalism to marked conservatism in the past twenty years. There does not seem to be any one condition in neurology or psychiatry which absolutely indicates interruption."⁴⁶ Perlmutter, 1947.

"By and large, obstetricians have performed therapeutic abortion on psychiatric indications begrudgingly. They have been inclined to regard the indications which their psychiatric colleagues bring to them as too esoteric and intangible to be convincing; and the thought has not infrequently crossed their minds that a clever, scheming woman is simply trying to hoodwink both psychiatrist and obstetrician. The present volume goes far towards correcting these misapprehensions on the part of obstetricians. Indeed, from the statements and case histories which psychiatrists present in this volume, it is clear that their opinion is veering rapidly toward greater conservatism. The guilt complex which sometimes follows artificially produced abortion receives especial emphasis. Author after author uses such phrases as 'the sense of guilt or inadequacy which appears directly related to an abortion', 'psychic "hangovers" from abortion', 'traumatic experience of an abortion', 'the effect of the termination on the integrity of the woman's personality structure', 'emotional trauma which the woman will subsequently experience', to say nothing of the stress laid on 'exceedingly depressed hysterectomized patients' and suicidal tendencies in vasectomized men. The feeling is growing apparently among the leaders in psychiatry that therapeutic abortion on psychiatric grounds is often a double edged sword and frequently carries with it a degree of emotional trauma far exceeding that which would have been sustained by continuation of pregnancy."⁴⁷ Eastman, 1954.

"Whether the abortion has been 'spontaneous' or 'therapeutic,' the potential mother thereby deprived of motherhood is likely to behave in a peculiar way. She will feel both relieved and deprived. Just how she behaves will depend on the degree to which she feels herself responsible for the abortion. . . . It may be said that those who commit or request abortion and those who suffer or endure abortion appear to have a similar post-abortion hangover. Whatever the differences in conscious or unconscious motivations for abortion, the experience of abortion in-

⁴⁶ Perlmutter, Analysis of Therapeutic Abortions, Bellevue Hospital 1935-1945, 53 Am. J. Obst. & Gynec. 1008, 1013-14 (1947).

⁴⁷ Eastman, Obstetrical Foreword, in Rosen, op. cit. supra note 34, at xx-xxi.

evitably arouses an unconscious sense of guilt. Patients who voluntarily, or involuntarily, have gone through this experience should be apprised of this fact and encouraged to talk about their feelings. As physicians come to understand and to apply this knowledge in their daily practice, more children will be born and more healthy children will grow."⁴⁸ Dunbar, 1954.

"The fact that no abortions have been done for neuropsychiatric reasons during the last two years at the University of Virginia Hospital means that a change of attitude has been successful in helping many people solve their problems in living, problems which seemed to be without solution at the time the case was presented. Neuropsychiatric disease is not necessarily an indication, since persons with serious reactions can be treated while pregnant by shock therapies as well as by psychotherapy. Readjustment of family attitudes frequently allays immediate panic and just as frequently makes the hated pregnancy become a cause for working out the elements behind family disunity."⁴⁹ Wilson, 1954.

In the emotionally sick patient, "an abortion, whether self-induced or spontaneous, merely relieves the pressure temporarily . . ."⁵⁰ Rosen, 1954.

"In other words, we at times even see patients who state they wish an abortion, and who, if it be arranged for them, actually do have it but only as a face-saving device for themselves. Underneath it all, they actually desire pregnancy. We do not believe it possible to over-emphasize this."⁵¹ Rosen, 1954.

No TA on account of mental disease has ever been done at Hague Maternity.⁵² Donnelly, 1955.

"The recent trend has been toward more liberal use of psychiatric indications, but they probably have been greatly overused. Russell reported that nervous and mental diseases made up 25 per cent of all indications for therapeutic abortion in 1950 in California, whereas renal and hypertensive causes made up only 20.9 per cent. Many qualified psychiatrists consider that therapeutic emptying of the uterus may result

⁴⁸ Dunbar, *A Psychosomatic Approach to Abortion and the Abortion Habit*, in Rosen, *id.* at 27-31.

⁴⁹ Wilson, *The Abortion Problem in the General Hospital*, in Rosen, *id.* at 197.

⁵⁰ Rosen, *The Emotionally Sick Pregnant Patient: Psychiatric Indications and Contraindications to the Interruption of Pregnancy*, in Rosen, *id.* at 232.

⁵¹ *Id.* at 241.

⁵² Donnelly, *Are There Medical Indications for Therapeutic Abortions?*, 52 *J. Med. Soc. N.J.* 112, 117 (1955).

in deep emotional trauma to the patient and that a poorly integrated personality may be made worse and even psychotic by the procedure."⁵³ Nelson & Hunter, 1957.

Report on 139 TA with 31,581 deliveries, as to psychiatric reasons (41 of 139): "In the literature this group constitutes the least logical and the most hazardous of all indications. . . . I feel that, except for the next group [neurologic], it is the least justifiable of all indications. Medical men have devised better treatment of severe diseases associated with pregnancy and have been able to markedly reduce the therapeutic abortion rate throughout the country only to find that this least justifiable of all indications, psychiatric reasons, has been allowed to run rampant. Throughout the country most authors [citing] report an increasing rate of therapeutic abortion for psychiatric reasons." Manic depressive psychosis and schizophrenia: "The problem here is one of institutional care and certainly therapeutic abortion will not solve it."⁵⁴ Scherman, 1958.

However, neurotics were quickly substituted for psychotics; and in one writing after another we begin to find suggestions that the medical man should recognize unmedical indications—economic, social, the wish of the patient—to determine his course as a medical man.

It becomes hard for a layman to avoid a feeling that there is an element in the profession that wants induced abortions and is determined to find some justification for them. It is equally hard to avoid a feeling that the real pressure for liberalized abortion comes not from medical men, concerned with medical needs, but from involuntary parents of unwanted children.

"If therapeutic abortion were limited to those cases where the life of the mother was certainly and immediately imperiled, the number of such abortions would be exceedingly small"

"In general one might say that since the [First] World War there have been two movements running counter to each other. On the one hand physicians have declared with increased evidence that certain maternal conditions such as tuberculosis, heart disease, pernicious vomiting, etc., did not require therapeutic abortion as often as reports in previous decades would seem to have indicated. . . .

"The disastrous social-economic consequences of the War, necessitating the limitation of offspring at all hazards, have led a group of honest

⁵³ Nelson and Hunter, *Therapeutic Abortion: A Ten-Year Experience*, 9 *Obst. & Gynec.* 284, 288 (1957).

⁵⁴ Scherman, *supra* note 41, at 330-31.

and well-meaning physicians to advocate an extension of therapeutic indications to eugenic factors, to general debility, poverty and excessively large families. Some have even gone so far as to advocate the Soviet system of legalized abortion when desired by the mother The bulk of the profession, however, is at present definitely opposed to any such far-reaching extensions of indications, and in Russia, there is an ever increasing effort to reduce the practice, since at best it subjects the woman to some immediate danger and ultimately to the risk of considerable physical deterioration."⁵⁵ Taussig, 1936.

"If one completely eliminates all socio-economic reasons, then one automatically eliminates therapeutic abortion for all fetal reasons and, for the most part, also eliminates most therapeutic abortions for any reason."⁵⁶ Greenhill, 1958.

"To deny that these forces [economic pressure, social factors and convenience] had not influenced us would be incorrect; to accept them would be unwise; and the best course would be to view future indications in the light of strict medical principles. . . ."⁵⁷ Moore & Randall, 1952.

The urge to save one's self from the burden of children is not peculiar to American women, and we find recourse to induced abortion among similar fractions in countries with such conflicting traditions as Germany and Israel.

"A survey shows that the attitude and experience on therapeutic abortion is the same in Germany as in Russia. Social indications are not acceptable, but may give some support to a medical indication. It is necessary to guard against doctors making pretense of the presence of basic disease merely as a cover for action on a social indication."⁵⁸ Kraatz, 1958.

Induced abortion other than therapeutic abortion is illegal in Israel. Most abortions reported by hospitals are shown as spontaneous, but analysis shows this to be camouflage.⁵⁹ Halevi & Brzezinski, 1958.

"In our country in the year 1953, socio-economic conditions *per se* never warrant therapeutic abortion. It is only human that they may

⁵⁵ Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects 278-79 (1936).

⁵⁶ Greenhill, Yearbook of Obstetrics and Gynecology 61 (1958).

⁵⁷ Moore and Randall, Trends in Therapeutic Abortion: A Review of 137 Cases, 63 Am. J. Obst. & Gynec. 28, 39 (1952).

⁵⁸ H. Kraatz, Grundsätzliche Gedanken zur Frage der Schwangerschafts unterbrechung, 138 Das Deutsche Gesundheitswesen 138, 141 (1958); 12 Excerpta Medica (§ 10 Obst. & Gynec.) No. 55 (1959).

⁵⁹ Halevi & Brzezinski, The Incidence of Abortion Among Jewish Women in Israel, 48 Am. J. Pub. Health 615, 621 (1958).

weigh heavily in the scale when other factors bring about consideration of abortion. For example, one is more prone to abort the cardiac patient who is unwed, on relief and already the mother of several children, than the woman with the same degree of cardiac pathology who is married, childless and well-to-do."⁶⁰ Guttmacher, 1954.

"The majority of illegal abortions are performed because of unplanned pregnancies in married women in order to regulate the size of their family."⁶¹ Willson, 1958.

"Social and economic considerations cannot always be ignored, although it goes without saying that by themselves they do not constitute a valid indication for interruption of pregnancy. All too often they exert strong influence in the decision. However, while such considerations alone should never justify therapeutic abortion, we believe that always to ignore them completely is wrong also, as occasionally these factors do play an important role."⁶² Nelson & Hunter, 1957.

Mt. Sinai Hospital in New York allows TA (1958) only after unanimous approval by a board made up of its chief of Obstetrics and chief of Psychiatry, with three others appointed from Medicine, Surgery and Pediatrics. From November 1, 1952, through March 1, 1958, it had 22,000 deliveries, 125 TA, or 1:175. Only 21 requests for permission were denied. Indications were 42% psychiatric, 26% eugenic, 10% past or present malignancy, 22% other causes. "These three conditions accounted for almost four-fifths of the cases, relegating the old orthodox trio—heart, lung and kidney—to secondary importance." Sterilization was favored during puerperium for women over 35 having 4 *living* children, and for those of all ages having 6 *living* children. Others could be sterilized on approval of the chief of Obstetrics.⁶³ Guttmacher, 1958.

"Most recent writers [Heffernan and Lynch 1953; Moore and Randall 1952; Taylor, Tillman and Blanchard 1954] stress the real need for disregarding socioeconomic and 'convenience' factors in therapeutic abortion." (But case records have notations of large family, poverty, and the like. Are these indications for TA? If they are not indications, why do they enter into the thought and consideration of a specific problem?)

"If one completely eliminates all socioeconomic reasons, then one automatically eliminates therapeutic abortion for all fetal [*i.e.*, genetic] rea-

⁶⁰ A. F. Guttmacher, The Shrinking Non-Psychiatric Indications for Therapeutic Abortion, in Rosen, Therapeutic Abortions 21 (1954).

⁶¹ Willson, Beecham, Forman & Carrington, Obstetrics and Gynecology 162 (1958).

⁶² Nelson and Hunter, *supra* note 53, at 285.

⁶³ Scope Weekly, April 2, 1958, p. 9.

sons and, for the most part, also eliminates most therapeutic abortions for any reason. The efforts of many workers have shown that with adequate hospitalization and treatment similar cases to those which in the past have been aborted can be carried to normal termination with little or no increase over their aborted counterpart in maternal morbidity or mortality."⁶⁴ Scherman, 1958.

At a Planned Parenthood seminar on abortion, New York, 1958, Dr. Kinsey insisted that the greatest number of induced abortions were found among those using contraceptives who grew careless.⁶⁵

V

TA acts on the fetus only to destroy it; that can hardly be called therapy as to the infant. Abortion can only be considered therapeutic as to the mother if in a substantial percentage of cases it substantially increases her length of life or restores her to good health. There are no adequate figures to show this result.

Effect of TA on the Mother

"The induction of abortion is attended by a certain, though in proper hands small, mortality. The dangers of infection . . . are not always avoidable . . . I consider the operation of induced abortion one of the most dangerous in obstetrics."⁶⁶ DeLee, 1913.

Soap pastes were introduced in Germany as abortifacients about 1930. They were soon attacked in German and other medical periodicals, and then in the *American Medical Association Journal*. The United States Food and Drug Administration, after long investigation, banned the use of them as posing a serious danger to health and to life.⁶⁷ Weilerstein, 1944. This *cremor saponis* is now being used in authorized Scandinavian clinics.

"According to mortality statistics there were 1,815 recorded deaths assignable to abortion in 1940. Obviously this figure represents only a fraction of the actual deaths, and by no means would it make the estimated figure of 9,480 appear unreasonable.

"Morbidity presents a much more important problem than mortality. It is impossible to estimate its incidence accurately. The number of

⁶⁴ Scherman, Therapeutic Abortion, 11 Obst. & Gynec. 323, 333-34 (1958).

⁶⁵ Kinsey, as recorded in Calderone, Abortion in the United States, ch. 8 (Abortion and Contraception), 156 (1958).

⁶⁶ DeLee, Principles and Practice of Obstetrics 1019 (1st ed. 1913).

⁶⁷ Weilerstein, Intrauterine Pastes, 125 J.A.M.A. 205-07 (1944).

women who suffer from chronic pelvic discomfort, sterility, ectopic pregnancy, surgical ablation of ovarian tissue and neuroses as a result of abortions is very many times the number who lose their lives as a result of abortion. Even when therapeutic abortions are done under the best of conditions, as in the abortaria of Russia, there is an aftermath which made the authorities question the wisdom of legalizing them."⁶⁸ Te Linde, 1946.

The New York Department of Health recorded 3,592 TA from 1943 to 1947; 1 in 250 mothers died within 1 month.⁶⁹ Tietze, 1950.

Maternal mortality rate of TB patients is slightly higher in hospitals permitting TA than in hospitals not permitting TA.⁷⁰ Heffernan & Lynch, 1953.

Of a total of 295 TA at Los Angeles County Hospital, 1931-1950, 21 died an average of 6.8 years later of the disease taken as an indication; 4 died without leaving the hospital.⁷¹ Russell, 1953.

"[T]he mortality rate on hospital services, where this operation is performed under ideal conditions for therapeutic reasons and on the recommendation of reputable physicians and hospital boards, is no higher than the mortality rate in other hospitals where this operation is not performed."⁷² Fisher, 1954.

"Whether the abortion has been 'spontaneous' or 'therapeutic,' the potential mother thereby deprived of motherhood is likely to behave in a peculiar way. She will feel both relieved and deprived. Just how she behaves will depend on the degree to which she feels herself responsible for the abortion."⁷³ Dunbar, 1954.

"Summary. It may be said that those who commit or request abortion and those who suffer or endure abortion appear to have a similar post-abortion hangover. Whatever the differences in conscious or unconscious motivations for abortion, the experience of abortion inevitably arouses an unconscious sense of guilt. Patients who voluntarily, or involuntarily, have gone through this experience should be apprised of this fact and

⁶⁸ Te Linde, *Operative Gynecology* 475 (1946).

⁶⁹ Tietze, *Therapeutic Abortions in New York City, 1943-1947*, 60 *Am. J. Obst. & Gynec.* 146, 147, 151 (1950).

⁷⁰ Heffernan and Lynch, *What is the Status of Therapeutic Abortion in Modern Obstetrics?*, 66 *Am. J. Obst. & Gynec.* 335, 336 (1953).

⁷¹ Russell, *Changing Indications for Therapeutic Abortion: Twenty Years' Experience at Los Angeles County Hospital*, 151 *J.A.M.A.* 108, 109, 111 (1953).

⁷² Fisher, *Criminal Abortion*, in Rosen, *op. cit. supra* note 60, at 9.

⁷³ Dunbar, *A Psychosomatic Approach to Abortion and the Abortion Habit*, in Rosen, *id.* at 27.

encouraged to talk about their feelings. As physicians come to understand and to apply this knowledge in their daily practice, more children will be born and more healthy children will grow."⁷⁴ Dunbar, 1954.

Of the 8 TA done at Margaret Hague Hospital 4 were for hypertensive disease; 2 of the 4 died at once; another died from cerebral hemorrhage 6 years later. The other one (1931) later had an abortion elsewhere, then a tubal ligation, 2 full term healthy babies after an ectopic pregnancy, and after the normal birth in 1952 was "still hypertensive, alive and well." Of 218 hypertensives studied here, two-thirds, with no superimposed preeclampsia, had no deaths; among the other third, complicated by preeclampsia, 6 died. Hypertension without complications is not affected by pregnancy, and abortion will not cure it; abortion may effect a cure in preeclampsia cases. The hospital had 2 TA for rheumatic heart disease, both in 1935, none thereafter. This was ruled out as an indication following the report of Gorenberg and McGeary in 1941. Of over 500 cardiacs, 1939-1952, only 2 mothers were lost, or 0.4%. The annual death rate for all rheumatic cardiacs, 1939-1952, was 2.6%. A ten year follow-up of the 260 entering here between 1937 and 1942 showed 188 still alive, with those having most pregnancies having the longest life.⁷⁵ Donnelly, 1955.

"No deaths occurred as a result of the procedure itself, although 1 patient died 6 days after curettage. This patient had malignant hypertension and uremia and we consider that she would have died regardless of treatment."⁷⁶ (Then why kill the child?) Nelson & Hunter, 1957.

"Therapeutic abortion always entails risk to the mother."⁷⁷ Donnelly, 1958.

"Maternal death rates vary considerably in different parts of the country and with different classes of patients. The mortality is higher in no-white ward patients than in either white ward or white private patients. This undoubtedly occurs because the former include the most impoverished and least well-educated people in our country. There is a higher incidence of medical complications such as essential hypertension, anemia, malnutrition, and toxemia among others, and they often remain untreated. These patients frequently do not seek prenatal care, enter-

⁷⁴ Id. at 31.

⁷⁵ Donnelly, *Are There Medical Indications for Therapeutic Abortions?*, 52 J. Med. Soc. N.J. 112, 115 (1955).

⁷⁶ Nelson and Hunter, *Therapeutic Abortion: A Ten-Year Experience*, 9 Obst. & Gynec. 284, 291 (1957).

⁷⁷ Donnelly, as recorded in Calderone, *op. cit. supra* note 65, ch. 6 (*Therapeutic Abortion in the United States*), 103.

ing the hospital late in pregnancy, attend irregularly, and cannot afford adequate diets and medications. The death rate is highest in urban communities and in the southeastern states where the concentration of non-white patients and those of low economic status is greatest. It is of interest that the largest proportion of home deliveries and of births which are not attended by physicians also occur in the deep south. Maternal mortality is lowest in the Northwest, parts of New England, and the upper Midwest, where the population is more homogeneous, with fewer Negroes and less poverty and malnutrition. Reduction in maternal mortality therefore must be a concern of educators, sociologists and economists, as well as of physicians. . . .

"The maternal death rate, which is expressed as the number of maternal deaths per 10,000 live births, was 58 in 1935, but by 1953 had been reduced to 6.1. Approximately 37 per cent of the deaths in 1935 were caused by abortion, ectopic pregnancy, or other hemorrhage, 27 per cent by infection, 22 per cent by toxemia, and the remainder by miscellaneous conditions. Hemorrhage, toxemia, and infection are still the most frequent causes of death in pregnant or recently delivered women, but those from hemorrhage and toxemia now occur more often than those due to infection. Although the reduction has been remarkable, many deaths which do occur could be avoided by more careful management. A most disturbing fact is the increasing number of deaths from anesthesia, almost all of which are caused by errors in the choice of the agent or in its administration."⁷⁸ Willson, 1958.

VI

No physician would be justified, ethically or legally, in considering an induced abortion except in the case of a complication of pregnancy which created a serious danger to the mother, and one which there was no reasonable hope of averting or overcoming by any other therapy however costly in time and effort.

From a purely medical standpoint, the obvious first step in any consideration of TA must be a determination that the TA will actually be therapeutic and not simply abortion. In other words, there must be a finding grounded in direct experience or adequately documented authority that the termination of pregnancy can be expected to remove the danger to the life of the mother without doing her any serious harm. Yet a faithful search of medical literature will disclose amazingly little evi-

⁷⁸ Willson, Beecham, Forman and Carrington, *Obstetrics and Gynecology* 15-16 (1958).

dence that TA is so effective in any of the situations in which it has commonly been used. It will disclose an equally amazing assortment of cases in which it has been used, and is being used, as the answer to complications which had never been recognized as indications for abortion. Surely a surgical or medical destruction of an infant life can find little justification, medically, in a vague hope on the part of a physician, or argument from analogy, or his feeling that there's no harm in trying. There are reports, chiefly from Scandinavia, which recount numerous induced abortions and boast of a low rate of mortality from the abortions, but without reporting their demonstrated effect in overcoming dangerous complicating diseases. Actually all but a small part of the authorized abortions performed under the laws of the Scandinavian countries are based on nonmedical grounds.

The doctor represents both mother and child, not merely the mother or the one who pays him; and so he has the duty to protect both lives. If not, if his duty is only to the mother, or primarily to the mother, he is certainly disqualified by interest from acting in a judicial capacity between mother and child. Here there is obvious need for a guardian or attorney to defend the interest—the right to life—of the child.

If we read the outstanding medical commentators of recent years, we find little evidence of any general professional demand for greater liberty in doing induced abortion.

"Until as recently as the past decade, therapeutic abortion was a relatively common procedure, well accepted by the majority of physicians as properly indicated for the preservation of the mother's life or immediate health in certain complicated pregnancies. . . . During the past 10 years, however, there has been a growing appreciation of the fact that many indications for therapeutic abortions are no longer tenable in the light of continuing advances in medical and surgical knowledge. This realization has stimulated many institutions and organizations to study this procedure carefully and to reevaluate their methods of managing the associated problems."⁷⁹ Russell, 1953.

"Modern medicine is a fluid science: there is, as a result, an ever-changing list of abnormal conditions for which abortion is currently indicated. Some long authenticated indications have virtually disappeared, while others are increasing in importance or being newly introduced. On the whole, the over-all frequency of therapeutic abortion is on the decline. This is due to two facts: first, cures have been discovered for a number

⁷⁹ Russell, *supra* note 71, at 108.

of conditions which previously could be cured only by termination of pregnancy; and, second, there has been a change in medical philosophy. Two decades ago the accepted attitude of the physician was that, if a pregnant woman were ill, the thing to do would be to rid her of her pregnancy. Today, it is felt that unless the pregnancy itself intensifies the illness, nothing is accomplished by abortion."⁸⁰ Guttmacher, 1954.

"As mentioned repeatedly in this volume, the incidence of therapeutic abortion because of organic disease has fallen dramatically during the past decade or so. This change has not come about through any outright endeavor on the part of the obstetricians to curtail interference with gestation, but has stemmed almost entirely from the gradual realization, based on extensive clinical experience, that pregnancy, if properly managed, seldom aggravates organic disease.

"Let us consider, for example, the three conditions which have long constituted the most frequent indications for therapeutic abortion on a physical basis, namely, essential hypertension, rheumatic heart disease and pulmonary tuberculosis."⁸¹ Eastman, 1954.

"Therapeutic abortion is a greatly abused operation and the incidence of the procedure the country over is much higher than it should be."⁸² Williams, ed. Eastman, 1956.

"Therapeutic abortion is becoming less frequent as medical and obstetric knowledge progresses. As Eastman has pointed out in the foreword to a book by Rosen, this change also has come about from the realization that pregnancy, if properly managed, seldom aggravates organic disease."⁸³ Nelson & Hunter, 1957.

"Most gynecologic conditions can be corrected by medical rather than surgical treatment, and many can be managed by the family physician who will take time to examine his patients and make accurate diagnoses."⁸⁴ Willson, 1958.

"Occasionally it is necessary to terminate a pregnancy which is endangering the life and health of a mother. This is called therapeutic abortion. That the need for therapeutic termination of pregnancy is limited is indicated by the fact that Cosgrove and Carter reported an incidence of only 1 in every 16,750 deliveries at the Margaret Hague Maternity Hos-

⁸⁰ A. F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in Rosen, *Therapeutic Abortion* 13 (1954).

⁸¹ Eastman, *Obstetrical Foreword*, in Rosen, *id.* at xix.

⁸² Williams, *Obstetrics* 1077 (11th ed. Eastman 1956).

⁸³ Nelson and Hunter, *supra* note 76, at 284.

⁸⁴ Willson, Beecham, Forman and Carrington, *op. cit.* *supra* note 78, at 15.

pital. This figure is much lower than the average, which has been about 1 in 200 deliveries. During recent years, as newer methods for controlling acute and chronic disease processes have been developed, the need for therapeutic abortion has markedly decreased. . . . There still are a few patients in whom we believe therapeutic termination of pregnancy to be warranted."⁸⁵ Willson, 1958.

"We must assume that the decreased incidence of therapeutic abortion in the past few years has not been due to a general decrease in complicated pregnancies, nor to a change in the type of these complications, but rather to a better understanding of such complications and a greater realization that with correct therapy the disease and pregnancy are compatible.

"Throughout the country there has been a great effort in recent years in an attempt to halt, or at least decrease, the loss of human life that occurs in an estimated 18,000 therapeutic abortions a year."⁸⁶ Scherman, 1958.

"The statistics presented show evidence of a very important trend in regard to therapeutic abortion. All major organic illnesses have shown a considerable decrease in frequency as indications. It shows that, even in the face of the serious complicating diseases, with competent care, disease and pregnancy are compatible in most instances."⁸⁷ Scherman, 1958.

"Treatment of the conditions which are aggravated by pregnancy has been so improved that they are now managed satisfactorily without interfering with the gestation. Therapeutic abortion accordingly is rarely justifiable."⁸⁸ Beck & Rosenthal, 1958.

"For years medicine has taught that pregnancy, though a normal physiologic process, is such a tremendous burden that it adds an unbearable load to any ill, diseased or handicapped person and, therefore, the two are not compatible. . . . In most instances no one has ever been able to define what the burden consisted of, but these statements were accepted. They were accepted by men who, for the most part, were dedicated to saving lives and who, when faced with such a seemingly overwhelming problem, took the only known way out by destroying the part of that problem which could not resist, while hoping to save that

⁸⁵ Id. at 164-65.

⁸⁶ Scherman, *Therapeutic Abortion*, 11 *Obst. & Gynec.* 323, 325 (1958).

⁸⁷ Id. at 333.

⁸⁸ Beck and Rosenthal, *Obstetrical Practice* 914 (7th ed. 1958).

portion which could go on living and in the future bespeak not the evil but only the life-saving efforts of the man of science. . . .

"In recent years the existence of these accepted terms of burden, strain, and load have been disproved in association with most diseases and, in the rare instances where they do exist, better methods of combating them have been found."⁸⁹ Scherman, 1958.

VII

We believe that our extracts from the medical literature of recent years, with flash-back to the turn of the century, are representative of the best medical thought during those years. We believe further that any review of that literature must make clear:

(1) that the medical consensus on the medical reasons for induced abortion was originally built up to a large extent on hasty impressions and reactions, without real evidence of therapeutic gain and with no attempt to tabulate the immediate and delayed effects on maternal mortality and morbidity of such operations, and comparatively, the mortality and morbidity of women not so operated upon, from complications recognized as indications for TA;

(2) that the predominant medical thought, based on more carefully observed experience, has reduced the recognized indications year by year until few are now recognized at all and that more and more doctors have come to reject the idea of TA entirely;

(3) that thousands of infant lives have been destroyed on supposed indications whose recognition is now considered erroneous;

(4) that there is not now and never has been a uniform attitude based on a uniform judgment towards TA; and

(5) that there is no swelling demand from medical men for greater freedom in ordering abortion on medical grounds, but that the present pressure is for freedom to have abortions for the convenience of the mother.

TA is grabbing at the easiest way, instead of striving for the best way. When TA is banned, medics have usually, under pressure of necessity, found a right way. Medical history justifies the belief that if TA is prohibited, the progress of medicine will remove the hazard the TA was designed to avoid; but if TA becomes the common practice, medical progress as to these conditions will become a dead-end street. There will be no study or thought given to how to avoid harm from a normal term

⁸⁹ Scherman, *supra* note 86, at 323-24.

delivery in any particular situation if there are never to be any normal deliveries in such a situation.

Before Semmelweiss (1847) and O. W. Holmes (1843), the percentage of puerperal (childbed) fever deaths might have justified abortion in every pregnancy, if the argument for TA is sound at all.

There are no real statistics or direct medical findings to support most of the accepted medical "indications." They are based on reports of a small number of cases by individual doctors or teams, usually on maternity sections of single small hospitals or selected cases in individual hospitals (the German report on 4 cases) and the hospitals have seldom been chosen as representative. Outstanding exceptions are the maternity cases of such really big hospitals as the Margaret Hague Maternity and the Los Angeles County Hospital.

Thousands of unborn infants have been slaughtered already on "indications" which are now recognized as offering no special threat to the pregnant, most of them now successfully treated without loss of the child. They were destroyed in the womb on the basis of general, or dominant, medical opinion at the time, yet all are now discredited. The "indications" of today are entitled to no greater respect as a basis for legislation. The purely medical have been almost wholly abandoned, with a shift to protection of mental health on which psychiatrists are not agreed but to which most are opposed. The further shift to neurotic indications has become a medical man's judgment of the economic and social or purely selfish factors which he believes to be responsible for the patient's condition.

The destruction of the unborn child was authorized to save the life of the mother. Now we are asked to give the practice legal authority, to prevent any disturbance of mental or emotional poise, through shame, dread of the burden of caring for the child or on the basis of similar considerations. Such considerations are not an excuse for TA anywhere in the United States, and they should not come to be.

How many mothers at some time during pregnancy threaten abortion or suicide? How many of these, even at the time of depression, would actually attempt it and not have a crushing reaction after this moment of strain had passed?

A mother who would sacrifice the life of her unborn child for her own health is lacking in something. If there could be any authority to destroy an innocent life for social considerations, it would still be in the interests of society to sacrifice such a mother rather than the child who might otherwise prove to be normal and decent and an asset.

Many medical practitioners never have a case in which they would justify a TA; yet each feels very strongly that he should be free to have a TA performed if and when he may get a case in which he believes the TA necessary for the mother. This is a natural feeling, but it is only a feeling, which need not obstruct or cramp any of his work. And in any event it should not be allowed to obscure several patent facts:

(1) that in medical practice as in other professions not all members are equally ethical;

(2) that the difference in diligence, patience and general attitude towards interference with pregnancy on the part of different medical men makes any uniform handling rationally inconceivable;

(3) that the availability of the easy method of TA to meet any combination of pregnancy with complicating disease would offer a constant temptation to resort to TA when other but more difficult or time consuming methods would fully protect the mother without sacrifice of her child;

(4) that practitioners for whom TA was not available have met the challenge by working out successful medical treatment for complications once regarded as impossible of management except by TA;

(5) that the average practitioner may make a mistake in determining the necessity for TA in a particular case;

(6) that a consultant who may get his case-taking and anamnesis from the physician calling him may err in consequence;

(7) that after a particular indication for TA has been proven both unnecessary and harmful, it will be a matter of years before the whole profession abandons it; and

(8) that the end does not justify the means.

If an underwriters' engineer were authorized, with the endorsement of one associate, to destroy every building he labeled a fire hazard, without giving any reason therefor, he might do much good to the city at large, like an MD with unrestricted authority to order TA with the endorsement of another MD but without a statement of his reason. But he might make errors of judgment, not appealable if no reason is given or required; he might be competent to recognize the danger in the existing structure, but incompetent to recognize a practical way of removing the danger without destroying the building; he might tear down a building that was not actually a fire hazard, to benefit an adjoining property. Less ethical engineers might destroy buildings for even less ethical reasons, and the owners of the buildings destroyed would have to stand the loss.

VIII

In addition to the indications just discussed, there is mention made today of factors, not strictly medical, which also are said to be reasons for TA. It is our purpose to take up these here.

Eugenic Abortions

"Therapeutic abortion for eugenic reasons, for faulty germ plasm, is far less common than preconceptional sterilization in such cases. . . . Each such case must be submitted to the most searching scrutiny. After such scrutiny, few pregnancies merit interruption."⁹⁰ Guttmacher, 1954.

"There are frequent statements in the literature, and especially in the older literature, to the effect that patients with schizophrenia, manic-depressive psychosis, some neuroses, epilepsy and diabetes should not have children because of the inheritable nature of their diseases. There are even not infrequent recommendations to the effect that these conditions *per se* constitute sufficient reason for interrupting a given pregnancy. For obvious reasons, we do not feel that these particular articles merit the emphasis of bibliographic reference. What seems biological inheritance, as Meyers and Murdock both stress in their chapters elsewhere in this book, in these diseases may frequently be familial and cultural environment."⁹¹ Rosen, 1954.

Huntington's Chorea means progressive deterioration; it is hereditary, but may skip a generation. "Since pregnancy does not impair the health of the choreic or endanger her life, there is no legal reason for therapeutic abortion."⁹² Greenhill, 1955.

There are just two conditions, or developments, which can be seriously considered today as eugenic reasons for induced abortion: RH factor difference and rubella (German measles) contracted by the mother before or during the first 3 months of pregnancy. Both were first the subject of report and discussion about twenty years ago. Apparently both will in a very short time have ceased to be a problem at all.

1. RH Factor

Rh factor difference may result in an erythroblastotic infant; it is suggested that this be recognized as a new indication for TA.⁹³ Perlmutter, 1947.

⁹⁰ A. F. Guttmacher, *supra* note 80, at 20.

⁹¹ Rosen, *The Emotionally Sick Pregnant Patient: Psychiatric Indications and Contraindications to the Interruption of Pregnancy*, in Rosen, *op. cit.* *supra* note 80, at 243.

⁹² Greenhill, *Obstetrics* 548 (11th ed. 1955).

⁹³ Perlmutter, *Analysis of Therapeutic Abortions, Bellevue Hospital 1935-1945*, 53 *Am. J. Obst. & Gynec.* 1015 (1947).

An indication for TA "when the mother has delivered one or more erythroblastotic babies and her husband is homozygous. If he is heterozygous it need not be interrupted."⁹⁴ DeLee, ed. Greenhill, 1951.

"Erythroblastosis Fetalis is usually not looked upon as an indication for therapeutic abortion. In serious instances of this disease the child is either stillborn, dies in the first few hours of life, or survives. When it survives, a good prognosis can be given for normalcy if, when indicated, copious exchange transfusion is promptly carried out."⁹⁵ Guttmacher, 1954.

"If infants have been severely affected and have died in previous pregnancies despite good treatment, and if the father is homozygous Rh positive, termination can be considered because there is no way of preventing a recurrence."⁹⁶ Willson, 1958. (Apparently this author would avoid the likelihood of a child being lost, by making certain of its destruction in advance. Others however had already taken a more cheerful view of this situation.)

"Since the permeability of the placenta to antibodies increases as pregnancy advances . . . it may be advisable to deliver some mothers several weeks before term When so indicated the pregnancy may be terminated by the induction of premature labor or by Caesarean section. On the other hand, the hazards of extreme prematurity must be avoided."⁹⁷ Beck & Rosenthal, 1958.

Dr. Potter, who has done much work in this field, reported a year ago on 302 births to 241 women, complicated by Rh factor difference, but found so many other elements that she was unwilling to shape any conclusions.⁹⁸ Potter, 1959.

"[I]t is important to stress that the term 'placental barrier' is no longer considered inclusive enough to represent the total maternal-fetal relationship involved in pregnancy. The amnion, membranous chorion, and decidua vera deserve consideration as well as the villus placenta and decidua basalis." From 1941 on, writers on Rh factor in erythroblastosis have offered different theories on how the barrier is crossed.

"It is my opinion that certain obstetric procedures, if used regularly, may decrease the incidence and severity of problems arising as a result of the passage of protein substances across the maternal-fetal barrier

⁹⁴ DeLee, *Principles and Practice of Obstetrics* 977 (10th ed. Greenhill 1951).

⁹⁵ A. F. Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in Rosen, *Therapeutic Abortion* 21 (1954).

⁹⁶ Willson, Beecham, Forman and Carrington, *Obstetrics and Gynecology* 165 (1958).

⁹⁷ Beck and Rosenthal, *op. cit. supra* note 88, at 690.

⁹⁸ Potter, *The Abortion Problem*, 19 GP 105, 109 (1959).

and that some obstetric procedures regularly practiced may be increasing the incidence and severity of these problems." Emphasis was placed on prenatal care; ascorbic acid and bioflavonoids were thought effective. Avoid amniotic fluid embolism by perforating sac to permit leakage. Abruptio placentae an extremely dangerous complication.⁹⁹ Reilly, 1960.

A number of other reports indicating some success in overcoming this complication have been published during the last two years, which we have not had opportunity to study.

2. *Rubella (German Measles)*

An Australian report on rubella contracted during the first 3 months of pregnancy as causing a high percentage of fetal deaths, stillbirths and abnormal infants alarmed many American medics and moved them to accept such infection in early pregnancy as a new indication for TA. However they did so on a purely eugenic basis, as there has never been any suggestion that this complication could offer the least threat to the life or the physical or mental health of the mother.

Recognized indications for therapeutic abortion: Rubella. A high percentage of these cases "show severe congenital anomalies," on the basis of the study by C. H. Albraugh in 129 J.A.M.A. 719 (1945).¹⁰⁰ (The relationship first discovered by Gregg in 1941.) Perlmutter, 1947.

Rubella was first taken as an indication on the basis of a report by Swan, Tostevin, Mayo and Black on 109 Australian cases to 1944 and 58 cases from 1945 to 1946.¹

"German measles contracted before the end of the third month is an indication because most of the forthcoming babies will have congenital defects, particularly eye defects, heart disease, dental abnormalities and deaf mutism."² DeLee, ed. Greenhill, 1951.

German measles contracted before the end of the third month may be an indication because many babies will have congenital defects et cetera.³ Greenhill, 1955.

Rubella and other virus infections have been taken as indications for TA in recent years.⁴ Heffernan & Lynch, 1952.

⁹⁹ Reilly, *The Maternal-Fetal Barrier*, 80 Am. J. Obst. & Gynec. 391-95 (1960).

¹⁰⁰ Perlmutter, *supra* note 93, at 1015.

¹ As reported in 134 J.A.M.A. 1579 (1947).

² DeLee, *op. cit.* *supra* note 94, at 977.

³ Greenhill, *op. cit.* *supra* note 92, at 500.

⁴ Heffernan and Lynch, *Is Therapeutic Abortion Scientifically Justified?*, 19 Linacre Q. 11, 22-23 (1952).

Highly respected investigators expressed in 1953 a pessimistic view of prospects for the fetus when rubella is contracted early in pregnancy.⁵ Krugman, 1953.

"Since the initial work of the Australians in 1941, an immense literature has made it clear that at least 30% of children whose mothers have German measles before the 12th week of pregnancy are born with congenital abnormalities . . . congenital cataracts, deafness, or other serious defects. This appears true even when the infection antedates pregnancy by a few weeks. However, after the 16th week the embryo no longer seems sensitive to this maternal disease. The other exanthemata [eruptive diseases] have been carefully studied for similar harmful influences, but none has been found. In view of this, many obstetricians feel that if rubella is unqualifiedly diagnosed before the 12th week of pregnancy by a doctor experienced in infectious diseases, therapeutic abortion should be performed."⁶ Guttmacher, 1954.

"German Measles contracted before the end of the third month may be an indication, because many babies will have congenital defects, particularly eye defects, heart disease, dental abnormalities and deaf mutism."⁷ Greenhill, 1955.

Rubella in the first 4 months causes severe congenital defects in probably 1 out of 5 or 6 cases. Lundström (1952) reported stillbirths, prematurities and other abnormalities in 17 of 579 who had rubella in the first 4 months; 6% among control group of 2,226. The chief abnormalities are cataracts, deaf-mutism, cardiac anomalies and mental retardation. A carrier of rubella can infect a pregnant woman before the carrier shows any external symptoms, and before the pregnancy is recognized. Gamma globulin from a healthy person is variable in effectiveness; "nor have the results with convalescent gamma globulin been any more consistent or reliable."⁸ Horstmann, 1956.

Horstmann cites the studies of Krugman and Ward published in 1953, but he did not have the benefit of their re-evaluation of 1958. Rubella and other diseases endanger the child but cause no increase in hazard to the mother.⁹ Beck & Rosenthal, 1958.

⁵ Krugman, Ward and Lanzar, Studies on Rubella Immunization, 151 J.A.M.A. 285, 287 (1953).

⁶ A. F. Guttmacher, *supra* note 95, at 21.

⁷ Greenhill, *op. cit.* *supra* note 92, at 500.

⁸ Horstmann, Rubella (German Measles), in Meakins, The Practice of Medicine 252 (6th ed. 1956).

⁹ Beck and Rosenthal, Obstetrical Practice 731-42 (7th ed. 1958).

Five years after their first report, Krugman and Ward had determined that the work done on this problem since 1953 required further consideration. They published the results of a re-evaluation showing only 0.9% contraction of rubella among 541 immunized pregnant women exposed to it, as against 11.2% for a control group of non-immunized pregnant and nonpregnant. Then as to the child: "The risk of congenital malformation resulting from a first trimester pregnancy complicated by rubella can best be determined by prospective studies. The early estimates of 90 or more per cent were derived from retrospective studies, which originated with the damaged infant; the normal infants, therefore, did not come to the attention of the observers. In recent years a number of surveys of the prospective type have been reported. . . . These studies have originated with the rubella infection in the pregnant woman, and have ended with the new-born infant—normal or abnormal. The accumulated data at the present time indicate that maternal rubella infection in the first trimester may be followed by congenital malformations in 10 to 12 per cent of cases."¹⁰ Krugman & Ward, 1958.

A distinguished Scottish physician writes quite differently. Rubella is transmitted by direct contact (possibly by bedding, clothing et cetera) only in the preliminary and eruptive stages. "The common abnormalities reported have been congenital cataracts, deafness and cardiac defects. . . . When a woman in the early months of pregnancy is exposed to the disease sero-prevention should be practiced. Gamma-globulin has been prepared from rubella convalescents and may be obtained from Blood Transfusion Centres. If not available, ordinary gamma-globulin in double the dose advised for measles (q.v.) should be given."¹¹ There is no suggestion of TA. Anderson, 1958.

Two studies of rubella in small groups were published during 1959. One was on the rubella epidemic of 1955-1956 in Montreal. Of 31 mothers who went full term, 25 had normal, healthy infants; 3 infants were lost—one, a stillbirth, two (with heart defects and cataracts) dying within 3 weeks. The other 3 survived—one, with a heart defect and cataracts, one with microphthalmia but otherwise normal and healthy, and one with a heart murmur at 6 weeks but given a good prognosis.

¹⁰ Krugman and Ward, *Rubella: Demonstration of Neutralizing Antibody in Gamma Globulin and Re-evaluation of the Rubella Problem*, 259 *New England J. Med.* 16, 17-18 (1958).

¹¹ Anderson, *Infectious Diseases*, in Dunlop, Davidson and Alstead, *Textbook of Medical Treatment* 39 (7th ed. 1958).

*Only 8 of the 31 had been given gamma globulin, and none had had convalescent serum.*¹² Oxorn, 1959.

Two medics reported on the beginning of a more extensive study. This report was on 89 infected in the first trimester and a control group of 91 free of rubella. The control group had fewer fetal deaths; the infected 89 had fewer abnormal infants.¹³ Siegel & Greenberg, 1959.

Of course neither of these two reports dealt with a large enough number to have any great significance; but they give the most recent view of the work which is now occupying many in this field.

CONCLUSION

If TA is to continue to be recognized on a medical basis in spite of the medical testimony against it, we should recommend:

- (1) that it be confined to no-fee clinics;
- (2) that it be done only on the recorded judgment of the staff or a specially qualified committee, on specified medical grounds, reciting the facts of each case and the authority for holding that TA is necessary and will be beneficial in such case, without offsetting after-effects;
- (3) that such judgment be entered only after appearance of a public guardian or attorney for the unborn;
- (4) that a follow-up record on each patient be required, with a clearing house for reports of all cases and continuous revision of acceptable indications in the light of additional experience, development of therapies et cetera;
- (5) that the statutory excuse of necessity of TA for the preservation of the life of the mother be made an affirmative defense, to be proved by the defendant as a fact, not as a mere opinion;
- (6) that there be denied to any staff or committee the authority to approve TA in any case in which it is asked on social or other non-medical grounds, or on a record in which entries have been made of such nonmedical elements.

¹² Oxorn, Rubella and Pregnancy—A Study of 74 Cases, 77 Am. J. Obst. & Gynec. 628 (1959).

¹³ Siegel and Greenberg, Virus Diseases in Pregnancy and Their Effects on the Fetus, 77 Am. J. Obst. & Gynec. 620 (1959).

GLOSSARY

- abruptio placentae*: premature detachment of the placenta.
- accouchement forcé*: artificially hastened delivery (usually by forceps).
- albuminuria*: the presence of albumin (a simple protein) in the urine, due to the presence of blood (or other albuminous fluid) escaping somewhere in the urinary tract.
- amnion*: the inner of the membranes composing the sac which envelops the fetus in the uterus.
- amniotic fluid*: fluid which surrounds the fetus and protects it from injury.
- anemia*: a condition caused by: reduction in amount of blood present; or deficiency in red-blood cells; or deficiency of hemoglobin.
- hypochronic anemia*: anemia marked by a lowered color index of the blood.
- pernicious anemia*: marked diminution of red corpuscles—usually fatal.
- sickle cell*: crescent shaped red blood cell peculiar to the Negro race.
- arteriolar lesions*: injury or damage to an arteriole (a minute artery continuous with the capillary network).
- arteriosclerosis*: hardening of arteries due to fibrous overgrowth of the inner coat of an artery.
- calcific pericarditis*: inflammation of the sac enclosing the heart, caused by lime or similar salt deposits.
- carcinoma*: cancer: malignant growth.
- chorea* (St. Vitus' Dance): a toxic or infectious disorder of the nervous system manifested by involuntary spasmodic movements of limbs or facial muscles.
- chorion*: outermost of the fetal envelopes derived from the ovum.
- curettage*: scraping of the interior of the uterus to remove new growths and abnormal tissues.
- cyanosis*: dark blue coloration of the skin due to deficient oxygenation of blood in the lungs or to a great reduction of blood in its passage through the capillaries.
- decompensation*: failure of counterbalancing of the circulation of the heart.
- dermoid*: (skin-like) a congenital tumor, the walls of which resemble skin and sometimes give origin to teeth or hair.
- dystrophy*: defective nutrition.
- eclampsia*: a disease occurring in the latter part of pregnancy and marked by convulsive seizure and coma. The toxemias (blood-poisonings) of pregnancy are preeclampsia (early stage) and eclampsia (final stage).
- ectopic pregnancy*: pregnancy outside the uterine cavity (e.g., tubal pregnancy).
- edema*: excess accumulation of watery fluid in the tissue spaces of the tissues.
- erythroblastosis*: an anemia of newborn children which develops when mother is an RH negative and develops antibodies against the fetus which is RH positive.
- exanthemata* (plural of *exanthema*): an eruption upon the skin.

fibroid tumor: tumor composed of fiber or fibrous connective tissues.

glomerulonephritis: inflammation of the kidneys with pronounced lesions of the blood vessels within the kidney.

glycogen: a carbohydrate readily converted into glucose.

hepatic: relating to the liver.

hepatitis (infectious): a virus-caused disease which attacks the liver.

hydatidiform mole: rapidly growing mass arising from the proliferation of the chorionic blood vessels. The mass fills the uterus.

hydramnios: an excess of amniotic fluid.

hydronephrosis: enlargement of kidneys due to obstruction of the flow of urine.

hyperemesis gravidarum: pernicious vomiting during pregnancy.

hypertensive vascular disease: vascular disease marked by increased blood pressure.

hypertension: high arterial blood pressure.

hyperthyroidism: symptoms produced by excessive activity of the thyroid gland.

hypertrophy: general increase in size of organ, but not due to formation of a tumor.

hysterectomy: surgical removal of the uterus.

icterus: jaundice.

intraabdominal: within the abdominal cavity.

ischemia: a local anemia due to obstruction of the blood supply.

mitral stenosis: a narrowing of the mitral valve in the heart.

myasthenia gravis: aggravated muscular weakness.

myoma (pl.: *myomata*): tumor composed of muscular tissues.

necrosis: death or degeneration of a specific group of cells.

neoplasm: new growths.

nephrectomy: surgical removal of a kidney.

nephritis: inflammation of the kidneys.

nephrolithiasis: kidney stones.

parenteral: relating to nourishment introduced by some method other than through the digestive tract and intestines (e.g., intravenous feeding).

peritoneum: the sac lining the abdominal cavity.

placenta: the organ on the wall of the uterus attached to the fetus by the umbilical cord, and through which the fetus is nourished.

placenta praevia: a condition whereby the placenta implants in the lower portion of the uterus and entirely or partially blocks the opening in the cervix.

polycystic: composed of many cysts.

polyhydramnios: an excess of amniotic fluid.

porphyria: the excretion of porphyrin (an organic pigment) in the urine.

preeclampsia: the state or condition preceding eclampsia (marked by headache, vomiting etc.).

proteinuria: excretion of any protein in the urine.

psychosomatic: pertaining to influence of mind or higher functions of the brain (fear, desire etc.) upon body functions, especially in relation to disease.

puerperal fever: the post-natal presence of bacteria in the blood stream which causes a fever.

pyelitis (pyelonephritis): inflammation of the pelvis of a kidney.

rectosigmoid: the rectum and lower curved portion of the colon considered together.

renal: relating to the kidneys.

Rh factor (positive): a substance present in red blood cells in about 85% of human beings. Rh negative means the blood does not contain this substance.

rubella: German measles.

stasis: stagnation of blood or other fluids.

subarachnoid hemorrhage: hemorrhage below the middle membrane, or middle layer of membranes covering the brain or spinal cord.

syndrome: concurrence of symptoms.

systolic blood pressure: the blood pressure which is due to systole, *i.e.*, the contraction phase of the heart beat.

thyrotoxicosis: poisoning by an excessive thyroid secretion.

toxemia: blood-poisoning.

trauma: a wound or injury, usually suddenly inflicted.

uterine myomata: tumors of the uterus.

vascular lesion: tearing of blood vessel.

vasoconstrictive: causing narrowing of the blood vessels.

BIBLIOGRAPHY

BOOKS

- American College of Surgeons—Panel on Indications for Therapeutic Abortion (San Francisco, 1951).
- American Neurological Ass'n, Committee for the Investigation of Eugenical Sterilization—Eugenic Sterilization; A Reorientation of the Problem (New York, 1936).
- Baksh, Ilah—Modern Medical Treatments, 2 vols. (Lahore, Pakistan, 1956).
- Bass, Murray H.—Advances in Internal Medicine: Diseases of Pregnant Women Affecting Offspring, vol. 5 (Chicago, 1952).
- Beck, Alfred C. and Rosenthal, Alexander H.—Obstetrical Practice, 7th ed. (Baltimore, 1958).
- Beck, Theodric R.—Elements of Medical Jurisprudence (Albany, 1823).
- Bouscaren, T. Lincoln, S.J.—Ethics of Ectopic Operations, 2d rev. ed. (Milwaukee, 1944).
- Calderone, Mary S. (ed.)—Abortion in United States: Planned Parenthood Seminar (New York, 1958).
- Cecil, Russell L. and Loeb, Robert F.—Textbook of Medicine, 9th ed. (Philadelphia, 1955).
- Child, Charles G., Jr.—Sterility and Conception (London and New York, 1931).
- Crossen, Robert J.—Diseases of Women, 10th ed. (St. Louis, 1953).
- Cunningham, John F.—Textbook of Obstetrics (New York, 1951).
- Davidson, Sir Stanley—The Principles and Practice of Medicine; A Textbook for Students and Doctors, 1st ed. (Edinburgh, 1952), 4th ed. (Baltimore, 1958).
- DeLee, Joseph—Principles and Practice of Obstetrics, 1st ed. (Philadelphia, 1913).
- Greenhill, Jacob P. (ed.), 8th ed. (Philadelphia, 1943) 10th ed. (Philadelphia, 1951).
- Greenhill, Jacob P.—Obstetrics, 11th ed. (Philadelphia, 1955).
- Dunlop, Derrick M., and others—Textbook of Medical Treatment, 7th ed. (Edinburgh, 1958).
- Eastman, Nicholson J.—Expectant Motherhood, 3d ed. (Boston, 1957).
- (ed.)—Williams, John W., Obstetrics 10th ed. (New York, 1950), 11th ed. (New York, 1956).
- "Obstetrical Foreword," Rosen, Harold (ed.)—Therapeutic Abortion (New York, 1954).
- Galdston, I.—Maternal Deaths: The Ways to Prevention (New York, 1937).
- Gebhard, Paul H., and others—Pregnancy, Birth and Abortion (New York, 1958).
- Good, Frederick L. and Kelly, O. F.—Marriage, Morals and Medical Ethics (New York, 1951).

- Greenhill, Jacob P. (ed.)—Year Book of Obstetrics and Gynecology (Chicago, 1933-1958).
- (ed.)—DeLee, Joseph, Principles and Practice of Obstetrics, 8th ed. (Philadelphia, 1943), 10th ed. (Philadelphia, 1951).
- Obstetrics, 11th ed. (Philadelphia, 1955).
- Surgical Gynecology, 2d ed. (Chicago, 1957).
- Healy, Edwin F., S.J.—Medical Ethics (Chicago, 1956).
- "Hippocrates," Hippocratic Collection (selections), English translation by W. H. S. Jones (Cambridge, Massachusetts, 1923).
- Hodge, Hugh L.—Foeticide, or Criminal Abortion; A Lecture Introductory to the Course on Obstetrics, and Diseases of Women and Children, 1st ed. (Philadelphia, 1839), 4th ed. (Philadelphia, 1872).
- Principles and Practices of Obstetrics (Philadelphia, 1864).
- Jensen, Julius—The Heart in Pregnancy (St. Louis, 1938).
- Kerr, John M.—Operative Obstetrics, 6th ed. (London, 1956).
- Lewis, Thomas L. T.—Progress in Clinical Obstetrics and Gynecology (London, 1956).
- McCormick, Charles O.—Textbook on Pathology of Labor, 2d ed. (St. Louis, 1947).
- Meakins, Jonathan C. (ed.)—Practice of Medicine, 6th ed. (St. Louis, 1956).
- Moore, Thomas V., O.S.B.—Principles of Ethics, 4th ed. (Philadelphia, 1943).
- Nature and Treatment of Mental Disorders (London, 1944).
- National Committee on Maternal Health—Abortion Problem (Baltimore, 1944).
- Novak, Emil—Gynecologic and Obstetrics Pathology, 3d ed. (Philadelphia, 1952).
- Osler, Sir William—Principles and Practice of Medicine, 15th ed. Christian (New York, 1944).
- Ploss, Heinrich, Bartels, Max and Bartels, Paul—Das Weib in der Natur- und Völkerrunde; anthropologische Studien, vol. 3, rev. ed. (Berlin, 1927).
- Podolsky, Edward—Red Miracle (New York, 1947).
- Pollak, Otto—Criminality of Women (Philadelphia, 1950).
- Ricci, James V.—Genealogy of Gynaecology (Philadelphia, 1943).
- Rosen, Harold, and others—Abortion Problem (New York, 1944).
- (ed.) Therapeutic Abortion (New York, 1954).
- Schumann, Edward A.—Extra-uterine Pregnancy (London and New York, 1921).
- Sigerist, Henry—Socialized Medicine in The Soviet Union (New York, 1937).
- Stander, Henricus J.—Toxomias of Pregnancy (Baltimore, 1929).
- (ed.)—Williams, John W., Obstetrics, 8th ed. (London and New York, 1941).
- Stern, Curt—Principles of Human Genetics (San Francisco, 1949).
- Sutherland, Halliday—Control of Life (London, 1945).
- Tardieu, Ambroise A.—Étude médico-légale sur l'Avortement, 5th ed. (Paris, 1898).

- Taussig, Fred J.—Abortion, Spontaneous and Induced: Medical and Social Aspects (St. Louis, 1936).
- Taylor, Alfred S.—Manual of Medical Jurisprudence (London, 1844).
- Smith, F. J. (ed.), Principles and Practice of Medical Jurisprudence, 5th ed. (London, 1905).
- Te Linde, Richard—Operative Gynecology (Philadelphia, 1946).
- Titus, Paul—Management of Obstetric Difficulties (St. Louis, 1937).
- Willson, James R. (ed.), 5th ed., rev. (St. Louis, 1955).
- Tredgold, Alfred F.—Textbook of Mental Deficiency, 6th ed. (Baltimore, 1937).
- Watson, Cecil J. (ed.)—Outlines of Internal Medicine, 8th ed. (Minneapolis, 1955).
- Williams, John W.—Obstetrics (New York, 1903).
- Stander, Henricus J. (ed.), 8th ed. (London and New York, 1941).
- Eastman, Nicholson J. (ed.), 10th ed. (New York, 1950), 11th ed. (New York, 1956).
- Willson, James R., and others—Obstetrics and Gynecology (St. Louis, 1958).
- (ed.)—Titus, Paul, Management of Obstetric Difficulties, 5th ed., rev. (St. Louis, 1955).
- Wiprud, Theodore—The Business Side of Medical Practice, 2d ed. (Philadelphia, 1949).

PERIODICALS

PRIOR TO 1950

- Murphy, James, "An Address Delivered at the Opening of the Section of Obstetrics, Medicine and Gynecology at the Annual Meeting of the British Medical Association held in Newcastle-on-Tyne, August, 1893." II Brit. Med. J. 453 (1893).
- Benthin, W., "Ueber Kriminelle Fructabtreibung mit besonderer Berücksichtigung der Verhältnisse in Ostfreussen." 77 Geburtshülfe und Gynäkologie 572 (1915).
- Corwin, J., Herrick, W., Valentine, M. and Wilson, J., "Pregnancy and Heart Disease." 13 Am. J. Obst. & Gynec. 617 (1927).
- Beckman, M. and Kirch, A., "Tuberkulose und Schwangerschaft." 135 Archiv für Gynäkologie 438 (1928-1929).
- Serdukoff, "L'avortement Artificiel entant que Traumatisme Biologique et ses Suites." 17 Gynécologie et Obstétrique 196 (1928).
- Reid, W. D., "The Prognosis of Heart Disease in Pregnancy." 19 Am. J. Obst. & Gynec. 63 (1930).
- Cova, E., speech by, reported in "Foreign Letters." (Italy), 98 J.A.M.A. 1393-94 (1932).
- Mayer, A., "Über die russischen Erfahrungen mit der Legalisierung des Aborts." 56 Zentralblatt für Gynäkologie 2753 (1932).

- Gilchrist, A. R. and Murray-Lyon, R. M., "Does Pregnancy Hasten the Fatal Termination in Rheumatic Heart Disease?" 40 *Edinburgh Med. J.* 587 (1933).
- Watkins, R. E., "A Five-Year Study of Abortion." 26 *Am. J. Obst. & Gynec.* 161 (1933).
- Browne, F. J. and Dodds, G. H., "The Remote Prognosis of the Toxaemias of Pregnancy Based on a Follow-up Study of 400 Patients in 589 Pregnancies for Periods Varying From 6 Months to 12 Years." 46 *J. Obst. & Gynaec. Brit. Emp.* 443 (1939).
- Sievers, H., "Konzeption und Sterilität nach Abort." 63 *Zentralblatt für Gynäkologie* 1212 (1939).
- Simons, J. H., "Statistical Analysis of One Thousand Abortions." 37 *Am. J. Obst. & Gynec.* 840 (1939).
- Eastman, N. J., "Hazards of Pregnancy and Labor in 'Grande Multipara'." 40 *N.Y.J. Med.* 1708 (1940).
- Ernst, S., "Med. z. Fachbl. deutsch, serzte in Rumanien." 64 *Zentralblatt für Gynäkologie* 1936 (1940).
- Hertig, A. T. and Edmonds, H. W., "Genesis of Hydatidiform Mole." 30 *Archives of Pathology* 260 (1940).
- Witt, G. F. and Cheavens, T. H., "Psychiatric Contraindications to Surgery." 35 *Texas State J. Med.* 681 (1940).
- Gorenberg, H. and McGeary, J., "Rheumatic Heart Disease in Pregnancy." 41 *Am. J. Obst. & Gynec.* 44 (1941).
- Berle, B. B., "An Analysis of Abortion Deaths in the District of Columbia for the Years 1938, 1939, 1940." 43 *Am. J. Obst. & Gynec.* 820 (1942).
- Browne, F. J. and Dodds, G. H., "Pregnancy in the Patient with Chronic Hypertension." 49 *J. Obst. & Gynaec. Brit. Emp.* 1 (1942).
- Mariette, E. S., Larson, L. M. and Litzenberg, J. C., "Treatment of Tuberculous Women During Pregnancy." 203 *Am. J. Med. Sci.* 866 (1942).
- Gorenberg, H., "Rheumatic Heart Disease, A Controllable Complication of Pregnancy." 45 *Am. J. Obst. & Gynec.* 835 (1943).
- Cosgrove, S. A. and Carter, P. A., "A Consideration of Therapeutic Abortion." 48 *Am. J. Obst. & Gynec.* 299 (1944).
- Mendelson, C. L., "The Management of Delivery in Pregnancy Complicated by Serious Rheumatic Heart Disease." 48 *Am. J. Obst. & Gynec.* 329 (1944).
- Weilerstein, R. W., "Intrauterine Pastes." 125 *J.A.M.A.* 205 (1944).
- Albraugh, C. M., "Congenital Anomalies Following Maternal Rubella in Early Weeks of Pregnancy." 129 *J.A.M.A.* 719 (1945).
- Kuder, K. and Finn, W. F., "Therapeutic Interruption of Pregnancy." 49 *Am. J. Obst. & Gynec.* 762 (1945).
- Dannreuther, W. T., "Therapeutic Abortion in a General Hospital." 52 *Am. J. Obst. & Gynec.* 54 (1946).

- Feldman, F., Susselman, S., Lipetz, B. and Barrera, S., "Shock Treatment of Psychoses Associated with Pregnancy." 103 J. Nervous & Mental Disease 494 (1946).
- Jacobs, A., "Pulmonary Tuberculosis and Pregnancy." 53 J. Obst. & Gynaec. Brit. Emp. 368 (1946).
- Miller, N. F., "Hysterectomy: Therapeutic Necessity or Surgical Racket?" 51 Am. J. Obst. & Gynec. 804 (1946).
- Barone, Fino and Hetherington, "Pregnancy Complicating Tuberculosis." 54 Am. J. Obst. & Gynec. 475 (1947).
- Bieren, R. E. and Hundley, J. M., "Indications for Removal of Normal Uterus." 54 Am. J. Obst. & Gynec. 321 (1947).
- Chesley, L. C. and Annitto, J. E., "Pregnancy in the Patient with Hypertensive Disease." 53 Am. J. Obst. & Gynec. 372 (1947).
- Ebaugh, F. G. and Heuser, K. D., "Psychiatric Aspects of Therapeutic Abortion." 2 Postgrad. Med. 325 (1947).
- Hamilton, B. E., "Report from the Cardiac Clinic of the Boston Lying-in Hospital for the First Twenty-Five Years." 33 Am. Heart J. 663 (1947).
- Kulka, W., "Deaths Following Use of Abortifacient Paste." 17 Am. J. Clinical Pathology 723 (1947).
- Perlmutter, I. K., "Analysis of Therapeutic Abortions, Bellevue Hospital 1935-1945." 53 Am. J. Obst. & Gynec. 1008 (1947).
- Wesselhoeft, C., "Rubella (German Measles)." 236 New England J. Med. 943-50, 978-88 (1947).
- Harvey, S. C., "Indications for Therapeutic Abortion from the Point of View of the Surgeon." 137 J.A.M.A. 331 (1948).
- Korns, H. M., "Therapeutic Abortion from the Point of View of the Internist." 137 J.A.M.A. 333 (1948).
- Smith, O. W., "Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy." 56 Am. J. Obst. & Gynec. 821 (1948).
- Bowles, H. E. and Domzalski, C. A., "Changing Indications for Therapeutic Abortion in Pulmonary Tuberculosis." 9 Hawaiian Med. J. 17 (1949).
- Collins, C. G., Beacham, W. O. and Beacham, D. W., "Ectopic Pregnancy, Mortality and Morbidity Factors." 57 Am. J. Obst. & Gynec. 1144 (1949).
- Schaeffer, G., "Pregnancy and Tuberculosis." 58 Am. J. Obst. & Gynec. 503 (1949).

1950

- Arbuse, D. I. and Schechtman, J., "Neuropsychiatric Indications for Therapeutic Abortion." 1 Am. Practise & Digest of Treatment 1069 (1950).
- Studdiford, W. E., "The Common Medical Indications for Therapeutic Abortion." 26 N.Y. Acad. Med. Bull. 721 (1950).
- Tietze, C., "Therapeutic Abortions in New York City, 1943-47." 60 Am. J. Obst. & Gynec. 146 (1950).
- Tietze, C., Guttmacher, A. F. and Rubin, S., "Unintentional Abortion in 1497 Planned Pregnancies." 142 J.A.M.A. 1348 (1950).

1951

- Anderson, G. W., "The Racial Incidence & Mortality of Ectopic Pregnancy." 61 Am. J. Obst. & Gynec. 312 (1951).
- Burge, E. S., "The Relationship of Threatened Abortion to Fetal Abnormalities." 61 Am. J. Obst. & Gynec. 615 (1951).
- Cross, J. B., Lester, W. M. and McCain, J. R., "The Diagnosis and Management of Abdominal Pregnancy." 62 Am. J. Obst. & Gynec. 303 (1951).
- Fisher, R. S., "Criminal Abortion." 42 J. Crim. L., Criminology & Police Sci. 242 (1951).
- Hall, R. E. and Tillman, A. J. B., "Diabetes in Pregnancy." 61 Am. J. Obst. & Gynec. 1107 (1951).
- Kruger, A. L., Cosgrove, R. S. and Cosgrove, S. A., "Pregnancy and Tuberculosis." 78 Va. Med. Monthly 417 (1951).
- Logan, W. P., "Incidence of Congenital Malformations and Their Relation to Virus Infections During Pregnancy." 2 Brit. Med. J. 641 (1951).
- Mandy, T. E., Scher, E., Farkas, R. and Mandy, A. J., "The Psychic Aspects of Sterility and Abortion." 44 So. Med. J. 1054 (1951).
- Russell, K. P., "Therapeutic Abortion in a General Hospital." 62 Am. J. Obst. & Gynec. 434 (1951).
- Wilson, D. C. and Caine, B., "The Psychiatric Implications of Therapeutic Abortions." 3 Neuropsychiatry 22 (1951).

1952

- Auer, J., "Acute Myelogenous Leukemia In Pregnancy." 63 Am. J. Obst. & Gynec. 445 (1952).
- Bass, M. H., "Diseases of Pregnant Women Affecting Offspring." 5 Advances in Internal Med. 15 (1952).
- Doyle, J. C., "Unnecessary Hysterectomies." 151 J.A.M.A. 360 (1952).
- Heffernan, R. J. and Lynch, W. A., "Is Therapeutic Abortion Scientifically Justified?" 19 Linacre Q. 11 (1952).
- Mendelson, C. L., "Coronary Artery Disease In Pregnancy." 63 Am. J. Obst. & Gynec. 381 (1952).
- Moore, J. G. and Randall, J. H., "Trends in Therapeutic Abortion, A Review of 137 Cases." 63 Am. J. Obst. & Gynec. 28 (1952).
- Russell, K. P., "Therapeutic Abortions in California in 1950." 60 West J. Surg., Obst. & Gynec. 497 (1952).
- Schade, F. F. and Foley, M. P., "Pregnancy in Myasthenia Gravis." 63 Am. J. Obst. & Gynec. 1154 (1952).
- Schaefer, G. and Epstein, H. H., "Results Following Therapeutic Abortion in Pulmonary Tuberculosis." 63 Am. J. Obst. & Gynec. 129 (1952).
- "Lobectomy for Pulmonary Tuberculosis During Pregnancy." 64 Am. J. Obst. & Gynec. 188 (1952).
- Stewart, H. L., and Monto, R. W., "Hodgkin's Disease and Pregnancy." 63 Am. J. Obst. & Gynec. 570 (1952).

Wilson, D. C., "Psychiatric Implications in Abortion." 79 Va. Med. Monthly 448 (1952).

1953

Gorenberg, H. and Chesley, L. C., "Rheumatic Heart Disease in Pregnancy." 1 Obst. & Gynec. 15 (1953).

Heffernan, R. J. and Lynch, W. A., "What Is the Status of Therapeutic Abortion in Modern Obstetrics?" 66 Am. J. Obst. & Gynec. 335 (1953).

Krugman, S., Ward, R. and Lazar, J. A., "Studies on Rubella Immunization." 151 J.A.M.A. 285 (1953).

Leff, B., "A Thirty-Seven Year Survey of Ectopic Pregnancy." 65 Am. J. Obst. & Gynec. 1313 (1953).

MacRae, D. J., "Heart Disease in Pregnancy." 60 J. Obst. & Gynaec. Brit. Emp. 650 (1953).

Millar, W. G., "Pregnancy and Polycystic Disease of the Kidneys." 60 J. Obst. & Gynaec. Brit. Emp. 868 (1953).

Nelson, H. B., Gillespie, L. and White, P., "Pregnancy Complicated by Diabetes Mellitus." 1 Obst. & Gynec. 219 (1953).

Novak, E. and Seah, C. S., "Choriocarcinoma of Uterus." 64 Am. Ass'ns Obst. & Gynec. Transactions 235 (1953).

Rosen, H., "The Emotionally Sick Pregnant Patient: Hypnodiagnosis and Hypno-evaluation—Psychiatric Indications and Contraindications to the Interruption of Pregnancy." 1 J. Clinical & Experimental Hypnosis 8 (1953).

Russell, K. P., "Changing Indications for Therapeutic Abortion—Twenty Years' Experience at Los Angeles County Hospital." 151 J.A.M.A. 108 (1953).

Schaefer, G., Douglas, R. G. and Dreishpoon, I. H., "The Obstetric Management of the Tuberculosis Patient." 1 Obst. & Gynec. 245 (1953).

Sweeney, W. J., "Pregnancy and Multiple Sclerosis." 66 Am. J. Obst. & Gynec. 124 (1953).

Thornton, W. N., Jr., "Therapeutic Abortion—Responsibility of the Obstetrician." 2 Obst. & Gynec. 470 (1953).

1954

Arje, S. L. and Bachman, K. B., "Disseminated Lupus Erythematosus and Pregnancy; Report of a Case." 4 Obst. & Gynec. 524 (1954).

Bryan, W. M., Jr., "Myasthenia Gravis in Pregnancy and in Newborn Infant; Review of Literature and Case Report." 4 Obst. & Gynec. 339 (1954).

Connell, J. N., "An Analysis of 56 Deaths in 56,456 Live Births from Margaret Hague Maternity Hospital." 68 Am. J. Obst. & Gynec. 1053 (1954).

Fultz, G. S., "Therapeutic Abortions." 47 So. Med. J. 55 (1954).

Golpitto, R. V., "Trends in Therapeutic Abortion." 68 Am. J. Obst. & Gynec. 988 (1954).

- Gorenberg, H. and Chesley, L. C., "Rheumatic Heart Disease in Pregnancy: The Remote Prognosis in Patients with 'Functionally Severe' Disease." 68 *Am. J. Obst. & Gynec.* 1151 (1954).
- Guttmacher, A. F., "Therapeutic Abortion: The Doctor's Dilemma." 21 *J. Mt. Sinai Hosp.* 111 (1954).
- Hamilton, B. E., "Cardiovascular Problems in Pregnancy." 9 *Circulation* 922 (1954).
- Holman, E. J., "Medicolegal Aspects of Sterilization, Artificial Insemination, and Abortion." 154 *J.A.M.A.* 1309 (1954).
- Hultberg, S., "Pregnancy in Hodgkin's Disease." 41 *Acta Radiologica* 277 (1954).
- Krugman, S. and Ward, R., "Rubella Problem: Clinical Aspects, Risk of Fetal Abnormality, and Methods of Prevention." 44 *J. Pediat.* 489 (1954).
- Meyer, H., Nadler, S. B. and Bloch, T., "Acute Porphyria and Pregnancy." 3 *Obst. & Gynec.* 214 (1954).
- Schaefer, G., Douglas, R. G. and Dreishpoon, I. H., "Extrapulmonary Tuberculosis and Pregnancy." 67 *Am. J. Obst. & Gynec.* 605 (1954).
- Stephenson, H. A., "Therapeutic Abortion." 4 *Obst. & Gynec.* 578 (1954).
- Taylor, H. C., Tillman, A. J. B. and Blanchard, J., "Fetal Loss in Hypertension and Preeclampsia; Part I: An Analysis of 4432 Cases." 3 *Obst. & Gynec.* 225 (1954).
- Ullery, J. C., "Management of Pregnancy Complicated by Heart Disease." 67 *Am. J. Obst. & Gynec.* 834 (1954).

1955

- Abramson, J. and Tenney, B., "Medical Progress: Cardiac Disease in Pregnancy." 253 *New England J. Med.* 279 (1955).
- Copenhagen Letter on Legalized Abortions, 157 *J.A.M.A.* 1578 (1955).
- Donnelly, J. P., "Are There Medical Indications for Therapeutic Abortions?" 52 *J. Med. Soc. N.J.* 112 (1955).
- Gillim, D., "Leukemia and Pregnancy." 70 *Am. J. Obst. & Gynec.* 1047 (1955).
- Glover, R. P., McDowell, D. E., O'Neill, T. J. and Janton, O. H., "Mitral Commissurotomy in Relation to Pregnancy." 158 *J.A.M.A.* 895 (1955).
- Litzenberg, O. H., "Heart Disease in Pregnancy." 5 *Obst. & Gynec.* 410 (1955).
- Mendelson, C. L., "Supportive Care, Interruption of Pregnancy and Mitral Valvulotomy in the Management of Mitral Stenosis Complicating Pregnancy." 69 *Am. J. Obst. & Gynec.* 1233 (1955).
- Merrill, J. A., "Cortisone in Disseminated Lupus Erythematosus During Pregnancy." 6 *Obst. & Gynec.* 637 (1955).
- Turner, S. J., LeVine, L. and Rothman, A., "Lupus Erythematosus and Pregnancy." 70 *Am. J. Obst. & Gynec.* 102 (1955).

1956

- Cosgrove, S. A., "Therapeutic Abortion." 55 J. Mich. State Med. Soc. 795 (1956).
- Daro, A. F., Gollin, H. A., Nora, E. G., Jr. and Primiano, N. P., "Premature Separation of the Normally Implanted Placenta—A Review of 306 Cases." 72 Am. J. Obst. & Gynec. 599 (1956).
- Durst, J. B. and Krembs, M. A., "Porphyria and Pregnancy." 160 J.A.M.A. 165 (1956).
- Hertig, A. T. and Mansell, H., "Tumors of the Female Sex Organs—Part I Hydatidiform Mole and Choriocarcinoma." Armed Forces Institute of Pathology, Washington, D. C. (1956).
- Loth, M. F. and Hesseltine, H. C., "Therapeutic Abortion at the Chicago Lying-In Hospital." 72 Am. J. Obst. & Gynec. 304 (1956).
- Reich, A. M., "Placenta Previa. A Critical Appraisal Based on a Thirty-five-year Study at Bellevue Hospital (1919-1954)." 72 Am. J. Obst. & Gynec. 277 (1956).
- Sabin, M. and Ocorn, H., "Epilepsy and Pregnancy." 7 J. Obst. & Gynec. 175 (1956).

1957

- Greenberg, M., Pellitteria, O. and Barton, J., "Frequency of Defects in Infants Whose Mothers Had Rubella During Pregnancy." 165 J.A.M.A. 675 (1957).
- K'ang Yang Chu et al., "Rheumatic Heart Disease Complicating Pregnancy." (Peking Med. Coll. Hosp.), 5 Chinese J. Obst. & Gynec. 451 (1957).
- Kolstad, P., "Therapeutic Abortion—A clinical study based upon 968 cases from a Norwegian hospital, 1940-53." 36 Acta Obstet. & Gynecologica Scandinavia (Supp. 6, 1957).
- Lebedev, A. A., "On Vomiting in Pregnancy." (In Russian) Pirogov 2d Med. Inst., (Moscow) (1957).
- Nelson, A. and Hunter, J. S., Jr., "Therapeutic Abortion: A Ten-Year Experience." 9 Obst. & Gynec. 284 (1957).
- Pitt, D., "Congenital Malformations and Maternal Rubella." 1 Med. J. Austl. 233 (1957).
- Plentl, A. A. and Gray, M. J., "Physiology of the Amniotic Fluid and the Management of Hydramnios." Surgical Clinics of North Am. 405 (Apr. 1957).

1958

- Ács, M., Tóth, B. and Elek, E., "A Méhszáj-méhnyak tágitása hyaluronidaseval műri vetélések esetén." 21 Magyar Nőorvosok Lapja 173 (1958).
- Berthelsen, H. G. and Ostergaard, E., "Komplikationer Og Mortalitet Ved Legal Abortus Provocatus Baseret pa 23,666 Anmeldelser Til Sundhedsstyrelsen I Arene 1953 Til 1957." ("The Complications and Mortality in Therapeutic

- Abortion Based Upon 23,666 Reports to the Department of Public Health During the Years 1953-57.") 120 Ugeskrift for Laeger 1005 (1958); 12 Excerpta Medica (§ 10 Obst. & Gynec.) 104, No. 377 (1959).
- Bobrow, M. L. and Friedman, S., "Incomplete Abortions: A Twenty-five Year Review of Cases Seen at a Large Municipal Hospital." 95 Am. J. Surg. 938 (1958).
- Friedman, E. A. and Little, W. A., "Toxemia and Placenta Previa." 76 Am. J. Obst. & Gynec. 919 (1958).
- Gorenberg, H. and Chesley, L. C., "Rheumatic Heart Disease in Pregnancy: The Remote Prognosis in Patients With 'Functionally Severe' Disease." 49 Annals of Internal Med. 278 (1958).
- Guttmacher, A. F., speech by, American College of Surgeons Obst.—Gynec. Clinic, reported in Scope Weekly, Apr. 2, 1958, p. 9.
- Halevi, H. S. and Brzezinski, A. (Hadassah Hebrew Univ. Hosp., Jerusalem), "The Incidence of Abortion Among Jewish Women in Israel." 48 Am. J. Pub. Health 615 (1958); 12 Excerpta Medica (§ 10 Obst. & Gynec.) 150, No. 561 (1959).
- Hu Chih-Yuan and Ch'eng Feng-K'uei, "Tubal Pregnancy: Pathological Analysis of 300 Cases." 76 Chinese Med. J. 517 (1958); 12 Excerpta Medica (§ 10 Obst. & Gynec.) 105, No. 380 (1959).
- Kraatz, H., (Univ. Frauenklin. der Charite, Berlin) "Grundsatzliche Gedanken zur Frage der Schwangerschaftsunterbrechung" (survey of authorized abortions in Germany and Russia). 13 Deutsche Gesundheitswesen 138 (1958).
- Krugman, S. and Ward, R., "Demonstration of Neutralizing Antibody in Gamma Globulin and Re-evaluation of the Rubella Problem." 259 New England J. Med. 16 (1958).
- Lamy, M. and Seror, M. (Clin. de Genet. Med., Paris) "Résultats d'une enquête sur les embryopathies d'origine rubéolique." ("Results of An Inquiry on Rubellar Embryopathies.") 13 Pédiatrie 348 (1958); 12 Excerpta Medica (§ 10 Obst. & Gynec.) 148, No. 552 (1959).
- Levine, A. S., "The Problem of Psychiatric Disturbances in Relation to Therapeutic Abortion." 6 J. of The Albert Einstein Med. Center 73 (1958).
- Mills, J. H., "A Medicolegal Analysis of Abortion Statutes," 31 So. Cal. L. Rev. 181 (1958).
- Nielsen, P. B., Wilhjelm, A. and Wilhjelm, B. J., "Abortus provocatus med cremor saponis sterilisatus." ("Therapeutic Abortion by Means of Sterile Cremor Saponis.") 120 Ugeskrift for Laeger 1009 (1958); 12 Excerpta Medica (§ 10 Obst. & Gynec.) 104, No. 378 (1959).
- Novell, H. A. and DeHaan, Q. C. (Univ. of Miami), "Toxemia of Pregnancy—Treatment With Hypotensive Drugs & Relationship to Anaphylaxis." 12 Obst. & Gynec. 154 (1958).
- Parlee, S. S., "Radiation Hazards in Obstetrics and Gynecology." 75 Am. J. Obst. & Gynec. 327 (1958).

- Potter, E. L. (Dep't of Obst. & Gynec., Univ. of Chi. & Chi. Lying-in Hosp.), "Outlook for Future Pregnancies in Woman Immunized to Rh." 75 Am. J. Obst. & Gynec. 348 (1958).
- Rusz, S., "Sclerosis Multiplex es Terhesseg." 11 Ideggy-Ögyāsati Szemle 35 (Budapest 1958).
- Scherman, Q., "Therapeutic Abortion." 11 Obst. & Gynec. 323 (1958).
- Smith, R. B. W., Sheehy, T. W. and Rothberg, H., "Hodgkins Disease and Pregnancy." 102 A.M.A. Archives of Internal Med. 777 (Nov. 1958).
- Salonovich, L. G., "Indications and Contra-Indications for Termination of Pregnancy in Epidemic Hepatitis (Botkin's Disease)." (In Russian) 22 Sov. Med. 123 (1958); 12 Excerpta Medica (§ 10 Obst. & Gynec.) 148, No. 553 (1959).
- Taylor, W. J., Black, H., Thrower, W. B. and Harken, D. E., "Valvuloplasty for Mitral Stenosis During Pregnancy." 166 J.A.M.A. 1013 (1958).
- VanDemark, N. L., "Spermatozoa in Female Genital Tract." 3 Int'l J. of Fertility (Mexico) 220 (1958); 12 Excerpta Medica (§ 10 Obst. & Gynec.) 122, No. 442 (1959).

1959

- Berthelsen, H. G. and Ostergaard, E., "Techniques and Complications in Therapeutic Abortion (1953-57)." 6 Danish Med. Bull. 105 (1959).
- "Lethality and Incidence of Complications in Therapeutic Abortion in Denmark, 1953-1957." 6 Danish Med. Bull. 110 (1959).
- Bertocchi, F. and Rossetti, O. (Osp. Degli Infermi, Riella), "Terapia conservatrice tubarica nella gravidanza extrauterina." 14 Quaderni Di Clinica Ostetrica E Ginecologica 759 (1959).
- Brey, J., "Bemerkenswerten aus einer Abortstatistik." (Med. Akad. Carl Gustav Carus, Dresden.) 14 Deutsche Gesundheitwesen 1608 (1959).
- Buxton, C. W., "Management of Patients with Hydatidiform Mole." 80 Ann. N.Y. Acad. Sci. 121 (1959).
- de Rom, F. and Petit, M., "La Mortalite maternellé gravido-puérperale dans les pays de Benelux." 11 Federation des Societes de Gynecologie et d'Obstetrique de Langue Française Bull. 157 (Supp. 1959).
- Flint, J. S., "Leukemia and Pregnancy." 56 Rocky Mt. Med. J. 59 (Aug. 1959).
- Gomberg, B., "Spontaneous Subarachnoid Hemorrhage in Pregnancy Not Complicated by Toxemia." 77 Am. J. Obst. & Gynec. 430 (1959).
- Guttmacher, A. F., "The Influence of Fertility Control Upon Psychiatric Illness." 115 Am. J. Psychiatry 683 (1959).
- Hopf-Van der Elst, H., "L'interruption legale de grossesse" (Polyclinique Psychiatrique Universitaire, Lausanne). 4 Zeitschrift fur Praventivmedizin 131 (1959).

- Kalkschmid, W., "Beitrag zur hypotensiv-edativen Therapie der Eklampie" (U. Frauenklin., Innsbruck). 71 Wiener Klinische Wochenschrift 592 (1959).
- Llanos, A. L. and Martinex-Villaverde, J. R., "Diabetes Insipida con Atonia Uterina" (9 yr. study of single case). 14 Bol. Inst. Pat. Med. 50 (Madrid, 1959).
- Oxborn, H., "Rubella and Pregnancy (47 cases)." 77 Am. J. Obst. & Gynec. 628 (1959).
- Packer, H. L. and Gampell, R. J., "Therapeutic Abortion: A Problem in Law and Medicine." 11 Stan. L. Rev. 417 (1959).
- Peretz, A., Paldi, E., Brandstaedter, S. and Batzilai, D., "Infectious Hepatitis in Pregnancy." 14 Obst. & Gynec. 435 (1959).
- Potter, E. L., "The Abortion Problem." 19 GP 105 (1959).
- Semmens, J. P., "Placenta Praevia: The Role of Conservative Management in a Controlled Study." 77 Am. J. Obst. & Gynec. 63 (1959).
- Siegel, M. and Greenberg, M., "Virus Diseases in Pregnancy and Their Effects on the Fetus." 77 Am. J. Obst. & Gynec. 620 (1959).
- Soichet, S., "Emotional Factors in Toxemia of Pregnancy (112 in Harlem Hosp.)." 77 Am. J. Obst. & Gynec. 1065 (1959).
- Taylor, T. R., "A Lawyer Reviews Plan for Legalized Abortion." 26 Linacre Q. 137 (1959).
- Vaglio, N. and Pezzani, M. (U. Naples), "Feocromocitoma in gravidanza." 64 Archivio Di Obstetricia E Ginecologia 337 (1959).

1960

- Chien-Tien Hsu, Ying-Mo Ma and T'ai-Te Wang, "Studies on Abruptio Placentae." 80 Am. J. Obst. & Gynec. 263 (1960).
- Foote, W. R. and Fraser, W. D., "Placenta Privio." 80 Am. J. Obst. & Gynec. 10 (1960).
- Garnet, J. D., "Pregnancy Complicated by Diabetes." 79 Am. J. Obst. & Gynec. 140 (1960).
- Hendelman, M. and Fraser, W. D., "A Clinical Analysis of Abruptio Placentae." 80 Am. J. Obst. & Gynec. 17 (1960).
- Reilly, C. T., "The Maternal-Fetal Barrier." 80 Am. J. Obst. & Gynec. 391 (1960).
- Rosenblum, J. M., Dowling, R. W. and Barnes, A. C., "Treatment of Tubal Pregnancy." 80 Am. J. Obst. & Gynec. 274 (1960).
- Škulj, V., "Significance of Tubal Pregnancy in the Reproductive Life of Women." 80 Am. J. Obst. & Gynec. 278 (1960).
- Wall, L. A., "Abortions: Ten Years' Experience at Kansas University Medical Center." 79 Am. J. Obst. & Gynec. 510 (1960).

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JUSTIFIABLE ABORTION—MEDICAL AND LEGAL FOUNDATIONS*

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Protecting the life of the unborn child has been a major concern of the earliest laws known to us. It has continued to be an object of law-making in every subsequent civilization which has contributed to our own because it springs from a universal feeling which in the past has ceased to move men only when a nation was in decay. These are beliefs we have noted in an earlier writing, but their foundation lies in a fuller appraisal of those sections of the Model Penal Code which first prompted expression.

For the sake of clarity, the section with which we are chiefly concerned and which, in 1959, has received tentative approval by the American Law Institute is set out here:

Section 207.11. Abortion and Related Offenses.

(1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.

(2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if:

- (a) he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or the pregnancy resulted from rape by force or its equivalent as defined in Section 207.4(1) or from incest as defined in Section 207.3; and
- (b) two physicians, one of whom may be the person performing the abortion, have certified in writing their belief in the justifying circumstances, and

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have filed such certificate prior to the abortion in the licensed hospital where it was to be performed, or in such other place as may be designated by law.

Justification of abortion is an affirmative defense.¹

Our objections to the language of the proposed revision have been already noted, and we have seen that medical opinion is ever more skeptical, more critical of the therapy of abortion and embryotomy. But it is necessary not merely to analyze the section and to study the medical testimony bearing on it, but also to trace from its earliest conceptions the history of legislation in the area of abortion, to consider the status of abortion as a common-law crime, and to look at the biological concepts which gave it definite form in the common law as well as the Aristotelian philosophy and Christian moral concepts which inspired them. So that we may determine whether the proponents of the new law are correct in saying that the only opposition to induced abortion is that of dogmatic religion and a population minority,² we shall turn to the laws and common thought of peoples who have gone before us for evidence of a Natural Law against abortion.

To make such a review possible, it has been necessary to bring together in their present form the existing abortion laws of all the States, and the text of the initial legislation in each.³

Prior to such review, however, the two "indications" of rape and incest, as proposed grounds for broadening statutory authority to perform abortion, remain for consideration.

Neither rape nor incest is a medical indication for induced abortion. Rape could be only a social ground for abortion; incest, social and eugenic. Yet the invocation of these grounds for abortion would be made the responsibility of doctors of medicine, not doctors in the economic or social sciences or genetics. The danger to medical practitioners in giving them authority to make this decision, and thereby responsibility for making it, is obvious and serious. The medical man dealing with a pregnancy allegedly due to rape or incest would face not only the peril of prosecution if he performed the operation but also the danger of an action for heavy damages whether he decided for or against it.

¹ Model Penal Code § 207.11(1), (2) (Tent. Draft No. 9, 1959).

² Model Penal Code § 207.11, comment (Tent. Draft No. 9, 1959).

³ It is suggested that the Appendices be read as part of the text.

Appendix I: Statutory Materials in the Area of Abortion—The United States and Its Territories, at page 447.

Appendix II: *R. v. Bourne*, [1938] 3 All E.R. 615 (K.B.), at page 521.

Rape and incest are both crimes, variously defined and punished, but invariably felonies. To "justify" an induced abortion under this clause of section 207.11 it would be necessary to establish one's bona fide belief in the occurrence of one or the other felony *as defined*,⁴ and not merely some conduct of generally similar character.

The only "statutory rape" which could by any possibility produce a pregnancy (age between 10 and 15 years) is declared only a third degree felony under section 207.4(2);⁵ and section 207.11 would have no application to a pregnancy resulting from any offenses against 207.4(2). Section 207.11(2)(a) relates to pregnancies resulting from rape by direct force or its close equivalent, as defined in section 207.4(1). But the fetus to be destroyed must be the direct physiological result of the rape or the incestuous connection. Proof of the crime and of the presence of fetal life would not be conclusive of the right to invoke this justification. Such life might have been brought into being by some normal and voluntary coition shortly before or after the rape or incest; and if such coition were found it would be a more likely source of the new life. Voluntary unlawful intercourse with another man a day or an hour before would not alter the criminal character of the rape, but it would make difficult the attribution to the rape of any pregnancy that followed.

It is well known that many an errant female if caught will call herself

⁴ Model Penal Code § 207.4(1) (Tent. Draft No. 4, 1955):

(1) Rape by Force or Its Equivalent. A male who has carnal knowledge of a female not his wife commits a felony of the second degree if:

(a) He compels her to submit by force or violence, or out of fear that death or serious physical injury or extreme pain is about to be inflicted on her or a member of her family, or by threat to commit any felony of the first degree; or

(b) For the purpose of preventing resistance he administers to her or employs, without her knowledge or consent, drugs, intoxicants, or other substance or force resulting in a major deficiency of the victim's power to appraise or control behavior; or

(c) The female is unconscious or physically powerless to resist; or

(d) The female is less than 10 years old (whether or not the actor is aware of that).

An offense within this subsection shall constitute a felony of the first degree if the actor inflicts serious physical injury upon the victim, or if the victim is not a voluntary social companion of the actor and has not previously permitted him sexual liberties.

⁵ Model Penal Code § 207.4(2) (Tent. Draft No. 4, 1955):

(2) Intercourse Without Legally Effective Consent. A male who has carnal knowledge of a female not his wife, in situations not covered by subsection (1), commits a felony of the third degree if:

...

(d) The female is less than 16 years old and the actor is at least 5 [?] years older than she is; but it shall be a defense under this paragraph if the actor proves that the girl was a prostitute.
(Brackets as in original.)

a rape victim. It is equally well known that many false charges of rape are made, some defensive in motive, others aggressive. The woman's instinct to escape blame by alleging that she was raped was recognized by the Hittites 3,500 years ago.

If a man seizes the woman in the mountains, it is the man's crime and he will be killed. But if he seizes her in (her) house, it is the woman's crime and the woman shall be killed. If the husband finds them, he may kill them, there shall be no punishment for him.⁶

Incestuous relations are revealed most commonly in rural areas, most often with a girl as victim and an older relative, or even parent, as aggressor. The type of girl who could be a consenting victim in such a relationship could also be an untrustworthy witness capable of detailed description of an imagined relationship.

Over a century ago an English writer on forensic medicine prudently remarked: "We must not suppose, as it appears to be commonly done, that medical proof of intercourse is tantamount to proof of rape." He described the quick disappearance of the physical evidence of rape, and the women as prosecution witnesses.⁸

Dr. Taylor's comments are in accord with the earlier expressions of the American writer, Dr. Theodric R. Beck who declared it almost impossible to prove rape of a married woman by physical examination: "Marks of external injury are hence to be considered as *corroborating*, but not as *certain* proofs of the commission of a rape."⁹ A writer on forensic medicine at the turn of the century declared: "Formerly, a woman's testimony was sufficient to convict, but partly due to the number of cases of false accusation, corroboration of the woman's testimony is sought for."¹⁰ And a more recent work again reminds us that all physical evidence of rape may disappear in a few days.¹¹

If a woman tells a doctor that she was raped two weeks ago and is only now overcoming her shame sufficiently to tell of it, the doctor has little to go on but his confidence or lack of confidence in her truthfulness. If he is one—and there will always be some—whose only moral code is

⁶ Götze transl., *The Hittite Laws*, in *Ancient Near Eastern Texts* 196 (2d ed. Pritchard ed. 1955).

⁷ Taylor, *Manual of Medical Jurisprudence* 578 (1844).

⁸ *Id.* at 579-80.

⁹ Beck, *Elements of Medical Jurisprudence* 55-56 (1823).

¹⁰ Emerson, *Legal Medicine and Toxicology* 115 (1909).

¹¹ Gonzales, *Legal Medicine* 606-07 (1954).

to weigh the fee against the risk to himself, the American Law Institute proposal would seem to provide him a perfect out.

Actually there seems to be little likelihood of any pregnancy resulting from a rape by force or from any intercourse in which the woman's consent was *wholly* refused throughout. On the other hand it would be difficult to give the name of abortion to the hygienic measures which would be taken practically anywhere in the United States promptly on the reporting of a rape, because at that stage there would be no new life to abort. Embryology today is making a very important distinction between "moment of conception" and moment of coition or emission. The time required for impregnation seems to vary with individual characteristics not yet identified, and has been reported as long as eighty hours.¹²

We have referred to the Laws of the Hittites. They constitute a very early code, but not the earliest known.

Ancient inscriptions contain references to the laws of Urukagina, King of Lagash at some time during the third millenium B.C., but no part of the text has so far been found.¹³

Ur-Nammu is now well known as the founder of the third dynasty of Ur. A code of laws was promulgated by him not later than 2050 B.C. A tablet found in two pieces was deciphered and translated by Kramer in 1952,¹⁴ but it contains only a part, and only five irrelevant sections could be deciphered.

No complete text of the laws of King Bilalama of Eshnunna, who reigned about a century later, has been found.¹⁵

Lipit-Ishtar was King of Isin about 1900 B.C. About half of his code was deciphered and translated by Steele and Kramer in 1947,¹⁶ from seven tablets excavated much earlier. They contain all of the long prologue and epilogue and thirty-seven sections, or fragments of sections, of the laws themselves. They contain nothing relevant, but apparently a greater number are lost.

The earliest abortion laws then of which we can speak with any certainty are still those of Hammurabi, Babylonian King of Sumer and Akkad from 1728 B.C. This code was promulgated in the first year of his

¹² Van Demark, Spermatozoa in Female Genital Tract, 3 Int'l J. of Fertility 220, 225 (1958), synopsized in 12 Excerpta Medica (§ 10 Obst. & Gynec.) No. 442 (1959).

¹³ Kramer, History Begins at Sumer 50 (1959).

¹⁴ Id. at 52-53.

¹⁵ Id. at 52.

¹⁶ Steele, The Code of Lipit-Ishtar, 52 A.J.A. 425 (1948).

reign, so that it seems more than probable that it is a compilation of much older laws. It contains the following:

209: If a seignior struck a(nother) seignior's daughter and has caused her to have a miscarriage, he shall pay ten shekels of silver for her fetus.

210: If that woman has died, they shall put his daughter to death.

211: If by a blow he has caused a commoner's daughter to have a miscarriage, he shall pay five shekels of silver.

212: If that woman has died, he shall pay one-half mina of silver.

213: If he struck a seignior's female slave and has caused her to have a miscarriage, he shall pay two shekels of silver.

214: If that female slave has died, he shall pay one-third mina of silver.¹⁷

The Babylonians and Assyrians were kindred peoples, both Semitic, and the descendants of Hammurabi intermarried with the Assyrian royalty. There was an unbroken tradition which carried over when the rule of the Near East passed from the South to the North. The laws accumulated from the fifteenth to the twelfth centuries B.C. were codified under the Assyrian King Tiglath-pileser I, in the twelfth century. They are recorded on many broken tablets found at Ashur about fifty years ago. They are similar to, but in general more severe than, those of the Sumerians and Babylonians:

21: If a seignior struck a(nother) seignior's daughter and has caused her to have a miscarriage, when they have prosecuted him (and) convicted him, he shall pay two talents thirty minas of lead; they shall flog him fifty (times) with staves (and) he shall do the work of the king for one full month.

. . . .

50: [If a seignior] struck a(nother) seignior's [wife] and caused her to have [a miscarriage], they shall treat [the wife of the seignior], who caused (the other) seignior's wife to [have a miscarriage], as he treated her [I]f that woman died, they shall put the seignior to death; he shall compensate for her fetus with a life. But, when that woman's husband has no son, if some one struck her so that she had a miscarriage, they shall put the striker to death; even if her fetus is a girl, he shall compensate with a life.

51: If a seignior struck a(nother) seignior's wife who does not rear her children and caused her to have a miscarriage, this punishment (shall hold): he shall pay two talents of lead.

¹⁷ Meek transl., *The Code of Hammurabi*, in Pritchard, op. cit. supra note 6, at 175. "Seignior" is an arbitrary term used by the translator to indicate either a noble or a gentleman.

52: If a seignior struck a harlot and caused her to have a miscarriage, they shall inflict blow for blow upon him; he shall compensate with a life.

53: If a woman has had a miscarriage by her own act, when they have prosecuted her (and) convicted her, they shall impale her on stakes without burying her. If she died in having the miscarriage, they shall impale her on stakes without burying her. If someone hid that woman when she had the miscarriage [without] informing [the king]. . . .¹⁸

The Hittites were of a different culture, long in contact with Babylonians and Assyrians, but as hostile invaders. Their sexual morality was notoriously low, and some of the perversions which their laws describe as not subject to punishment are startling even today. Two of an original set of three tablets were recovered at about the same time as the above Assyrian laws, and contain some two hundred laws or sections. Among them are the following:

17: If anyone causes a free woman to miscarry—if (it is) the 10th month, he shall give 10 shekels of silver, if it is the 5th month, he shall give 5 shekels of silver and pledge his estate as security.

Later version of 17: If anyone causes a free woman to miscarry, he shall give 20 shekels of silver.

18: If anyone causes a slave-woman to miscarry, if (it is) the 10th month, he shall give 5 shekels of silver.

Later version of 18: If anyone causes a slave-girl to miscarry, he shall give 10 shekels of silver.¹⁹

Archeologists have not discovered any codes of law attributable to the ancient Egyptians. This indicates either that perishable materials such as papyrus or leather were used to record them, or that having no such codes the Egyptians were guided by a topical justice originating in the word of the god-king.²⁰

The feeling of the ancient Egyptian would seem to be quite adequately expressed in the fourteenth century B.C. hymn attributed to the pharaoh Amenhotep IV:

CREATION OF MAN

[Ikhnaton's Hymn to Sun-god Aton]

Creator of the germ in woman,
 Maker of seed in man,
 Giving life to the son in the body of his mother,
 Soothing him that he may not weep,

¹⁸ Meek transl., *The Middle Assyrian Laws*, in Pritchard, id. at 181, 184-85.

¹⁹ Götze transl., *The Hittite Laws*, in Pritchard, id. at 190.

²⁰ Wilson, *Egyptian Documents*, in Pritchard, id. at 212.

Nurse (even) in the womb,
 Giver of breath to animate every one that he maketh!
 When he cometh forth from the womb ... on the day of his birth²¹

Dr. Joseph Needham comments: "At this early period there is no trace of the notions which appear later, such as the idea that embryos are not alive until the time of birth or hatching, or the idea that the soul is breathed into the embryo at some particular point in development."²²

The Jews, in their trek from Egypt, were given one relevant law:

If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine.

And if *any* mischief follow, then thou shalt give life for life²³

Among the Jews, as in the Babylonian Empire of Hammurabi, it seems reasonably certain that there was no thought of any voluntary destruction of an unborn child at the wish of either parent, or both, and no need of penalties to prevent it. "The omission is one indication, among many, of the intense regard felt by the Jewish people for parenthood and the future of their race."²⁴

"EMBRYO: The young of a mammal while still connected with the body of its mother. . . . [Ancient Halakah, followed by Samaritans and Karaites, held it a separate being; the New Halakah, *i.e.*, Pharisees and Rabbinites, held it to be only a part of the mother.] The point would also concern the criminal law, as in the case of a man causing the death of the embryo by injuring its mother. According to the old Halakah he would be considered as a murderer; according to the new he would only be treated as a man injuring a limb. . . . With regard to civil questions it is considered as a living child in some cases, but not in all."²⁵

Nor was voluntary destruction of an unborn child included in the long recital of the vices of the Jews' Canaanite neighbors. It is only when the Assyrians have reached the heights of power and plumbed the depths of vice that we find any lawmakers recognizing a need to deal with this practice; and when they did they were merciless in their treatment of the mother who sacrificed her own unborn. The Hittite laws dealt with

²¹ Breasted, Ikhnoton, *The Religious Revolution*, in 2 *The Cambridge Ancient History* 118 (Bury, Cook and Adcock eds. 1924).

²² Needham, *History of Embryology* 9 (1st ed. 1934).

²³ Exodus 21:22-23 (King James).

²⁴ 6 Hastings, *Encyclopædia of Religion and Ethics* 55 (1913).

²⁵ 5 *The Jewish Encyclopedia* 148 (3d ed. 1925). (Hebrew characters omitted.)

many sexual deviations, condoning some; but the prohibition against causing an abortion applied to "anyone," and was not limited to any particular means or occasion. In considering the Hittite fine, it may be borne in mind that one shekel of silver was the statutory price of an ox hide or of twenty lamb or kid skins.²⁶

While our traditional culture derives so largely from the Near East, our racial origins and the base of our European languages seem to trace back to the Aryan people now associated with India. We have nothing on the laws or institutions of the great Dravidian civilization nor on the succession of invasion waves which securely planted the Aryans in the north between 2500 and 1500 B.C. Over the centuries Indian writers seem to have written about everything except history, but the early classics have been remarkably well preserved. Fixing their time of origin is naturally difficult. In the later Vedas the condemnation of abortion, meaning always the destruction of the unborn child by or with the consent of the mother, is most emphatic, making it in fact the unforgivable sin:

1. On *Trita* the gods wiped off this sin, *Trita* wiped it off on human beings; hence if *Grâhi* (attack of disease) has seized thee, may these gods remove her by means of their charm!

2. Enter into the rays, into smoke, O sin; go into the vapours, and into the fog! Lose thyself on the foam of the river! Wipe off, O *Pushan*, the misdeeds upon him that practiseth abortion!²⁷

"At *Maitr. S. IV, 1, 9*, it is stated that the gods did not find a person upon whom they might be able to wipe off from themselves the bloody part of the sacrifice, i.e. their guilt. *Agni* spat upon the waters, and successively three personages, *Ekata*, *Dvita*, and *Trita*, were born. The gods wiped off their guilt upon them; they in turn wiped themselves upon one who was overtaken by the rising sun, i.e. one over whom the sun had risen while he was asleep; this one wiped himself upon one who was overtaken by the setting sun; . . . he upon one that had married a younger sister, before the older was married; he upon one whose younger brother had married before himself; he upon one who had married before his older brother; he upon one who had slain a man; he upon one who had committed an abortion. 'Beyond him who has committed an abortion the sin does not pass.'²⁸

²⁶ Götze transl., *The Hittite Laws, in Ancient Near Eastern Texts* 196 (2d ed. Pritchard ed. 1955).

²⁷ Bloomfield transl., *Hymns of the Atharva-Veda*, in 42 *The Sacred Books of the East* 165 (Müller ed. 1897).

²⁸ Commentary on VI, 112, id. at 521.

"It seems that this is too narrow, and that the hymns were constructed to cover all the crimes in the catalogues connected with the legend of Trita, as mentioned above. This at least is in Kesava's mind Further, the text of both hymns (VI, 112, 3; 113, 2) states distinctly that the sins in question shall be wiped off upon the abortionist, the *bhrûnahân*, whose crime figures as a most shocking one at the end of the lists. This indicates that the entire list of sins is in the mind of the poet, even though he intends to direct his charm against some special part of them."²⁹

7. Now (follows the enumeration of) the actions which cause loss of caste (Pataniya).

8. (These are) stealing (gold), crimes whereby one becomes an Abhisasta, homicide, neglect of the Vedas, *causing abortion*, incestuous connexion with relations born from the same womb as one's mother or father, and with the offspring of such persons, drinking spirituous liquor, and intercourse with persons the intercourse with whom is forbidden.³⁰

1. (Now follows the description of the) penances.

2. He who has (intentionally) slain a Brâhmana shall emaciate himself, and thrice throw himself into a fire,

3. Or he may become in battle a target for armed men,

4. Or, remaining chaste, he may, during twelve years, enter the village (only) for the purpose of begging, carrying the foot of a bedstead and a skull in his hand and proclaiming his deed.

5. If he meets an Ârya, he shall step out of the road.

6. Standing by day, sitting at night, and bathing in the morning, at noon, and in the evening, he may be purified (after twelve years),

. . . .

13. Also for (destroying) the embryo of a Brâhmana, though (its sex) may be not distinguishable.³¹

Buddha taught in northern India in the sixth century B.C. The mass of writings by his followers can hardly have had any influence on our own institutions or thought. In the Vinayas all killing is condemned, including abortion.³²

The so-called Code of Manu, dated in its present form from about A.D.

²⁹ Id. at 524.

³⁰ Bühler transl., Sacred Laws of the Âryas, in 2 The Sacred Books of the East ⁷³ (Müller ed. 1879). (Emphasis added.)

³¹ Id. at 280-81.

³² Davids and Oldenberg transl., Vinaya Texts, in 13 The Sacred Books of the East ²³⁵ (Müller ed. 1881).

100 but going back several centuries before that, repeats the ban on abortion:

89. Libations of water shall not be offered . . .

90. To women who have joined a heretical sect, who through lust live (with many men), who have caused an abortion, have killed their husbands, or drink spiritous liquor.³³

One noble figure stands out among that other great Aryan people, the Iranians. There is no question as to his historicity, although his life is variously placed from 1000 to 700 B.C. His teaching was preserved by followers disposed to elevate rather than to debase it. It dominated Persian government when the new empire was extending over the Near East and Middle East, and Darius the Great was at pains to describe himself in his inscriptions as a Zoroastrian.

The Vendîdâd, most important unit of the Avesta, discourses on abortion:

11 (36). 'If a man come near unto a damsel, either dependent on the chief of the family or not dependent, either delivered unto a husband or not delivered, and she conceives by him, let her not, from dread of the people, destroy the fruit in her womb.

12 (38). 'And if the damsel, from dread of the people, shall destroy the fruit in her womb, the sin is on both the father and herself, the murder is on both the father and herself; both the father and herself shall pay the penalty for wilful murder.

13 (40). 'If a man come near unto a damsel, either dependent on the chief of the family or not dependent, either delivered unto a husband or not delivered, and she conceives by him, and she says, "I have conceived by thee;" and he replies, "Go then to the old woman and apply to her that she may procure thee miscarriage;"

14 (43). 'And the damsel goes to the old woman and applies to her that she may procure her miscarriage; and the old woman brings her some Banga, or Shaêta, or Ghnâna, or Fraspâta, or some other of the drugs that produce miscarriage and [the man says], "Cause thy fruit to perish!" and she causes her fruit to perish; the sin is on the head of all three, the man, the damsel, and the old woman.³⁴

29. 'That man does not follow the way of the Law, O Zarathustra!

³³ Bühler transl., *The Laws of Manu*, in 25 *The Sacred Books of the East* 184 (Müller ed. 1886).

³⁴ Darmesteter transl., *The Zend-Avesta*, Part I, in 4 *The Sacred Books of the East* 174-75 (Müller ed. 1880). (Footnotes omitted.)

who commits the Bâodhō-(varsta) crime [wilful murder] with a damsel and an old woman,' said Zarathustra to the young king Vîstâspa.³⁵

The offenses punished by Hammurabi are malicious or reckless attacks or injury, of which miscarriage is an accidental result, not a thing planned. The later Assyrians met with real induced abortions, and these they forbade under heaviest penalties.

Infanticide, by exposure and the like, and induced abortion are in general alternative, the former being used until a people has developed enough medical and surgical skill to effect an abortion with some hope of survival by the mother.

"Destruction of the human embryo has not among any people become a social habit, as general infanticide has done among some modern primitive communities and among the ancient Greek and Italians. Throughout history its prevalence has been sporadic. . . . Whatever be the reason operating to induce the destruction of a new life, the crime, as already noted, has nowhere and at no time been a social habit. . . . A broad line, lastly, can be drawn between barbarian, classical and Oriental ethics on the one hand and Christian on the other, with regard to the value attached to the unborn life and the rights of the individual over it."³⁶

Discussion of abortion in ancient Greece is usually directed to the city-states of Sparta and Athens.

Sparta from legendary times offered the working model of the wholly integrated communistic state, whose people had no recognition as human beings but only as instruments of a government operating at that early date behind an iron curtain, and all natural affection was banned as weakness. Whether these people had any morality is a matter of definition; certainly the great mass conformed to the single norm for all conduct—what is desired by the state, as represented by the hereditary minority who had come to have the sole right to govern.

In such a state, with a minimum standard of living, laborers working with a minimum of tools, and a powerful army at all times required, it was natural enough that every infant should be closely examined as a potential asset of the state before the cost of rearing the child might be undertaken. Abortion they did not know, and they would not have permitted it if known because they were unwilling to lose any physically

³⁵ Darmesteter transl., *The Zend-Avesta*, Part II, in 23 *The Sacred Books of the East* 335 (Müller ed. 1883). (Footnotes omitted.)

³⁶ 6 Hastings, *op. cit.* supra note 24, at 54-55.

perfect male child, and they had no way of recognizing such a child in the womb.³⁷

After Sparta had ceased to be a power Aristotle advocated the practice of abortion by the Spartans. He would have limited it however to the early period of gestation when, he believed, there was as yet no human life in the fetus.³⁸

Athens was the antithesis of Sparta; it finally established the ultimate in democracy—for a few thousand citizens, ruling many thousand slaves and outsiders. For centuries its only wealth was intellectual. A rather logical system of laws dealing with crimes worked well for a long time. As in the beginnings of most nations, crimes seen as injuring only the individual were treated essentially as torts, and this continued throughout its full political development. Civil actions were begun by oral complaint (*dikai*), and public authority was satisfied when compensation or damages had been paid. Even murder was so treated.

There were a few offenses, presumably those representing the greatest interference with normal Athenian life, which were prosecuted in the Areopagus or a predecessor court by individuals in the name of the state, on written charges which served as indictments (*graphai*). Economic injuries to the family were so treated, though those affecting only the marital relationship were not, unless adultery could be so regarded. Otherwise there are just four crimes other than political for which criminal prosecution could be had: contumely (*hubris*), whether by action causing loss of face or by slander; certain aggravated thefts (*klopē*, when done in a bath house or a public place); adultery (*moicheia*); and procuration (*proagōgeia*). Among the political offenses, all of which were harshly treated, was the presentment of a *graphe* which could not be sustained by proof, which naturally restricted the use of criminal process for the foregoing offenses.

"During the five hundred years after the founding of the Athenian state there seems to have existed an expanding 'frontier' economy, based in part upon the exploitation of internal resources, made possible by technological improvement and the institution of slavery, and in greater part upon the conquest of other peoples and the incorporation of their wealth into the domestic economy. One might well adduce as indications of inner-direction during this period the changing attitudes toward the family and the upbringing of children; the laws which enhanced the free-

³⁷ Aristotle, *The Politics*, II, ix; Plato, *The Republic*, v, 461c; Plutarch, *Lives*, *Lycurgus*, XVI.

³⁸ Aristotle, *The Politics*, II, ix.

dom of the individual, for example, the significant reforms which permitted the free alienation of property and the initiation of a criminal prosecution by a 'third party'; the multiplication of opportunities for profitable employment in commerce, agriculture, and industry; the drift from country to city; the enthusiasm for exploration and conquest; and the increasing interest in philosophic speculation and science.

"By the turn of the fifth century the Athenian empire had reached the zenith of its power; and the Greeks of this period were familiar with the idea of an expanding population. . . . [Two centuries later we find that the problem has radically shifted and the fear of overpopulation has been replaced by the fear of depopulation.] Polybius, writing in the second century, declared that the population of Greece was dying out because of the practice of infanticide. This is undoubtedly an overstatement; infanticide was confined, as contraception tends to be today, largely to the upper and upper middle classes. Nevertheless, it indicates the trend toward artificial limitation of the size of the family and suggests that the population had reached the period not only of incipient but of actual decline."³⁹

After crushing the Persian power at Plataea and Salamis, Athens took over much of the wealth of the Persian empire and all of its vices. It was but a few years from Salamis to Pericles. In the theater Euripides first portrayed incest, but not abortion in consequence. Neither the lesser tragedians who followed him, nor Aristophanes or any of the comedians, talk of abortion. Aristophanes has a single reference to infant exposure, in *The Frogs*;⁴⁰ and this exposure was rather similar to the placing of an infant on the doorsteps of an orphanage, as endless stories show identification of adults by the ring or neck chain which seems always to have been placed upon the infant when exposed. It remained for civilized Roman brutality to substitute exposure deliberately designed for the destruction of the infant by the elements or beasts or birds of prey. When Polybius wrote, Athens had become but one fraction of a corrupt and parasitical Greece, which had added to its vices some of the ruthlessness of the Romans. But it is doubtful that its exposure of infants ever took on quite the character of that practiced at Rome.

Thebes, third of the great city-states and the one which retained its vigor the longest, had a law forbidding infant exposure under pain of death, and providing for adoption by the city of any infant whose parents

³⁹ Riesman, *The Lonely Crowd* 28-29 (1950).

⁴⁰ Line 80.

formally declared their inability to rear it.⁴¹ It seems strange that a solution of this character is not suggested instead of abortion for economic necessity, in our own day when the demand for orphans for adoption so far exceeds the supply.

Rome under the Monarchy and down to the last years of the Republic can hardly be said to have had a criminal law. Until the establishment of the Twelve Tables⁴² (c. 450 B.C.) there was only an oral tradition, entrusted to a few patrician magistrates who professed to determine fact and law in cases of every sort "ex more maiorum."

The first, and almost only, concern of the state was with treason, always punished by death with such added features as might suggest themselves. Murder too was always considered a capital offense, with rather horrible details in the case of such as were considered parricide; but prosecution was left to the family of the victim, with the *Comitia Centuriata* passing sentence.

Criminal law developed very slowly. Eventually the long succession of arbitrary sentences following arbitrary determinations that a particular act at a particular time should be punishable developed a rather tenuous legal tradition.⁴³

Under Monarchy and Republic alike Romans recognized many crimes but had no organization for public prosecution of these offenses. Apparently the control by the *Paterfamilias* over all of his family and their descendants was just as absolute under the Monarchy as it was after being given more definite expression in the Twelve Tables. He was counted on to prosecute whoever injured anyone subject to his authority. And his family pride was supposed to be so strong that he would punish promptly and fully any member of his legal family who disgraced it by any sort of misconduct.⁴⁴

In looking for the institution of infanticide, which naturally would come before abortion in that primitive state, we have to begin with the very first pages of the traditional history of Rome. When the Vestal Silvia was seduced and abandoned by the god Mars (*Ares*), she bore the twins Romulus and Remus. Incensed at the betrayal of her vows, the cruel king Amulis had Silvia cast into prison, and the twins exposed, thus making possible the vulpine adoption.⁴⁵

⁴¹ Aelianus, *Variae Historiae*, II, vii.

⁴² 3 Remains of the Old Latin, *The Twelve Tables* 424 (Loeb ed. 1938).

⁴³ Cicero, *Ad Herennium*, I, xiii; 1 Strachan-Davidson, *Problems of the Roman Criminal Law* 102-14 (1912); Wolff, *Roman Law, An Historical Introduction* 53 (1951).

⁴⁴ 5 Duruy, *History of Rome* 526-27 (Mahaffy ed. Ripley and Clarke transl. 1883).

⁴⁵ Livy, I, iv.

How this sort of origin could be expected to affect Romulus as the founder and lawgiver of a city is something for psychologists. A law of Romulus was said to have required parents to rear all of their male children and firstborn daughters, and to have forbidden any to be destroyed before they were three years old unless they were monsters or maimed from birth—these could be exposed at once after inspection and approval by one's five nearest neighbors.⁴⁶ Today we are told that no such law has been found in historical times.⁴⁷

A husband might reject an infant child because of his belief that the child could never survive to be a normal adult; but then as now a husband's judgment as to the frailty of the child would commonly be influenced by his judgment or suspicion of the moral frailty of his wife. Under the Monarchy, however, such rejection and exposure appear to have been a recognized right rather than a common practice. In any event there could be no rejection in advance. All infants were carried to full term.⁴⁸

Obviously the absolute authority of the *Paterfamilias* would include authority to order an abortion on the one hand or, on the other, to punish or divorce a wife who brought about her own abortion without such authority.⁴⁹

The right of the Roman husband to divorce his wife was as absolute and as simple in its exercise as that of the Moslem. The wife however had two great safeguards: the community judgment which could make or break any citizen, and the obligation of the husband to restore all her dowry and property unless she had been guilty of adultery or other criminal conduct.

The wisdom of this law [of Romulus] concerning wives is attested by the length of time it was in force; for it is agreed that during the space of five hundred and twenty years no marriage was ever dissolved at Rome.⁵⁰

We find no indications of abortion among the Romans until we reach the decay of the Republic, and we could almost say the same of divorce for misconduct. Historians looking back from the early days of the Empire tell us that the unique reverence for the Roman matron traced

⁴⁶ Dionysius of Halicarnassus, *The Roman Antiquities*, II, xv.

⁴⁷ 1 Hastings, *Encyclopædia of Religion and Ethics* 4 (1908).

⁴⁸ 5 Duruy, *op. cit.* supra note 44, at 518.

⁴⁹ Plutarch, *Lives*, Romulus, XXII, 3; Balestrini, *Aborto, Infanticidio* 30 (D'Infante ed. 1888); 4 Hastings, *Encyclopædia of Religion and Ethics* 296 (1911).

⁵⁰ Dionysius of Halicarnassus, *The Roman Antiquities*, II, xxv, at 7 (Loeb ed. 1937).

back to the original Monarchy.⁵¹ Today we find confirmation in one of the German writers who have dedicated great scholarship to the glorification of sex in its single aspect of coition: "It was enough for the Roman, with his primitive character, to direct his sexual instincts into simple channels. For many centuries marriage meant to the Romans a severe and pure, but prosaic, union; it was under the firm authority of the husband, who had little feeling for the subtler possibilities of sex."⁵²

With the establishment of the Republic the plebeians demanded and soon obtained their first written law, that of the Twelve Tables. Whether we have the actual text of the Tables, or a substantial part, is still debated. Critics in our own time have vouched for substantial parts.⁵³

The Twelve Tables were for centuries highly prized, and Romans guarded them as jealously as English commoners did the "laws of Edward." Cicero tells us that as a boy four centuries later he was required to memorize them.⁵⁴

Tacitus writes:

Upon the expulsion of Tarquin, the commons, to check senatorial factions, framed a large number of regulations for the protection of their liberties or the establishment of concord; the Decemvirs came into being; and, by incorporating the best features of the foreign constitutions, the Twelve Tables were assembled, the final instance of equitable legislation. For succeeding laws, though occasionally suggested by a crime and aimed at the criminal, were more often carried by brute force in consequence of class-dissension⁵⁵

Tacitus' assertion of some Athenian contribution agrees with Livy's account.⁵⁶ This has been questioned; but it is customary today to speak of the Tables as the traditional law of the Monarchy modified by consideration of the laws of Solon.⁵⁷ Be that as it will, the great achievement of the Twelve Tables was the reduction of the laws to writing, and making their terms known to all who must live under them. But next in importance is the fact that the institution of the *Paterfamilias* was kept unchanged, carrying into the reign of Augustus.⁵⁸

⁵¹ Plutarch, *Lives*, *Romulus*, XX, 3; Tacitus, *Dialogus de Oratoribus*, XXVIII.

⁵² Kiefer, *Sexual Life in Ancient Rome* 5 (1953).

⁵³ Girard, *Textes de droit romain*, publiés et annotés 9 (5th ed. 1923).

⁵⁴ Cicero, *De Legibus*, II, xxiii.

⁵⁵ Tacitus, *Annals*, III, xxvii, at 565 (Loeb ed. 1943).

⁵⁶ Livy, III, xxxii.

⁵⁷ Wolff, *Roman Law, An Historical Introduction* 56-57 (1951).

⁵⁸ Zulueta, *The Institutes of Gaius*, Part 2, at 29-30 (1953).

All offenses relating to the family were left to the family to handle.⁵⁹ The authority of the *Paterfamilias* exceeded any family authority that has ever been recognized by other civilized peoples. It extended to wife, children and descendants, slaves, all in his household, during his whole lifetime. It included both the authority to determine when an unlawful act had been committed within this enlarged family and to impose and execute punishment when guilt was found.⁶⁰

The *patria potestas* and all the effects of formal marriage were extended from the patricians to all citizens. A son was permitted to emancipate himself from this authority by certain devices, but the cost to him in loss of inheritance and other rights made this privilege unimportant.⁶¹ The patrician woman had always by the formal marriage in manum passed from the *patria potestas* of her father to that of her husband. The same effect was now given to the equivalent formal marriage of plebeians.

This law obliged both the married women, as having no other refuge, to conform themselves entirely to the temper of their husbands, and the husbands to rule their wives as necessary and inseparable possessions.⁶²

A woman could remain under the parental authority and retain her property rights if she forewent the formal religious ceremony and had instead the informal coemptio or year to year marriage. This was actually permanent, but once a year the wife had to prevent its being converted into the formal marriage in manum by declaring against it, much in the same manner in which we block passage once a year to prevent formation of a prescriptive easement. But under some *patria potestas* she remained at all times. It is evident, then, why there was for centuries no criminal law on abortion. If a case of abortion were found, it would belong to the family authority to punish it. The only crimes which the state undertook to repress directly were those regarded as treasonable and those affecting the public peace, and for these there were just two punishments—death and banishment with forfeiture of property, which had to be approved by the assembly of the *Comitia Centuriata*.⁶³ The appeal to the *Comitia Centuriata*, meeting as a court of review, has been called the beginning

⁵⁹ 1 Bryce, *Studies in History and Jurisprudence* 86 (1901).

⁶⁰ Dionysius of Halicarnassus, *The Roman Antiquities*, II, xxvi; Beck, *Medical Jurisprudence* 188 (1st ed. 1823); 5 Duruy, *op. cit. supra* note 44, at 526-27.

⁶¹ 1 Duruy, *History of Rome* 322 (Mahaffy ed. Ripley and Clarke transl. 1883).

⁶² Dionysius of Halicarnassus, *op. cit. supra* note 50, at 383.

⁶³ Cicero, *De Republica*, II, xxxi; Livy, X, ix; Velerius Maximus, *Factorum et Dictorum Memorabilium*, IV, i; 1 Duruy, *op. cit. supra* note 61, at 334.

of a criminal law in Rome.⁶⁴ The absolute authority of the *Paterfamilias*, including determination of life or death within his family, obviously meant that he could either order an abortion or punish the wife who had an abortion which he had not ordered. Abortion was not punishable by the state, but the husband could if he wished impose the death penalty on the wife who deprived him of an unseen child without his consent.⁶⁵

It was after the Second Punic War that exposure of infants first became common at Rome.⁶⁶

"It can hardly be an accident that all ancient writers mark the end of the second Punic war as the turning-point of morality and social tradition—and so as the beginning of emancipation of Roman women. That was the period when Rome ceased to be a state of yeomen-farmers."⁶⁷

"When an entire economic epoch is breaking up, it is impossible for women not to change their nature and outlook; especially since new wealth and new opportunities have a more powerful effect on the spirit of women than of men. The average woman at that time in Rome saw new and unprecedented possibilities of satisfying her innate vanity, ambition and sensuality."⁶⁸

At the close of the war the first temple of Venus, as counterpart of Aphrodite, was opened in Rome; Priapus was brought from Asia Minor.⁶⁹ This was followed by the bringing in of Cybele.⁷⁰

It was just at the end of this war that Plautus has *Pyrgopolinices* saying:

What need have I of children? I live well, happily,
Peacefully, doing as I please.⁷¹

That the various religious cults were mere cover for the introduction of sexual vices⁷² is manifested by the constant invocations in the amatory and pornographic writings. Lucretius was an atheist, but he began *De Rerum Natura* with a long tribute to Venus and sexual gratification.

The development of the practice of infant exposure is indicated by frequent references. Terence's *Chremes*, for example, asks "Why let

⁶⁴ Mommsen, *Römisches Strafrecht* 171 (1899).

⁶⁵ 1 Paulys, *Real-Encyclopädie der Classischen Altertumswissenschaft* 107 (1st ed. 1894).

⁶⁶ 1 Hastings, *Encyclopædia of Religion and Ethics* 4 (1908).

⁶⁷ Kiefer, *op. cit.* supra note 52, at 41.

⁶⁸ *Id.* at 43.

⁶⁹ *Id.* at 116-17.

⁷⁰ Livy, XXIX, xi.

⁷¹ Plautus, *Miles Gloriosus*, act III, lines 705-06 [author's transl.].

⁷² Livy, XXXIX, viii; Augustine, *De Civitate Dei*, VI-VII.

those live who will only know misfortune?" In a long discussion of the rescue of exposed infants they are said to be taken up and adopted only that they may be later made into profitable slaves or harlots.⁷³

More and more women were giving up the formal marriage in *manum* to avoid giving up their separate property and to avoid passing under the authority of the husband. In doing so they remained free women, and all free women were punishable for any crime, including murder of a husband, only by their own *Paterfamilias*. The *Bacchantes* were punished in this way in 186 B.C., but it was becoming a very uncertain sanction.⁷⁴

After the final destruction of Carthage, the great Roman military machine was not broken up, but used to conquer Greece, Macedon, Asia Minor, North Africa, Gaul and Spain. Most of the prisoners taken were brought to Rome as simple slaves; but the Greeks, already the intellectual leaders, teachers and administrators of most of the nations to the East, played a different part. "A great wave of new ideas and knowledge poured in" as Greeks penetrated Rome and Roman Italy.⁷⁵ Their rhetoricians brought literary roots, their artisans crafts and arts, but their philosophers taught not Plato or Aristotle but Epicurus, whose followers preached the supreme duty to satisfy all desires.⁷⁶

There was great dissatisfaction on the part of Romans who prized the old tradition. In 150 B.C. all foreign philosophers and rhetoricians were banished, but they had done their planting, and there was no expulsion of the women and procurers who had followed them or first reached Rome as slaves. A few years later the censor Metellus supplied Richard Brinsley Sheridan with his best known epigram⁷⁷ on the dilemma woman always poses for man, but exhorted his audience to face the fact and use their union to bring eternal benefit rather than mere temporary gratification.⁷⁸ Apparently he lost his audience as did St. Paul in Athens. "The austerity of the early Romans was due to their poverty rather than to their conscience" and they welcomed the chance to get away from it, and two or three generations were sufficient to establish general "gluttony and drunkenness and debauchery hitherto unknown." In particular "Greek vices, hitherto unknown in Rome, now became naturalized there.

⁷³ Terence, *Heauton Timorumenos*, act IV, lines 634-64 (Loeb ed. 1931).

⁷⁴ Livy, XXXIX, xviii.

⁷⁵ Cicero, *De Republica*, II, xix, at 143 (Loeb ed. 1943); *Pro Archia*, III.

⁷⁶ Athenaeus, *Deipnosophistae*, XII, iv.

⁷⁷ "As for the women, though we scorn and flout them,
"We can't live with and will not live without them."

⁷⁸ Gellius, *The Attic Nights*, I, vi.

Yet Roman sobriety gave way slowly⁷⁹ More and more Roman matrons began saying with Plautus' harlot:

Like a growing city, we need men, many men.⁸⁰

"Women of free birth imitated this vicious life, we know, for in the year 114, to bring back modesty, the Senate ordered the construction of a temple to Venus Verticordia, the Venus who turns hearts to virtue. But this new Venus was less powerful than she who presided over unchaste loves."⁸¹

Juvenal harks back to this period:

Where, you ask, do they come from, such monsters as these? In the old days Latin women were chaste by dint of their lowly fortunes.

Toil and short hours for sleep kept cottages free from contagion,
Hands were hard from working the wool, and husbands were watching,
Standing to arms at the Colline Gate, and the shadow of Hannibal's looming.

Now we suffer the evils of long peace. Luxury hatches
Terrors worse than the wars, avenging a world beaten down.
Every crime is here, and every lust, as they have been
Since the day, long since, when Roman poverty perished.⁸²

Wives, at last, were now depriving their husbands of wanted children. The next urge was to rid themselves of unwanted husbands. Meanwhile the legions were rolling. Slaves and booty from conquered lands were pouring in. Wives of patricians and of newly rich were looking for more exciting diversions than spinning and ordering a household. The responsibility of *patria potestas* became a burden which was shrugged off. By the time of the Civil Wars the rapid corruption could not be ignored, for it was endangering all government. When one wife learned from a slave how to poison an unwanted husband, who could say whose wife would learn it next?

When Sylla felt himself solidly in power and took thought of the condition of the state he had set himself to rule, he obtained enactment of the Lex Cornelia, actually a series of laws addressed to the most imminent evils endangering the Republic. One of these, *De Sicariis et Veneficis* (Of Murders and Poisonings), about 85 B.C., forbade all dealing in poisons, including abortifacients as such. It punished all who sup-

⁷⁹ 2 Duruy, *History of Rome* 275-76 (Mahaffy ed. Ripley and Clarke transl. 1883).

⁸⁰ Plautus, *Cistellaria*, line 80 [author's transl.].

⁸¹ 2 Duruy, *op. cit.* supra note 79, at 276-77.

⁸² Juvenal, *Satires*, VI, in Humphries, *The Satires of Juvenal* 74 (1958).

plied abortant drugs, but not the woman who used them.⁸³ Cicero a few years later complained that there was no law to punish directly abortion itself, as abortion.⁸⁴

But to challenge the ancient *patria potestas* by legislation bringing the state into the bedchamber was something which even this confident dictator would not risk. It was now clear to all who were willing to face facts that the control of conduct through the family authority was no longer any control at all, that conduct within the familia was threatening the state itself, that authority to control conduct and responsibility for its exercise be reunited, and that Rome had reached a point where this could be accomplished only by legislation. The executions of the Bacchantes in the second century had been under pressure of an hysteria caused by the astounding number of those involved and the distinguished names which were beginning to be revealed. Even so, there is no record of what was actually done as to the great majority of the offenders. But, like the Athenians at an earlier date, the Roman citizen was ready to fight for a right which he was no longer interested in exercising and which he no longer felt a duty to exercise. The legal effect of marriages, divorce, inheritance and right to bequeath were all matters which must affect in every case more than a single family; and there was, in consequence, less jealousy of state interference in these areas.

Julius Caesar, in his great work of reorganizing the city-state, gave his name chiefly to the Lex Julia de Maritandis Ordinibus, providing a comprehensive written law for the governance of marital relations and the promotion of larger families, but his assassination prevented his handing it to the Senate. But Augustus too was convinced that governmental responsibility had to be substituted for the mockery of family responsibility.

"In the tempest which for a century past had raged in the Republic, not only institutions had perished, but a shameless cynicism had ruined private morals. In many Roman houses there were no longer fathers, sons, wives, in the true sense. Marriage had become an inconvenience, and was abandoned"⁸⁵

At the beginning of the reign of Augustus as Emperor we have a long passage on abortion with an instrument, not covered by the Lex Cornelia,

⁸³ Castiglioni, *A History of Medicine* 227 (1941); 1 Paulys, *Real-Encyclopädie der Classischen Altertumswissenschaft* 107 (1st ed. 1894).

⁸⁴ Cicero, *Pro Cluentio*, XI.

⁸⁵ 4 Duruy, *op. cit. supra* note 79, at 136.

by a poet whose works are commonly regarded as the antithesis of puritanica.

Corinna, rashly seeking to rid her heavy bosom of its load, lies languishing in peril of life. . . .

. . . .

Of what avail to fair woman to rest free from the burdens of war, nor choose with shield in arm to march in the fierce array, if, free from peril of battle, she suffers wounds from weapons of her own, and arm her unforeseeing hands to her own undoing?

She who first plucked forth the tender life deserved to die in the warfare she began. Can it be that, to spare your bosom the reproach of lines, you would scatter the tragic sands of deadly combat? If vicious ways like this had found favour with mothers of olden time, the race of mortal men would have perished from the earth You, too, though you were to be born fair, would have perished had your mother tried what you have tried; and I myself, though a death through love was to be my better fate, would never have seen the day had my mother slain me.

Why cheat the full vine of the growing cluster, and pluck with ruthless hand the fruit yet in the green? What is ripe will fall of its self—let grow what has once become quick; a life is no slight reward for a short delay. Ah, women, why will you thrust and pierce with the instrument, and give dire poisons to your children yet unborn? . . . Tell me, what Tereus provokes you on, what Jason, to pierce your bodies with aggrieved hand? This neither the tigress has done in jungles of Armenia, nor has lioness had the heart to destroy her unborn young; yet tender woman does it—but not unpunished; oft she who slays her own in her bosom dies herself. She dies herself, and is borne to the pyre with hair unloosed, and all who behold cry out: “’Tis her desert!”⁸⁶

“Such a state of morals endangered not only the family, but society itself. In order to compel the class of citizens to recruit itself from within, and not from the foul sink of slavery, Augustus resumed and developed the measures of Caesar; in the year 18 B.C. he proposed the *Lex Julia de maritandis ordinibus*. . . . [T]he comitia with one voice rejected the proposal, and the Emperor had to wait twenty years before he could secure its acceptance.”⁸⁷

In the next year Augustus sought to affect some improvement in a different way. He ordered the holding of the Secular Games, and the feature was the choral performance of an ode composed by Horace for the occasion. It was a prayer for normal birth and youthful morality.⁸⁸

⁸⁶ Ovid, *Amores*, II, xiii-xiv, at 421, 423, 425, 427 (Loeb ed. 1914).

⁸⁷ 4 Duruy, op. cit. supra note 79, at 136-37.

⁸⁸ Horace, *The Secular Hymn*, To Appollo and Diana, in 2 Martin, *The Works of Horace* 97 (1888).

At other times Horace recalled the days of Rome's sturdy poverty:

The farmer-soldier's manly brood
Was trained to delve the Sabine sod,
And at an austere mother's nod
To hew and fetch the fagot wood,

While Phoebus threw from mountain crest
An everchanging shadow shape,
And let the weary steers escape,
And, passing, ushered kindly rest.

Each baleful evening leaves us less!
We, of degenerate sires the seed,
Degenerate too, are doomed to breed
Sons deeper sunk in wickedness.⁸⁹

And Livy begins his history with that reminder:

[N]o state was ever greater, none more righteous or richer in good examples, none ever was where avarice and luxury came into the social order so late, or where humble means and thrift were so highly esteemed and so long held in honour.⁹⁰

The Emperor himself is said to have addressed a gathering of the childless knights of Rome:

For it is human beings that constitute a city, we are told, not houses or porticos or market-places empty of men.

Bethink you, therefore, what wrath would justly seize the great Romulus, the founder of our race, if he could reflect on the circumstances of his own birth and then upon your conduct in refusing to beget children even by lawful marriage! . . .

. . . .
For surely it is not your delight in a solitary existence that leads you to live without wives, nor is there one of you who either eats alone or sleeps alone; no, what you want is to have full liberty for wantonness and licentiousness.⁹¹

It must have disturbed the first Emperor to contrast the newly acquired habits of his own people with those of the tribes beyond the Rhine who were already the greatest threat to his Empire. "*Numerum liberorum finire, aut quemquam ex agnatis necare, flagitium habetur*"⁹²—to limit

⁸⁹ Horace, Odes, III, vi, in Rutherford, *The Odes of Horace* 130 (1877).

⁹⁰ Livy, I, Praefatio at 7 (Loeb ed. 1925).

⁹¹ Dio, Roman History, LVI, at 13, 17 (Loeb ed. 1924). (Footnotes omitted.)

⁹² Tacitus, Germania, XIX.

the number of children, or to destroy any one of those born to them, was held disgraceful.

But Horace, always calm, pictured Rome as he saw it:

An age of sin has left a trace
Polluting wedlock, tainting home
And child: from that foul fountain foam
Disasters on the realm and race.

Well pleased the ripening virgin learns
Tonic dance and wanton art;
From blossom-time her maiden heart
For lust's unhallowed raptures years;

She leaves a tipsy husband soon
Some younger paramour to catch,
Nor knows, nor chooses who shall snatch
The darkened chamber's lawless boon;

Signalled before her husband's face,
She goes to ease some pedlar's pain,
Some stout sea-captain's come from Spain
To spend a fortune on disgrace.⁹³

The Emperor's persistence finally brought acceptance of the Julian Laws in A.D. 4. This was soon expanded into the Lex Papia-Poppaea, a code governing marriage and divorce, property rights and inheritances. Every child was to bring his father additional tax benefits and quicker political advancement. It sought to check abortion by inducement, not by threat.⁹⁴

But at the height of his happiness and his confidence in his family and its training, Fortune proved fickle. He found the two Julias, his daughter and granddaughter, guilty of every form of vice, and banished them.⁹⁵

"[S]hall we believe that the Emperor succeeded in making his people religious and moral by virtue of laws? The law has nothing to do with these things. It cannot penetrate to the depths of men's consciences, eradicate vice, and purify the soul. Yet, as it controls external actions, it sometimes reaches through them the passions which produce them. The man who for forty-four years made Roman society feel the pressure of

⁹³ Horace, Odes, III, vi, in Rutherford, *The Odes of Horace* 129 (1877).

⁹⁴ 4 Duruy, *op. cit.* supra note 79, at 137-38.

⁹⁵ Suetonius, II, lxxv, at 221 (Loeb ed. 1914).

an honest will, certainly restored a degree of order, propriety, and outward dignity. He forced his fellow-citizens to respect themselves by laws which, after doing some good at Rome, went on doing much more in the provinces, where they were copied and better obeyed."⁹⁶

Augustus' successor Tiberius

revived the custom of our forefathers, that in the absence of a public prosecutor matrons of ill-repute be punished according to the decision of a council of their relatives. He absolved a Roman knight from his oath and allowed him to put away his wife, who was taken in adultery with her son-in-law, even though he had previously sworn that he would never divorce her. Notorious women had begun to make an open profession of prostitution [*lenocinium*—register as harlots], to avoid the punishment of the laws by giving up the privileges and rank of matrons.⁹⁷

The right of government to register and control professional prostitutes had long been accepted, on much the same basis as our first public utility laws. Exposure of infants and abortion were still the responsibility of the *patria potestas* alone. Suetonius tells that the exposure of infants was one of the horrors which shocked Rome at the death of Germanicus.⁹⁸

Romans, however, were gradually getting away from exposure. Abortion, on the contrary, was on the increase. The distinction which they made between infanticide and abortion, like that of abortion proponents today, was due to the difference between the emotional reactions to what they must see and to what they could avoid seeing. In modern Japan, wholesale infanticide was readily replaced by wholesale abortion securing the same desired result. Roman abortion came as an incident of luxurious and dissipated living among the wealthy and the powerful, inspired by idleness, love of comfort and female vanity, during a period when women had attained to the greatest freedom and were coming to exercise the greatest influence. This evil was seeping through from the upper to the lower social levels, just as wealth and idleness were doing. Sylla, Caesar, and Cicero, and the first two emperors had sought to check the trend, and supported these efforts by example. Now, however, the imperial influence and example were to be of a very different character. Caligula married his sister Drusilla, and at her death decreed her deification, and then married three wives torn from their husbands.⁹⁹ Claudius followed with his nymphomaniac wife Messalina who was permitted to

⁹⁶ 4 Duruy, *History of Rome* 139-40 (Mahaffy ed. Ripley and Clarke transl. 1883).

⁹⁷ Suetonius, III, xxxv, at 343-45 (Loeb ed. 1914).

⁹⁸ Suetonius, IV, v.

⁹⁹ Dio, *Roman History*, LIX.

practice promiscuous harlotry in a Roman bagnio and to enter into a bigamous marriage with her young favorite Silius. After her murder, Claudius married his niece Agrippina, after obtaining a senatorial decree transferring her to another family to avoid the impediment of legal consanguinity.¹⁰⁰

Nero at the time of his accession was depicted with a "beatnik beard" (bust in the Capitol, Hall of Emperors). He murdered his ambitious mother Agrippina, then his dutiful wife Octavia, then his second wife Poppaea, the "Miss Roman Empire" of her day.¹ But sycophant intellectuals like Seneca and Petronius thronged about him. Money, entertainment, gifts of all sorts, were poured out to the people, who proved the condition they had reached by wild acclaim and public thanksgivings after each murder. Petronius' filthy tale is commonly taken to be an authentic picture of the lower levels of Nero's Rome.² No more eloquent commentary on the upper level could be asked than the designation of Petronius as *Arbiter Elegantiarum*.³

Viscount Bryce quotes Seneca: "Desinit esse remedio locus ubi quae fuerant vitia mores sunt." (There is no longer room for any remedy where everything which had once been a vice is now a part of the common pattern.)⁴

Seneca took occasion to defend infanticide as still a Roman custom:

Does a man hate the members of his own body when he uses the knife upon them? There is no anger there, but the pitying desire to heal. Mad dogs we knock on the head; the fierce and savage ox we slay; sickly sheep we put to the knife to keep them from infecting the flock; unnatural progeny we destroy, we drown even children who at birth are weakly and abnormal. Yet it is not anger but reason that separates the harmful from the sound.⁵

And in a letter to his wife Seneca mentions the then current practice of abortion by fashionable women to preserve their beautiful figures.⁶

The five "Caesars" who reigned between Nero and Domitian had no influence on Roman morals, except perhaps Vespasian. But Domitian began by seducing his niece Julia, who died in an attempt at self-induced

¹⁰⁰ Id. LXI.

¹ Suetonius, VI, xxxiv-xxxv.

² Petronius, *The Satyricon*.

³ Thomas, *Pétrone* v (1902).

⁴ 2 Bryce, *Studies in History and Jurisprudence* 802 (1901).

⁵ Seneca, *De Ira*, I, xv, at 145 (Loeb ed. 1928).

⁶ Seneca, *De Consolatione Helviam*, XVI.

abortion. He stopped the public performances of the obscene mimes, and revived the Julian Laws on divorce and the Lex Scantinia against "a shameful vice";⁷ but Martial addressed fulsome lyrics to the Emperor's *ganymede*.⁸

At the close of the first century of our era then, we find infanticide still persistent, legal and not too much frowned upon; and abortion, lawful for any who could obtain the means, now common among the well to do of all classes. And Roman morals, at the same time, seemed to have reached absolute bottom in all departments.

The kindly Stoic Musonius Rufus had discussed the question whether all infants should be preserved and reared. His pupil Epictetus was to offer an eloquent answer a few years later. While Martial was singing the praises of Domitian who had awarded him the artificial status and benefits of a three-time father, Rome's great satirist was speaking out in plain terms:

Now we are suffering all the evils of long-continued peace. Luxury, more ruthless than war, broods over Rome, and exacts vengeance for a conquered world. No guilt or deed of lust is wanting, since Roman poverty has disappeared. This was the source whence Sybaris flowed to these seven hills, and Rhodes too, and Miletus, and Tarentum crowned with garlands, insolent and flushed with wine!

Money, the nurse of debauchery, was the first that introduced foreign manners, and enervating riches sapped the sinews of the age with foul luxury. For what cares Venus in her cups?

. . . .

Yet these [the poor], when circumstances so require, are ready to encounter the perils of childbirth, and endure all the irksome toils of nursing. But rarely does a gilded bed contain a woman lying-in: so potent are the arts and drugs of her that can insure barrenness, and for bribes kill men while yet unborn. Yet grieve not at this, poor wretch! and with thine own hand give thy wife the potion, whatever it be: for did she choose to bear her leaping children in her womb, thou wouldst perchance become the sire of an *Æthiop*; a blackamoor would soon be your sole heir, one whom you would not see of a morning.⁹

That Juvenal was not the mere dour declaimer, witness his well known quip in the same satire: "A husband should have the privilege of committing a solecism."¹⁰

⁷ Martial, *Epigrams*, IX, vi, viii; 5 Duruy, *op. cit.* supra note 96, at 180-83.

⁸ Martial, *Epigrams*, IX, xi-xiii.

⁹ Juvenal, *Satires*, VI, in Evans and Gifford, *The Satires of Juvenal, Persius, Sulpicia and Lucilius* 49-50, 63 (2d ed. 1882).

¹⁰ *Id.* at 56.

Meanwhile Christianity had made a beginning in its penetration of the capital of the Empire. All the books of the New Testament, except possibly the Gospel of John, had been written. The apostle Paul had written in condemnation of the vices of the Empire. At some point between A.D. 65 and 80 appeared *The Didache*, the earliest Christian writing now known, outside of the canonical books.

But the second commandment of the teaching is this;

Thou shalt do no murder; thou shalt not commit adultery; thou shalt not commit sodomy; thou shalt not commit fornication; thou shalt not steal; thou shalt not use magic; thou shalt not use philtres; thou shalt not procure abortion, nor commit infanticide; thou shalt not covet thy neighbour's goods.¹¹

And shortly thereafter that early apologia for the Christians known as the Epistle to Diognetus appeared.

They marry as all men, they bear children, but they do not expose their offspring.¹²

And through the centuries the Christian teaching continued to be "Thou shalt not commit abortion." The precise time at which a new life comes into being which can be the subject of abortion is a question for the embryologist which is perhaps still to be answered. But there was at the end of the first century no appreciable Christian influence on either imperial policies or popular opinion or feeling. First the Persian Empire, and then the Grecian states, had demonstrated that a nation of homosexuals is a dying nation; yet in Rome pederasty was taken for granted and regarded with as little repugnance as cigarette smoking today. Trajan, the clean and vigorous soldier, determined to restore the glory of pagan Rome, made many well conceived efforts towards political reform; but apparently he had no conception of the underlying moral elements of its decline. Epictetus, who died in the same year as Trajan, had attacked the lingering practice of infanticide.

But how, then, can we still be social beings, if affection for our own children is not a natural sentiment? Why do you dissuade the wise man from bringing up children? Why are you afraid that sorrow will come to him on their account? . . . Nay he knows, that if once a child is born, it is no longer in our power not to love it or to care for it But a sheep does not abandon its own offspring, nor a wolf; and yet does a man abandon his? What do you wish us to do? Would you have us to be foolish as

¹¹ *The Didache* (anon.), II, 1-2, in 1 *The Apostolic Fathers* 312 (Loeb ed. 1912).

¹² *Epistle to Diognetus* (anon.), V, 6, in 2 *id.* at 361 (1913).

sheep? But even they do not desert their offspring. Would you have us be fierce as wolves? But even they do not desert their offspring. Come now, who follows your advice when he sees his child fallen on the ground and crying? Why, in my opinion, your mother and your father, even if they had divined that you were going to say such things, would not have exposed you!¹³

No one at Rome, however, seemed much concerned with his appeal. The vice was no longer exclusively one of the patricians or the rich. Plutarch's report on the practice in his day, as quoted by Kiefer, sounds amazingly like the abortion pleas of today:

"The poor do not rear their children, because they are afraid that if they are badly fed and educated they will grow up to be slavish and boorish and to lack all the graces."¹⁴

In or about A.D. 180 the Christian lawyer Minucius Felix, in an apologetic comparison of Christian and pagan practices, wrote:

I see your newly born sons exposed by you to wild beasts and birds of prey, or cruelly strangled to death. There are also women among you who, by taking certain drugs, destroy the beginnings of the future human being while it is still in the womb and are guilty of infanticide before they are mothers.¹⁵

Grecian culture and moral concepts were now dominant in the Empire. Clement of Alexandria asserted that no moral code or sense of decency could be looked for among a people who held to the religious mythology of the Greeks. Every vice was made respectable by invocation of that vice's patron god. He reviewed the Olympian hierarchy, and showed that even the most idealized of these deities, not only Zeus but Apollo, not only Aphrodite but Athene, had been acclaimed throughout Greek literature as practitioners of the most abominable vices.¹⁶

Kiefer quotes the opening of Florus' *Epitomae of Livy*:

"If we consider the Roman people as a man, and reflect on the whole course of its life—its birth, its growth, its prime and its old age—we shall find that it passed through four stages. The first, under the Kings, lasted for 400 years, during which Rome struggled with its own neighbours. This was its infancy. The next age lasted from the Consulship of Brutus

¹³ Epictetus, *The Discourses as Reported by Arrian, The Manual and Fragments*, I, xxiii, at 149, 151 (Loeb ed. 1926).

¹⁴ Kiefer, *Sexual Life in Ancient Rome* 35 (1953).

¹⁵ Minucius Felix, *Octavius*, XXX, at 82-83 (Freese transl. 1919).

¹⁶ Clement of Alexandria, *The Exhortation to the Greeks*, II, IV.

and Collatinus to the Consulship of Appius Claudius and Quintus Fulvius—150 years, in which Italy was subdued. This was a time full of virile and martial energy and might be called Rome's youth. Next come 150 years until Augustus, during which Rome subdued the whole world. This was the early manhood of the nation, the prime and flower of its life. From Augustus to the present age are almost two hundred years, in which the idleness of the Emperors has withered the Empire in old age. . . . We were corrupted first by the conquest of Syria, and then by Asia, the legacy of Attalus. That wealth and power struck at the root of morality, and made the nation sink and drown in the cesspool of its own vices."¹⁷

Septimius Severus, the first Emperor from North Africa, A.D. 193-211, set out to prove that paganism could match Christian ideals, and satisfy the new and uncorrupted citizenry of the Empire who were disgusted by the heritage from Greece and Rome. His own life was clean. The palace group included the great jurists Papinian, Paulus and Ulpian; Aelianus and Galen were favorite guests. He founded the school at Alexandria and put in charge of it the ascetic Plotinus, to build up a Platonic philosophy which would be able to meet Christianity on the moral as well as the intellectual level.

He tightened the laws against adultery, and at the same time removed the disqualifications long imposed upon the children of such connections. Finally he decreed exile for wives who resorted to abortion, and made abortion generally one of the *Crimina Extraordinaria* with no fixed penalty. All of these decrees were carried into the *Corpus Juris*.¹⁸

"[I]t is certain that after Rome encountered Carthage, and Greece, and Asia Minor, a multitude of different stocks poured into Italy, and mingled with the pure native breed. That was a grave change from the old ideals; for the Empire had been built on the solidarity of the ancient aristocratic families. In addition to this, the best blood of Italy was sapped by constant and savage warfare and nothing was gained to compensate that loss. . . . Even at the end of the Republic the percentage of pure Romans in these colonies was small; and long before the Empire officially came to an end, they suffered changes and importations which diminished even that small proportion of pure stock."¹⁹

The addition to the racial mixture of Germans and Goths and others from the north was of quite a different sort. Dissatisfaction with the

¹⁷ Kiefer, op. cit. supra note 14, at 351-52.

¹⁸ 6 Duruy, *History of Rome* 538, 556 (Mahaffy ed. Ripley and Clarke transl. 1883); 2 Sherman, *Roman Law in the Modern World* 489-90 (2d ed. 1922).

¹⁹ Kiefer, op. cit. supra note 14, at 355-56.

Graeco-Roman tradition brought over intellectual leaders like Minucius Felix and Tertullian to Christianity after they had explored the various phases of Grecian thought. The new element, rude but unspoiled, had little taste for sexual depravity. Christianity, however, was still on the defensive, and not shaping any legislation. Under Constantine and under Julian the Christians were still a minority, although they were coming to include the best of the Empire. When imperial laws began to be written by men who thought in Christian terms, abortion was condemned, but that was not until well into the fourth century.

The Christian position against the destruction of human life before or after birth never changed, but biological thought did. The Stoics' theory of life beginning only at actual birth of the fully developed infant meant that there could be no destruction of life by abortion. The first Christians regarded the new life which began at conception as continuing essentially unchanged during its whole period of development; induced abortion at any stage was therefore a homicide.

How many of you might I deservedly charge with infant murder; and not only for choosing from among the different kinds of death some of the cruelest for their own children, such as drowning or starving with cold or hunger, or exposing to the mercy of dogs; dying by the sword being too sweet a death for children, and such as a man would choose to fall by sooner than any other ways of violence. But Christians now are so far from murder that with them it is utterly unlawful to destroy a child in the womb, when nature is in deliberation about the man; for to kill a child before it is born is to commit murder by way of advance; and there is no difference whether you destroy a child in its formation or after it is formed and delivered. For we Christians look upon him as a man who is one in embryo; for he is a being like the fruit in blossom, and in a little time would have been a perfect man, had nature met with no disturbance.²⁰

The development of a code of law for the Church's own governance required definition and distinction. When are we dealing with a human life?

The answer had to be found not in moral theology or ethics but in embryology. From the second century to the eighteenth the only authority recognized in the western world on embryology, or in any department of medicine, was the Emperor Severus' physician Galen. The works attributed to him filled seven large volumes when printed in Venice in 1572; a nineteenth century edition prepared by the German Scholar Karl Gottlob Kühn comprised twenty-two volumes. Three of these treatises related

²⁰ Tertullian, *Apologia*, IX, vi-vii [author's transl.].

to embryology: On Natural Faculties (theoretical), On Formation of Fetus (anatomical), and On Whether an Embryo is an Animal. Galen took both his philosophy and his biology from Aristotle and Aristotle's immediate followers; and that is where we must begin if we are to understand the development of the several systems of law in relation to abortion.

It is not only necessary to decide whether what is forming in the female receives anything material, or not, from that which has entered her, but also concerning the soul in virtue of which an animal is so called (and this is in virtue of the sensitive part of the soul)—does this exist originally in the semen and in the unfertilized embryo or not, and if it does whence does it come? For nobody would put down the unfertilized embryo as soulless or in every sense bereft of life (since both the semen and the embryo of an animal have every bit as much life as a plant), and it is productive up to a certain point. That then they possess the nutritive soul is plain (and plain is it from the discussions elsewhere about soul why this soul must be acquired first). As they develop they also acquire the sensitive soul in virtue of which an animal is an animal. For e.g. an animal does not become at the same time an animal and a man or a horse or any other particular animal. For the end is developed last, and the peculiar character of the species is the end of the generation in each individual. Hence arises a question of the greatest difficulty, which we must strive to solve to the best of our ability and as far as possible. When and how and whence is a share in reason acquired by those animals that participate in this principle?²¹

For all three kinds of soul, not only the nutritive, must be possessed potentially before they are possessed in actuality. And it is necessary either (1) that they should all come into being in the embryo without existing previously outside it, or (2) that they should all exist previously, or (3) that some should so exist and others not.²²

Now that it is impossible for them all to pre-exist is clear from this consideration. Plainly those principles whose activity is bodily cannot exist without a body, e.g. walking cannot exist without feet. For the same reason also they cannot enter from outside.²³

It remains, then, for the reason alone so to enter and alone to be divine, for no bodily activity has any connexion with the activity of reason.²⁴

²¹ Aristotle, *De Generatione Animalium*, II, iii, col. 736a, line 28-col. 736b, line 9 (Platt ransl. 1910).

²² Id. col. 736b, lines 15-20.

²³ Id. lines 22-25.

²⁴ Id. lines 28-31.

The complete human life, then, which includes the vegetable, animal and rational, is not created or produced all at once, but one develops into another by stages, from an original potentiality. A purely vegetative or nutritive life begins at the moment of conception, and to it is subsequently added an animal life; and the complete man comes into being through infusion of the rational life shortly before his birth.

With very few exceptions, Christian writers not only on medicine but also on theology accepted the three-stage theory of Aristotle.

St. Augustine states clearly that destruction of the fetus at any stage is a grave offense, and that its destruction after it has acquired a human soul in the womb is homicide; but that when its life actually begins is a matter of biological fact not yet determined. But not all of his discussion is equally clear to a layman. It is the infusion of the intellectual soul which gives substantial form, that which makes the matter of the fetus distinctively man, and this comes after the physical formation of the fetus is complete. He distinguished between formed and unformed, and again between already living and not yet living, but he does not make formed and living synonymous.²⁵

About 1150 the Benedictine John Gratian made a compilation of canonical decrees, patristic writings and Roman law, with brief comments of his own, as a textbook for law classes, giving it the name *Decretum*. It became at once the basic work on canon law. In the next century it was supplemented by other decretals and brought up to date by the Dominican Raymond Penafort, the additions being designated as *Decretalium Collectiones*. The original and the supplementary works together were recognized as the *Corpus Juris Canonici* until the new Code of 1917.

It contains three propositions as to abortion, on which St. Augustine is cited: Every destruction of an unborn child is condemned; destruction of the fetus before it has been animated is not legally homicide; and the human soul is not infused until after formation of the body.²⁶

The *Decretalium Collectiones* contains one from Pope Innocent III, in 1211. A cleric who was engaging in horseplay with a pregnant woman, unintentionally caused her abortion. The ruling was that he should be barred from the exercise of his ministry if the fetus had already acquired

²⁵ Augustine, *Quæstionum in Heptateuchum*, II, lxxx, in 34 *Patrologiæ Cursus Completus*, 626-27 (Migne ed. 1887).

²⁶ *Decretum Magistri Gratiani*, pt. II, C. XXXII, q. II, chs. 7-9, in 1 *Corpus Juris Canonici* 1122 (2d ed. Friedberg ed. 1922).

life, otherwise not. ("[S]i nondum erat vivificatus conceptus, ministrare poterit; alioquin debet ab altaris officio abstinere.")²⁷

The theory of three successive stages of life in the fetus which Galen had taken from Aristotle was even more securely fixed by the writings of Thomas Aquinas. In explaining these stages, however, he made a substantial change. When the sentient stage was reached it was replaced by a new, animal life which included the vegetative functions. When the intellectual soul was created and infused, it replaced the mere animal-vegetative, and thereafter provided for all human activities, vegetative, sentient and rational.

[N]ow it is clear that the first thing by which the body lives is the soul. And as life appears through various operations in different degrees of living things, that whereby we primarily perform each of all these vital actions is the soul. For the soul is the primary principle of our nourishment, sensation, and local movement; and likewise of our understanding. Therefore this principle by which primarily we understand, whether it be called the intellect or the intellectual soul, is the form of the body. This is the demonstration used by Aristotle (*De An.*, II, 2 (414a 12)).²⁸

We must therefore conclude that the sensitive soul, the intellectual soul and the nutritive soul are in man numerically one and the same soul. This can easily be explained, if we consider the differences of species and forms. For we observe that the species and forms of things differ from one another as the perfect and the less perfect; just as in the order of things the animate are more perfect than the inanimate, animals more perfect than plants, and man more perfect than brute animals. Furthermore, in each of these genera there are various degrees. . . . Thus the intellectual soul contains virtually whatever belongs to the sensitive soul of brute animals, and to the nutritive soul of plants. . . . [S]o neither is Socrates a man by one soul, and an animal by another; but by one and the same soul he is both animal and man.²⁹

The embryo has first of all a soul which is merely sensitive, and when this is removed, it is supplanted by a more perfect soul, which is both sensitive and intellectual, as will be shown further on.³⁰

Whence we must conclude that there is no other substantial form in

²⁷ Penafort, *Decretalium Collectiones*, lib. V, tit. XII, ch. xx, in 2 id. at 802. (Footnotes omitted.)

²⁸ Aquinas, *Summa Theologica*, I, Q. 76, art. 1, in *Introduction to Saint Thomas Aquinas* 293 (Pegis ed. 1948).

²⁹ Id. art. 3, at 306.

³⁰ Id. art. 3, reply obj. 3, at 306.

man besides the intellectual soul; and that just as the soul contains virtually the sensitive and nutritive souls, so does it contain virtually all inferior forms, and does alone whatever the imperfect forms do in other things. The same is to be said of the sensitive soul in brute animals, and of the nutritive soul in plants, and universally of all more perfect forms in relation to the imperfect.³¹

It is interesting to compare with the staid and precise language of Thomas Aquinas these lines from "Mathnawi" of the Sufi philosopher-poet Jala ud-Din Rumi:

I died from mineral and plant became;
Died from the plant, and took a sentient frame;
Died from the beast, and donned a human dress;
When by my dying did I e'er grow less?³²

Dante described it more carefully:

There the one is mingled with the other; one designed to be passive, the other to be active, by reason of the perfect place whence it springs;
and, joined thereto, it begins to operate

The active virtue having become a soul, like that of a plant, in so far different that the former is on the way and the latter is already at the goal,

then effects so much that now it moves and feels, like a sea-fungus; and then sets about developing organs for the powers whereof it is the germ.

Now, son, expands, now distends, the virtue which proceeds from the heart of the begetter, where nature intends all human members;

but how from an animal it becomes a human being thou seest not yet

. . . .

. . . .

know that so soon as the organization of the brain is perfect in the embryo,

the First Mover turns him to it, rejoicing over such handiwork of nature, and breathes into it a new spirit with virtue filled,

which draws into its substance that which it finds active there, and becomes one single soul, that lives, and feels, and turns round upon itself.³³

The recognition of a crime of abortion in our Common Law has frequently been questioned, all on the authority of Sir Edward Coke's commentary,³⁴ of which Sir James F. Stephen writes: "I now come to Coke's

³¹ Id. art. 4, at 308.

³² Browne, *A Persian Anthology*, No. 10, at 88 (Ross ed. 1927).

³³ Dante, *Divine Comedy*, *Purgatorio*, canto XXV, at 341-42 (Carlyle, Okey and Wicksteed transl. 1950).

³⁴ Coke, *The Third Part of the Institutes of the Laws of England*, ch. 7 (3d ed. 1660).

Third Institute, a work which, not by reason of its own merits, but because of the reputation of its author, may be regarded as the second source of the criminal law, Bracton being regarded as the first."³⁵ It would be hard indeed to set up the belief of any sixteenth century scholar against the positive declaration of the king's Justiciar as to the law which he himself was busily administering in the middle of the thirteenth century: Liber III, tractus secundus, ch. 4 (Homicide): "Si sit aliquis, qui mulierem praegnantem percusserit, vel ei venenum dederit per quod fecerit abortivum, si puerperium jam formatum vel animatum fuerit, & maximè si animatum, facit homicidiū."³⁶ "If there be someone, who has struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide."³⁷

Bracton was confirmed by the anonymous judge whose commentary was published as *Fleta*: "Qui eciam mulierem praegnantem oppresserit vel venenum dederit vel percusserit ut faciat abortivum, vel non concipiat, si foetus erat iam formatus et animatus recte homicida est, et similiter qui dederit vel acceperit venenum sub hac intencione ne fiat generacio vel concepicio."³⁸

Many have been puzzled by the curious phrasing in Bracton which Sir Travers Twiss in his edition of Bracton has translated: "if the foetus be already formed and animated, and particularly if it be animated." The initial difficulty for one who relies on this translation is that the word "vel" of the original has been translated as "and" instead of "or." The proper conjunction does make sense but to understand it fully requires some knowledge of the background of this old law. All European thought in matters relating to medicine and biology down to the seventeenth century, or even later, was shaped by the teaching of Galen, the great Greek scholar of the second century. His *Opera Omnia* published at Brescia in 1490 was one of the earliest printed works. During some fifteen centuries many studied Galen, no one ever challenged him.³⁹ Galen in turn had taken his embryology from Aristotle, which must have added to his authority in the thirteenth century.

In 1803 the first English statute on abortion⁴⁰ removed the requirement

³⁵ 3 Stephen, *History of the Criminal Law of England* 52 (1883).

³⁶ 2 Bracton, *De Legibus et Consuetudinibus Angliæ* 278 (Twiss ed. 1879).

³⁷ *Id.* at 279.

³⁸ 2 *Fleta* 60-61 (Selden Soc'y ed. Richardson and Sayles eds. 1955).

³⁹ Castiglioni, *A History of Medicine* 221 (1941).

⁴⁰ Miscarriage of Women Act, 1803, 43 Geo. 3, c. 58.

—originated by Coke, enunciated by Blackstone—that the act come after quickening, although it did preserve a distinction. It condemned the wilful, malicious and unlawful use of medical agents (with no reference to surgical) with intent to induce abortion, without regard to whether the attempt was effective, or whether death resulted to the mother. It was made a felony in every case, but punishable by death only if the potion was given after quickening, otherwise (“wilfully and maliciously”) only by transportation up to fourteen years, whipping, the pillory, imprisonment, “one or more of the said Punishments.”

This statute remained unchanged through the remaining years of George III and the Regency, but in 1828 it was amended, in the course of an Offences against the Person Act, to apply as well to abortions induced unlawfully by use of instruments. It limited imprisonment to three years at hard labor, but set a minimum of seven years for transportation beyond the seas.⁴¹

It was only in the next year that the Roman Catholic Relief Act was passed, making it possible for His Majesty’s Catholic subjects to sit in Parliament, although still ineligible for the highest offices.⁴²

In 1837 the young Victoria came to the throne, with Lord Melbourne continuing as Prime Minister, and one of the first enactments was an amendment to the Offences against the Person Act which, among other things, eliminated all reference to quickening and actual pregnancy, and increased the term of transportation to any term from fifteen years to life.⁴³

Finally, in 1861, the new Offences against the Person Act gave the abortion law its present form, at least so far as parliamentary action was concerned.⁴⁴ Section 58 declared a felony the use of any means by a woman with intent to effect her own miscarriage, if actually pregnant, or by others with like intent without regard to whether she was actually pregnant or not. The new section 59 made a misdemeanor, punishable by penal servitude up to three years or imprisonment with or without hard labor up to two years, the furnishing of any means of effecting abortion with knowledge that it was intended to be used for such purpose on any woman, pregnant or not.

In 1890, it was held that, while a woman could not be convicted under the first clause of section 58 unless she were actually pregnant, actual

⁴¹ 9 Geo. 4, c. 31 (1828).

⁴² 10 Geo. 4, c. 7, § 2 (1829).

⁴³ 7 Will. 4 & 1 Vict., c. 85 (1837).

⁴⁴ 24 & 25 Vict., c. 100 (1861).

pregnancy need not be proved in establishing a conspiracy with others to effect her own abortion.⁴⁵

It was a year after the Offences against the Person Act of 1861 that Catholic members of Parliament were authorized to take their seats without declaring against the Mass.⁴⁶

There have been but few, and it would seem from here unimportant, occasions of judicial interpretation of the Act of 1861, until the trial of Dr. Bourne in 1938.⁴⁷ The report of the case at the trial level is fully set out in an Appendix⁴⁸ and is recommended to the reader's attention at this time.

The instructions and summing up, delivered without notes, by a trial judge never specially recognized, in the criminal court in London, have been acclaimed by American lawyers who favor freer abortion, as marking a new epoch in our law. To the ordinary American lawyer, who must determine the effect to be given to judicial statements according to American practice and experience, these instructions would seem to supply very little authority for anything. Our biggest cities have, unfortunately, more criminal trials going on every day than all of England. The instructions given, usually on consideration of written requests, are never reported and seldom indicated by the daily papers covering the various trials; they are preserved by no law reporter unless reviewed by a higher court. The English may perhaps give some tremendous authority to the unsupported comments of the first trial judge to speak on a subject. In this we do not follow. Whether a successor of Judge Macnaghten would ever feel, as apparently Judge Macnaghten did, that special circumstances or merely the growth of new ideas over the years could give him the right to consider the issues of such a case for himself—we would not presume to form an opinion. We can only watch from a great distance and wonder whether a trial judge in one of the criminal courts outside London could ignore the Macnaghten instructions (now twenty-three years old) and make his own determination of whether a statute still on the books should be nullified by judicial action (a typical American practice, we are often told); or whether the Government is to go on through the foreseeable future considering all prosecutions for abortion as barred by the *Bourne* case; or whether

⁴⁵ *The Queen v. Whitchurch*, [1890] 24 Q.B.D. 420.

⁴⁶ The Statute Law Revision Act, 1863, 26 & 27 Vict., c. 125.

⁴⁷ *R. v. Bourne*, [1938] 3 All E.R. 615 (K.B.).

⁴⁸ Appendix II, p. 521.

a prosecution could be had on complaint of an individual—these are all questions which it would be improper for us to attempt to answer.

And while we wonder, we recall the testimony of obstetricians of today, and of many pages of cold figures, that every pregnancy involves some risk to the physical, mental or emotional health of the mother. If any least hazard to the mother takes a case from under the operation of section 58 of the Act of 1861, and if our courts could be expected to follow as established law this commentary of an English trial judge, then there would seem to be little occasion for liberalizing our own abortion laws.

For a ruling of such import, the form in which we have it is hardly satisfactory to an American. The case is found in three sets of law reports⁴⁹ and all report it differently, one being substantially different from the others. In addition, we would be inclined to respect the accuracy of *The Times* in its report of the trial on July 20, 1938.

A respected English law writer, discussing the case in 1938,⁵⁰ noted that the judge cited no legal authority for any of his propositions: all were the product of pure reason. As to the justification of the abortion by the medical necessity of saving the mother, the judge stated that he had no authorities to aid him. He draws on the Infant Life Act of 1929 for an express exception on this account to the terms of that Act, and by analogy or implication makes it a part of the abortion law he was administering. But, Mr. Davies comments, "As far back as 1846, the Criminal Law Commissioners, after setting out the law relating to abortion, suggested the addition of this proviso: 'Provided that no act specified in the last preceding Article shall be punishable when such act is done in good faith with the intention of saving the life of the mother whose miscarriage is intended to be procured.' They appended a note to this: 'This proviso seems expedient: it is contained in other codes, but does not appear to have been adverted to in our treatises.' To this day, the proviso has not been specifically attached to the crime of abortion . . ."⁵¹

Actually it was not shown that the young girl on whom the abortion was done was in any danger of death from the continuance of her pregnancy, in spite of the terrible wrong which had been done to her. The judge said: "Life depends upon health, and it may be that health is so gravely impaired that death results."⁵² And if "the probable con-

⁴⁹ [1938] 3 All E.R. 615 (K.B.); [1939] 1 K.B. 687 (1938); 108 L.J.K.B. 471 (1939).

⁵⁰ Davies, *The Law of Abortion and Necessity*, 2 *Modern L. Rev.* 126 (1938).

⁵¹ *Id.* at 136. (Footnote omitted.)

⁵² [1938] 3 All E.R. at 617.

sequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman."⁵³ As the testimony in support of this justification was slight and quite speculative, the judge instructed the jury that it must acquit unless the prosecution proved beyond a reasonable doubt that the abortion was *not* medically necessary. As he introduced this justification into the statute law, it was but reasonable that he should be the one to fix its terms. The summing up contained but a brief reference to a bit of the testimony; the instructions were an elaborate and rather devious argument for the defense.

A reading of the entire statement of Judge Macnaghten in this case will incline the average lawyer to agree with Mr. Davies that while juries are commonly blamed for refusal to convict mothers of infanticide, their verdicts are actually due in most cases to instructions by quibbling judges.

The first State to enact a statute dealing directly with abortion was Connecticut⁵⁴ which in 1821 adopted Section I of Lord Ellenborough's Act,⁵⁵ punishing the attempt to abort a fetus by poison after quickening, but not Section II which punished such an attempt before quickening; and it substituted life imprisonment for the death penalty. In 1830 Connecticut extended the statute to attempts by means other than the use of drugs and the like, but still dealt only with acts done after quickening, and reduced the penalty to a term of seven to ten years.⁵⁶ In 1860 it was extended to attempts on any woman, but the punishment was further reduced to a prison term of one to five years; and for the first time an exception was made for acts "necessary to preserve the life of such woman."⁵⁷

In 1827 Illinois had made a crime punishable by imprisonment up to three years of any attempt by means of any noxious substance upon any pregnant woman.⁵⁸ It was not until 1867 that it was applied to such attempts regardless of the means used, setting a penalty of two to ten years' imprisonment, and declaring such an attempt murder when it re-

⁵³ *Id.* at 619.

⁵⁴ Conn. Stat. tit. 22, §§ 14, 16, at 152, 153 (1821) [Appendix I, p. 453].

⁵⁵ Miscarriage of Women Act, 1803, 43 Geo. 3, c. 58.

⁵⁶ Conn. Laws ch. 1, § 16, at 255 (1830) [Appendix I, p. 453-54].

⁵⁷ Conn. Pub. Acts ch. LXXI, § 1, at 65 (1860) [Appendix I, p. 454].

⁵⁸ Ill. Rev. Code § 46, at 131 (1827) [Appendix I, p. 466].

sulted in the death of the mother.⁵⁹ At the same time it exempted abortion and attempted abortion "for *bona fide* medical and surgical purposes."

In 1828, the year of 9 Geo. 4, New York made an attempt to abort a quick child second degree manslaughter if the intent was to destroy the child, or a misdemeanor if the attempt was only to produce miscarriage (not defined) at any stage of pregnancy.⁶⁰ In either case the attempt was excused if necessary to preserve the life of the mother, or if two physicians had so advised. An Act of 1845 exempted attempts whether before or after quickening only when necessary to preserve the life of the mother, dropping the alternative of opinions by two physicians.⁶¹ It also declared a misdemeanor whenever the mother should seek and take an abortifacient or submit to any attempt to abort her child, without express requirement that she be actually pregnant. The next year an attempted abortion by others on a pregnant woman was declared manslaughter in the second degree if the woman died as a result.⁶²

Ohio in 1834 made a misdemeanor of any such attempt on any pregnant woman unless necessary to preserve her life, actually or in the opinion of two physicians.⁶³ The attempt after quickening, "with intent thereby to destroy such child" was declared a high misdemeanor, punishable by imprisonment for one to seven years.

The next year Indiana declared a misdemeanor the attempt by any means on any pregnant woman unless necessary to preserve her life.⁶⁴ There were amendments from time to time, but it was not made a felony until 1881.⁶⁵

Missouri in 1835 legislated against attempts to destroy a quick child, but excused it if necessary to preserve the life of the mother or if such advice was given by a single physician.⁶⁶

In 1838 the first penal code of the new State of Arkansas defined as manslaughter a *successful attempt* to destroy a quick child, unless neces-

⁵⁹ Ill. Pub. Laws §§ 1, 2, 3, at 89 (1867) [Appendix I, p. 467].

⁶⁰ N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§ 8, 9, at 550; N.Y. Rev. Stat. pt. IV, ch. I, tit. VI, § 21 at 578 (1828-1835) [Appendix I, p. 499].

⁶¹ N.Y. Laws ch. 260, §§ 1, 3, at 285 (1845) [Appendix I, p. 500].

⁶² N.Y. Laws ch. 22, § 1, at 19 (1846) [Appendix I, p. 500].

⁶³ Ohio Gen. Stat. §§ 111(1), 112(2), at 252 (1841) [Appendix I, p. 504].

⁶⁴ Ind. Rev. Stat. § 3, at 224 (1838) [Appendix I, p. 468].

⁶⁵ Ind. Laws ch. XXXVII, § 22 (1881) [Appendix I, p. 468].

⁶⁶ Mo. Rev. Stat. art. II, § 10, at 168 (1835) [Appendix I, p. 490].

sary to preserve the life of the mother, or a "regular physician" so advised.⁶⁷

The Territorial Legislature of Iowa in 1839 adopted the old statute on attempts to abort by poisoning, providing for imprisonment up to three years.⁶⁸ In 1843 it extended the ban to attempts by other means, but only if the child was actually killed (the wording is ambiguous), in which case the action taken was declared manslaughter.⁶⁹ At the same time the act exempted any such measures if necessary to preserve the life of the mother.

The Maine statute of 1840 declared a crime any successful attempt to destroy the child at any stage of pregnancy; any other attempt was punished by a jail sentence.⁷⁰ The act exempted whatever was "done as necessary to preserve the life of the mother."

In 1841 Alabama enacted what had by then become something of a standard American abortion statute, forbidding attempts to cause miscarriage by any means unless necessary to preserve the life of the mother, but provided only a three to six months' jail term as punishment.⁷¹

The reform of English penal laws had eliminated the death penalty for most felonies, including abortions and abortion attempts. Under 7 Will. 4 & 1 Vict., c. 85,⁷² however, the attempt by any means was again declared a felony, which could be punished by transportation for life. It made no exception on account of danger to the mother, which was an American contribution. No such exception has been made by Parliament to this day, and if any be now recognized it must be based on the argumentative instructions of a single trial court judge in 1938 adjusting the Act of Parliament to his own conception of what such a law should be.

Most of the early American statutes dealt severely with abortions performed after quickening, but were relatively quite lenient as to abortions at an earlier stage. Most of them began with rather loose authorization of abortions based on the opinions of one or two medical men that they were necessary to preserve the life of the mother, but a few years' experience generally brought amendments to limit exemption to cases in which the abortion *was* necessary, with no substitution of a physician's declared opinion for the fact.

⁶⁷ Ark. Rev. Stat. ch. 44, div. III, art. II, § 6 (1838) [Appendix I, p. 450].

⁶⁸ Iowa (Terr.) Stat. 1st Legis., 1st Sess., § 18, at 145 (1838-1839) [Appendix I, p. 470-71].

⁶⁹ Iowa (Terr.) Rev. Stat. § 10 (1843) [Appendix I, p. 471].

⁷⁰ Me. Rev. Stat. ch. 160, §§ 13, 14 (1840) [Appendix I, p. 478].

⁷¹ Ala. Acts ch. 6, § 2 (1840-1841) [Appendix I, p. 447].

⁷² Offences against the Person Act, 1837.

All but a few States punished acts done with the intent to produce abortion, regardless of whether an abortion was actually effected, and this has become more and more the common pattern in this country as in England.

The old English statute to punish concealment of birth and death of bastard infants⁷³ had been generally recognized or adopted by the American colonies, and was included in the statutes of most of the older States before any of them enacted abortion laws.

In most of the abortion laws, English and American, as well as in the Canon Law, we note the omission to specify the time at which in the legal view an abortion becomes possible. The Nebraska statute specifies a "vitalized embryo, or foetus at any stage of utero gestation."⁷⁴ When is it vitalized? A paragraph from a much used commentary on the Code of Canon Law of 1917, with reference to Canon 985, may be of interest.

"Those who perform an *abortion* on a human being incur irregularity, provided, of course, the act is committed, not accidentally or unawares, but intentionally or through grievous culpability, even though by accident. The aborted fetus must be a *fetus humanus*, and, as is generally added, *animatus*, i.e., a living human fetus. We were surprised to see no reference, among Card. Gasparri's quotations, to the Constitution of Gregory XIV, '*Sedes Apostolica*,' of May 31, 1591, which restricted irregularity and penalties to the *fetus animatus*, as the old law had it. However, said Constitution is quoted under can. 2350, § 1. We believe that the unanimous teaching of the school should not be set aside, especially since the wording *fetus humanus* can only signify a living fetus. Animation, as stated before, takes place within the first week after conception. Theologians as well as canonists admit that the old theory concerning animation may still be held as far as the incurring of penalties and irregularities is concerned. This theory is that between the conception and the animation of a male fetus forty days, and of a female fetus, eighty days elapse. As long as no authentic declaration has been issued, the strict interpretation applied to penal laws may be followed here, and the period of forty, respectively eighty days be admitted. At any rate, we cannot scientifically speak of a human fetus before the lapse of six days after conception."⁷⁵

An exhaustive study of the history of Canon Law from its beginnings to the New Code was published by Roger J. Huser, O.F.M., in 1942.⁷⁶

⁷³ Miscarriage of Women Act, 1803, 43 Geo. 3, c. 58, § 4.

⁷⁴ Neb. Rev. Stat. § 28-404 (1956) [Appendix I, p. 491].

⁷⁵ Augustine, A Commentary on the New Code of Canon Law 489-90 (1920).

⁷⁶ Huser, The Crime of Abortion in Canon Law (1942).

Among canonists (and also Catholic theologians) there is still difference of opinion on the biological problem of when conception takes place: presumably the moment impregnation of the ovum takes place, or is completed. But when is that?

The moral theologian takes account of discoveries in embryology as soon as known. The canonist can give them effect only when they have evoked a new declaration from a canonical authority.

That a new life exists from the moment of conception—a human soul—is certainly the prevailing view of Catholic theologians as well as biologists. It is not accepted by all.⁷⁷

It is repeatedly urged that broadening the statutory authority to perform therapeutic abortion will cure a greater evil of widespread abortions by men without medical qualifications resulting in an appalling number of maternal deaths.

The American Law Institute abortion section corresponds to the Danish law of 1939.⁷⁸ We are told that while the number of legal abortions increased in twelve years to some 5,000 a year, the number of criminal abortions, instead of approaching zero increased to 9,000 a year. In Copenhagen only 70% of all pregnancies were allowed to go full term to deliver a living child.⁷⁹

The taking over by good medical men of all abortions would work an improvement in the figures on deaths from abortion only if they took over literally *all* cases. But no statute yet proposed would authorize abortion of an infant only because conceived out of wedlock. The young woman unintentionally pregnant who now risks all in going to an under-cover abortionist will continue to do so, since legitimate medical men are not permitted to perform the operations they seek, and well-qualified hospitals and surgeons will still be asking a higher fee than these young women can pay.

Of the cases reported by Dr. Gebhard and his associates in 1958, only 33 percent paid over \$100 for their abortions; the average, of those who paid at all, was \$83.⁸⁰

The various hopelessly conflicting "estimates" of the number of spontaneous abortions, induced abortions and deaths from abortion are all

⁷⁷ Hyacinthus and Hering, *De Tempore Animationis Foetus Humani*, 28 *Angelicum* 18-29 (1951).

⁷⁸ Law of May 18, 1937, [1939] *Lovtidende for Kongeriget Danmark* at 254 (Den.).

⁷⁹ Donnelly, as recorded in Calderone, *Abortion in the United States*, ch. 6 (*Therapeutic Abortion in the United States*) (1958).

⁸⁰ Gebhard, Pomeroy, Martin and Christenson, *Pregnancy, Birth and Abortion* 200 (1958).

stated in such broad terms of minimum and maximum, constituting such wide brackets, that it seems silly to call them estimates at all.⁸¹ They agree however in maintaining that the number of concealed deaths from this cause must be enormous because all criminal abortions are performed by men without medical qualifications in places devoid of hygienic safeguards. Just who is qualified to say to what extent this is true? The Gebhard report says:

Although in the course of taking sex histories we have acquired as subjects several practicing abortionists, and have secured supplementary data on their practice of abortion, we do not have a wide enough sample to generalize about them as a group. In the limited number of professional abortion specialists interviewed we have been impressed with their technical ability and the low number of deaths and ill effects resulting from their operations. We have also been impressed with their obvious concern, in most cases, over the plight of a woman with an unwanted pregnancy. One abortion specialist, for instance, who had considerable evidence to support his claim that he had performed 30,000 abortions without a single death in the course of his medical practice, attempted to hire a psychiatric social worker to counsel prospective abortion patients on the social and emotional aspects of their problem. This attempt met with failure because of his inability to find a trained person who was willing to become associated with him in his illegal practice. To be sure, the profit motive is also present, as the practice of inducing illegal abortion is a lucrative one, but the particular abortionists who consented to be interviewed had a much higher quality of surgical and medical technique than much of the literature would lead one to expect.⁸²

But all the discussion of these men who specialize in abortions for women pregnant out of wedlock seems today to be academic or historical, since most of those who seek abortions today are said to be wives who did not wish to become pregnant.⁸³

"In the past, the rearing of children has been an unqualified contribution to society because of high mortality, but in the 20th century it is a questionable achievement. It is certainly a self-indulgence. . . . As soon as babies become a distraction, a sedative, or a justification to a life which has succumbed to outer pressures at the expense of inner development, their birth is lamentable. . . . Girls and women in their new, their

⁸¹ Report of the Statistics Committee, in Calderone, *op. cit.* supra note 79, at 180.

⁸² Gebhard, Pomeroy, Martin and Christenson, *op. cit.* supra note 80, at 198-99.

⁸³ Kinsey, as recorded in Calderone, *op. cit.* supra note 79, ch. 8 (Abortion and Contraception), 156.

own unfolding will but in passing be imitators of masculine vices and virtues and repeaters of masculine professions. After the uncertainty of such transitions it will become apparent that women only went through the whole range and variety of those (often ridiculous) disguises in order to clean their most characteristic nature of the distorting influences of the other sex."⁸⁴

It is often said that those with a rigid code of morality should live their own lives in accordance with it but not seek to impose it upon others. Therapeutic abortionists impose their code on the thousands of infant victims. The proposition also assumes that there are no objective principles of morality, which requires in turn a denial of any objective truth.

Gilson writes: "The great curse of modern philosophy is the almost universally prevailing rebellion against intellectual self-discipline. Where loose thinking obtains, truth cannot possibly be grasped, whence the conclusion naturally follows that there is no truth."⁸⁵

But there is objective truth, which does not lose its character as truth no matter how many refuse to accept it. The laws which control the character and movement of bodies in the physical universe, perhaps still undiscovered, are objectively true—yesterday, today, tomorrow; they were not affected by the poetic fancies of early Greek speculation, nor by centuries of acceptance of Ptolemaic theory, nor by acceptance of a heliocentric theory in its place. They are not affected by the ignorance or the disbelief of a numerical majority of mankind at any time.

The Model Penal Code seeks to impose the views of a self-elected better element on states and communities whose people are overwhelmingly opposed to abortion. It may be put through legislatures by the prestige of its proponents, or by its inclusion as a small item in a generally desired code reform and amid the heat of debate over sections opposed by organized crime and other lobbies. However it fares, it is either right or wrong.

Legislative adoption of this section would not leave its opponents undisturbed in their own way of life. The mere fact of affirmative approval of therapeutic abortion by a legislature would change the views and practices of millions who earnestly try to shape their lives to a moral code, but who look to their lawmakers to define it for them.

Some doctors and hospitals in every community would be quick to take advantage of the permission given them by statute, no matter how

⁸⁴ Coolidge, *Population v. People*, 16 *Population Bull.* 145 (1960), reprinted from *Bull. No. 8*, Thorne Ecological Research Station.

⁸⁵ Gilson, *God and Philosophy* xv (1951).

small a minority they might be; and this would put pressure on other doctors, and tempt patients who believed all induced abortion wrong.

The twin to section 207.11 was incorporated in a bill which was offered in the House of Commons by Hon. Kenneth Robinson (Laborite) in 1959, was finally debated and on February 13, 1961, died under rule.⁸⁶

It may be recalled that in 1956 the English version of the declaration of rights of sex deviates was published by the Church of England Moral Welfare Council (Dr. Derrick Sherwin Bailey, secretary).⁸⁷ It was given final form by an independent committee under Sir John Wolfenden, in 1957, and was declared to have the endorsement of the Archbishop of Canterbury and authorities of the principal churches in England. It was incorporated in a bill and offered in Parliament. Ian Harvey, Conservative secretary of state at the Foreign Office had resigned when his homosexual relations with a Royal Guardsman were publicized.⁸⁸ On April 9, 1959, the *Daily Express* carried a sensational attack on the homosexual influence in London theater, touched off by the sentencing of a choreographer and revue star for soliciting sex perversion.⁸⁹ The deviate declaration was brought up for vote a year later, on June 29, 1960, and was rejected by a vote of 213 to 99.⁹⁰

Perhaps the most strongly urged reason for the revision of our abortion laws is that they have been found unenforceable because not supported adequately by the people in general and by jurors in particular. Of course, the real reason that there has been so little successful prosecution under such statutes is simply that in most cases the crime is so difficult to prove. If the abortion is successful, all evidence of the operation disappears within a few days and the only witness is the mother who brought it about. Rape is another crime in which all physical evidence will ordinarily vanish in a few days but there is certainly no movement to abolish or modify our laws against this crime on that account. Another factor in the poor enforcement of abortion statutes is the fact that in abortion cases the natural prosecutor, the child, is dead and its natural guardian the criminal, so that there is no pressure on public prosecutors to bring these cases before a grand jury. An English writer declared a few years ago that juries were generally blamed for refusal to convict a

⁸⁶ NCWC News Service (Radio, Foreign) Feb. 13, 1961, p. 5.

⁸⁷ Washington (D.C.) Post, May 25, 1956, p. 47, col. 1.

⁸⁸ Chicago Daily Tribune, March 20, 1959, pt. 2, p. 12, col. 1.

⁸⁹ Daily Express (London), April 9, 1959, p. 8, cols. 2-3; see also, Chicago American, April 9, 1959, § 1, p. 9, col. 3.

⁹⁰ Chicago Daily Tribune, June 30, 1960, pt. 4, p. 9, cols. 5-6.

mother of infanticide, but that their verdicts were actually due to instructions given them by quibbling judges.⁹¹

The widespread practice of infanticide, and then its reduction under Christian laws, shows that there is value to penal laws even where they are widely disregarded. The statutes against duelling found in the laws of all of the early States of the Union were for a long time very difficult to enforce but the legislation persisted and furnished the rallying point for the opposition to this absurd custom.

It is said that statutes should never declare criminal and undertake to punish any conduct which is regarded as proper and desirable by a respectable minority. It is always the "respectability" of the minority which is looked to. A really big minority including many "respectable" elements not only opposes legislation in aid of Negro rights and claims, but opposes bitterly and actively, to the extent of violent defiance of this and other legislation. A large and very respectable minority challenges sincerely the whole idea of punishing the mixture of driving and alcohol. We have much legislation against narcotics, subversives, trusts and monopolies, all of which are heartily opposed by many but we could hardly carry on our manner of life of today without the aid of these penal laws.

Murder and other crimes of violence are increasing at a spectacular rate in the United States and at least some other countries. Police and prosecution efforts are becoming ever less effective. But few today would propose abandonment of existing laws against such crimes. The Model Penal Code does not abandon but seeks to improve them.

Section 207.11 would authorize reputable doctors to perform abortions in reputable hospitals for a variety of medical and nonmedical reasons. Should the next step be to make this more fully effective for a larger part of the population by modifying our penal laws to justify murder, robbery, burglary, larceny, embezzlement, the confidence game, whenever in the opinion of two experts one of these crimes would be a necessary means for a particular individual to obtain the money to pay the fees for an abortion by a reputable doctor in a reputable hospital?

A Model Penal Code, in dealing with abortion, should contain only the condemnation, without "justifications." Any State that so desired could then insert for itself any exceptions or exemptions or provision for therapeutic abortion. Every State is still the proper guardian and interpreter of its own moral standards and traditions.

⁹¹ Davies, Killing in English Law, 1 Modern L. Rev. 203 (1937).

But no State at peace has, or can give, the right to destroy an innocent life. Elaborate safeguards against unjust execution for crime are found in all the States. Many advocates of liberalization of abortion laws are unconditionally opposed to capital punishment for any crime. They would have the foulest murder punished only by a term in prison, often with benefit of probation and parole laws, but would order death, on the recommendation of two medical men, for the innocent child in the womb. Rape and incest draw only prison terms—in many States ridiculously small ones—but the unborn infant attributed to such crime is to be killed without even opportunity to show that he had actually some other origin.

We can all remember the general horror at the slaughter of the Kulaks in aid of the communist economy, and the slaughter in the name of science at Dachau. We still reject the totalitarian state and maintain the natural right to life of the individual as a human being, for whose protection the state exists.

The Marquis de Sade had one of his heroines (Juliette) say:

"[A]nd so that is what murder is: a little matter disorganized, a few combinations changed, some atoms broken and returned to Nature's crucible from whence they will return in a few days in another form; where is the evil in that? Are women or children more precious to Nature than flies or worms? If I take life from the one, I give it to the other; where is the crime in what I do?"⁹²

Just *passim* we may note that de Sade seems to have been in full accord with the views of Seneca quoted earlier in this work. "De Sade was much occupied with the idea of the optimum population, and in *La Philosophie dans le Boudoir* he reaches conclusions very similar to those put forward by Malthus three years later in his *Essay on Population*. He did not pronounce definitely whether France had passed the optimum, though he rather suspected it had; the future danger was anyhow grave. . . . He was against the preservation of malformed or diseased children: 'Any child who is born without the necessary qualities which will allow him to become one day a useful citizen has no right to life and the best thing to do is to deprive him of it the moment he gets it.'"⁹³ It will be recalled that this was another instance of Spartan simplicity.

The Model Code would delegate to any two men licensed to practice medicine both legislative and judicial authority beyond that of the State

⁹² Gorer, *The Marquis de Sade* 232 (1934).

⁹³ *Id.* at 152.

itself. Though holding no office, elective or appointive, they would determine the indications for therapeutic abortion and their application to each patient, without even the required aid of any expert opinion; give definite on-the-spot answers to all questions in the shadowy area of genetics; and determine the paternity of an unborn child and whether it was the product of a crime of rape or incest.

The state cannot authorize medical men to do what is beyond its own authority—to destroy an innocent life. It cannot authorize such killing for the good of the state or of society, or as a scientific experiment. It may not take one innocent life to save another, let alone to preserve the health of another. As Antigone replied to Creon:

Nor are
Your proclamations of such power that you
Of mortal birth, can hope to nullify
Th' unwritten and unerring laws of Heaven,
For not alone today nor yesterday
Are these unfailing laws in force. In all
Past time they lived and to eternity
Will they endure⁹⁴

It seems strange to hear charges that our laws against abortion are due to pressure from the Catholic population. They might like to take the credit, as their church is certainly opposed in principle to induced abortion. But it is not a fact. The first modern statute, the English Act of 1803, was enacted by a Parliament which had no Catholic members, and few Catholic constituents. The statute 30 Car. 2, Stat. 2, barring Catholics from both houses of Parliament was not repealed until 1829 (10 Geo. 4, c. 7). The first American laws against abortion were enacted by States in which, at the time of enactment, Catholics were an object of curiosity rather than a political force: Connecticut, 1821; Massachusetts, 1845; Vermont, 1846; Maine, 1840; Illinois, 1827; New York, 1828; Ohio, 1834; Indiana, 1835; Iowa, 1839; Arkansas, 1838; Alabama, 1841; Virginia, 1848; the Kingdom of Hawaii, 1850. New Hampshire's abortion law was passed in 1848; its Constitution of 1783 was in full force until 1877, and prescribed that only Protestants could be Governor, member of the Senate or member of the lower house.⁹⁵

These enactments did not represent a passing hysteria. In general the trend in amendatory legislation has been towards tightening the laws and increasing the penalties.

⁹⁴ Sophocles, *Antigone* 24 (Robinson transl. 1958).

⁹⁵ N.H. Const. pt. II.

It is some seventy years since Balestrini warned: "Whenever abortion becomes a social custom, it is the external manifestation of a people's decadence, and far too deeply rooted to be cured by the mere attempt to suppress the external manifestation."⁹⁶

We do not believe that abortion is likely to become an American social custom. The recent failure in Parliament of a bill similar to the American Law Institute section 207.11 encourages belief that such bills will not get too far in our own legislatures.

A few years ago Dr. Donnelly reminded a medical audience that Dr. Osler, perhaps the most highly regarded medical man of our day, could never have been born if the argument for economic indications had prevailed in his community, as he was the ninth child in a very poor family. Of more general interest is the fact that on a similar supposition there would have been no Abraham Lincoln, as his mother, Nancy Hanks, was the result of an affair between a poor, shiftless girl without education or means or morals, and a stranger from thither side of the mountain.

There will always be women to shut their hearts to everything but their own desires. Some of them will undoubtedly obtain abortions no matter what laws we have.

[T]he good die first,
And they whose hearts are dry as summer dust
Burn to the socket.⁹⁷

There are many others who cry out for abortion at some time during pregnancy when pain and discouragement are hardest, but who will be grateful that an existing law prevented the plea from being heeded. As the old Russian proverb has it: "Two small hands upon the breast, and labor is forgotten."

⁹⁶ Balestrini, *Aborto, Infanticidio* 191 (d'Infante ed. 1888).

⁹⁷ Wordsworth, *The Excursion*, I, in 6 *The Poetical Works of William Wordsworth* 35 (1864).

APPENDIX I

Statutory Materials on Abortion—The United States and Its Territories

Author's insertions are in brackets; brackets appearing in the statutes have been changed to parentheses.

ALABAMA

Ala. Code tit. 14, § 9 (1940).

"Any person who willfully administers to any pregnant woman any drug or substance, or uses or employs any instrument or other means to induce an abortion, miscarriage, or premature delivery, or aids, abets, or prescribes for the same unless the same is necessary to preserve her life or health and done for that purpose, shall on conviction . . . [fine \$100-\$1,000, imprisonment up to 12 months]." [As amended, Acts 1951, p. 1630.]

Ala. Acts ch. 6, § 2 (1840-1841).

"Every person who shall willfully administer to any pregnant woman any medicines, drugs, substance or thing whatever, or shall use and employ any instrument or means whatever with intent thereby to procure the miscarriage of such woman, unless the same shall be necessary to preserve her life, or shall have been advised by a respectable [sic] physician to be necessary for that purpose, shall upon conviction, be punished by fine not exceeding five hundred dollars, and by imprisonment in the county jail, not less than three, and not exceeding six months."

Statutory Development.

Ala. Laws 1843, ch. VI, § 2, at 431 (Clay's Digest).

Ala. Code 1852, pt. 4, tit. 1, ch. 2, art. V, § 3230: ". . . must, on conviction, be fined . . . and imprisoned not less than three nor more than twelve months."

Ala. Pen. Code 1866, tit. 1, § 64, at 31: ". . . any drug or substance, or uses or employs . . . means to procure her miscarriage . . . and done for that purpose [deletes advice of physician] . . . [fine to \$500] and may also be imprisoned . . . [3-12 months]."

Ala. Rev. Code 1867, pt. 4, tit. 1, ch. 5, § 3605: ". . . any drug or substance, or uses or employs any instrument or other means to procure her miscarriage, unless the same is necessary to preserve her life, and done for that purpose . . . [fine to \$500 and possible imprisonment 3-12 months]."

Ala. Code 1876, pt. 5, tit. 1, ch. 5, § 4192.

Ala. Code 1887, § 4022.

Ala. Acts 1894, at 131: amending § 4022: ". . . and sentenced to the penitentiary for not less than two, nor more than five years."

Ala. Code 1897, ch. 120, § 4305: ". . . and imprisoned in the . . ."

Ala. Code 1907, § 6215.

Ala. Gen. Laws 1911, at 548: amending § 6215: ". . . means to induce an abortion, miscarriage or premature delivery, or aids, abets, advises or prescribes for the same . . ."

Ala. Code 1923, § 3191: deleting "advises" from § 6215.

Ala. Gen. Laws 1951, at 1630: amending Ala. Code 1940, tit. 14, § 9 by adding "or health," and changing fine from \$500 or less to \$100-\$1,000, imprisonment from 2-5 years to up to 12 months.

Case Material.

Statute applies only after quickening, *Smith v. Gaffard*, 31 Ala. 45 (1857).

ALASKA

Alaska Comp. Laws Ann. § 65-4-6 (1949).

"That if any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter, and shall be punished accordingly." [Unchanged from "An Act To define and punish crimes in the District of Alaska and to provide a code of criminal procedure for said district," Mar. 3, 1899, ch. 1, § 8, almost verbatim from Organic and General Laws of Oregon 1864, ch. 43, § 509, at 528.]

Alaska Comp. Laws Ann. §§ 35-3-87, -88 (1949).

Section 87: ". . . Any license . . . may be revoked . . . for unprofessional conduct as hereinafter defined."

Section 88: "The words 'unprofessional or dishonorable conduct' as used in the last preceding section are hereby declared to mean: (1) Procuring or aiding or abetting in procuring a criminal abortion . . ." [Unchanged from Sess. Laws 1917, ch. 8, §§ 7, 8, at 19; Comp. Laws Ann. §§ 2227, 2228 (1933).]

ARIZONA

Ariz. Rev. Stat. Ann. § 13-211 (1956).

"A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years." [Almost verbatim from Cal. Pen. Code § 274 (1872), before 1935 amend.]

Howell Code ch. 10, § 45 (1865).

"Every person who shall willfully and maliciously administer . . . any poison . . . with the intention to cause the death of such person . . . [A]nd every person who shall administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to produce the miscarriage of any woman then being with child, and shall be thereof duly convicted . . . [imprisonment in territorial prison 2-5 years]. Provided, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life." [Comp. Laws 1877, § 45.]

Ariz. Rev. Stat. (Pen. Code) §§ 454, 455 (1887).

Section 454: "Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drugs, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable . . . [imprisonment 2-5 years]."

Section 455: "Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to pre-serve her life, is punishable . . . [imprisonment 1-5 years]." [Pen. Code § 244 (1901); Pen. Code § 274 (1913); Rev. Code § 4645 (1928); Code § 43-301 (1939) (in part).] [Sections 454, 455 unchanged from Cal. Pen. Code § 275 (1872).]

Ariz. Rev. Stat. Ann. §§ 13-212, -213 (1956).

Section 212: "A woman who solicits from any person any medicine, drug or substance whatever, and takes it, or who submits to an operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless it is necessary to preserve her life, shall be punished . . . [imprisonment 1-5 years]." [Almost verbatim from Cal. Pen. Code § 275 (1872).]

Section 213: "A person who wilfully writes, composes or publishes a notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for prevention of conception, or who offers his services by a notice, advertisement or otherwise, to assist in the accomplishment of any such purpose, is guilty of a misdemeanor." [Rev. Pen. Code § 288 (1901); from Cal. Bus. & Prof. Code § 601.]

ARKANSAS

Ark. Stat. Ann. §§ 41-301, -302 (1947).

Section 301: "It shall be unlawful for anyone to administer or prescribe any medicine or drugs to any woman with child, with intent to produce an abortion, or premature delivery of any foetus before the period of quickening, or to produce or attempt to produce such abortion by any other means; and any person offending . . . [fine to \$1,000 and imprisonment 1-5 years] provided, that this section shall not apply to any abortion produced by any regular practicing physician, for the purpose of saving the mother's life." [From Laws 4th Adj. Sess. 1875, § 1, at 5.]

Section 302: "Every person who knowingly advertises, prints, publishes, or knowingly causes to be advertised, printed, published or circulated any pamphlet, printed paper, book, newspaper notice or reference containing words or language giving or conveying any notice, hint, or reference to any person, or to the name of any person, real, or fictitious, from whom or to any place, house, or shop, or office where any poison, drug, mixture, preparation, medicine, or noxious thing, whether medicinal, mechanical or otherwise, or any advice, information or knowledge may be obtained for the purpose of causing miscarriage, or abortion, in the case of any woman pregnant with child, shall be punished . . . [fine not less than \$1,000; jail 6-12 months]." [Unchanged from Act of Nov. 8, 1875, Laws 4th Adj. Sess. 1875, § 2.]

Statutory Development.

Ark. Terr. Laws 1835 (not enacted) were compiled from the laws of Louisiana, Missouri, and the Arkansas Territory; they contained nothing on abortion.

Ark. Rev. Stat. ch. 44, div. III, art. II, § 6 (1838).

"Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall employ any instrument or other means with intent thereby to destroy such child, and thereby shall cause its death, unless the same shall be necessary to preserve the life of the mother, or shall have been advised by a regular physician to be necessary for such purpose, shall be deemed guilty of manslaughter." [From first Legislature, October 1837 Session.]

Ark. Stat. Ann. § 41-2223, -2224 (1947).

Section 2223: "The wilful killing of an unborn, quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be adjudged manslaughter." [Unchanged from Rev. Stat. 1838, ch. 44, div. III, art. II, § 5; immediately precedes present § 2224 in all compilations.]

Section 2224: [Unchanged from Rev. Stat. 1838, ch. 44, div. III, art. II, § 6, above.]

CALIFORNIA

Cal. Pen. Code § 274.

"Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State prison not less than two nor more than five years. (Enacted [as Pen. Code § 274] 1872. As amended Stats. 1935, c. 528, p. 1605, § 1.)"

Cal. Pen. Code § 274 (Deering 1886).

"Every person who provides, supplies, or administers to any *pregnant* woman, or procures any *such* woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years." [Italicized words deleted by 1935 amend.]

Cal. Pen. Code § 275.

"Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the State Prison not less than one nor more than five years. (Enacted [as Pen. Code § 275] 1872 [never amended].)"

Cal. Pen. Code § 276 (Supp. 1960).

"Every person who solicits any woman to submit to any operation, or to the use of any means whatever, to procure a miscarriage, unless the same is necessary to pre-

serve her life, is punishable by imprisonment in the county jail not longer than one year or in the state prison not longer than five years, or by fine of not more than five thousand dollars (\$5,000). Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances. (Added by Stats. 1957, c. 270, p. 921, § 1.)”

Cal. Sess. Stats. ch. 99, § 45, at 233 (1849-1850).

“[Poisoning.] . . . And every person who shall . . . administer or cause to be administered or taken, any medicinal substances, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished . . . [2-5 years]: *Provided*, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life.”

Case Material.

People v. Glass, 158 Cal. 650, 112 Pac. 281, *reversal and remand aff'd*, 158 Cal. 667, 112 Pac. 292 (1910), construes “unlawfully” in a statute.

State need not prove actual pregnancy, *Rinker v. State Bd. of Med. Examiners*, 59 Cal. App. 2d 222, 138 P.2d 403 (Dist. Ct. App. 1943).

Act with intent to abort is enough; need not prove either pregnancy or miscarriage, *People v. Gallardo*, 41 Cal. 2d 57, 257 P.2d 29 (1953); *People v. Raffington*, 98 Cal. App. 2d 455, 220 P.2d 967 (Dist. Ct. App. 1950), *cert. denied*, 340 U.S. 912 (1951); *People v. Pollum*, 97 Cal. App. 2d 173, 217 P.2d 463 (Dist. Ct. App. 1950). Any attempt with intent is sufficient, *People v. Berger*, 131 Cal. App. 2d 127, 280 P.2d 136 (Dist. Ct. App. 1955). But intent to abort must be proved, *People v. Collins*, 80 Cal. App. 2d 526, 182 P.2d 585 (Dist. Ct. App. 1947), *cert. denied*, 335 U.S. 831 (1948), 337 U.S. 961 (1949).

Intent to abort requires belief woman is pregnant, *People v. Stuart*, 168 Cal. App. 2d 62, 335 P.2d 192 (Dist. Ct. App. 1959); *People v. Murphy*, 60 Cal. App. 2d 762, 141 P.2d 755 (Dist. Ct. App. 1943). This does not mean actual knowledge, if doctor believes her pregnant, *People v. Stuart*, *supra*; his supposition of pregnancy is enough, *People v. Richardson*, 161 Cal. 552, 120 Pac. 20 (1911). Not provable by testimony of the woman alone, *People v. Murphy*, *supra*; evidence corroborating that of the prosecuting witness can be slight, *People v. Allen*, 104 Cal. App. 2d 402, 231 P.2d 896 (Dist. Ct. App. 1951); her testimony does require corroborative evidence, *People v. Gallardo*, *supra*. Woman's submission to abortion does not make her accomplice or accessory, *People v. Gallardo*, *supra*; *People v. Califro*, 120 Cal. App. 2d 504, 261 P.2d 332 (Dist. Ct. App. 1953), *cert. denied*, 347 U.S. 957 (1954); *People v. Reimringer*, 116 Cal. App. 2d 332, 253 P.2d 756 (Dist. Ct. App. 1953) (referring to Cal. Pen. Code § 275). Intent provable by showing same means used by defendant to effect previous abortions, *People v. Darby*, 64 Cal. App. 2d 25, 148 P.2d 28 (Dist. Ct. App. 1944).

State must prove abortion was not necessary to save life of mother, *People v. Long*, 15 Cal. 2d 590, 103 P.2d 969, *cert. denied*, 311 U.S. 698 (1940) (murder by abortion); *People v. Ballard*, 167 Cal. App. 2d 803, 335 P.2d 204 (Dist. Ct. App. 1959). Peril to her life need not be imminent; doctor need not think her death certain to result if abortion is not performed, *People v. Ballard*, *supra*.

Conviction of criminal abortion for murder by abortion if mother dies later as result of abortion, *People v. Coltrin*, 5 Cal. 2d 649, 55 P.2d 1161 (1936) (overruled, *People v.*

Brown, 49 Cal. 2d 577, 320 P.2d 5 (1958)). Murder by abortion cannot be established without proof abortion was not necessary to save life of mother; but if necessary may be manslaughter if carelessly done, *People v. Long*, *supra* (referring to Cal. Pen. Code §§ 192, 274).

People v. Ballard, *supra* at 814, 335 P.2d at 212: "Surely, the abortion statute (Pen. Code, § 274) does not mean by the words 'unless the same is necessary to preserve her life' that the peril to life be imminent. It ought to be enough that the dangerous condition 'be potentially present, even though its full development might be delayed to a greater or less extent. Nor was it essential that the doctor should believe that the death of the patient would be otherwise *certain* in order to justify him in affording present relief.' (*State v. Dunkleberger*, 206 Iowa 971 [221 N.W. 592, 596 (1928)]); see also *Rex v. Bourne* [1939] 1 K.B. 687 (1938); *Commonwealth v. Wheeler*, 315 Mass. 394 [53 N.E. 2d 4 (1944)]; 23 So. Cal. L. Rev. 523.)"

COLORADO

Colo. Rev. Stat. Ann. § 40-2-23 (1953).

"Poisoning—procuring abortion.—" [Same as Cal. Laws 1949, except: substitutes "any such poison, substance or liquid," "instrument of whatsoever kind," and "shall be imprisoned for a term not exceeding three years in the penitentiary and fined in a sum not exceeding one thousand dollars," and omits the proviso; adds: "If any woman by reason of such treatment shall die . . . deemed guilty of murder, and if convicted, to be punished accordingly, unless it appear that such miscarriage was procured or attempted by or under advice of a physician or surgeon with intent to save the life of such woman or to prevent serious and permanent bodily injury to her."]

Colo. Gen. Laws, Joint Res., Mem., and Priv. Acts of the Terr. of Colo. Legis. Asm., 1st Sess., § 42, at 296-97 (1861).

"Every person who shall wilfully and maliciously administer . . . [poison]; and every person who shall administer substance or liquid, or who shall use or cause to be used any instrument, of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and fined in a sum not exceeding one thousand dollars; and if any woman, by reason of such treatment, shall die, the person or persons administering, or causing to be administered, such poison, substance or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished accordingly." [Almost same as Cal. Laws 1890, ch. 99, § 45, at 233.] [Section 24 defined involuntary manslaughter as "killing of a human being, without any intent to do so, in the commission of an unlawful act"]

Colo. Rev. Stat. ch. 11, § 42, at 202 (1868).

"[A]dminister, or cause to be administered or taken, any such poison, substance . . . three years in the penitentiary . . . [and added:] unless it appear that such miscarriage was procured or attempted by or under advice of a physician or surgeon, with intent to save the life of such woman, or to prevent serious and permanent bodily injury to her."

Statutory Development.

Colo. Gen. Laws 1877, § 637, at 269.

Colo. Gen. Stat. 1883, § 735, at 302.

Colo. Laws 1891, § 1, at 122: amending § 735: deleting "manslaughter" and adding "murder." (Mills Ann. Stat. Supp. 1891-1896, § 1209, at 354.)

Colo. Rev. Stats. 1908, § 1646.

Colo. Laws 1921, § 6687.

Colo. Stat. Ann. 1935, ch. 48, § 56.

Courtwright's Mills Ann. Stat. 1930, § 1775.

Colo. Rev. Stat. Ann. 1957 Supp.; Colo. Sess. Laws 1959: no additions or changes concerning abortion.

Case Material.

Administration or use with intent to cause miscarriage constitutes the offense, *Dougherty v. People*, 1 Colo. 514 (1872). "Abortion" and "miscarriage" are synonymous, *Marmaduke v. People*, 45 Colo. 357, 101 Pac. 337 (1909).

CONNECTICUT

Conn. Gen. Stat. Rev. § 53-29 (1958).

"Any person who gives or administers to any woman, or advises or causes her to take or use anything, or uses any means, with intent to procure upon her a miscarriage or abortion, unless the same is necessary to preserve her life or that of her unborn child, shall be fined not more than one thousand dollars or imprisoned in the State Prison for not more than five years or both. (1949 Rev., S. 8363.)"

Conn. Stat. tit. 22, §§ 14, 16, at 152, 153 (1821).

Section 14: "Every person who shall, wilfully and maliciously, administer to, or cause to be administered to, or taken by, any person or persons, any deadly poison, or other noxious and destructive substance, with an intention him, her or them, thereby to murder, or thereby to cause or procure the miscarriage of any woman, then being quick with child, and shall be thereof duly convicted, shall suffer imprisonment, in new-gate prison, during his natural life, or for such other term as the court having cognizance of the offence shall determine."

Section 16: [Concealment of death of bastard infant.]

Case Material.

The clause on abortion in Conn. Stat. 1821, tit. 22, § 14, at 152, as enlarged in the 1854 revision was "probably repealed in 1860," *State v. Carey*, 76 Conn. 342, 352, 56 Atl. 632, 636 (1904).

Conn. Laws ch. 1, § 16, at 255 (1830).

"Every person who shall wilfully and maliciously administer to, or cause to be administered to, or taken by, any woman, then being quick with child, any medicine, drug, noxious substance, or other thing, with an intention thereby to procure the miscarriage of any such woman, or to destroy the child of which she is pregnant; or shall wilfully and maliciously use and employ any instrument, or other means to produce such mis-

carriage, or to destroy such child, and shall be thereof duly convicted, shall suffer imprisonment in the Connecticut State Prison, for a term not less than seven, nor more than ten years."

Conn. Pub. Acts ch. LXXI, §§ 1, 2, at 65 (1860).

Section 1: "That any person with intent to procure the miscarriage or abortion of any woman, shall give or administer to her, prescribe for her, or advise, or direct, or cause or procure her to take, any medicine, drug or substance whatever, or use or advise the use of any instrument, or other means whatever, with the like intent, unless the same shall have been necessary to preserve the life of such woman, or of her unborn child, shall be deemed guilty of felony, and upon due conviction . . . [fine to \$1,000, imprisonment 1-5 years]."

Section 2: "Any person who shall knowingly aid or assist any other person in the commission of the offense above described, shall be deemed guilty of felony . . . [fine to \$500, imprisonment 1-5 years]."

[Sections 1 and 2 reworded from time to time: Gen. Stat. 1866, tit. XII, ch. II, §§ 22, 23, at 248-49; Gen. Stat. Rev. 1887, tit. XIX, ch. XCIX, § 1411, at 326; Gen. Stat. Rev. 1902, tit. 7, ch. 82, § 1155, at 351; Gen. Stat. Rev. 1918, div. 6, tit. LVI, ch. 327, § 6200, at 1714; Gen. Stat. Rev. 1930, div. 6, tit. LIX, ch. 323, § 6056, at 1886; Gen. Stat. Rev. 1949, vol. III, div. 6, tit. LXIV, ch. 417, § 8363, at 3052.]

Conn. Gen. Stat. Rev. § 53-30 (1958).

"Any woman who does or suffers anything to be done, with intent thereby to produce upon herself miscarriage or abortion, unless necessary to preserve her life or that of her unborn child, shall be fined not more than five hundred dollars or imprisoned not more than two years or both."

Conn. Pub. Acts ch. LXXI, § 3 (1860).

"Every woman who shall solicit, purchase or obtain of any person, or in any other way procure or receive any medicine, drug or substance whatever, and shall take the same, or shall submit to any operation or other means whatever, or shall commit any operation or violence upon herself, with intent thereby to produce miscarriage, or abortion, unless the same shall have been necessary to preserve her own life, or that of her unborn child, shall be deemed guilty of felony, and upon conviction . . . [fine of \$500, imprisonment 1-2 years]." [Compressed into present form: Gen. Stat. Rev. 1887, § 1412, at 326; Gen. Stat. Rev. 1902, § 1156, at 351; Gen. Stat. Rev. 1918, § 6201, at 1714; Gen. Stat. Rev. 1930, § 6057, at 1886; Gen. Stat. Rev. 1949, § 8364, at 3052.]

Conn. Gen. Stat. Rev. § 53-31 (1958).

"Any person who, by publication, lecture or otherwise or by advertisement or by the sale or circulation of any publication, encourages or prompts to the commission of the offenses described in section 53-29 or 53-30, or who sells or advertises medicines or instruments or other devices for the commission of any of said offenses, except to a licensed physician or to a hospital approved by the state department of health, or who advertises any so-called monthly regulator for women . . . [\$500 fine, imprisonment to 1 year]."

Conn. Pub. Acts ch. LXXI, § 4 (1860).

"Any person who shall, by publication, lecture or otherwise, or by advertisement, sale or circulation of any publication designed or calculated to encourage or prompt to the commission of said offences, or by sale or advertisement of medicines for the commission of them shall be deemed guilty of felony . . . [fine only \$300-\$500]."

Conn. Gen. Stat. tit. XII, ch. II, § 25 (1866).

"Every person, who shall, by publication, lecture or otherwise, or by advertisement, or the sale or circulation of any publication, encourage or prompt to the commission of the offenses described in the three preceding sections, or who shall sell, or advertise medicines for the commission of them, shall pay a fine not exceeding five hundred dollars." [Unchanged until amendment of June 21, 1905, Laws 1905, ch. 167, added after "them": "or who shall advertise any so-called monthly regulator for women."]

DELAWARE

Del. Code Ann. tit. 11, §§ 301, 302 (1953).

Section 301: "Whoever, with the intent to procure the miscarriage of any pregnant woman, or any woman supposed by such person to be pregnant, unless the same is necessary to preserve her life, administers, advises, prescribes or causes to be taken by her, any poison, drug, medicine or other noxious thing, or uses any instrument or other means, whether the miscarriage is accomplished or not, is guilty of a felony, and shall be fined not less than \$100 nor more than \$500, and imprisoned not less than 1 nor more than 5 years."

Section 302: "Whoever advertises, prints, publishes, distributes or circulates any pamphlet, printed paper, book, newspaper, notice, advertisement, or reference, containing words or language giving or conveying any notice, hint or reference to any person, or to the real or fictitious name of any person from whom, or to any place, house, shop, or office where anything whatsoever, or any instrument or means whatsoever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any pregnant woman, shall be fined not less than \$50 nor more than \$200, and imprisoned not more than 1 year."

Del. Laws ch. 226, §§ 1, 2, at 522 (1883).

Section 1: "Every person who shall advertise, print, publish, distribute or circulate, or shall cause to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper, notice, advertisement, or reference, containing words or language giving or conveying any notice, hint or reference to any person, or to the real or fictitious name of any person from whom, or to any place, house, shop, or office where anything whatsoever, or any instrument or means whatsoever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any pregnant woman, shall be guilty of a misdemeanor, and upon conviction thereof . . . [fine \$50-\$200 and imprisonment up to 1 year]."

Section 2: "Every person who, with the intent to procure the miscarriage of any pregnant woman or women supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her, advise, or prescribe for her, or cause to be taken by her any poison, drug, medicine, or other noxious thing, or

shall use any instrument or other means whatsoever, or shall aid, assist, or counsel any person so intending to procure a miscarriage, whether said miscarriage be accomplished or not, shall be guilty of a felony, and upon conviction thereof . . . [fine \$100-\$500 and imprisonment 1-5 years]."

Del. Laws ch. 22, § 6, at 67 (1797).

" . . . And if any perfon or perfons fhall counfel, advife or direct fuch woman to kill the child fhe goes with, and, after fhe is delivered, of fuch child, fhe kills it, every fuch perfon fo advifing or directing, fhall be deemed acceffary to fuch murder, and fhall have the fame punifhment as the principal fhall have." ["An ACT for the advancement of Juftice, and more certain adminiftration thereof," enacted by William Keith, Royal Governor of the counties of New-Castle, Kent and Sussex, upon Delaware, and Province of Pennsylvania "by and with the advice and confent of the freemen of the faid counties, in General Affembly met," 1719.]

Comment.

The first Constitution of the state of Delaware, Del. Const. art. 25 (1776), kept in force the Common Law of England and so much of the English statutes as had already been adopted in practice and which were not repugnant to the rights and privileges under this Constitution and the Declaration of Rights. Del. Laws 1700-1797, vol. 1, app., at 89.

Statutory Development.

Del. Rev. Code 1852, codified and enacted all prior general public laws.

Del. Rev. Code 1874, same with amendments and additions compiled; not reenacted.

Del. Rev. Code 1893, same with amendments and additions compiled; not reenacted.

Del. Rev. Code 1915, enactment of 1914 revision which included alteration of wording of Del. Laws 1883, ch. 226, §§ 1, 2, at 522: "Whoever" replaced "Every person who," and "woman" was substituted for "women" (in section 2).

DISTRICT OF COLUMBIA

D.C. Code Ann. § 22-201 (Supp. VIII, 1960).

"Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; or if the death of the mother results therefrom, the person procuring or producing, or attempting to procure or produce the abortion or miscarriage shall be guilty of second degree murder. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 809; June 29, 1953, 67 Stat. 93, ch. 159, § 203.)"

" . . . Act of June 29, 1953, amended the section by replacing previous language with the present revised language, and providing that the penalty for the offense would be imprisonment for from one to ten years in lieu of previous provision of 'not more than five years'; and also providing that in the event of death, the person procuring the abortion would be guilty of second degree murder whereas the previous provision was

for imprisonment of from three to twenty years." [Also drops earlier provision that death of child causes same increase in punishment as death of mother.]

D.C. Code Ann. § 22-2001 (1951).

"Whoever sells, or offers to sell, or give away, in the District, or has in his possession with intent to sell or give away or to exhibit to another, any obscene, lewd, or indecent book, pamphlet . . . or advertises any drug, nostrum, or instrument intended to produce abortion . . . shall be fined not less than fifty dollars . . . or imprisoned not more than one year, or both. (Mar. 3, 1901, 31 Stat. 1332, ch. 854, § 872 [substantially unchanged].)"

31 Stat. 1322 (1901).

Section 809: "Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years."

Case Material.

Immaterial whether woman actually pregnant, *Peckam v. United States*, 96 U.S. App. D.C. 312, 226 F.2d 34, *cert. denied*, 350 U.S. 912 (1955); immaterial whether attempt to abort succeeds, *Crichton v. United States*, 67 App. D.C. 300, 92 F.2d 224, *cert. denied*, 302 U.S. 702 (1937).

FLORIDA

Fla. Stat. Ann. §§ 782.09, .10, 797.01, .02, 782.16 (1944).

Section 782.09: "The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." [From Acts 1st Sess. 1868, ch. 1637, III, § 10, unchanged except for omission of "in the first degree."]

Section 782.10: "Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter." [From Acts 1st Sess. 1868, ch. 1637, III, § 11, unchanged except for omission of "in the second degree."]

Section 797.01: "Whoever with intent to procure miscarriage of any woman unlawfully administers to her, or advises or prescribes for her, or causes to be taken by her, any poison, drug, medicine or other noxious thing, or unlawfully uses any instrument or other means whatever with the like intent, or with like intent aids or assists therein, shall, if the woman does not die in consequence thereof, be punished by imprisonment in the state prison not exceeding seven years, or by fine not exceeding one thousand dollars." [From Acts 1st Sess. 1868, ch. 1637, VIII, § 9, unchanged except for omission of "nor less than one year."]

Section 797.02: "Whoever knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or the name of any person, real or fictitious, from whom, or to any place, house, shop or office where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be punished by imprisonment in the state prison not exceeding one year, or by fine not exceeding one thousand dollars." [From Acts 1st Sess. 1868, ch. 1637, VIII, § 10, unchanged except for insertion of "prison" for "penitentiary or county jail."]

Section 782.16: "If any woman conceals the death of any issue of her body, which if born alive would be a bastard, so that it may not be known whether such child was born alive or not, or whether or not it was murdered, she shall be punished by imprisonment not exceeding one year, or by fine not exceeding one hundred dollars." [From Acts 1st Sess. 1868, ch. 1637, VIII, § 11, almost verbatim except for substitution of "child" for "issue" and deletion of "in the county jail."]

Case Material.

Under the present section 782.10, state must prove pregnancy, quickening, and acts with intent to destroy fetus; it is not required to do so for conviction under section 782.07 (manslaughter by negligence) [Rev. Stat. 1892, §§ 2387, 2384 (respectively)], *Weightnovel v. State*, 46 Fla. 1, 35 So. 856 (1903). Under present section 782.10 [Comp. Gen. Laws 1927, § 7144] proof of effort to cause abortion is essential, as is quickening, *Johnson v. State*, 91 So. 2d 185 (Fla. 1956); *Armstrong v. State*, 107 Fla. 494, 145 So. 212 (1933).

For conviction under section 797.01 [Rev. Stat. 1892, § 2618] it was not necessary that the woman should have been actually pregnant; prescribing or advising with intent to produce abortion constitutes the crime, even though nothing was done in accordance with such prescription or advice. (Section 2618 is substantially Mass. Pub. Stat. 1882, § 9, at 1166, which was derived from 1 Vict. c. 85, § 6.) *Eggart v. State*, 40 Fla. 527, 25 So. 144 (1898).

In prosecution under section 797.01 an allegation of pregnancy was surplusage. It was necessary to prove only that defendant attempted to cause a miscarriage by using any of the means designated with that intent. *Urga v. State*, 155 Fla. 86, 20 So. 2d 685 (1945).

Fla. Stat. Ann. § 458.12 (1952).

"(1) The board shall have authority to discipline the holder of a license or other authority to practice medicine in this state, and each applicant for license, whose default has been entered or who has been heard and found guilty by the board, of any of the following:

"

"(i) The procuring, aiding or abetting in procuring of criminal abortion; Derivation: Comp. Gen. Laws 1927, § 3415. Laws 1927, ch. 12285, § 5. Laws 1921, ch. 8415, § 13."

GEORGIA

Ga. Code Ann. § 26-1101, -1102, -1103, -1104, -1105, -1106 (1933).

Section 1101 (81 P.C.): "Any person who shall administer to any woman, pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, or shall be advised by two physicians to be necessary for such purpose, shall, in case the death of child or mother be thereby produced, be guilty of an assault with intent to murder. (Acts 1876, p. 113.)"

Section 1102 (82 P.C.): "Any person who shall wilfully administer to any pregnant woman any medicine, drug, or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to produce the miscarriage or abortion of any such woman, unless the same shall be necessary to preserve the life of such woman, or shall be advised by two physicians to be necessary for that purpose, shall be guilty of a misdemeanor. (Acts 1876, p. 113.)"

Section 1103 (80 P.C.): "The wilful killing of an unborn child so far developed as to be ordinarily called 'quick,' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be punished by death or imprisonment for life, as the jury may recommend. (Acts 1876, p. 113.)"

Section 1104 (77 P.C.): "If any person shall counsel, advise, or direct a woman to kill the child with which she is pregnant, and after she is delivered of such child she shall kill it, every such person so advising or directing shall be deemed an accessory before the fact to such murder, and shall have the same punishment as the principal. (Cobb, 785.)" [Acts 1865-1866, at 233; from Pen. Code (2d pt.) § 23 (1816).]

Section 1105 (78 P.C.): "The constrained presumption arising from the concealment of the death of any child, that the child whose death is concealed was therefore murdered by the mother, shall not be sufficient or conclusive evidence to convict the person indicted for the murder of her child, unless proof shall be given that the child was born alive, nor unless the attending circumstances shall be such as shall satisfy the minds of the jury that the mother did wilfully and maliciously destroy and take away the life of such child. (Cobb, 785.)" [Acts 1865-1866, at 233; almost verbatim from Pen. Code (2d pt.) § 24 (1816).]

Section 1106 (79 P.C.): "If any woman shall conceal or attempt to conceal the death of any issue of her body, which, if it were born alive, would be a bastard, so that it may not come to light whether it was murdered or not, she shall be guilty of a misdemeanor. (Acts 1865-6, p. 233. Cobb, 785.)" [Rewriting of Pen. Code (2d pt.) § 22 (1816).]

Ga. Pen. Code § 17 (1811).

"And be it further enacted, That if any person or persons advise or counsel another to kill a child before its birth, and the child be killed after its birth, in pursuance of such advice, such adviser or advisers is or are declared accessory to the murder."

Ga. Pen. Code §§ 8, 9, 10, 22, 23, 24 (1816).

Section 8: "Involuntary manslaughter, shall consist in the killing of a human being, without any intention to do so; but in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence."

Section 9: "Involuntary manslaughter, in the commission of an unlawful act, shall be

punished by confinement or labour, or solitude in the penitentiary, for a term not less than six months, and not longer than three years."

Section 10: "Involuntary manslaughter in the commission or performance of a lawful act, where there has not been observed necessary discretion and caution, shall be punished by confinement or labour, or solitude in the penitentiary, for a term not less than three months, and not longer than one year."

Section 22: "If any woman shall endeavour privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would by law be a bastard, so that it may not come to light, whether it was murdered or not, every such mother, being convicted thereof, shall suffer an imprisonment at hard labour or in solitude in the penitentiary, for any time not exceeding one year."

Section 23: "If the same indictment charges any woman with the murder of her bastard child, as well as with the offence in the preceding section, the jury by whom such woman shall be tried, may either acquit or convict her of both offences; or find her guilty of one and acquit her of the other; and if any person shall counsel, advise or direct such woman to kill the child she is pregnant or goes with, and after she is delivered of such child she kills it; every such person so advising or directing, shall be deemed accessory to such murder, and shall have the same punishment as the principal shall have."

Section 24: "The constrained presumption, arising from the concealment of the death of any child, that the child whose death is concealed was therefore murdered by the mother, shall not be sufficient or conclusive evidence to convict the person indicted, of the murder of her child, unless probable proof be given, that the child was born alive, nor unless the circumstances attending it shall be such as shall satisfy the minds of the jury, that the mother did wilfully, and maliciously, destroy and take away the life of such child."

Ga. Pen. Code §§ 8, 9, 10, 22, 23, 24 (1817).

Section 8: "Involuntary manslaughter, shall consist in the killing of a human being, without any intention to do so; but in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: *Provided always*, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious or riotous intent, the offence shall be deemed and adjudged to be murder."

Section 9: "Involuntary manslaughter, in the commission of an unlawful act, shall be punished by confinement or hard labour, or solitude, in the Penitentiary, for a term not less than six months, and not longer than three years."

Section 10: "Involuntary manslaughter, in the commission or performance of a lawful act, where there has not been observed necessary discretion and caution, shall be punished by confinement, or hard labour, or solitude, in the Penitentiary, for a term not less than three months, and not longer than one year."

Section 22: "If any woman shall endeavour privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would by law be a bastard, so that it may not come to light, whether it was murdered or not, every such mother, being convicted thereof, shall suffer an

imprisonment at hard labour or in solitude in the Penitentiary, for any time not exceeding one year."

Section 23: "If the same indictment charge any woman with the murder of her bastard child, as well as with the offence in the preceding section, the jury by whom such woman shall be tried, may acquit her of murder and find her guilty of concealing the death of the bastard, or acquit her of both offences: But, if the said jury shall find her guilty of the murder, they shall return no verdict upon the count for the concealment of the death of the bastard; and if any person shall counsel, advise or direct such woman to kill the child she is pregnant, or goes with, and after she is delivered of such child she kill it, every such person so advising or directing, shall be deemed accessory to such murder, and shall have the same punishment as the principal shall have."

Section 24: "The constrained presumption arising from the concealment of the death of any child, that the child, whose death is concealed, was therefore murdered by the mother, shall not be sufficient or conclusive evidence to convict the person indicted of the murder of her child, unless probable proof be given that the child was born alive, nor unless the circumstances attending it, shall be such as shall satisfy the minds of the jury, that the mother did wilfully and maliciously destroy and take away the life of such child."

Ga. Pen. Code §§ 56, 57, 58, 67, 68, 69 (1833).

Section 56-IX: "Involuntary manslaughter shall consist in the killing of a human being without any intention to do so; but in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: *Provided* always, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the penitentiary, the offence shall be deemed and adjudged to be murder."

Section 57-X: "Involuntary manslaughter, in the commission of an unlawful act, shall be punished by confinement and labor in the penitentiary for a term not less than one year, nor longer than three years."

Section 58-XI: "Involuntary manslaughter, in the commission or performance of a lawful act, where there has not been observed necessary discretion and caution, shall be punished by fine or imprisonment in the common jail of the county, or both, at the discretion of the court."

Section 67-XX: "If any person shall counsel, advise, or direct a woman to kill the child she is pregnant, or goes with, and after she is delivered of such child, she kill it, every such person so advising or directing, shall be deemed an accessory before the fact to such murder, and shall have the same punishment as the principal."

Section 68-XXI: "The constrained presumption arising from the concealment of the death of any child, that the child, whose death is concealed, was therefore murdered by the mother, shall not be sufficient or conclusive evidence to convict the person indicted, of the murder of her child, unless probable proof be given that the child was born alive, nor unless the circumstances attending it shall be such as shall satisfy the minds of the jury that the mother did wilfully and maliciously destroy and take away the life of such child."

Section 69-XXII: "If any woman shall conceal or attempt to conceal the death of any issue of her body, male or female, which if it were born alive, would by law be a

bastard, so that it may not come to light whether it was murdered or not, every such mother being convicted thereof, shall be punished by fine or imprisonment in the common jail of the county, or both, at the discretion of the court." [Ga. Pen. Code § 17 (1811).]

Ga. Laws No. CXXX, §§ I, II, III, IV, at 113 (1876).

Section I: ". . . [F]rom and after the passage of this Act, the wilful killing of an unborn child, so far developed as to be ordinarily called 'quick,' by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be guilty of a felony, and punishable by death or imprisonment for life, as the jury trying the case may recommend." [Became 80 P.C., 26-1103, *supra*.]

Section II: ". . . [E]very person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or mother be thereby produced, be declared guilty of an assault with intent to murder." [Became 81 P.C., 26-1101, *supra*.]

Section III: ". . . [A]ny person who shall wilfully administer to any pregnant woman any medicine, drug or substance, or anything whatever, or shall employ any instrument or means whatever, with intent thereby to procure the miscarriage or abortion of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished as prescribed in section 4310 of the Revised Code of Georgia." [Became 82 P.C., 26-1102, *supra*.]

Section IV: [Repeals conflicting laws.]

Case Material.

Death of mother described only as "pregnant" means one whose child was not quick, and so governed not by Penal Code § 81 (Acts 1876), but by Penal Code section on murder by unlawful act, *Summerlin v. State*, 150 Ga. 173, 103 S.E. 461 (1920). State must prove quickening beyond a reasonable doubt, *Hunter v. State*, 29 Ga. App. 366, 115 S.E. 277 (1923).

". . . [U]nnecessary to decide whether or not the language . . . makes it incumbent on the State to prove such allegation, or whether such exception is an affirmative defense peculiarly within the knowledge of the defendant." Proof that mother was healthy, in a normal condition, or that there was nothing in her condition to indicate any necessity for such operation, is sufficient, with motivations such as to avoid disgrace. Her testimony as to consulting one doctor is enough to show the absence of statutory advice by two doctors. *Guiffrida v. State*, 61 Ga. App. 595, 597, 7 S.E.2d 34, 36 (1940); *Holloway v. State*, 90 Ga. App. 86, 82 S.E.2d 235 (1954).

Ga. Code Ann. 1933, § 26-1101 requires showing of malice towards quick child, section 26-1103 malice towards the mother. Fetus not a "human being" whose killing can be murder; section 26-1102 applies when child is not yet quick. *Passley v. State*, 194 Ga. 327, 329-30, 21 S.E.2d 230, 232 (1942). In section 26-1101 "child" means one unborn, quick, alive at time of act, *Taylor v. State*, 105 Ga. 846, 33 S.E. 190 (1890). Woman's consent, to conceal her shame, does not excuse from section 26-1101; intent

to destroy fetus may exist without need to know child was quick, *Barrow v. State*, 121 Ga. 187, 48 S.E. 950 (1904).

HAWAII

Hawaii Rev. Laws §§ 309-3, -4, -5, 60-9, 64-7 (1955).

Section 3: "Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman when with child, in order to produce her miscarriage, or maliciously uses any instrument or other means with like intent, shall, if the woman is then quick with child, be fined not more than \$1,000 and imprisoned at hard labor not more than five years; and if she is then not quick with child, shall be fined not more than \$500 and imprisoned at hard labor not more than two years. (P.C. 1869, c. 12, s. 1)"

Section 4: "Where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified. (P.C. 1869, c. 12, s. 2)"

Section 5: "If any woman conceals the death of any issue of her body, whether born alive or not, which, if born alive, would have been illegitimate, so that it may not be known whether the issue was born alive or not, or whether it was murdered, she shall be fined not more than \$100 and imprisoned at hard labor not more than two years. (P.C. 1869, c. 12, s. 3)"

Section 9: "(a) The board of health upon the recommendation of the territorial board of chiropractic examiners shall refuse to issue or may order any license issued under this chapter to be revoked or suspended at any time in a proceeding before the board of health upon any one or more of the following grounds: (1) Procuring or aiding or abetting in procuring a criminal abortion"

Section 7: "Any license to practice medicine and surgery may be revoked or suspended . . . for any one or more of the following acts or conditions on the part of the holder of such license: (a) Procuring, or aiding or abetting in procuring, a criminal abortion"

Hawaii Pen. Code §§ 1, 2, 3 (1850).

Section 1: "Whoever maliciously, without lawful justification, administers, or causes or procures to be administered any poison or noxious thing to a woman then with child, in order to produce her mis-carriage, or maliciously uses any instrument or other means with like intent, shall, if such woman be then quick with child, be punished by fine not exceeding one thousand dollars and imprisonment at hard labor not more than five years. And if she be then not quick with child, shall be punished by a fine not exceeding five hundred dollars, and imprisonment at hard labor not more than two years."

Section 2: "Where means of causing abortion are used for the purpose of saving the life of the woman, the surgeon or other person using such means is lawfully justified."

Section 3: [Provides for fine and imprisonment of any woman concealing the death of a bastard child so that it can't be known whether or not it was born alive, or was murdered. It does not mention abortion.]

Case Material.

"[T]he period within which the crime may be committed . . . [is] from the moment the womb is instinct with the embryo life and gestation has begun, until expulsion or

delivery. . . . '[W]ith child' . . . connotes a physical condition following conception and continuing until expulsion or delivery, irrespective of whether the fetus prior to expulsion has lost its vitality so that it could not mature into a living child." *Territory of Hawaii v. Young*, 37 Hawaii 150, 159-60 (1945).

IDAHO

Idaho Code Ann. § 18-601 (1948).

"Every person who provides, supplies or administers to, any pregnant woman, or procures any such woman to take any medicine or drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years. (Cr. & P. 1864, § 42)"

Idaho (Terr.) Laws §§ 33, 34, 42, at 435 (1863-1864).

Section 33: "The killing being proved, the burden of proving circumstances or mitigation, or that justify or excuse the homicide, will devolve on the accused"

Section 34: [Concealing death of bastard.]

Section 42: "Every person who shall wilfully and maliciously administer, or cause to be administered to, or taken by any person, any poison or other noxious or destructive substance or liquid, with the intention to cause the death of such person . . . and every person who shall administer or cause to be administered, or taken, any medicinal substance, or shall use or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the territorial prison for a term not less than two years, nor more than five years:

"*Provided*, That no physician shall be effected [*sic*] by the last clause of this section, who in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life." [Unchanged in Rev. Stat. 1874-1875, ch. IV, § 42.]

Idaho Code Ann. § 18-602 (1948).

"Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years. (R.S. [1887])"

Idaho Rev. Stat. (Pen. Code) § 6795 (1887).

"Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the Territorial prison not less than one nor more than five years." [New section.]

Idaho Code Ann. §§ 18-603, 19-2115, 18-303 (1948).

Section 603: "Every person who wilfully publishes any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion, or for the

prevention of conception, or who offers his services by any notice, advertisement, or otherwise to assist in the accomplishment of any such purpose, is guilty of a felony. (R.S. [1887])"

Section 2115: "Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein . . . the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence. (R.S. [1887])"

Section 303: "All offenses recognized by the common law as crimes and not herein enumerated are punishable, in the case of felony, by imprisonment in the state prison for a term not less than one year nor more than five years; and in case of misdemeanors, by imprisonment in the county jail for a term not exceeding six months or less than one month, or by a fine not exceeding \$500, or both (Cr. & P. 1864, § 151)"

Idaho Comp. Laws ch. IV, § 42, at 319 (1874-1875).

"Every person who shall wilfully and maliciously administer, or cause to be administered to or taken by any person, any poison or other noxious or destructive substance or liquid with the intention to cause the death of such person, and being thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than ten years, and which may extend to life; and every person who shall administer or cause to be administered or taken any medicinal substance, or shall use or cause to be used any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years; *provided*, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

ILLINOIS

Ill. Rev. Stat. ch. 38, §§ 3, 4, 5, 6 (1959).

Section 3: "Whoever, by means of any instrument, medicine, drug or other means whatever, causes any woman, pregnant with child, to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the penitentiary not less than one year nor more than ten years; or if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder." [Rev. Stat. 1845, § 46, at 158; Laws 1867, §§ 1, 2, 3, at 89; unchanged from Act of March 27, 1874.]

Section 4: "If any druggist, dealer in medicine, or other person, sells to any person any drug or medicine, known or presumed to be ecbolic or abortifacient, except upon the written prescription of some well known and respectable practicing physician, or keeps on hand, or advertises or exposes for sale, or sells any pills, powders, drugs or combination of drugs designed especially for the use of females, without keeping the certificate as required in the next succeeding section, he shall for each offense be fined not less than \$50 nor more than \$500, or be confined in the county jail not less than thirty days or more than six months, or both: *Provided*, this section shall not be construed to apply to compounds known as 'Official.'" [Laws 1871-1872, at 369.]

Section 5: "Before any pills, powders, drugs or combination of drugs designed expressly for the use of females, shall be kept or exposed for sale or sold, the proprietor thereof shall submit under oath a true statement of the formula by which the same is compounded, to five well known and respectable practicing physicians, in the county where the same is proposed to be sold, and shall procure their certificate, signed and verified by the affidavit of each of them, that such combination is not abortifacient; and every person keeping on hand, or in any manner advertising or exposing for sale or selling such combination, shall keep such certificate, or a sworn copy thereof, with the formula attached, for the inspection of any person desiring to see the same." [Laws 1871-1872, at 369.]

Section 6: "Whoever advertises, prints, publishes, distributes or circulates, or causes to be advertised, printed, published, distributed or circulated any pamphlet, printed paper, book, newspaper, notice, advertisement or reference, containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop or office where any poison, drug, mixture, preparation, medicine, or noxious thing, or any instrument or means whatever, or any advice, information, direction or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be punished by imprisonment . . . [not exceeding three years, or fine not exceeding \$1,000]. (As amended . . . [in punishment clause] by L. 1919, p. 426.)"

III. Rev. Code §§ 40, 41, 46, at 130, 131 (1827).

Section 40: "The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution . . ."

Section 41: "If any woman shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which if born alive, would by law, be a bastard, so that it may not come to light, whether it shall have been murdered or not, every such mother being convicted thereof, shall suffer imprisonment in the county jail, for a term not exceeding one year: *Provided however*, That nothing herein contained, shall be so construed as to prevent such mother from being indicted and punished for the murder of such bastard child."

Section 46: "Every person who shall wilfully and maliciously administer, or cause to be administered to, or taken by any person, any poison, or other noxious or destructive substance or liquid, with an intention to cause the death of such person, or to procure the miscarriage of any woman, then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and be fined in a sum not exceeding one thousand dollars." [Rev. Code § 189 (1827) repeals previous Acts relating to crimes and punishments, including those of March 23, 1819, and February 12, 1821.]

III. Rev. Code § 46, at 179 (1833).

"[Killing by poison.] . . . And every person who shall administer, or cause to be administered, or taken, any such poison, substance, or liquid, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years in the penitentiary, and fined in a sum not exceeding one thousand dollars." [Rev. Code §§ 40, 41 (1827) remain unchanged.]

III. Rev. Stat. § 41, at 157 (1844-1845).

"If any woman shall endeavor, privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which if born alive would be a bastard, so that it may not come to light, whether it shall have been murdered or not, every such mother being convicted thereof shall suffer imprisonment in the county jail for a term not exceeding one year: *Provided, however,* That nothing herein contained shall be so construed as to prevent such mother from being indicted and punished for the murder of such bastard child."

III. Pub. Laws §§ 1, 2, 3, at 89 (1867).

Section 1: ". . . If any person shall, by means of any instrument or instruments, or any other means whatever, cause any pregnant woman to miscarry, or shall attempt to procure or produce such miscarriage, the person so offending shall be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall be confined in the penitentiary for a period not less than two nor more than ten years."

Section 2: "If any person shall, in the attempt to produce the miscarriage of a pregnant woman, thereby cause and produce the death of such woman, the person so offending shall be deemed guilty of murder, and shall be punished as the law requires for such offense."

Section 3: "The provisions of this act shall not apply to any person who procures or attempts to produce the miscarriage of any pregnant woman for *bona fide* medical or surgical purposes."

Comment.

"It were to be expected, that the early enactments which proceeded, first from the Territorial, then from the State Government, would be crude, imperfect and inharmonious. They were not adopted together, as a distinct body of statute law, nor with any view to their connexion or consistency [*sic*] with each other; but hastily produced, at different times and places in obedience to ever-varying wants and circumstances of an unsettled, scattered and heterogeneous population. And if we recur to the days during which those hardy pioneers of civilization were contending with the difficulties of an untried soil and climate—when, to acquire the means of subsistence and defence, were objects of daily toil and nightly solicitude—when the rifle, and the plow, and the woodman's axe proved better friends than the pen and the musty volume,—and the strong arm afforded more efficient protection than any law, we may readily conclude, that they found little leisure for the *business* of legislation, and that they made their laws, as they made their log cabins, their roads and bridges—as they *needed* them, for their shelter and convenience, from time to time." III. Rev. Stat. 1844-1845, pref. (Brayman, H.), at ix.

INDIANA

Ind. Ann. Stat. § 10-105 (1956).

"Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine or substance whatever, with intent thereby to procure the miscarriage of such woman, or, with like intent, uses or suggests, directs or advises the use of any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, on conviction, if the woman miscarries, or dies in consequence thereof, be fined not less than one hundred dollars (\$100) nor more

than one thousand dollars (\$1,000), and be imprisoned in the state prison not less than three (3) years nor more than fourteen (14) years. (Acts 1905, ch. 169, § 367, p. 584.)"

Statutory Development.

Ind. Laws 1st Asm., 2d Sess., 1817, and Act of Feb. 10, 1831, relative to crime and punishment, contain nothing on abortion or poisoning.

Ind. Rev. Stat. §§ 1, 3, at 224 (1838).

Section 1: "[E]very person who shall administer or cause and procure to be administered, any poison . . ."

Section 3: "[E]very person who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall upon conviction, be punished by imprisonment in the county jail any term of time not exceeding twelve months, and be fined any sum not exceeding five hundred dollars."

[Approved February 7, 1835.]

Act of June 14, 1852, § 36.

"Every person who shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, anything whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be punished by imprisonment in the county jail not exceeding twelve months, and be fined not exceeding five hundred dollars."

Ind. Laws ch. LXXXI, § 2 (1859).

"Every person who shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, any thing whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life; and any person as druggist, apothecary, physician, or other person selling medicine, whether he be a merchant or peddler, who shall sell any medicine in the form of pills, powders, fluid, or in any other form, which from its character by advertisement or otherwise is known to be capable of producing abortion or miscarriage, with intent to produce abortion, notwithstanding any caution given in the advertisement of such medicine, or contained in the directions accompanying the same, for any such offense, the person or persons guilty of the same shall be deemed guilty of a misdemeanor, and shall be punished . . . [by imprisonment up to 12 months, and fine up to \$500]."

Ind. Laws ch. XXXVII, §§ 22, 23, 93 (1881).

Section 22: "Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine or substance whatever, with intent thereby to procure the miscarriage of such woman, or, with like intent, uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be fined not more than five hundred dollars nor less than fifty dollars, and imprisoned in the State prison not more than fourteen years nor less than three years."

Section 23: "Every woman who shall solicit of any person any medicine, drug, or

substance or thing whatever, and shall take the same, or shall submit to any operation or other means whatever, with intent thereby to procure a miscarriage, except when by a physician for the purpose of saving the life of mother or child, shall be fined not more than five hundred dollars nor less than ten dollars, and imprisoned in the county jail not more than twelve months nor less than thirty days, and any person who in any manner whatever unlawfully aids or assists any such woman to a violation of this section, shall be liable to the same penalty." [Unchanged in Burns (Ind.) Ann. Stat. §§ 1996, 1997 (1894).]

Section 93: "Whoever prints or publishes any advertisement of any secret drug or nostrum purporting to be for the exclusive use of females, or which cautions females against their use when in a condition of pregnancy, or in any way publishes any account or description of any drug, medicine, instrument or apparatus for preventing conception or for procuring abortion or miscarriage, or sells or gives away or keeps for sale or gratuitous distribution, any newspaper, circular, pamphlet, or book containing such advertisement, account or description, or any secret drug or nostrum purporting to be exclusively for the use of females, or for preventing conception or procuring abortion or miscarriage, shall be fined not more than five hundred dollars nor less than five dollars, to which may be added imprisonment in the county jail not more than six months nor less than ten days." [Unchanged in Burns (Ind.) Ann. Stat. § 2084 (1894).]

Case Material.

"If the miscarriage was produced by the unlawful antecedent act of the appellant, as charged, then, under the statute, the offense was complete; and the fact that her death may have resulted from the improper treatment of her physician or otherwise, would not operate to defeat his conviction. The indictment, it is true, charged both miscarriage and death as the consequences of the criminal acts alleged, but it was not incumbent upon the State to establish both facts in order to convict, as by the provisions of the statute either miscarriage or death as a result completes the offense." *Hauk v. State*, 148 Ind. 238, 253, 46 N.E. 127, 132 (1897).

Prosecution for death caused by attempted abortion must be under section 23, not for manslaughter, *Montgomery v. State*, 80 Ind. 338, 41 Am. Rep. 815 (1882).

Abortion is causing unlawful miscarriage, *Hauk v. State*, *supra*.

Three essentials of abortion under section 23: (1) uses of an instrument etc., (2) by defendant, and (3) without necessity to save life of mother; testimony of victim that she was "perfectly well" and "felt perfectly healthy" up to time of abortion, was enough for prima facie showing that abortion was not so necessary, *Greco v. State*, 233 Ind. 464, 120 N.E.2d 179 (1954).

Ind. Laws ch. 169, § 368 (1905).

"Every woman who shall solicit of any person any medicine, drug, or substance or thing whatever, and shall take the same, or shall submit to any operation or other means whatever, with intent thereby to procure a miscarriage, except when done by a physician for the purpose of saving the life of mother or child, shall, on conviction . . . [be fined \$10-500, imprisoned 30 days to 1 year]."

Ind. Ann. Stat. §§ 10-2803, -2804 (Supp. 1960).

Section 2803: "Whoever sells or lends, or offers to sell or lend, or gives away, or offers to give away, or in any manner exhibits or has in his possession, with or

without intent to sell, lend or give away, any obscene, lewd, indecent or lascivious book, pamphlet, paper, drawing, lithograph, engraving, picture, daguerreotype, photograph, stereoscopic picture, model, cast, instrument, or article of indecent or immoral use, or instrument or article for procuring abortion, or for self-pollution, or medicine for procuring abortion, or preventing conception, or advertise the same, or any of them, for sale, or writes or prints any letter, circular, handbill, card, book, pamphlet, advertisement or notice of any kind, or gives information orally, stating when, how, where, or by what means, or of whom any of the obscene, lewd, indecent or lascivious articles or things, hereinbefore mentioned can be purchased, borrowed, presented or otherwise obtained, or are manufactured; or whoever manufactures, or draws and exposes, or draws with intent to sell or have sold, or prints any such articles or things, shall be fined not less than twenty dollars (\$20.00) nor more than one thousand dollars (\$1,000), to which may be added imprisonment for not less than twenty (20) days nor more than one (1) year . . . [not to affect regular medical teaching, publication or practice]. (Acts 1905, ch. 169, § 462, p. 584; 1957, ch. 133, § 1, p. 241 [increasing punishments].)"

Section 2804: "Whoever knowingly deposits in any post office or express office in this state, or places in charge of any person, firm or corporation to be carried or conveyed, any lewd . . . or any circular . . . stating when, where, how or of whom, such articles or things or any of them can be purchased or otherwise obtained, or knowingly receives the same or any of them with intent to carry or convey the same, or knowingly carries or conveys the same, except in the United States mail, shall be fined not less than twenty dollars (\$20.00) nor more than one thousand dollars (\$1,000), to which may be added imprisonment for not less than twenty (20) days nor more than one (1) year. (Acts 1905, ch. 169, § 463, p. 584; 1957, ch. 133, § 2, p. 241 [increasing punishments].)"

Ind. Rev. Stat. § 1998 (1881).

"Whoever prints or publishes an advertisement of any secret drug or nostrum purporting to be for the exclusive use of females, or which cautions females against their use when in a condition of pregnancy; or in any way publishes any account or description of any drug, medicine, instrument, or apparatus for preventing conception or for procuring abortion or miscarriage; or sells or gives away, or keeps for sale or gratuitous distribution, any newspaper, circular, pamphlet, or book containing such advertisement, account, or description, of any secret drug or nostrum purporting to be exclusively for the use of females, or for preventing conception or procuring abortion or miscarriage,—shall be fined not . . . less than five dollars . . ." [Same in 1905.]

IOWA

Iowa Code § 701.1 (1946).

"If any person, with intent to produce the miscarriage of any woman, willfully administer to her any drug or substance whatever, or, with such intent, use any instrument or other means whatever, unless such miscarriage shall be necessary to save her life, he shall be imprisoned in the penitentiary for a term not exceeding five years, and be fined in a sum not exceeding one thousand dollars." [Unchanged from Code § 12973 (1924, 1927, 1931, 1935, 1939); unchanged in Code Ann. § 701.1 (Supp. 1960).]

Iowa (Terr.) Stat. 1st Legis., 1st Sess., § 18, at 145 (1838-1839).

"Every person who shall wilfully and maliciously administer, or cause to be administered to or taken by any person, any poison or other noxious or destructive substance,

with the intention to cause the death of such person, and being duly convicted thereof, shall be punished by imprisonment for not less than two years, nor more than twenty years; and every person who shall administer, or cause to be administered or taken, any such poison, substance or liquid, with the intention to procure the miscarriage of any woman being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, and fined in a sum not exceeding one thousand dollars."

Iowa (Terr.) Rev. Stat. §§ 10, 13 (1843).

Section 10: "The wilfull killing of an unborn quick child, by any injury to the mother of the child, which would be murder if it resulted in the death of such mother, shall be adjudged manslaughter, and every person who shall administer to any woman, pregnant with a child, any medicine, drug, or substance whatever, or shall employ any other means with intent thereby to destroy such child, and thereby cause its death, unless the same shall be necessary to preserve the life of the mother, shall be deemed guilty of manslaughter."

Section 13: "Every person convicted of the crime of manslaughter, shall be punished by imprisonment at hard labor in the penitentiary, for a term not exceeding seven years, and fined in any sum not exceeding ten thousand dollars nor less than five hundred dollars."

[Act of February 16, 1843.]

Statutory Development.

Iowa Code 1851, tit. 1, ch. 4, § 28, repealed all Iowa laws not included in that Code; abortion omitted.

Case Material.

In 1856 the Iowa Supreme Court held that enactment of Code 1851 left Iowa with no statute on abortion; "and, certainly, independent of statute it is not a punishable offense, when the child is not quick in the womb." Repeating Blackstone's quote of Coke, "'this, though not murder, was by the ancient law homicide or manslaughter. But the modern law does not look upon this offence in quite so atrocious a light, but only as a heinous misdemeanor.'" There was no common-law crime if abortion done before quickening. *Abrams v. Foshee*, 3 Iowa 274, 278, 279, 66 Am. Dec. 77, 80 (1856).

The next Legislature restored the statutory crime.

Iowa Rev. Laws, tit. XXIII, ch. 165, art. 2, § 4221 (1860).

"[E]very person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall upon conviction thereof, be punished by imprisonment in the county jail for a term of not exceeding one year, and be fined in a sum not exceeding one thousand dollars." [Act of March 15, 1858, § 1.]

Statutory Material.

In 1863, *Abrams v. Foshee* was reaffirmed, and Act of 1858 held by its terms inapplicable to an abortion by the mother herself, *Hatfield v. Gano*, 15 Iowa 177 (1863).

In 1878 conviction under Code 1873, § 3864 upheld though before quickening; abortion at any stage of pregnancy now a crime, *State v. Fitzgerald*, 49 Iowa 260, 31 Am. Rep. 148 (1878).

Iowa Acts 19th Gen. Asm., ch. 19, at 20 (1882).

"... That section 3864 of the Code of 1873 be and the same is hereby amended by striking out the words 'one year' in the sixth line thereof, and inserting in lieu thereof the words 'five years.'"

Iowa Sess. Laws 36th Gen. Asm., ch. 45, § 1, at 69 (1915).

"Attempt to produce miscarriage. Section forty seven hundred fifty-nine of the code is hereby amended by striking from line two (2) thereof the word 'pregnant.'" [Codified in Iowa Code tit. xxiv, ch. 2, § 4759 (Supp. 1915).]

Case Material.

Death of fetus creates danger to life of mother, which justifies its removal, *State v. Dunklebarger*, 206 Iowa 971, 221 N.W. 592 (1928).

Attempted abortion causing death of mother is 2d degree murder; state has burden of proof that abortion was not necessary for preservation of life of mother, *State v. Rowley*, 216 Iowa 140, 248 N.W. 340 (1933). To show criminal intent, state must prove that abortion was not necessary for preservation of life of mother, *State v. Snyder*, 244 Iowa 1244, 59 N.W.2d 223 (1953).

Iowa Code §§ 725.5, .6, 147.56, 205.1, .2, .3 (1946).

Section 725.5: "Whoever sells, or offers for sale, or gives away, or has in his possession with intent to sell, loan, or give away any obscene, lewd, indecent, lascivious, or filthy book, pamphlet, paper, drawing, lithograph, engraving, picture, photograph, writing, card, postal card, model, cast, or any instrument or article of indecent or immoral use, or any medicine, article, or thing designed or intended for procuring abortion or preventing conception, or advertises the same for sale, or writes or prints any letter, circular, handbill, card, book, pamphlet, advertisement, or notice of any kind, giving information, directly or indirectly, when, where, how, or by what means any of the articles or things hereinbefore mentioned can be purchased, or otherwise obtained or made, shall be guilty of a misdemeanor and be fined not more than one thousand nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both."

Section 725.6: "Whosoever deposits in any post office within this state, or places in charge of any person to be carried or conveyed, any of the articles or things named in section 725.5, or any circular, handbill, card, advertisement, book, pamphlet, or notice of any kind, giving information, directly or indirectly, when, how, where, or by what means any of the articles or things mentioned in section 725.5 can be purchased or obtained, or knowingly or willfully receives the same to carry or convey, or knowingly carries or conveys the same in any manner, except in the United States mail, shall be fined not more than one thousand dollars, nor less than fifty dollars, or be imprisoned in the county jail not more than one year, or both."

Section 147.56: "For the purposes of section 147.55 'unprofessional conduct' shall consist of any of the following acts:

"...

"6. Procurement or aiding or abetting in the procurement of a criminal abortion."

Section 205.1: "No person shall sell, offer or expose for sale, deliver, give away, or have in his possession with intent to sell, except upon the original written prescription of a licensed physician, dentist, or veterinarian, any cotton root, ergot, oil of tansy, oil of savin, or derivatives of any of said drugs."

Section 205.2: "The requirements of section 205.1 that certain drugs shall be furnished only upon written prescription, shall not apply to the sale of such drugs to persons who wholesale or retail the same, nor to any licensed physician, dentist or veterinarian for use in the practice of his profession."

Section 205.3: "No person shall fill any prescriptions calling for any of the drugs required by chapter 204 or this chapter to be furnished only upon written prescription unless the same be for medical, dental, or veterinary purposes only, and unless the physician, dentist, or veterinarian prescribing the same be personally known to such person, and no such prescription shall be refilled."

KANSAS

Kan. Gen. Stat. Ann. §§ 21-409, -410, -421, -437, -1101 (Supp. 1959).

Section 409: "The willful killing of any unborn quick child, by an injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree." [From Terr. Stat. 1855, ch. 48, § 9.]

Section 410: "Every person who shall administer to any pregnant woman any medicine, drug, or substance whatsoever, or shall use or employ any instrument or other means with the intent thereby to destroy the foetus, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, if the death of the mother thereof ensue from the means employed, shall be guilty of manslaughter in the first degree. (G.S. 1949, § 21-410; L. 1957, ch. 216, § 1; June 29.)" [From Terr. Stat. 1855, ch. 48, § 10.]

Section 421: "Persons convicted of manslaughter in the first and second degrees shall be punished as follows: *First*, if in the first degree, by confinement and hard labor for a term not less than five years nor more than twenty-one years; *second*, if in the second degree, by confinement and hard labor for a term not less than three nor more than five years." [Gen. Stat. 1868, ch. 31, § 28.]

Section 437: "Every physician or other person who shall willfully administer to any pregnant woman any medicine, drug, or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall upon conviction be adjudged guilty of a misdemeanor, and punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment." [From Terr. Stat. 1855, ch. 48, § 39.]

Section 1101: "[I]f any publisher or other person shall by printing, writing, or in any other way publish or cause to be published or expose to sale any obscene pictures; an account, advertisement or description of any drug, medicine, instrument or apparatus used or recommended to be used, for the purpose of preventing conception, or procuring abortion or miscarriage; or shall by writing or printing, in any circular, newspaper, pamphlet or book, or in any way publish or circulate any advertisement or obscene

notice herein recited; or shall within the state of Kansas keep for sale or for gratuitous distribution any newspaper, circular, book or pamphlet containing such notice or advertisement of such drugs, medicines, instruments or apparatus; or shall keep for sale any secret nostrum, drug, medicine, instrument or apparatus named; or shall advertise lotteries, or the sale of lottery tickets, such publisher or other person violating any of the provisions of this act shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined not less than fifty nor more than one thousand dollars, or imprisonment (imprisoned) in the county jail not less than thirty days nor more than six months, or by both such fine and imprisonment, at the discretion of the court: *Provided*, That nothing in this act shall be so construed as to prevent the publication and sale of standard medical works." [Same as Laws 1874, ch. 89, § 1.]

Kan. (Terr.) Stat. ch. 48, §§ 9, 10, 39 (1855).

Section 9: "The wilful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree."

Section 10: "Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug, or substance whatsoever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree." [Unchanged in Gen. Laws 1859, § 10.]

Section 39: "Every physician or other person who shall wilfully administer to any pregnant woman any medicine, drug or substance whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail not exceeding one year, or by fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Kan. Gen. Laws ch. 28, §§ 9, 10 (1859).

Section 9: "The wilful killing, of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree."

Section 10: "Every person who shall administer to any woman, pregnant with a quick child, any medicine, drug or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree."

KENTUCKY

Ky. Rev. Stat. Ann. §§ 435.040, 436.020, .030 (1955).

Section 435.040: "Any person who violates any of the provisions of KRS 436.020 shall be punished as provided by KRS 435.010 or 435.020 for murder or voluntary manslaughter, as the facts may justify, if the woman to whom a drug or other substance

has been administered or upon whom an instrument has been used dies." [Former Civ. Code § 1219a-3.]

Section 436.020: "(1) Any person who prescribes or administers to any pregnant woman or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or other substance, or uses any instrument or other means, with the intent to procure the miscarriage of that woman, unless the miscarriage is necessary to preserve her life, shall be fined not less than five hundred dollars nor more than one thousand dollars, and confined in the penitentiary for not less than one nor more than ten years.

"(2) If, by reason of any of the acts described in subsection ((1) [*sic*] of this section, the miscarriage of the woman is procured and she does miscarry, causing the death of the unborn child, whether before or after quickening time, the person violating the provisions of subsection (1) of this section shall be confined in the penitentiary for not less than two nor more than twenty-one years.

"(3) In any prosecution under subsection (1) or (2) of this section, or under KRS 435.040, the consent of the woman to the performance of the operation or the administering of the drug, medicine or other substance shall be no defense, and she shall be a competent witness in the prosecution. For the purpose of testifying she shall not be considered an accomplice." [Former Civ. Code §§ 1219a-1, -2, -4.]

Section 436.030: "Any woman who is delivered of any issue of her body, which, if born alive, would be a bastard, and who endeavors privately by drowning or secretly burying the child or in any other way, directly or indirectly, to conceal the birth of the child, so that it may not be known whether the child was born alive or not, shall be confined in the penitentiary for not less than one nor more than five years." [Former Civ. Code § 1220.]

Ky. Acts ch. 67, § 2, at 117 (1801).

"If any woman, not being a slave, be delivered of any issue of her body, which being born alive, would by law be a bastard, and shall endeavor privately, either by drowning or secret burying thereof, or any other way, either by herself or procuring of others, to conceal the death thereof, so that it may not come to light, whether it were born alive or not, but be concealed, in every such case, the mother so offending, being thereof lawfully convicted, shall be deemed a felon, and sentenced to undergo a confinement in the jail and penitentiary house, for a period not less than two years, nor more than seven years."

Ky. Acts ch. 58, §§ 1, 2, 3, 4, at 189 (1910).

Section 1: "It shall be unlawful for any person to prescribe or administer to any pregnant woman, or to any woman whom he has reason to believe pregnant, at any time during the period of gestation, any drug, medicine or substance, whatsoever, with the intent thereby to procure the miscarriage of such woman, or with like intent, to use any instrument or means whatsoever, unless such miscarriage is necessary to preserve her life; and any person so offending, shall be punished by a fine of not less than five hundred nor more than one thousand dollars, and imprisoned in the state prison for not less than one nor more than ten years."

Section 2: "If by reason of any of the acts described in Section 1 hereof, the miscarriage of such woman is procured, and she does miscarry, causing the death of the

unborn child, whether before or after quickening time, the person so offending shall be guilty of a felony, and confined in the penitentiary for not less than two, nor more than twenty-one years."

Section 3: "If, by reason of the commission of any of the acts described in Section 1 hereof, the woman to whom such drug or substance has been administered, or upon whom such instrument has been used, shall die, the person offending shall be punished as now prescribed by law, for the offense of murder or manslaughter, as the facts may justify."

Section 4: "The consent of the woman to the performance of the operation or the administering of the medicines or substances, referred to, shall be no defense, and she shall be a competent witness in any prosecution under this act, and for that purpose she shall not be considered an accomplice."

Case Material.

The common law punishment for offenses for which no punishment is provided by statute is by fine and imprisonment, *Conner v. Commissioner*, 76 Ky. (13 Bush) 714 (1878).

Defense has burden of proof on affirmative defense of insanity, the presumption of sanity being equal to that of innocence, *Graham v. Commissioner*, 55 Ky. (16 B. Monroe) 587 (1855).

"... [I]t never was a punishable offense at common law to produce, with the consent of the mother, an abortion prior to the time when the mother became quick with child. It was not even murder at common law to take the life of the child at any period of gestation, even in the very act of delivery." *Mitchell v. Commissioner*, 78 Ky. 204, 210 (1879). Although no common-law felony before quickening, resultant death of mother constitutes murder (quoting *Smith v. State*, 33 Me. 48 (1851)) because of "the act being done without lawful purpose and dangerous to life," *Peoples v. Commissioner*, 87 Ky. 487, 492, 9 S.W. 509, 511 (1888). "To produce an abortion upon a woman is necessarily to endanger her life, and the charge that appellant willfully, feloniously and with malice aforethought killed her by such means is certainly sufficient . . . to constitute a charge of manslaughter at least. . . . If appellant used the instruments upon the woman for the purpose of producing an abortion, believing her to be pregnant, and thereby killed her in this unlawful attempt, he was guilty of manslaughter." It is immaterial that there was no actual abortion and that death was due to other causes, since appellant "believing her to be pregnant by him, had undertaken to cause an abortion." *Wilson v. Commissioner*, 20 Ky. L. Rep. 1251, 1252, 1253, 1255, 60 S.W. 400, 401, 402, 403 (1901).

LOUISIANA

La. Rev. Stat. Ann. §§ 14:87, :88, 37-1285 (1950).

Section 87: "Abortion is the performance of any of the following acts, for the purpose of procuring premature delivery of the embryo or fetus:

"(1) Administration of any drug, potion, or any other substance to a pregnant female; or

"(2) Use of any instrument or any other means whatsoever on a pregnant female.

"Whoever commits the crime of abortion shall be imprisoned at hard labor for not less than one nor more than ten years." [Unchanged from Rev. Stat. 1870, § 807.]

Section 88: "Distribution of abortifacients is the intentional:

"(1) Distribution or advertisement for distribution of any drug, potion, instrument, or article for the purpose of procuring an abortion; or

"(2) Publication of any advertisement or account of any secret drug or nostrum purporting to be exclusively for the use of females, for preventing conception or producing abortion or miscarriage.

"Whoever commits the crime of distribution of abortifacients shall be fined not more than five hundred dollars, or imprisoned for not more than six months, or both." [From original Acts 1920, No. 88, §§ 1, 2, No. 95, § 1.]

Section 1285: "The board may refuse to issue, suspend, or institute proceedings in any court of competent jurisdiction to revoke any certificate issued under this Part for any of the following causes:

". . . .

"(6) Procuring, aiding or abetting in procuring an abortion unless done for the relief of a woman whose life appears in peril after due consultation with another licensed physician; or

"(7) Advertising means or medicine whereby monthly periods can be regulated or re-established" [From Acts 1914, No. 56, § 16, No. 54, § 10.]

La. Rev. Stat. § 24, at 138 (1856).

"Whoever shall feloniously administer or cause to be administered any drug, potion, or any other thing to any woman, for the purpose of procuring a premature delivery, and whoever shall administer or cause to be administered to any woman pregnant with child, any drug, potion, or any other thing, for the purpose of procuring abortion, or a premature delivery, shall be imprisoned at hard labor, for not less than one, nor more than ten years."

La. Acts § 3, at 182 (1817).

"If any woman shall be delivered of any issue of her body, and shall endeavour privately, either by drowning or secret burying thereof, or in any other way, either by herself, or the aid and assistance of others, so to conceal the birth thereof that it may not come to light, whether it be born alive or not, in any and every such case the said mother, together with all and every other such person or persons so aiding and assisting, shall, on conviction thereof, be punished by imprisonment not less than five, nor more than fourteen years." [Act of February 22, 1817.] [Unchanged in 1 Bullard & Curry Digest ch. 37, art. 72, sec. III, at 256 (1842).]

MAINE

Me. Rev. Stat. Ann. ch. 134, §§ 9, 10, 11 (1954).

Section 9: "Whoever administers to any woman pregnant with child, whether such child is quick or not, any medicine, drug or other substance, or uses any instrument or other means, unless the same was done as necessary for the preservation of the mother's life, shall be punished, if done with intent to destroy such child and thereby it was destroyed before birth, by a fine of not more than \$1,000 and by imprisonment for not more than 5 years; but if done with intent to procure the miscarriage of such woman, by a fine of not more than \$1,000 and by imprisonment for less than 1 year, and any person consenting and aiding or assisting shall be liable to like punishment. (R.S. c. 121, s. 9.)"

Section 10: "If a woman is willingly delivered in secret of the issue of her body, which would be a bastard if born alive, and conceals the death thereof so that it is not known whether it was born dead, or alive and was murdered, she shall be punished by a fine of not more than \$100 or by imprisonment for not more than 3 years; and she may be charged with such offense and also with the murder of such child in the same indictment, and convicted and punished for either, according to the verdict. (R.S. c. 121, s. 10.)" [Laws 1830, ch. 2, §§ 9, 10, 11, at 54.]

Section 11: "Publication, sale or distribution of information tending to produce miscarriage.—Whoever publishes, sells or distributes by hand or otherwise any circular, pamphlet or book containing recipes or prescriptions for the cure of chronic female complaints or private diseases, or recipes or prescriptions for drops, pills, tinctures or other compound designed to prevent conception or tending to produce miscarriage or abortion shall be punished by a fine of not less than \$50 nor more than \$100, or by imprisonment for not more than 3 months. (R.S. c. 121, § 11.)"

Me. Rev. Stat. ch. 160, §§ 11, 12, 13, 14 (1840).

Sections 11, 12: [Concealment of birth and death of bastard.]

Section 13: "Every person, who shall administer to any woman pregnant with child, whether such child be quick or not, any medicine, drug or substance whatever, or shall use or employ any instrument or other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done as necessary to preserve the life of the mother, shall be punished by imprisonment in the state prison, not more than five years, or by fine, not exceeding one thousand dollars, and imprisonment in the county jail, not more than one year."

Section 14: "Every person, who shall administer to any woman, pregnant with child, whether such child be quick or not, any medicine, drug or substance whatever . . . with intent thereby to procure the miscarriage of such woman, unless the same shall have been done, as necessary to preserve her life, shall be punished by imprisonment in the county jail, not more than one year, or by fine, not exceeding one thousand dollars."

Me. Rev. Stat. ch. 124, § 8, at 685 (1857).

"Whoever administers to any woman pregnant with child, whether such child is quick or not, any medicine, drug, or other substance, or uses any instrument or other means, unless the same were done as necessary for the preservation of the mother's life, shall be punished, if done with intent to destroy such child and thereby it was destroyed before birth, by imprisonment not more than five years, or by fine not exceeding one thousand dollars; if done with intent to procure the miscarriage of such woman, by imprisonment less than one year, and by fine not exceeding one thousand dollars." [From Rev. Stat. 1840, ch. 160, §§ 13, 14.]

MARYLAND

Md. Ann. Code art. 27, § 3 (1957).

"Any person who shall knowingly advertise, print, publish, distribute or circulate, or knowingly cause to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop,

or office, where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, for the purpose of producing abortion, can be procured, or who shall knowingly sell, or cause to be sold any such poison, drug, mixture, preparation, medicine or noxious thing or instrument of any kind whatever; or from whom any advice, direction, information or knowledge may be obtained for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished by imprisonment in the penitentiary for not less than three years, or by a fine of not less than five hundred dollars nor more than one thousand dollars, or by both, in the discretion of the court; and in case of fine being imposed, one-half thereof shall be paid to the State of Maryland, and one-half to the school fund of the city or county where the offense was committed; provided, however, that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously, either as the result of accident, constitutional debility, or any other natural cause, or the production of abortion by a regular practitioner of medicine when, after consulting with one or more respectable physicians he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother." [Ann. Code § 3 (1951); Ann. Code § 3 (1939); Ann. Code § 3 (1924); Ann. Code § 3 (1912); Ann. Code § 3 (1904); Ann. Code § 3 (1888); Ann. Code ch. 179, § 2 (1868).]

Statutory Development.

Md. Rev. Laws 1859, nothing on abortion.

Md. Laws ch. 179, § 2, at 315 (1868).

"[A]ny person who shall knowingly advertise, print, publish, distribute or circulate, or knowingly cause to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference containing words or language, giving or conveying any notice, hint or reference to any person, or to the name of any person real or fictitious, from whom; or to any place, house, shop or office, where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever; for the purpose of producing abortion, or who shall knowingly sell, or cause to be sold any such poison, drug, mixture, preparation, medicine or noxious thing or instrument of any kind whatever; or where any advice, direction, information or knowledge may be obtained for the purpose of causing the miscarriage or abortion of any woman pregnant with child, at any period of her pregnancy, or shall knowingly sell or cause to be sold any medicine, or who shall knowingly use or cause to be used any means whatsoever for that purpose, shall be punished by imprisonment in the penitentiary for not less than three years, or by a fine of not less than five hundred nor more than one thousand dollars, or by both, in the discretion of the Court; and in case of fine being imposed, one-half thereof shall be paid to the State of Maryland, and one-half to the School Fund of the city or county where the offense was committed; provided, however, that nothing herein contained shall be construed so as to prohibit the supervision and management by a regular practitioner of medicine of all cases of abortion occurring spontaneously, either as the result of accident, constitutional debility, or any other natural cause, or the production of abor-

tion by a regular practitioner of medicine when, after consulting with one or more respectable physicians, he shall be satisfied that the foetus is dead, or that no other method will secure the safety of the mother."

Md. Ann. Code art. 43, § 94 (1957).

"Any midwife who shall be convicted of producing an abortion or inducing premature labor, shall, in addition to the other penalties provided by law, forfeit her license to practice midwifery and shall not thereafter be permitted to practice midwifery in this State." [Ann. Code § 93 (1951); Ann. Code § 93 (1939); Ann. Code ch. 294, § 93 (1924).]

Case Material.

Death of mother is common-law misdemeanor, *Worthington v. State*, 92 Md. 222, 48 Atl. 355 (1901).

Defendant has burden of proof of justification; good faith or belief not enough, *Adams v. State*, 200 Md. 133, 88 A.2d 556 (1951).

The mother's uncorroborated testimony sufficient for conviction, *Basoff v. State*, 208 Md. 643, 119 A.2d 917 (1956).

MASSACHUSETTS

Mass. Gen. Laws Ann. ch. 272, §§ 19, 20, 21, 22 (1959).

Section 19: "Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or, with the like intent, unlawfully uses any instrument or other means whatever, or, with like intent, aids or assists therein, shall, if she dies in consequence thereof, be punished by imprisonment in the state prison for not less than five nor more than twenty years; and, if she does not die in consequence thereof, by imprisonment in the state prison for not more than seven years and by a fine of not more than two thousand dollars. (Historical Note St. 1845 c. 27. G.S. 1860 c. 165 § 9. P.S. 1882 c. 207 § 9. R.L. 1902 c. 212 § 15.)"

Section 20: "Whoever knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper, notice, advertisement or reference, containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop or office where, any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, or any advice, direction, information or knowledge, may be obtained for the purpose of causing or procuring the miscarriage of a woman pregnant with child or of preventing, or which is represented as intended to prevent, pregnancy, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two and one half years or by a fine of not more than one thousand dollars. (Historical Note St. 1847 c. 83. G.S. 1860 c. 165 § 10. P.S. 1882 c. 207 § 10. R.L. 1902 c. 212 § 16. St. 1905 c. 316. St. 1918 c. 257 § 464. St. 1919 c. 5. St. 1920 c. 2.)"

Section 21: "Whoever sells, lends, gives away, exhibits, or offers to sell, lend or give away an instrument or other article intended to be used for self-abuse, or any drug, medicine, instrument or article intended to be used for self-abuse, or any drug, medicine,

instrument or article whatever for the prevention of conception or for causing unlawful abortion, or advertises the same, or writes, prints or causes to be written or printed a card, circular, book, pamphlet, advertisement or notice of any kind stating when, where, how, of whom or by what means such article can be purchased or obtained, or manufactures or makes any such article, shall be punished by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years or by a fine of not less than one hundred nor more than one thousand dollars. (Historical Note St. 1879 c. 159 § 1. P.S. 1882 c. 207 § 17. R.L. 1902 c. 212 § 26. St. 1918 c. 257 § 464. St. 1919 c. 5. St. 1920 c. 2.)"

Section 22: [Concealment of death of illegitimate child.] "(Historical Note St. 1696 c. 11. St. 1784 c. 42 § 2. R.S. 1836 c. 130 § 6. G.S. 1860 c. 165 § 11. P.S. 1882 c. 207 § 11. R.L. 1902 c. 212 § 17.)"

Mass. Acts & Resolves ch. 27 (1845).

"... Whoever maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow, any poison, drug, medicine or noxious thing . . . and whoever maliciously and without lawful justification, shall use any instrument or means whatever with the like intent, and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned not more than twenty years, nor less than five years in the State Prison; and if the woman doth not die in consequence thereof, such offender shall be guilty of a misdemeanor, and shall be punished by imprisonment not exceeding seven years, nor less than one year, in the state prison or house of correction, or common jail, and by fine not exceeding two thousand dollars. (Approved by the Governor, Jan. 31, 1845)."

Case Material.

"There can be no sentence upon this verdict. The assault and battery are out of the case, and no abortion is alleged to have followed the taking of the potion: and if an abortion had been alleged and proved to have ensued, the averment that the woman was quick with child at the time is a necessary part of the indictment." *Commonwealth v. Bangs*, 9 Mass. (Tyng) 387, 388 (1812).

Abortion with woman's consent not punishable at common law unless quick, *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 43 Am. Dec. 396 (1845).

Under 43 Geo. 3, c. 58, § 2, it was held pregnancy must be proved, *R. v. Scudder*, 3 Car. & P. 605; then 9 Geo. 4, c. 31, § 13, applied in terms where not pregnant. 7 Will. 4 & 1 Vict., c. 85, silent as to this; held pregnancy not necessary, *Reg. v. Goodchild*, 2 Car. & K. 293; then Massachusetts adopted Gen. Stat. 1869, ch. 165, § 9, dropping former express requirement of pregnancy, thereafter no longer required. *Commonwealth v. Taylor*, 132 Mass. 261 (1882).

Assumed danger to physical or mental health would justify abortion, *Commonwealth v. Wheeler*, 315 Mass. 394, 53 N.E.2d 4 (1944).

Common-law abortion had to be by someone else other than mother; the patient not an accomplice requiring corroboration; any base motive will support indictment; her consent, to avoid disgrace, no justification. *Commonwealth v. Wood*, 77 Mass. (11 Gray) 85 (1858). Woman having abortion not an accomplice requiring corroboration as witness, *Commonwealth v. Follansbee*, 155 Mass. 274, 29 N.E. 471 (1892).

Doctor not exempt from what is now Mass. Gen. Laws Ann. 1959, ch. 272, § 21, *Commonwealth v. Gardner*, 300 Mass. 372, 15 N.E.2d 222, *appeal dismissed*, 305 U.S. 559 (1938).

Pregnancy of a woman not essential to conviction of conspiracy unlawfully to use instruments upon her to procure a miscarriage, *Commonwealth v. Cheng*, 310 Mass. 293, 37 N.E.2d 1010 (1941); *Commonwealth v. Viera*, 329 Mass. 470, 109 N.E.2d 171 (1952).

Abortion is destruction of life within womb, or causing delivery before fetus is capable of sustaining life, *Commonwealth v. Smith*, 213 Mass. 563, 100 N.E. 1010 (1913). Includes every method that may be tried, even those unlikely to succeed, *Commonwealth v. Goldenberg*, 338 Mass. 377, 115 N.E.2d 187, *cert. denied*, 359 U.S. 1001 (1959).

MICHIGAN

Mich. Stat. Ann. §§ 28.554, .555 (1954).

Section 554: "Sec. 322. The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." [Unchanged from Rev. Stat. 1846, ch. 153, § 32.]

Section 555: "Sec. 323. Any person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, be guilty of manslaughter.

"In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed." [Rev. Stat. 1846, ch. 153, § 22, as amended.]

Mich. Code §§ 9, 58 (1815).

Section 9: "And Whereas, many lewd and dissolute women, being pregnant with bastard children, but regardless of natural affection, or to avoid shame, or escape punishment, conceal their pregnancy, and the birth of such children, whereby many of them perish, for want of the usual & necessary aid and assistance, and also conceal the death of such children, so that it cannot be known whether they were murdered or not: *Be it therefore Enacted*, by the authority aforesaid [Governor and Judges of Territory]; that if any woman shall conceal her pregnancy, and shall willingly, and of purpose, be delivered in secret, by herself of any issue of her body, male or female, which shall by law be a bastard, every such woman so offending, shall be adjudged to be guilty of a misdemeanor, and on conviction thereof, shall be punished by fine, not exceeding one hundred dollars, or by imprisonment at hard labour, not exceeding four months, or both. *And be it further Enacted*, that if any woman shall endeavor privately, by drowning or secret burying, or any other way, either by herself, or the procurement of others, to conceal the death of any such issue of her body, which, if it were born alive, would by law be a bastard, so that it may not come to light, whether it were born alive or not, or whether it was murdered or not, then and in every such case the woman so offending, her aiders or abettors, counsellors, and procurers, shall be adjudged to be guilty of a misdemeanor, and on conviction thereof, shall be punished by fine, not exceeding two hundred dollars, or by imprisonment, at hard labour, not exceeding one year, or both."

Section 58: "*And be it Enacted*, by the authority aforesaid, That assaults, batteries, false imprisonment, mayhems, affrays, riots, routs, unlawful assemblies, nuisances, cheats,

deceits, and all other offences, of an indictable nature at common law and not provided for by this, or some other act of the Territory of Michigan, shall be deemed, and taken to be misdemeanors, and punished by fine or imprisonment, or both, or by fine, and imprisonment at hard labor, or both, or by fine, or solitary imprisonment at hard labor, or both, at the discretion of the Court, before whom the conviction shall be had; *Provided*, that such fine shall not exceed one thousand dollars & such imprisonment one year."

Mich. (Terr.) Laws, §§ 8, 62, 73 (1820).

Section 8: "And whereas many lewd and dissolute women, being pregnant with bastard children, but regardless of natural affection, or to avoid shame, or escape punishment, conceal their pregnancy, and the birth of such children, whereby many of them perish, for want of the usual and necessary aid and assistance, and also conceal the death of such children, so that it cannot be known whether they were murdered or not: Be it therefore enacted, That if any woman shall conceal her pregnancy, and shall willingly, and of purpose, be delivered in secret by herself, of any issue of her body, male or female, which shall by law be a bastard, every such woman so offending, shall be punished by fine not exceeding one hundred dollars, or by imprisonment at hard labor, not exceeding four months, or both, at the discretion of the court: And be it further enacted, That if any woman shall endeavor privately by herself, or the procurement of others, to conceal the death of any such issue of her body, which, if it were born alive, would by law be a bastard, so that it may not come to light, whether it were born alive or not, or whether it was murdered or not, then and in every such case, the woman so offending, her aiders, abettors, counsellors, and procurers, shall, on conviction thereof, be punished by fine not exceeding two hundred dollars, or by imprisonment, at hard labor, not exceeding one year, or both, at the discretion of the court."

Section 62: "And be it further enacted, That assaults, batteries, false imprisonments, mayhems, affrays, riots, routs, unlawful assemblies, nuisances, cheats, deceits, and all other offences, of an indictable nature at common law, and not provided for by this act, or some other act of the territory of Michigan, shall be punished by fine or imprisonment, or both, or by fine, and imprisonment at hard labor, or both, or by fine, or solitary imprisonment at hard labor, or both, at the discretion of the court before whom the conviction shall be had: *Provided*, That such fine shall not exceed one thousand dollars, and such imprisonment one year."

Section 73: "The same being adopted from the laws of four of the original states; to wit, the states of New-Jersey, New-York, Vermont and Pennsylvania, as far as necessary and suitable to the circumstances of the territory of Michigan."

Mich. Rev. Stat. ch. 153, §§ 32, 33, 34, at 662 (1846).

Section 32: "The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter."

Section 33: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter."

Section 34: "Every person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Mich. Laws ch. 106, §§ 1, 2, at 175 (1869).

Section 1: "[N]o person or persons, their agents or clerks, shall print, stamp, or engrave on any cards, bills, or posters for public display or advertisement, or publish in any newspaper in the State of Michigan, the virtues or applications and its or their effects of any such patent and other simple or compound medicine, in language of immoral tendency or of ambiguous character. Any person or persons, their agents or clerks, who shall fail to comply with the requirements herein expressed, shall be deemed guilty of misdemeanor, and shall be liable to a fine not less than fifty, nor more than one hundred dollars, or to imprisonment in the county jail not exceeding three months, or both, for each and every offense. Any proprietor or proprietress of any newspaper published in the State of Michigan, who shall permit any such publications to appear in consecutive issues, each and every day shall be deemed a new and separate offense, and shall be liable to a penalty as herein expressed."

Section 2: "The publication or sale within this State of any circular, pamphlet, or book containing recipes or prescriptions in indecent or obscene language for the cure of chronic female complaints or private diseases, or recipes or prescriptions for drops, pills, tinctures, or other compounds designed to prevent conception, or tending to produce miscarriage or abortion is hereby prohibited; and for each copy thereof, so published and sold, containing such prohibited recipes or prescriptions, the publisher and seller shall each be deemed guilty of a misdemeanor, and shall be liable to the same penalties provided for a violation of the preceding section."

Mich. Comp. Laws §§ 750.14, .15, .34, .40, .150 (1931).

Section 14: [Abortion.]

Section 15: "Any person who shall in any manner, except as hereinafter provided, advertise, publish, sell or publicly expose for sale any pills, powder, drugs or combination of drugs, designed expressly for the use of females for the purpose of procuring an abortion, shall be guilty of a misdemeanor.

"Any drug or medicine known to be designed and expressly prepared for producing an abortion, shall only be sold upon the written prescription of an established practicing physician of the city, village, or township in which the sale is made; and the druggist or dealer selling the same shall, in a book provided for that purpose, register the name of the purchaser, the date of the sale, the kind and quantity of the medicine sold, and the name and residence of the physician prescribing the same."

Section 34: "Any person who shall advertise in his own name or in the name of another person, firm or pretended firm, association, corporation or pretended corporation, in any newspapers, pamphlet, circular, periodical or other written or printed paper, or the owner, publishers or manager of any newspaper or periodical who shall permit to be published or inserted in any newspaper or periodical owned or controlled by him, an advertisement of the treating or curing of venereal diseases, the restoration of

"Lost manhood" or "Lost vitality or vigor," or shall advertise in any manner that he is a specialist in diseases of the sexual organs, or diseases caused by sexual vice, self abuse or in any diseases of like cause, or shall advertise in any manner any medicine, drug, compound, appliance or any means whatever whereby sexual diseases of men or women may be cured or relieved, or miscarriage or abortion produced, shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than 1 year or by a fine of not more than 500 dollars."

Section 40: "The publication or sale within this state of any circular, pamphlet or book containing recipes or prescriptions in indecent or obscene language for the cure of chronic female complaints or private diseases, or recipes or prescriptions for drops, pills, tinctures, or other compounds designed to prevent conception, or tending to produce miscarriage or abortion is hereby prohibited; and for each copy thereof, so published and sold, containing such prohibited recipes or prescriptions, the publisher and seller shall each be guilty of a misdemeanor."

Section 150: "If any unmarried woman shall conceal the death of any issue of her body, so that it may not be known whether such issue was born alive or not, or whether it was not murdered, she shall be punished by fine not exceeding 100 dollars, or imprisonment in the county jail not more than 1 year."

Mich. Stat. Ann. §§ 14, 15 (1935).

Section 14: "Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

"In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed."

Section 15: "Any person who shall in any manner, except as hereinafter provided, advertise, publish, sell or publicly expose for sale any pills, powder, drugs or combination of drugs, designed expressly for the use of females for the purpose of procuring an abortion, shall be guilty of a misdemeanor.

"Any drug or medicine known to be designed and expressly prepared for producing an abortion, shall only be sold upon the written prescription of an established practicing physician of the city, village, or township in which the sale is made; and the druggist or dealer selling the same shall, in a book provided for that purpose, register the name of the purchaser, the date of the sale, the kind and quantity of the medicine sold, and the name and residence of the physician prescribing the same." [Annotation note: "History.—See Pub. Acts '73, No. 138, How. § 9312, 9313, C.L. '97, § 11729, 11730, C.L. '15 § 15523, 15524, C.L. '29 § 16885."]

MINNESOTA

Minn. Stat. Ann. §§ 617.18, .19, .20, .21, .22, .25, .26 (1953).

Section 18: "Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life, or that of the child with which she is pregnant, shall—

"(1) Prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take, any medicine, drug, or substance; or

"(2) Use, or cause to be used, any instrument or other means—shall be guilty of abortion and punished by imprisonment in the state prison for not more than four years or in a county jail for not more than one year."

Section 19: "A pregnant woman who takes any medicine, drug, or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant shall be punished by imprisonment in the state prison for not less than one year nor more than four years."

Section 20: "Whoever shall manufacture, give, or sell an instrument, drug, or medicine, or any other substance, with intent that the same may be unlawfully used in producing the miscarriage of a woman, shall be guilty of a felony."

Section 21: "In any prosecution for abortion or attempting abortion, no person shall be excused from testifying as a witness on the ground that his testimony would tend to criminate himself."

Section 22: "Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a misdemeanor; and every woman who, having been convicted of endeavoring to conceal the still-birth of any issue of her body, which if born alive would be illegitimate, or the death of such issue under the age of two years, shall, subsequent to such conviction, endeavor to conceal any such birth or death, shall be punished by imprisonment in the state prison for not more than five years."

Section 25: "Every person who shall sell, lend, or give away, or in any manner exhibit, or offer to sell, lend, or give away, or have in his possession with intent to sell, lend, give away, or advertise or offer for sale, loan, or distribution, any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion; or shall write or print, or cause to be written or printed, a card, circular, pamphlet, advertisement, or notice of any kind, or shall give oral information, stating when, where, how, or whom, or by what means such article or medicine can be obtained or who manufactures it, shall be guilty of a gross misdemeanor, and punished by imprisonment in the county jail for not more than one year, or by a fine of not more than \$500, or by both."

Section 26: "Every person who shall deposit or cause to be deposited in any post-office in the state, or place in charge of any express company or other common carrier or person for transportation, any of the articles or things specified in section 617.24 or 617.25, or any circular, book, pamphlet, advertisement or notice relating thereto, with the intent of having the same conveyed by mail, express, or in any other manner; or who shall knowingly or wilfully receive the same with intent to carry or convey it, or shall knowingly carry or convey the same by express, or in any other manner except by United States mail, shall be guilty of a misdemeanor. The provisions of this section and section 617.25 shall not be construed to apply to an article or instrument used by physicians lawfully practicing, or by their direction or prescription, for the cure or prevention of disease."

Minn. (Terr.) Rev. Stat. ch. 100, §§ 10, 11, at 493 (1851).

Section 10: "The willful killing of an unborn infant child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree."

Section 11: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

Minn. (Terr.) Rev. Stat. ch. 107, § 7, at 519 (1851).

"If any woman shall conceal the death of any issue of her body, which, if born alive, would be a bastard, so that it may not be known whether such issue was born alive or not, or whether it was not murdered, she shall be punished by imprisonment in the territorial prison, not more than one year, nor less than six months, or by fine not exceeding three hundred dollars, nor less than one hundred dollars."

Minn. Stat. at Large vol. II, ch. 54, Sec. 29, §§ 1, 2, 3, 4, at 987 (1873).

Section 1: "That any person who shall administer to any woman with child, or prescribe for any such woman, or suggest to, or advise, or procure her to take any medicine, drug, substance or thing whatever, or who shall use or employ, or advise or suggest the use or employment of any instrument or other means or force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the state prison for a term not more than ten (10) years nor less than three (3) years."

Section 2: "Any person who shall administer to any woman with child, or prescribe, or procure, or provide for any such woman, or suggest to, or advise, or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ, or suggest, or advise the use or employment of any instrument or other means or force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall upon conviction thereof be punished by imprisonment in the state prison for a term not more than two years nor less than one year, or by fine not more than five thousand dollars nor less than five hundred dollars, or by such fine and imprisonment both, at the discretion of the court."

Section 3: "Any woman with child who shall apply to or solicit from any physician, druggist or other person whomsoever, any medicine, drug, substance or thing whatever, or shall take or administer the same, or shall submit to or perform upon herself any operation of any sort or character whatever, with intent thereby to cause or produce a miscarriage, or abortion, or premature labor, unless the same shall have been necessary to preserve her life, or the life of such child, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a term not more than two years nor less than three months, or by fine not exceeding one thousand dollars nor less than three hundred dollars, or by such fine and imprisonment both at the discretion of the court."

Section 4: "Any person who shall knowingly advertise, print, publish, distribute or circulate in any form, or shall knowingly cause to be advertised, printed, published,

distributed or circulated in any form, any book, pamphlet, circular, printed paper, newspaper notice, advertisement or reference containing language or words or characters giving or conveying any notice, hint or reference to any person, or to the name of any person real or fictitious, from whom or to any house, shop, store, office, or other place whatever, where any poison, drug, mixture, preparation, medium or noxious thing, or any instrument or means whatever, or any advice, direction, information or knowledge may be obtained for the purpose of causing or procuring the miscarriage or abortion, or premature labor of any woman pregnant with child, shall, upon conviction thereof be punished by imprisonment in the state prison for a term not more than two years, or in the county jail for a period not less than three months, or by fine not more than five hundred dollars nor less than one hundred dollars, or by such fine and imprisonment both, at the discretion of the court."

Case Material.

Not necessary that an abortion be actually effected, *State v. Madden*, 161 Minn. 132, 201 N.W. 297 (1924).

Woman upon whom abortion is performed is not accomplice in the commission of the offense; not necessary to corroborate the woman in abortion prosecution, *State v. Tennyson*, 212 Minn. 158, 2 N.W.2d 833 (1942).

MISSISSIPPI

Miss. Code Ann. §§ 2222, 2223, 2289, 8893 (1956).

Section 2222: "The wilful killing of an unborn quick child, by an injury to the mother of such child, which would be murder if it resulted in the death of the mother, shall be manslaughter."

Section 2223: "1. Whoever, by means of any instrument, medicine, drug, or other means whatever shall wilfully and knowingly cause any woman pregnant with child to abort or miscarry, or attempts to procure or produce an abortion or miscarriage, unless the same were done as necessary for the preservation of the mother's life, shall be imprisoned in the state penitentiary not less than one (1) year, nor more than ten (10) years; or if the death of the mother results therefrom, the person procuring, causing, or attempting to procure or cause the abortion or miscarriage shall be guilty of murder.

"2. No act prohibited in section 1 hereof shall be considered as necessary for the preservation of the mother's life unless upon the prior advice, in writing, of two reputable licensed physicians.

"3. The license of any physician or nurse shall be automatically revoked upon conviction under the provisions of this act." [From Laws 1952, ch. 260, §§ 1, 2, 3, repeating Code § 2223 (1942).]

Section 2289: "A person who sells, lends, gives away, or in any manner exhibits, or offers to sell, lend, or give away, or has in his possession with intent to sell, lend, or give away, or advertises or offers for sale, loan, or distribution any instrument or article, or any drug or medicine, for the prevention of conception, or for causing unlawful abortion; or who writes, or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement, or notice of any kind, or gives information orally, stating when, where, how, of whom, or by what means such article or medicine can be purchased or obtained, or who manufactures any such article or medicine, is guilty of a misdemeanor, and, on conviction, shall be punished by fine not less than twenty-five

dollars nor more than two hundred dollars, and by imprisonment in the county jail not exceeding three months."

Section 8893: "The Mississippi State Board of Health may on its own initiative or on complaint suspend or revoke for any cause named below any license that it has issued that authorizes any person to practice medicine, osteopathy, or any other method of preventing, diagnosing, relieving, caring for, or curing disease, injury, or other bodily condition; and said board is furthermore authorized and empowered to direct the cancellation in the office of the clerk of any circuit court of any record of any license so suspended or revoked.

"(a) The causes for which a license may be suspended or revoked and the record of such license cancelled are as follows:

". . . .

"(5) Procuring, or attemption [*sic*] to procure, or pretending to procure, or aiding or abetting in procuring or pretending to procure, an abortion that is not necessary to preserve the life of a pregnant woman."

Miss. Code §§ 8, 9, at 958 (1848).

Section 8: "The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of the mother, shall be deemed manslaughter in the first degree."

Section 9: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree."

[Act of February 15, 1839.]

MISSOURI

Mo. Rev. Stat. §§ 559.090, .100 (1949).

Section 90: "The willful killing of an unborn quick child, (by any injury to the mother of such child) which would be murder if it resulted in the death of such mother, shall be deemed manslaughter." [From Rev. Stat. 1835, § 9, at 168.]

Section 100: "Any person who, with intent to produce or promote a miscarriage or abortion, advises, gives, sells or administers to a woman (whether actually pregnant or not), or who, with such intent, procures or causes her to take, any drug, medicine or article, or uses upon her, or advises to or for her the use of, any instrument or other method or device to produce a miscarriage or abortion (unless the same is necessary to preserve her life or that of an unborn child, or if such person is not a duly licensed physician, unless the said act has been advised by a duly licensed physician to be necessary for such a purpose), shall, in event of the death of said woman, or any quick child, whereof she may be pregnant, being thereby occasioned, upon conviction be adjudged guilty of manslaughter, and punished accordingly; and in case no such death ensue, such person shall be guilty of the felony of abortion, and upon conviction be punished by imprisonment in the penitentiary not less than three years nor more than five years, or by imprisonment in jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment; and any practitioner of medicine or surgery, upon conviction of any such offense, as is above defined, shall

be subject to have his license or authority to practice his profession as physician or surgeon in the state of Missouri revoked by the state board of medical examiners in its discretion." [From Rev. Stat. 1835, § 10, at 168.]

Mo. Rev. Stat. art. II, §§ 9, 10, 36, at 168 (1835).

Section 9: "The wilful killing of any unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree."

Section 10: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatsoever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by a physician to be necessary for that purpose, shall be deemed guilty of manslaughter in the second degree."

Section 36: "Every physician, or other person, who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatsoever, or shall use or employ any instrument or means whatsoever, with intent thereby to procure abortion, or the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by a physician to be necessary for that purpose, shall, upon conviction, be adjudged guilty of a misdemeanor, and be punished by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

Mo. Rev. Stat. art. II, §§ 9, 10, 26, 40, at 168 (1855).

Sections 9, 10: [Unchanged from Rev. Stat. 1835.]

Section 26: "Every woman who shall be delivered of a child, and shall endeavor privately, by drowning or secretly burying the same, or in any other way, directly or indirectly, to conceal the birth thereof, so that it may not be known whether it was born alive or not, shall be deemed guilty of a felony, and shall, upon conviction, be imprisoned in the penitentiary not more than seven years."

Section 40: [Substantially unchanged from Rev. Stat. 1835, art. II, § 36.]

Case Material.

State has burden of showing abortion not medically necessary. "We nevertheless held that evidence of antecedent good health prior to the use of the means by which the abortion was committed was a sufficient compliance . . ." *State v. Hawkins*, 210 S.W. 4, 7 (Mo. 1919). Such good health prior to the abortion means only that the woman was capable of carrying her child to full term, *State v. Stillman*, 301 S.W.2d 830 (Mo. 1957).

MONTANA

Mont. Rev. Code Ann. §§ 94-401, -402 (1947).

Section 401: "Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

Section 402: "Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years."

Mont. (Terr.) Laws § 41, at 184 (1864).

"Every person who shall wilfully and maliciously administer, or cause to be administered to or taken by any person, any poison or other noxious or destructive substance or liquid, with the intention to cause the death of such person, and being thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term of not less than ten years, and which may extend to life. And every person who shall administer, or cause to be administered, or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention to produce the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison for a term not less than two years nor more than five years. *Provided*, That no physician shall be affected by the last clause of this section, who in the discharge of his professional duties deems it necessary to produce the miscarriage of any woman in order to save her life."

Mont. Laws, Crim. Laws, ch. IV, §§ 41, 42, at 269 (1871-1872).

Section 41. "If any woman shall endeavor, privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if born alive would be a bastard, so that it may not come to light, whether it shall have been murdered or not, every such mother, being convicted thereof, shall suffer imprisonment in the territorial prison for a term not exceeding one year: *Provided, however*, That nothing herein contained shall be so construed as to prevent such mother from being indicted and punished for the murder of such bastard child."

Section 42: "Every person who shall administer or cause to be administered or taken, or furnished to another to be taken, any medical substance, or shall use or cause to be used any instrument whatever with the intent to procure the miscarriage of any woman then being with child (unless the same shall be done to save the life of such woman), and shall be convicted thereof, shall be punished by imprisonment in the territorial prison for a term of not less than two years, nor more than five years."

NEBRASKA

Neb. Rev. Stat. §§ 28-404, -405 (1956).

Section 404: "Any physician or other person who shall administer, or advise to be administered, to any pregnant woman with a vitalized embryo, or foetus, at any stage of utero gestation, any medicine, drug, or substance whatever, or who shall use or employ, or devise to be used or employed, any instrument or other means with intent thereby to destroy such vitalized embryo or foetus, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such vitalized embryo, or foetus, or mother, in consequence thereof, be imprisoned in the penitentiary not less than one nor more than ten years."

Section 405: "Any physician or other person who shall willfully administer to any

pregnant woman any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall be punished by imprisonment in the county jail not more than one year or by fine not exceeding five hundred dollars, or by both."

Neb. Gen. Stat. ch. 58, §§ 6, 39 (1873).

Section 6: "Any physician or other person who shall administer, or advise to be administered, to any pregnant woman with a vitalized embryo, or foetus, at any stage of utero gestation, any medicine, drug, or substance whatever, or who shall use or employ, or devise to be used or employed, any instrument or other means with intent thereby to destroy such vitalized embryo, or foetus, unless the same shall have been necessary to preserve the life of the mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such vitalized embryo, or foetus, or mother, in consequence thereof, be imprisoned in the penitentiary not less than one nor more than ten years."

Section 39: "Any physician, or other person, who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall be punished by imprisonment in the county jail, not more than one year, or by fine, not exceeding five hundred dollars, or by both such fine and imprisonment."

NEVADA

Nev. Rev. Stat. §§ 200.210, .220, 201.120, .130, .140, .150 (1959).

Section 210: "The willful killing of any unborn quick child, by any injury committed upon the mother of such child, is manslaughter. (1911 C&P § 138; RL § 6403; NCL § 10085.)"

Section 220: "Every woman quick with child who shall take or use, or submit to the use of, any drug, medicine or substance, or any instrument or other means, with intent to procure her own miscarriage, unless the same is necessary to preserve her own life or that of the child whereof she is pregnant, and thereby causes the death of such child, shall be guilty of manslaughter. (1911 C&P § 140; RL § 6405; NCL § 10088.)"

Section 120: "Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall:

"1. Prescribe, supply or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or

"2. Use, or cause to be used, any instrument or other means; shall be guilty of abortion, and punished by imprisonment in the state prison for not more than 5 years, in the county jail for not more than 1 year. (1911 C&P § 182; RL § 6447; NCL § 10129.)"

Section 130: "Every person who shall manufacture, sell or give away any instrument, drug, medicine or other substance, knowing or intending that the same may be used,

lawfully used in procuring the miscarriage of a woman, shall be guilty of a gross misdemeanor. (1911 C&P § 183; RL § 6448; NCL § 10130.)"

Section 140: "In any prosecution for abortion, attempting abortion, or selling drugs unlawfully, no person shall be excused from testifying as a witness on the ground that his testimony would tend to incriminate him, but such testimony shall not be used against him in any criminal prosecution except for perjury in giving such testimony. (1911 C&P § 184; RL § 6449; NCL § 10131.)"

Section 150: "Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a gross misdemeanor. (1911 C&P § 185; RL § 6450; NCL § 10132.)"

Neu. (Terr.) Laws ch. 28, §§ 34, 42, at 61, 63 (1861).

Section 34: "If any woman shall endeavor privately, either by herself, or the procurement of others, to conceal the death of any issue of her body, male or female, which, if born alive, would be a bastard, so that it may not come to light, whether it shall have been murdered or not, every such mother being convicted thereof, shall suffer imprisonment in the Territorial Prison, for a term not exceeding one year; provided, however, that nothing herein contained shall be so construed as to prevent such mother from being indicted and punished for the murder of such bastard child."

Section 42: ". . . And every person who shall administer, or cause to be administered or taken, any medicinal substance, or shall use, or cause to be used, any instruments whatever, with the intention to procure the miscarriage of any woman then being with child, and shall be thereof duly convicted, shall be punished by imprisonment in the Territorial prison, for a term not less than two years; *provided*, that no physician shall be affected by the last clause of this section, who, in the discharge of his professional duties, deems it necessary to produce the miscarriage of any woman in order to save her life."

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. § 585:12 (1955).

"If any person shall wilfully administer to a pregnant woman any medicine, drug, substance, or thing whatever, or shall use or employ any instrument or means whatever, with intent thereby to procure the miscarriage of such woman, he shall be imprisoned not more than one year, or fined not more than one thousand dollars, or both."

N.H. Laws ch. 743, § 1, at 708 (1848).

". . . That every person, who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or means whatever with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment at the discretion of the Court."

H. Rev. Stat. Ann. § 585:13 (1955).

"If any person shall administer to a woman pregnant with a quick child any medicine, drug, or substance whatever, or shall use or employ any instrument or means what-

ever, with intent thereby to destroy the child, unless, by reason of some malformation or of difficult or protracted labor, it shall have been necessary, to preserve the life of the woman, or shall have been advised by two physicians to be necessary for that purpose, he shall be fined not more than one thousand dollars and imprisoned not more than ten years."

N.H. Laws ch. 743, § 2, at 708 (1848).

"Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or means whatever, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for such purpose, shall, upon conviction, be punished by fine not exceeding one thousand dollars, and by confinement to hard labor not less than one year, nor more than ten years."

N.H. Rev. Stat. Ann. § 585:14 (1955).

"If any person shall cause the death of a pregnant woman, in the perpetration or attempt to perpetrate either of the crimes mentioned in the two preceding sections, or in consequence of the perpetration or the attempt to perpetrate either of them, he shall be deemed guilty of murder in the second degree, and shall be punished accordingly."

N.H. Laws ch. 743, §§ 3, 4, at 708 (1848).

Section 3: "Any person who shall cause the death of any pregnant woman, in the perpetration, or attempt to perpetrate either of the crimes mentioned in the two preceding sections, or in consequence of the perpetration, or the attempt to perpetrate either of said crimes, shall be taken and deemed to be guilty of murder in the second degree, and be punished accordingly."

Section 4: "Any woman who shall voluntarily submit to the violation of the provisions of this act upon herself, shall be punished by imprisonment in the county jail not exceeding one year or by fine not exceeding one thousand dollars, or by both said fine and imprisonment at the discretion of the Court."

N.H. Rev. Stat. Ann. § 585:15 (1955).

"If any woman shall be privately delivered of a child, which if born alive would be a bastard, and shall endeavor privately to conceal its death and the manner or cause thereof, she shall be imprisoned not more than two years, or fined not more than two thousand dollars."

Provincial Act of 1714.

[To prevent the destroying and murdering of bastard children.] "Whereas many Lewd women that have been Delivered of Bastard Children, to avoid their Shame and to escape punishment, do secretly Bury or Conceal the Death of their Children, and after if the Child be found dead, the Said Women doe alleadge that the Said Child was Born dead, whereas it falleth out Sometimes (although hardly it is to be proved) that the Said Child or Children were Murdered by the Said Women their lewd Mothers or by their Assent or procurement./

"Be it therefore Enacted by the Governour Council and Representatives Convened in General Assembly and by the Authority of the Same, that if any Woman be delivered

of any Issue of Her Body, Male, or female, which if it were born alive should by Law be a Bastard; and that she Endeavour Privately either by Drowning or Secret Burying thereof, or any other way; either by Her selfe the procureing of others So to conceale the Death thereof that it may not come to light, whether it were born alive or not but be concealed. In Every Such Case the Mother Soe offending shall Suffer death as in the case of Murther, Except Such Mother cann make proof by one Witness at the least, the Child whose death was by her So intended to be concealed was Born dead./” [1 Original Acts, at 96; 1 Recorded Acts, at 184; Laws 1716, at 42.]

Act of February 3, 1791.

“And be it further enacted That if any Woman shall endeavour privately to conceal the Death of any Issue of her Body which if born alive would by Law be a Bastard so that it may not come to light whether it were born alive or not or whether it was murdered or not in every such Case the Mother so offending on being thereof convicted shall be set on the Gallows for the space of one Hour, and may be imprisoned not exceeding two Years or instead of being set on the Gallows may be fined not exceeding three hundred Pounds / . . .” [Laws 1792, at 244; Comp. Laws 1797, at 269.]

Case Material.

Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958), discusses N.H. Rev. Stat. Ann. §§ 585:12, :13 (1955) in action for prenatal injuries.

“Unlawfully” as used in statutes: no need to allege unlawfulness if statute not so worded, *State v. Concord R.R.*, 59 N.H. 85, 86 (1879).

NEW JERSEY

N.J. Rev. Stat. Ann. §§ 2A:87-1, :170-76 (1953).

Section 1: “Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.

“If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than \$5,000, or by imprisonment for not more than 15 years, or both.”

Section 76: “Any person who, without just cause, utters or exposes to the view of another, or possesses with intent to utter or expose to the view of another, or to sell the same, any instrument, medicine or other thing, designed or purporting to be designed for the prevention of conception or the procuring of abortion, or who in any way advertises or aids in advertising the same, or in any manner, whether by recommendation for or against its use or otherwise, gives or causes to be given, or aids in giving any information how or where any such instrument, medicine or other thing may be had, seen, bought or sold, is a disorderly person.”

Case Material.

State v. Cooper, 22 N.J.L. 52 (Sup. Ct. 1849):

“Is, then, the procuring of an abortion, either by means of potions or of an operation used by the mother herself, or by another with her consent, an indictable offense at the common law, unless the mother be quick with child?” [At 53.]

"It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. *In contemplation of law* life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it." [At 54.]

"*Abortion*, as a crime, is to be found only in modern treatises and in modern statutes. No trace of it is to be found in the ancient common law writers. Bracton, indeed, uses language which at first view might seem to favor a different conclusion. . . . He is treating, however, of the crime of homicide, and it is perfectly certain, by the unanimous concurrence of all the authorities, that the offence could not be committed unless the child had quickened." [At 55.]

"In a modern case, a distinction was taken, by a learned judge upon the circuit, between the terms '*quick with child*' and '*with quick child*,' and it was said that the former term means simply having conceived. *Regina v. Wycherley*, 8 Car. & P. 262. There is no foundation whatever in law for this distinction.

"Two modern elementary writers upon criminal law, of acknowledged reputation, have given some countenance to the idea, that the mere attempt to procure an abortion is an indictable offence at the common law. 1 *Russell on Cr.* 540; *Roscoe's Crim. Ev.* 190. Neither of them, however, states the principle with confidence, or distinguishes between the condition of the child before and after quickening. . . .

"In a recent American treatise upon criminal law, the proposition, that the procuring of an abortion was indictable at the common law, had been stated, and advocated with much learning. *Wharton's Crim. Law* 308; *Wharton's Prec.* 108. . . .

"We are of opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently that the mere attempt to commit the act is not indictable." [At 57-58.]

N.J. Laws at 266 (1849).

"[I]f any person or persons, maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing; and if any person or persons maliciously, and without lawful justification, shall use any instrument, or means whatever, with the like intent; and every person, with the like intent, knowingly aiding and assisting such offender or offenders, shall, on conviction thereof, be adjudged guilty of a high misdemeanor; and if the woman die in consequence thereof, shall be punished by fine, not exceeding one thousand dollars, or imprisonment at hard labour for any term not exceeding fifteen years, or both; and if the woman doth not die in consequence thereof, such offender shall, on conviction thereof, be adjudged guilty of a misdemeanor, and be punished by fine, not exceeding five hundred dollars, or imprisonment at hard labour, for any term not exceeding seven years, or both."

Case Material.

State v. Murphy, 27 N.J.L. 112 (Sup. Ct. 1858):

"The crime . . . as defined by the statute, consists in advising, without lawful justification, a pregnant woman to take some noxious thing, with intent to cause her miscar-

riage. The actual taking or swallowing of the drug, by the terms of the statute, constitutes no element of the crime."

"[Comparing New Jersey Statute with language of 9 Geo. 4, ch. 31, § 13 (1828):] The language of our statute is much more comprehensive To restrict the meaning and operation of this act within the narrow limits of the English statute would greatly abridge the obvious import of its terms" [At 113.]

"The guilt of the defendant is not graduated by the success or failure of the attempt. It is immaterial whether the *fœtus* is destroyed, or whether it has quickened or not." [At 114.]

"Under the statute, the defendant's guilt is complete by giving the advice with the intent specified in the act, and it is immaterial whether the advice be followed or not." [At 115.]

N.J. Laws ch. 337, §§ 1, 2, 3, 4, at 45 (1872).

[Amended Act of 1849: deletes "and every person, with the like intent, knowingly aiding and assisting such offender or offenders"; extends death of mother to death of "mother or child," slightly lowers punishments.]

N.J. Gen. Pub. Laws ch. CXCI, at 240 (1881).

[Increases punishments to fine and up to 5 years' hard labor or both if no death, and to fine (to \$5,000) and up to 15 years' hard labor or both if either child or mother die.]

Case Material.

State v. Meyer, 64 N.J.L. 382, 386, 45 Atl. 779, 780 (Sup. Ct. 1900): "But the revisers of 1898 have abandoned the distinction previously made in respect to the grade of the crime. They denounce a single crime as a high misdemeanor and distinguish the cases when death does or does not ensue, not by the designation of the crime, but only by the punishment which must follow conviction. The result, in my judgment, is that death is no longer an essential element of the crime, but is to be considered solely with respect to the punishment to be inflicted after conviction. This result rendered inadmissible the dying declarations of the deceased"

State v. Orecchio, 27 N.J. Super. 484, 489-90, 99 A.2d 595, 598 (App. Div. 1953): "With regard to the expression 'unlawfully and wilfully:' The word 'unlawfully' negatives all legal cause of excuse. *Bishop, Criminal Procedure* (1913), § 503. 'Wilful' is opposed to accidental or involuntary; it means intentional; what a man wills to do. *State v. Clark*, 29 N.J.L. 96 (Sup. Ct. 1860); *State v. Scott*, 104 N.J.L. 544 (*E. & A.* 1928). "It is frequently understood . . . as signifying an evil intent without justifiable excuse." *Potter v. United States*, 155 U.S. 438, 15 S. Ct. 144, 147, 39 L. Ed. 214 (1894). In the indictment before us, the expression 'unlawfully and wilfully' should be construed to mean intentionally and without legal excuse."

State v. Siciliano, 21 N.J. 249, 121 A.2d 490 (1956): At common law induced abortion was a crime only after quickening. Modern New Jersey statutes eliminate this element, in a shift from mere protection of child to protection of mother and child, and make it abortion at any stage. It is authorized when necessary for avoidance of death or *permanent, serious* injury to the mother.

NEW MEXICO

N.M. Stat. Ann. §§ 40-3-1, -2, -3 (1953).

Section 1: "Any person who shall administer to any pregnant woman any medicine, drug or substance whatever, or attempt by operation or any other method or means to produce an abortion or miscarriage upon such woman, shall be guilty of a felony, and, upon conviction thereof, shall be fined not more than two thousand (\$2,000.00) dollars, nor less than five hundred (\$500.00) dollars or imprisoned in the penitentiary for a period of not less than one (1) nor more than five (5) years, or by both such fine and imprisonment in the discretion of the court trying the case."

Section 2: "Any person committing such act or acts mentioned in section 1 (40-3-1) hereof which shall culminate in the death of the woman shall be deemed guilty of murder in the second degree; Provided, however, an abortion may be produced when two (2) physicians, licensed to practise in the state of New Mexico, in consultation, deem it necessary to preserve the life of the woman, or to prevent serious and permanent bodily injury."

Section 3: "For the purpose of the act, the term 'pregnancy' is defined as that condition of a woman from the date of conception to the birth of her child."

N.M. (Terr.) Acts ch. 36, §§ 5, 6, at 41, 42 (1907).

Section 5: "The wilful killing of an unborn infant child by any injury to the mother of said child which would be murder if it resulted in the death of such mother shall be deemed murder in the second degree."

Section 6: "Every person who shall administer to any woman pregnant with a quick child any medicine, drug or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother and shall have been advised by a physician to be necessary for such purpose, shall, in case the death of such child or such mother be thereby produced, be deemed guilty of murder in the second degree."

NEW YORK

N.Y. Pen. Law §§ 80, 81, 81-a, 82, 1050.

Section 80: "A person who, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve the life of the woman, or of the child with which she is pregnant, either:

"1. Prescribes, supplies, or administers to a woman, whether pregnant or not, or advises or causes a woman to take any medicine, drug, or substance; or,

"2. Uses, or causes to be used, any instrument or other means,

"Is guilty of abortion, and is punishable by imprisonment in a state prison for not more than four years, or in a county jail for not more than one year."

Section 81: "A pregnant woman, who takes any medicine, drug, or substance, or uses or submits to the use of any instrument or other means, with intent thereby to produce her own miscarriage, unless the same is necessary to preserve her life, or that of the child whereof she is pregnant, is punishable by imprisonment for not less than one year, nor more than four years."

Section 81-a: "A female who has violated section eighty-a [probably should read "eighty," as no section "eighty-a" existed at the time this section became effective] of

this article or who has committed an attempt to violate such section shall not be excused from attending and testifying or producing any evidence, documentary or otherwise, in any investigation or trial relating to violations of sections eighty, eighty-one, eighty-two, ten hundred and fifty, or eleven hundred and forty-two of this chapter, or an attempt to commit any such violation, upon the ground or for the reason that the testimony or evidence, documentary or otherwise, required of her, may tend to convict her of a crime or to subject her to a penalty or forfeiture; but no such female shall be prosecuted or subjected to any such penalty or forfeiture for or on account of any transaction, matter or thing concerning which she is compelled, after having claimed her privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against her upon any criminal investigation, proceeding or trial. Added L. 1942, c. 791, eff. Sept. 1, 1942."

Section 82: "A person who manufactures, gives or sells an instrument, a medicine or drug, or any other substance, with intent that the same may be unlawfully used in procuring the miscarriage of a woman, is guilty of a felony."

Section 1050: "Such homicide is manslaughter in the first degree, when committed without a design to effect death:

"

"The wilful killing of an unborn quick child, by any injury committed upon the person of the mother of such child, is manslaughter in the first degree.

"A person who provides, supplies, or administers to a woman, whether pregnant or not, or who prescribes for, or advises or procures a woman to take any medicine, drug, or substance, or who uses or employs, or causes to be used or employed, any instrument or other means, with intent thereby to procure the miscarriage of a woman, unless the same is necessary to preserve her life, in case the death of the woman, or of any quick child of which she is pregnant, is thereby produced, is guilty of manslaughter in the first degree."

N.Y. Rev. Stat. pt. IV, ch. I, tit. II, §§ 8, 9, at 550 (1828-1835).

Section 8: "The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree." [Unchanged in Stat. Laws 1881, § 8.]

Section 9: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

N.Y. Rev. Stat. pt. IV, ch. I, tit. VI, § 21, at 578 (1828-1835).

"Every person who shall wilfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment."

N.Y. Laws ch. 260, §§ 1, 2, 3, 4, 5, 6, at 285 (1845).

Section 1: "Every person who shall administer to any person pregnant with a quick child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall be deemed guilty of manslaughter in the second degree."

Section 2: "Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, substance or thing whatever, or shall use or employ any instruments or other means whatever, with intent thereby to procure the miscarriage of any such woman, shall, upon conviction, be punished by imprisonment in a county jail, not less than three months nor more than one year."

Section 3: "Every woman who shall solicit of any person any medicine, drug, or substance or thing whatever, and shall take the same, or shall submit to any operation, or other means whatever, with intent thereby to procure a miscarriage, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail, not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

Section 4: "Any woman who shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, which if born alive would by law be a bastard, whether it was born dead or alive, or whether it was murdered or not, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by imprisonment in a county jail, not exceeding one year."

Section 5: "Any woman who shall be convicted a second time of the offence specified in the fourth section of this act, shall be imprisoned in a state prison for a term not less than two or more than five years."

Section 6: "Section nine, article first, title second of chapter one, of the fourth part of the Revised Statutes, and section twenty-one, title six, chapter one of the fourth part of the Revised Statutes are hereby repealed."

N.Y. Laws ch. 22, § 1, at 19 (1846).

"Every person who shall administer to any woman pregnant with a quick child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall in case the death of such child, or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

N.Y. Laws ch. 631, §§ 1, 2, at 1502 (1869).

Section 1: "Any person who shall administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life, shall, in case the death of such child, or of such woman be thereby produced, be deemed guilty of manslaughter in the second degree."

Section 2: "Whoever shall unlawfully supply or procure any medicine, drug, substance or thing whatever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not pregnant, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

N.Y. Gen. Stats. ch. 181, §§ 1, 2, 3, 4, at 71 (1872).

Section 1: "Any person who shall hereafter willfully administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance or thing whatever, or shall use or employ, or advise or procure her to submit to the use or employment of any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life or that of such child, shall, in case the death of such child or of such woman be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in a State prison for a term not less than four years or more than twenty years."

Section 2: "Any woman pregnant with child who shall take any medicine, drug, substance or thing whatever, or shall use or employ, or suffer any other person to use or employ, or submit to the use or employment of any instrument or other means whatever, with the intent thereby to produce the miscarriage of the child of which she is so pregnant, unless the same shall have been necessary to preserve her life or that of such child, shall, in case the death of such child shall be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the State prison for a term not less than four years or more than ten years."

Section 3: "Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug, substance or thing whatever, or manufacture, advertise or sell any such medicine, drug, substance or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, shall upon conviction be punished by imprisonment in a county jail, or in a State prison, not less than one nor more than three years, in the discretion of the court."

Section 4: "Whosoever shall unlawfully supply or procure any advice, instruction, medicine, drug, substance or thing whatever, knowing that the same is intended to be unlawfully used or employed, with intent to procure the miscarriage of any woman, whether she be or be not pregnant, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail not less than three months nor more than one year, or by a fine, not exceeding one thousand dollars, or by both such fine and imprisonment." [Wording unchanged in Rev. Stat. 1881, vol. 3, at 2479.]

Case Material.

Mother not an accomplice, *People v. McGonegal*, 136 N.Y. 62, 32 N.E. 616 (1892). Mother's consent to abortion is not a defense, *McCandless v. State*, 3 App. Div. 2d 600, 162 N.Y.S.2d 570 (1957), *aff'd*, 4 N.Y.2d 797, 173 N.Y.S.2d 30, 149 N.E.2d 530 (1958).

State need not prove pregnancy, but must prove intent to cause miscarriage, *People v. Kellner*, 52 N.Y.S.2d 355 (Sup. Ct. 1945).

Pregnancy not material element under section 80(2), *People v. Alexsen*, 223 N.Y. 650, 119 N.E. 708 (1918).

Defendant must show necessity, *Weed v. People*, 3 Th. 50 (Sup. Ct.), *aff'd*, 56 N.Y. 628 (1874). Compare *Bradford v. People*, 20 Hun 309 (N.Y. Sup. Ct. 1880); *People v. Meyers*, 5 N.Y. Crim. 120 (Sup. Ct.), *aff'd*, 107 N.Y. 671, 14 N.E. 608 (1887). Burden of proof of medical necessity is on defendant, *People v. McGonegal*, 62 Hun 622, 17 N.Y. Supp. 147 (Sup. Ct. 1891); *People v. Hammer*, 194 App. Div. 712, 186 N.Y. Supp. 132 (1921).

Mere giving of advice not crime under section 80 unless acted upon, *People v. Phelps*, 133 N.Y. 267, 30 N.E. 1012 (1892).

NORTH CAROLINA

N.C. Gen. Stat. §§ 14-44, -45 (1953).

Section 44: "If any person shall willfully administer to any woman, either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of the mother, he shall be guilty of a felony, and shall be imprisoned in the State's prison for not less than one year nor more than ten years, and be fined at the discretion of the court."

Section 45: "If any person shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or anything whatsoever, with intent thereby to procure the miscarriage of such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, he shall be guilty of a felony and shall be imprisoned in the jail or State's prison for not less than one year nor more than five years and shall be fined, at the discretion of the court."

N.C. Sess. Laws ch. 351, §§ 1, 2 (1881).

Section 1: "[E]very person who shall wilfully administer to any woman either pregnant or quick with child, or prescribe for any such woman, or advise or procure any such woman to take any medicine, drug or other substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy said child, unless the same shall have been necessary to preserve the life of such mother, shall be guilty of a felony, and shall be imprisoned in the state penitentiary for not less than one year nor more than ten years, and be fined at the discretion of the court."

Section 2: "[E]very person who shall administer to any pregnant woman, or prescribe for any such woman, or advise and procure such woman to take any medicine, drug or any thing whatsoever, with intent thereby to procure the miscarriage of any such woman, or to injure or destroy such woman, or shall use any instrument or application for any of the above purposes, shall be guilty of a misdemeanor, and, on conviction, shall be imprisoned in the jail or state penitentiary for not less than one year or more than five years, and fined at the discretion of the court."

Case Material.

State v. Slagle, 83 N.C. 544, 545-46 (1880): "The last two counts charge an offence at common law and pursue the form set out in Arch. Cr. Pl., 341, and in Chitty Cr.

Law, 798, which was prepared a year previous to the enactment of 43 George III, ch. 58, and is taken from the Crown office as stated in the note of 2 Russ. Crimes, 522 (533). In some of the States it has been held that in the absence of any statute the offence can only be perpetrated upon a woman so far advanced in gestation as to be quick with child, and this requirement is met in the present bill. But we are not disposed thus to restrict the criminal act, but to hold that it may be committed at any stage of pregnancy. It was determined by the Supreme Court of Pennsylvania in *Mills v. Commonwealth*, 13 Penn., 631, and we quote the clear and forcible language in which the principle is announced in the opinion of *Coulter, J.*: 'It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman because it interferes with and violates the mysteries of nature in the process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountains of life, and, therefore, it is punished. The next error assigned is that it ought to have been charged in the count that the woman had become quick. But although it has been so held in Massachusetts and in some other States, it is not, I apprehend, the law in Pennsylvania, and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offence, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life and gestation has begun, the crime may be perpetrated.'

"This enunciation of the law, so careful and distinct in expression, dispenses with the necessity for further discussion."

NORTH DAKOTA

N.D. Rev. Code § 12-2501, -2502, -2503, -2504 (1943).

Section 2501: "Every person who administers to any pregnant woman, or who prescribes for any such woman, or who advises or procures any such woman to take, any medicine, drug, or substance, or uses or employs, or procures or advises the use, of any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be punished by imprisonment in the penitentiary for not less than one year nor more than three years, or in a county jail for not more than one year."

Section 2502: "Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or who advises or procures any woman to take, any medicine, drug, or substance whatever, or who uses or employs, or procures or advises the use, of any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, in case the death of the child or of the mother is produced thereby, is guilty of manslaughter in the first degree."

Section 2503: "The willful killing of an unborn quick child by an injury committed upon the person of the mother of such child, and not prohibited in the preceding section, is manslaughter in the first degree."

Section 2504: "Every woman who solicits of any person any medicine, drug, or substance whatever and takes the same, or who submits to any operation or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, shall be punished by imprisonment in the county jail for not more than one year, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment."

OHIO

Ohio Rev. Code Ann. § 2901.16 (Page 1953).

"No person shall prescribe or administer a medicine, drug, or substance, or use an instrument or other means with intent to procure the miscarriage of a woman, unless such miscarriage is necessary to preserve her life, or is advised by two physicians to be necessary for that purpose.

"Whoever violates this section, if the woman either miscarries or dies in consequence thereof, shall be imprisoned not less than one nor more than seven years."

Ohio Gen. Stat. §§ 111(1), 112(2), at 252 (1841).

Section 1: "[A]ny physician, or other person, who shall wilfully administer to any pregnant woman any medicine, drug, substance, or thing whatever, or shall use any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in the county jail not more than one year, or by fine, not exceeding five hundred dollars, or by both such fine and imprisonment."

Section 2: "[A]ny physician, or other person, who shall administer to any woman, pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case of the death of such child or mother, in consequence thereof, be deemed guilty of a high misdemeanor, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than seven years, nor less than one year."

[Act passed February 27, 1834; took effect June 1, 1834.]

OKLAHOMA

Okl. Stat. Ann. tit. 21, §§ 861, 862, 863, 714 (1958).

Section 861: "Every person who administers to any pregnant woman, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument, or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the penitentiary not exceeding three years, or in a county jail not exceeding one year." [Rev. Laws 1910, § 2436.]

Section 862: "Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding one thousand dollars, or by both." [Rev. Laws 1910, § 2437.]

Section 863: "Every woman who endeavors either by herself or by the aid of others to conceal the stillbirth of an issue of her body, which if born alive would be a bastard, or the death of any such issue under the age of two years, is punishable by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars or both." [Rev. Laws 1910, § 2438.]

Section 714: "Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or advises or procures any such woman to take any medicine, drug or substance whatever, or uses or employs any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, is guilty in case the death of the child or of the mother is thereby produced, of manslaughter in the first degree." [Rev. Laws 1910, § 2323.]

OREGON

Ore. Rev. Stat. §§ 163.060, 677.010, .190 (1959).

Section 163.060: "If any person administers to any woman pregnant with child any medicine, drug or substance whatever, or uses or employs any instrument or other means, with intent thereby to destroy such child, unless the same is necessary to preserve the life of such mother, such person shall, in case the death of such child or mother is thereby produced, be deemed guilty of manslaughter."

Section 677.010: "As used in this chapter, unless the context or a specially applicable definition requires otherwise:

"(a) 'Abortion' means the expulsion of the foetus at a period of uterogestation so early that it has not acquired the power of sustaining an independent life. It shall be conclusively presumed for the purpose of this chapter that the foetus has not acquired such power earlier than 150 days after gestation, and a disputable presumption of lack of such power shall arise if the expulsion takes place earlier than 240 days after gestation."

Section 677.190: "The board may refuse to grant a license to any applicant who desires to practice medicine and surgery in this state or may suspend or revoke such licenses for any of the following reasons:

"

"(2) The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril because of her pregnant condition after due consultation with another duly licensed medical physician or surgeon who is not an associate or relative of the physician or surgeon and who agrees that an abortion is necessary. The record of this consultation shall be in writing and shall be maintained in the hospital where the consultation occurred or in the offices of all physicians or surgeons involved for a period of [at] least three years after the date of such abortion." [The Medical Practice Act is to be treated as an integral part of the Criminal Abortion statute, *State v. Buck*, 200 Ore. 87, 262 P.2d 495 (1953).]

Ore. Stat. ch. III, § 13, at 187 (1853-1854).

"Any person who shall administer to any woman pregnant with a quick child, or prescribe for any such woman, or advise, or procure any such woman, to take any medicine, drug, or substance whatever, or shall use or employ any instrument or other means with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child, or of such mother, be thereby produced, be deemed guilty of manslaughter."

Ore. Gen. Laws, Crim. Code, ch. 43, § 509, at 528 (1845-1864).

"If any person shall administer to any woman pregnant with a child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means,

with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter." [Act of October 19, 1864.]

Ore. Comp. Laws Ann. § 23-408 (1940).

"If any person shall administer to any woman pregnant with a child any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall be necessary to preserve the life of such mother, such person shall, in case the death of such child or mother be thereby produced, be deemed guilty of manslaughter." [Same as 1 Hill Ann. Laws tit. II, ch. II, § 1721, at 892 (1887).]

Ore. Comp. Laws Ann. ch. 9, art. I, §§ 54-901, -931 (1940).

Section 901: "When used in this act, the following terms will have the following meanings, unless otherwise limited: . . . 'Abortion' shall mean the expulsion of the foetus at a period of uterogestation so early that it has not acquired the power of sustaining an independent life; provided it shall be conclusively presumed for the purpose of this statute that the foetus has not acquired such power earlier than one hundred fifty (150) days after gestation, and a disputable presumption of lack of such power shall arise if the expulsion take place earlier than two hundred forty (240) days after gestation. . . ."

Section 931: "The board may refuse to grant a license to any applicant who desires to practice medicine and surgery in this state or may suspend or revoke such licenses for any of the following reasons: . . . (b) The procuring or aiding or abetting in procuring an abortion unless such is done for the relief of a woman whose health appears in peril because of her pregnant condition after due consultation with another duly licensed medical physician and surgeon. . . ."

PENNSYLVANIA

Pa. Stat. Ann. tit. 18, §§ 4718, 4719, 4720, 4525 (1945).

Section 4718: "Whoever, with intent to procure the miscarriage of any woman, unlawfully administers to her any poison, drug or substance, or unlawfully uses any instrument, or other means, with the like intent, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding three thousand dollars (\$3,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding five (5) years, or both. (1939, June 24, P.L. 872, § 718. From act 1860, March 31, P.L. 382, § 88.)"

Section 4719: "Whoever unlawfully administers to any woman, pregnant or quick with child, or supposed and believed to be pregnant or quick with child, any drug, poison or other substance, or unlawfully uses any instrument or other means, with the intent to procure the miscarriage of such woman, resulting in the death of such woman, or any child with which she may be quick, is guilty of felony, and upon conviction thereof, shall be sentenced to pay a fine not exceeding six thousand dollars (\$6,000), or undergo imprisonment by separate or solitary confinement at labor not exceeding ten (10) years, or both. (1939, June 24, P.L. 872, § 719. From act 1860, March 31, P.L. 382, § 87.)"

Section 4720: "Whoever, being a woman, endeavors privately, either by herself or the procurement of others, to conceal the death of her bastard child, so that it may not come to light, whether it was born dead or alive or whether it was murdered or not, is guilty of a misdemeanor, and upon conviction thereof, shall undergo imprisonment, by separate and solitary confinement at labor, not exceeding one (1) year, or fined not exceeding five hundred dollars (\$500), or both. . . ." [Pen. Code § 720 (1939); from Pen. Code (1860), replacing Act of May 31, 1718, 1 Sm. L. 105, § 8; Act of April 5, 1790, 2 Sm. L. 531, § 6; and Act of April 22, 1794, 3 Sm. L. 186, §§ 17, 18.]

Section 4525: "Whoever prints or publishes, or causes to be printed or published, in any newspaper, pamphlet, book or circular, any advertisement of, or sells or keeps for sale, or gives away or publishes an account or description of, or by writing, publishes or circulates any notice of any secret drug, nostrum, medicine, recipe or instrument, purporting to be for the use of females for the purpose of preventing conception, or procuring abortion or miscarriage, is guilty of a misdemeanor, and shall upon conviction thereof, be sentenced to pay a fine not exceeding five hundred dollars (\$500), or undergo imprisonment not exceeding one (1) year, or both."

Pa. Laws No. 374, §§ 87, 88, 89 (1860).

Section 87: "If any person shall unlawfully administer to any woman, pregnant or quick with child, or supposed and believed to be pregnant and quick with child, any drug, poison, or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding seven years."

Section 88: "If any person, with intent to procure the miscarriage of any woman, shall unlawfully administer to her any poison, drug or substance whatsoever, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, such person shall be guilty of felony, and being thereof convicted, shall be sentenced to pay a fine not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, not exceeding three years."

Section 89: "If any woman shall endeavor privately, either by herself or the procurement of others, to conceal the death of any issue of her body, male or female, which, if it were born alive, would by law be a bastard, so that it may not come to light, whether it was born dead or alive, or whether it was murdered or not, every such mother, being convicted thereof, shall suffer an imprisonment, by separate or solitary confinement at labor, not exceeding three years; and if the grand jury shall, in the same indictment, charge any woman with the murder of her bastard child, as well as with the offence aforesaid, the jury by whom such woman shall be tried, may either acquit or convict her of both offences, or find her guilty of one and acquit her of the other, as the case may be."

Pa. Laws No. 19, § 2 (1870).

"[I]f any person shall print or publish, or cause to be printed or published, in any newspaper in this state, any advertisement of any secret drug or nostrum purporting to be for the use of females; or if any druggist or other person shall sell or keep for sale, or shall give away any such secret drug or nostrum purporting to be for the use

of females, or if any person shall, by printing or writing, or in any other way, publish an account or description of any drug, medicine, instrument or apparatus for the purpose of preventing conception, or of procuring abortion or miscarriage, or shall, by writing or printing, or any circular, newspaper, pamphlet or book, or in any other way publish or circulate any obscene notice, or shall, within this state, keep for sale or gratuitous distribution any secret drug, nostrum or medicine for the purpose of preventing conception, or procuring abortion or miscarriage, such person or persons, so violating any of the provisions of this act, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined in any sum not exceeding one thousand dollars, or be imprisoned in the county jail not exceeding six months, or both, at the discretion of the court: *Provided*, That nothing in this act contained shall be construed to affect teaching in regular chartered medical colleges, or the publication of standard medical books."

Pa. Laws No. 51, § 2 (1897).

"A person who sells, lends, gives away or in any manner exhibits or offers to sell, lend, or give away, or has in his possession with intent to sell, lend, or give away, or advertises or offers for sale, loan or distribution, any instrument or article, or any recipe, drug or medicine for the prevention of conception, or for causing unlawful abortion, or advertises or holds out representations that it can be so used or applied, or any such description as will be calculated to lead another to so use or apply any such article, recipe, drug, medicine or instrument, or who writes or prints, or causes to be written or printed, a card, circular, pamphlet, advertisement or notice of any kind, or gives information orally stating when, where, how, of whom or by what means such an instrument, article, recipe, drug or medicine can be purchased or obtained, or who manufactures any such instrument, article, recipe, drug or medicine is guilty of a misdemeanor, and shall be liable to the same penalties as provided in section one of this act." [Section one provides said person upon conviction shall be sentenced to not more than one-year imprisonment, or be fined not more than one thousand dollars, or both, for each offense.]

Case Material.

"Miscarriage, both in law and philology, means the bringing forth the foetus before it is perfectly formed and capable of living; and is rightfully predicated of the woman, because it refers to the act of premature delivery. The word abortion is synonymous and equivalent to miscarriage in its primary meaning. It has a secondary meaning in which it is used to denote the offspring. But it was not used in that sense here, and ought not to have been. It is a flagrant crime at common law to attempt to procure the miscarriage or abortion of the woman. Because it interferes with and violates the mysteries of nature in that process by which the human race is propagated and continued. It is a crime against nature which obstructs the fountain of life, and therefore it is punished. The next error assigned is, that it ought to have been charged in the count that the woman had become *quick*. But, although it has been so held in Massachusetts and some other States, it is not, I apprehend, the law in Pennsylvania and never ought to have been the law anywhere. It is not the murder of a living child which constitutes the offence, but the destruction of gestation by wicked means and against nature. The moment the womb is instinct with embryo life, and gestation has begun, the crime

may be perpetrated. The allegation in this indictment was therefore sufficient, to wit: 'that she was then and there pregnant and big with child.['] By the well settled and established doctrine of the common law, the civil rights of an infant *in ventre sa mere* are fully protected at all periods after conception; 3 *Coke's Institutes*. A count charging a wicked intent to procure miscarriage of a woman, [']then and there being pregnant,' by administering potions, &c., was held good on demurrer by the Supreme Court of this State; *Mss. Reps.* January, 1846; *Whart. Crim. Law*, 308. There was therefore a crime at common law sufficiently set forth and charged in the indictment." *Mills v. Commonwealth*, 13 Pa. (1 Harris) 631, 633 (1850).

Abortion does not constitute either first or second degree murder, *Commonwealth v. Railing*, 113 Pa. 37, 4 Atl. 459 (1886); *Railing v. Commonwealth*, 110 Pa. 100, 1 Atl. 314 (1885).

The statute (present section 4719) applies only when death results; but every induced abortion is a common-law crime in Pennsylvania, *Commonwealth v. Kelsea*, 103 Pa. Super. 399, 157 Atl. 42 (1931).

Prosecution need establish only use and intention, *Commonwealth v. Trombetta*, 131 Pa. Super. 487, 200 Atl. 107 (1938). See *Commonwealth v. Sierakowski*, 154 Pa. Super. 321, 35 A.2d 790 (1944).

Abortion is not a misdemeanor but a felony, whether death results or not, although it is not so declared in terms by the statute. It is more than the mere attempt covered by the present section 4718, though less than required by present section 4719, *Commonwealth v. Cohen*, 31 Pa. D. & C. 249 (1938). See *Kine v. Zuckerman*, 4 Pa. D. & C. 227 (1924).

PUERTO RICO

Puerto Rico Laws Ann. tit. 33, ch. 81, § 1053 (1956).

"Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the penitentiary not less than two nor more than five years. (Penal Code, 1937, § 266.)" [Unchanged from Porto Rico Comp. Rev. Stat. 1913, 5708, § 266.]

RHODE ISLAND

R.I. Gen. Laws Ann. §§ 11-3-1, -2, -3, -4 (1956).

Section 1: "Every person who, with the intent to procure the miscarriage of any pregnant woman or woman supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or other means whatsoever or shall aid, assist or counsel any person so intending to procure a miscarriage, shall if the woman die in consequence thereof, be imprisoned not exceeding twenty (20) years nor less than five (5) years, and if she do not die in consequence thereof, shall be imprisoned not exceeding seven (7) years nor less than one (1) year: provided, that the woman whose miscarriage shall have been caused or attempted shall not be liable to the penalties prescribed by this section. (History of Section. G. L. 1896, ch. 277, § 22; G. L. 1909, ch. 343 § 23; G. L. 1923, ch. 395, § 23; G. L. 1938, ch. 606, § 22.)"

Section 2: "Any person who shall be indicted for the murder of any infant child, or of

any pregnant woman, or of any woman supposed by such person to be or to have been pregnant, may also be charged in the same indictment with any or all the offenses mentioned in § 11-3-1, and if the jury shall acquit such person on the charge of murder and find him guilty of the other offenses or either of them, judgment and sentence may be awarded against him accordingly. (History of Section. G. L. 1896, ch. 277, § 23; G. L. 1909, ch. 343, § 24; G. L. 1923, ch. 395, § 24; G. L. 1938, ch. 606, § 23.)"

Section 3: "In prosecutions for any of the offenses described in § 11-3-1, in which the death of a woman is alleged to have resulted from the means therein described, dying declarations of the deceased woman shall be admissible as evidence, as in homicide cases. (History of Section. G. L., ch. 343, § 30, as enacted by P. L. 1915, ch. 1258, § 9; G. L. 1923, ch. 395, § 30; G. L. 1938, ch. 606, § 30.)"

Section 4: "Every person who knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper, notice, advertisement or reference containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop or office where, any poison, drug, mixture, preparation, medicine, or noxious thing, or any instrument or means whatsoever, or any advice, direction, information or knowledge, may be obtained for the purpose of causing or procuring the miscarriage of a woman pregnant with child, or who knowingly exhibits, advertises or sells to be used for such purpose any poison, drug, mixture, preparation, medicine, noxious thing, instrument or means whatsoever, or who, with or without any charge therefor, gives to any person any advice, information, instruction or direction for the purpose of causing or assisting in any such miscarriage, shall be punished by imprisonment for not more than two (2) years, or by a fine of not more than one thousand dollars (\$1,000), or by both. (History of Section. G. L., ch. 347, § 14, as enacted by P. L. 1915, ch. 1219, § 2; G. L. 1923, ch. 399, § 14; G. L. 1938, ch. 610, § 14.)"

R.I. Gen. Laws ch. 277, § 22, at 977 (1896).

"Every person who, with the intent to procure the miscarriage of any pregnant woman or woman supposed by such person to be pregnant, unless the same be necessary to preserve her life, shall administer to her or cause to be taken by her any poison or other noxious thing, or shall use any instrument or other means whatsoever or shall aid, assist or counsel any person so intending to procure a miscarriage, shall, if the woman die in consequence thereof, be imprisoned not exceeding twenty years nor less than five years, and if she do not die in consequence thereof, shall be imprisoned not exceeding seven years nor less than one year: *Provided*, that the woman whose miscarriage shall have been caused or attempted shall not be liable to the penalties prescribed by this section."

SOUTH CAROLINA

S.C. Code §§ 16-82, -83, -84 (1952).

Section 82: "Any person who shall administer to any woman with child, prescribe for any such woman or suggest to or advise or procure her to take any medicine, substance, drug or thing whatever or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage, abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life or the life of such child, shall, in case the death

of such child or of such woman results in whole or in part therefrom, be deemed guilty of a felony and, upon conviction thereof, shall be punished by imprisonment in the penitentiary for a term not more than twenty years nor less than five years. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman." [Code § 1112 (1932).]

Section 83: "Any person who shall administer to any woman with child, prescribe, procure or provide for any such woman or advise or procure any such woman to take any medicine, drug, substance or thing whatever or shall use or employ or advise the use or employment of any instrument or other means of force whatever, with intent thereby to cause or produce the miscarriage, abortion or premature labor of any such woman, shall, upon conviction thereof, be punished by imprisonment in the penitentiary for a term not more than five years or by fine of not more than five thousand dollars or by such fine and imprisonment both, at the discretion of the court. But no conviction shall be had under the provisions of this section upon the uncorroborated evidence of such woman." [Code § 1113 (1932).]

Section 84: "Any woman with child who shall apply to or solicit from any physician, druggist or other person whomsoever any medicine, drug, substance or thing whatever, shall take or administer the same or shall submit to or perform upon herself any operation of any sort or character whatever, with intent thereby to cause or produce a miscarriage, abortion or premature labor, unless the same shall have been necessary to preserve her life or the life of such child, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment in the county jail or state penitentiary for a term not more than two years or by fine not exceeding one thousand dollars, or by both such fine and imprisonment, at the discretion of the court." [Code § 1114 (1932).]

S.C. Acts No. 354, §§ 1, 2, 3, at 547-48 (1883).

Section 1: "[A]ny person who shall administer to any woman with child, or prescribe for any such woman, or suggest to or advise or procure her to take, any medicine, substance, drug or thing whatever, or who shall use or employ, or advise the use or employment of, any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, unless the same shall have been necessary to preserve her life, or the life of such child, shall, in case the death of such child or such woman results in whole or in part therefrom, be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the Penitentiary for a term not more than twenty years nor less than five years."

Section 2: "[A]ny person who shall administer to any woman with child, or prescribe or procure or provide for any such woman, or advise or procure any such woman to take, any medicine, drug, substance or thing whatever, or shall use or employ or advise the use or employment of any instrument or other means of force whatever, with intent thereby to cause or procure the miscarriage or abortion or premature labor of any such woman, shall, upon conviction thereof be punished by imprisonment in the Penitentiary for a term not more than five years or by fine not more than five thousand dollars, or by such fine and imprisonment both, at the discretion of the Court; but no conviction shall be had under the provisions of Sections 1 or 2 of this Act upon the uncorroborated evidence of such woman."

Section 3: "[A]ny woman with child who shall apply to or solicit any physician, druggist or other person whomsoever any medicine, drug, substance or thing whatever, or shall take or administer the same, or shall submit to or perform upon herself any operation of any sort or character whatever, with intent thereby to cause or produce a miscarriage or abortion or premature labor, unless the same shall have been necessary to preserve her life, or the life of such child, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the County jail or State Penitentiary for not more than two years or by fine not exceeding one thousand dollars, or by such fine and imprisonment both, at the discretion of the Court."

Case Material.

"From the earliest enactment of statutes designating the offense under discussion as 'abortion,' and until the present day, a distinction between the condition of the child before and after quickening has been recognized by providing a much severer punishment for the destruction of a child after it has quickened than for the destruction of a child before it has quickened. It is so with the statutes under which the appellant was prosecuted. Moreover, the violation of Section 1112 [Code 1932] is made a felony, whereas the violation of Section 1113 [Code 1932], is a misdemeanor. It is obvious that the word 'child' was not used in the same sense in Section 1113 as in Section 1112; and it is clear to us that it was the intent of the legislature to make such distinction in the light of the common law rule, and much earlier statutes in England and this country. In an abortion the fetus is always destroyed, and if it be held that 'child' covers the entire period of time of gestation from conception to birth, then in all abortions, there is the death of the child." *State v. Steadman*, 214 S.C. 1, 8, 51 S.E.2d 91, 93 (1948).

SOUTH DAKOTA

S.D. Code §§ 13.3101, .3102, .3103 (Supp. 1960).

Section 3101: "Every person who administers to any pregnant woman or who prescribes for any such woman or advises or procures any such woman to take any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the State Penitentiary not exceeding three years or in a county jail not exceeding one year."

Section 3102: "Every woman who solicits of any person any medicine, drug, or substance and takes the same or who submits to any operation or to the use of any means with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in a county jail not exceeding one year or by a fine not exceeding one thousand dollars or both."

Section 3103: "Every woman who endeavors either by herself or by the aid of others to conceal the stillbirth of an issue of her body, which if born alive would be a bastard, or the death of any such issue under the age of two years, is punishable by imprisonment in a county jail not exceeding one year or by a fine not exceeding one thousand dollars or both."

S.D. Comp. Laws §§ 4022, 4116 (1929).

Section 4022: "Every person who administers to any woman pregnant with a quick child, or who prescribes for such woman, or advises or procures any such woman to

take any medicine, drug or substance whatever, or advises or procures any such woman to use or employ, or to have used or employed, any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, is guilty, in case the death of the child or of the mother is thereby produced, of manslaughter in the first degree."

Section 4116: "Every person who administers to any pregnant woman, or who prescribes for any such woman, or advises or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument or other means, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state penitentiary not exceeding three years, or in a county jail not exceeding one year."

TENNESSEE

Tenn. Code Ann. §§ 39-301, -302 (1955).

Section 301: "Every person who shall administer to any woman pregnant with child, whether such child be quick or not, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means whatever, with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve the life of the mother, shall be punished by imprisonment in the penitentiary not less than one (1) nor more than five (5) years." [Unchanged from Code § 10791 (1932).]

Section 302: "Every person who shall administer any substance with the intention to procure the miscarriage of a woman or shall use or employ any instrument or other means with such intent, unless the same shall have been done with a view to preserve the life of such woman, shall be punished by imprisonment in the penitentiary not less than one (1) nor more than three (3) years." [Unchanged from Code § 10792 (1932).]

Tenn. Acts ch. CXL, §§ 1, 2, at 188-89 (1883).

Section 1: "[E]very person who shall administer to any woman pregnant with child, whether such child be quick or not, any medicine, drug or substance whatever, or shall use or employ any instrument, or other means whatever with intent to destroy such child, and shall thereby destroy such child before its birth, unless the same shall have been done with a view to preserve the life of the mother, shall be punished by imprisonment in the penitentiary not less than one nor more than five years."

Section 2: "Every person who shall administer any substance with the intention to procure the miscarriage [*sic*] of a woman then being with child, or shall use or employ any instrument or other means with such intent, unless the same shall have been done with a view to preserve the life of such mother, shall be punished by imprisonment in the penitentiary not less than one nor more than three years."

TEXAS

Tex. Pen. Code Ann. ch. 9, arts. 1191, 1192, 1193, 1194 (1960).

Article 1191: "If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two

nor more than five years; if it be done without her consent, the punishment shall be doubled. By abortion is meant that the life of the foetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused. (Acts 1907, p. 55.)" [Pen. Code art. 1071 (1911); Pen. Code art. 641 (1895); Pen. Code art. 536 (1879).]

Article 1192: "Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice." [Pen. Code art. 1072 (1911); Pen. Code art. 642 (1895); Pen. Code art. 537 (1879).]

Article 1193: "If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars." [Pen. Code art. 1073 (1911); Pen. Code art. 643 (1895); Pen. Code art. 538 (1879).]

Article 1194: "If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder." [Pen. Code art. 1074 (1911); Pen. Code art. 644 (1895); Pen. Code art. 539 (1879).]

Tex. Gen. Stat. Dig. ch. VII, arts. 531, 532, 533, 534, 535, 536, at 524 (Oldham & White 1859).

Article 531: "If any person shall designedly administer to a pregnant woman, with her consent, any drug or medicine, or shall use towards her any violence, or any means whatever, externally or internally applied, and shall thereby procure any abortion, he shall be punished, by confinement, in the Penitentiary, not less than two, nor more than five years; if it be done without her consent the punishment shall be doubled."

Article 532: "Any person who furnishes the means for procuring an abortion, knowing the purpose intended, is guilty as an accomplice."

Article 533: "If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be punished by fine not less than one hundred nor more than one thousand dollars."

Article 534: "If the death of the mother is occasioned by an abortion so produced, or by an attempt to effect the same, it is murder."

Article 535: "If any person shall, during parturition of the mother, destroy the vitality or life in a child, in a state of being born, and before actual birth, which child would otherwise have been born alive, he shall be punished, by confinement in the Penitentiary, for life, or any period not less than five years, at the discretion of the jury."

Article 536: "Nothing contained in this Chapter shall be deemed to apply to the case of an abortion procured or attempted to be procured by medical advice for the purpose of saving the life of the mother."

UTAH

Utah Code Ann. §§ 76-2-1, -2 (1953).

Section 1: "Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take, any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than ten years."

Section 2: "Every woman who solicits of any person any medicine, drug, or sub-

stance whatever, and takes the same or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than one nor more than five years."

Utah Comp. Laws tit. IX, ch. III, § 142 (1876).

"Every person who provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the penitentiary not less than two nor more than ten years."

Case Material.

Actual pregnancy essential, *Sherman v. McEntire*, 111 Utah 348, 179 P.2d 796 (1947).

Prosecution must prove abortion not necessary, *State v. Wells*, 35 Utah 400, 100 Pac. 681 (1909).

VERMONT

Vt. Stat. Ann. tit. 13, § 101 (1959).

"A person who wilfully administers, advises or causes to be administered anything to a woman pregnant, or supposed by such person to be pregnant, or employs or causes to be employed any means with intent to procure the miscarriage of such woman, or assists or counsels therein, unless the same is necessary to preserve her life, if the woman dies in consequence thereof, shall be imprisoned in the state prison not more than twenty years nor less than five years. If the woman does not die in consequence thereof, such person shall be imprisoned in the state prison not more than ten years nor less than three years. However, the woman whose miscarriage is caused or attempted shall not be liable to the penalties prescribed by this section."

Vt. Acts No. 33, § 1 (1846).

"Whoever maliciously, or without lawful justification, with intent to cause and procure the miscarriage of a woman, then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine or noxious thing, or shall cause or procure her, with like intent, to take or swallow any poison, drug, medicine or noxious thing, and whoever maliciously and without lawful justification, shall use any instrument or means whatever, with the like intent, and every person, with the like intent, knowingly aiding and assisting such offenders, shall be deemed guilty of felony, if the woman die in consequence thereof, and shall be imprisoned in the state prison, not more than ten years, nor less than five years; and if the woman does not die in consequence thereof, such offenders shall be guilty of a misdemeanor; and shall be punished by imprisonment in the state prison not exceeding three years, nor less than one year, and pay a fine not exceeding two hundred dollars."

Vt. Stat. Ann. tit. 13, § 104 (1959).

"A person who knowingly causes to be made public by print, writing, words or language that give any information where anything, or any advice or information, may be obtained for the purpose of causing or procuring the miscarriage of a pregnant woman, shall be imprisoned in the state prison not more than ten years nor less than

three years. A person who sells or gives away anything for the purpose of producing such miscarriage shall be imprisoned in the state prison not more than three years nor less than one year and fined not more than \$500.00 nor less than \$200.00."

Vt. Acts No. 57, §§ 1, 3 (1867).

Section 1: "Every person who shall be convicted of wilfully administering to any pregnant woman, or to any woman supposed by such person to be pregnant, or of advising or prescribing for such woman, or causing to be taken by her anything whatever, or shall employ any means whatever, with intent thereby to procure the miscarriage of such woman, or of aiding and assisting therein, or by counseling and procuring the same, unless the same is necessary to preserve her life, shall, if the woman die in consequence thereof, be imprisoned in the State Prison not exceeding twenty years nor less than five years; and if she do not die in consequence thereof, shall be imprisoned in the State Prison not exceeding ten years nor less than three years; provided, that the woman whose miscarriage shall have been caused or attempted, shall not be liable to the penalties prescribed by this section."

Section 3: "Whoever knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated any printed or written pamphlet, paper, book, newspaper, notice, advertisement or reference containing words or language giving any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop or office, where anything whatever, or any instrument or means whatever, or any advice, direction, information or knowledge, may be obtained for the purpose of causing or procuring the miscarriage of any pregnant woman, shall be imprisoned in the State Prison not exceeding ten years, nor less than three years. Any merchant, druggist, peddler, or any person whatever, who shall vend, sell or give away any such medicine, drug, compound, poison or noxious thing, for the purpose named in this act, shall be deemed guilty of a misdemeanor and shall be punished by imprisonment in the State Prison not exceeding three years, nor less than one year, and pay a fine not less than two hundred dollars, nor exceeding five hundred dollars."

VIRGIN ISLANDS

V.I. Code Ann. tit. 14, § 151 (1957).

"Whoever provides, supplies, or administers to any pregnant woman, or procures any such woman to take any medicine, drug or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless necessary to preserve her life, shall be imprisoned not more than 5 years. (History: Revision note. Based on the 1921 Codes, Title IV, ch. 6, § 9. Changes were made in phraseology.)"

VIRGINIA

Va. Code Ann. §§ 18.1-62, -63 (Supp. 1960).

Section 62: "If any person administer to, or cause to be taken by a woman, any drug or other thing, or use means, with intent to destroy her unborn child, or to produce abortion or miscarriage, and thereby destroy such child, or produce such abortion or miscarriage, he shall be confined in the penitentiary not less than one nor more than ten years. No person, by reason of any act mentioned in this section, shall be

punishable when such act is done in good faith, with the intention of saving the life of such woman or child." [Acts 1847-1848 made "quick" and "not quick" separate offenses; Code ch. 187, § 8, at 1189 (1873), abolished this distinction.]

Section 63: "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."

Va. Acts tit. II, ch. 3, § 9, at 96 (1848).

"Any free person who shall administer to any pregnant woman, any medicine, drug or substance whatever, or use or employ any instrument or other means with intent thereby to destroy the child with which such woman may be pregnant, or to produce abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, unless the same shall have been done to preserve the life of such woman, shall be punished, if the death of a quick child be thereby produced, by confinement in the penitentiary, for not less than one nor more than five years, or if the death of a child, not quick, be thereby produced, by confinement in the jail for not less than one nor more than twelve months."

WASHINGTON

Wash. Rev. Code § 9.02.010 (1951).

"Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall—

"(1) Prescribe, supply, or administer to a woman, whether pregnant or not, or advise or cause her to take any medicine, drug or substance; or,

"(2) Use, or cause to be used, any instrument or other means;

"Shall be guilty of abortion, and punished by imprisonment in the state penitentiary for not more than five years, or in the county jail for not more than one year."

Wash. (Terr.) Stats. ch. II, §§ 37, 38, at 81 (1854).

Section 37: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, shall, in case the death of such child or of such mother be thereby produced, on conviction thereof, be imprisoned in the penitentiary not more than twenty years, nor less than one year."

Section 38: "Every person who shall administer to any pregnant woman, or to any woman who he supposes to be pregnant, any medicine, drug, or substance whatever, or shall use or employ any instrument, or other means, thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall on conviction thereof, be imprisoned in the penitentiary not more than five years, nor less than one year, or be imprisoned in the county jail not more than twelve months, nor less than one month, and be fined in any sum not exceeding one thousand dollars."

Case Material.

Applies even though the fetus was already dead when co-conspirator doctor finished operation begun by others, *State v. Cox*, 197 Wash. 67, 84 P.2d 357 (1938).

Defendant must prove necessity, *State v. Hart*, 26 Wash. 2d 776, 175 P.2d 944 (1946).

WEST VIRGINIA

W. Va. Code Ann. § 5923 (1955).

"Any person who shall administer to, or cause to be taken by, a woman, any drug or other thing, or use any means, with intent to destroy her unborn child, or to produce such abortion or miscarriage, and shall thereby destroy such child, or produce such abortion or miscarriage, shall be guilty of a felony, and upon conviction, shall be confined in the penitentiary not less than three nor more than ten years; and if such woman die by reason of such abortion performed upon her, such person shall be guilty of murder. No person, by reason of any act mentioned in this section, shall be punishable where such act is done in good faith, with the intention of saving the life of such woman or child." [For earlier law see Va. Crim. Code of 1848.]

WISCONSIN

Wis. Stat. Ann. § 940.04 (1958).

"(1) Any person, other than the mother, who intentionally destroys the life of an unborn child may be fined not more than \$5,000 or imprisoned not more than 3 years or both.

"(2) Any person, other than the mother, who does either of the following may be imprisoned not more than 15 years:

"(a) Intentionally destroys the life of an unborn quick child; or

"(b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child. It is necessary to prove that the fetus was alive when the act so causing the mother's death was committed.

"(3) Any pregnant woman who intentionally destroys the life of her unborn child or who consents to such destruction by another may be fined not more than \$200 or imprisoned not more than 6 months or both.

"(4) Any pregnant woman who intentionally destroys the life of her unborn quick child or who consents to such destruction by another may be imprisoned not more than 2 years.

"(5) This section does not apply to a therapeutic abortion which:

"(a) Is performed by a physician; and

"(b) Is necessary, or is advised by 2 other physicians as necessary, to save the life of the mother; and

"(c) Unless an emergency prevents, is performed in a licensed maternity hospital.

"(6) In this section 'unborn child' means a human being from the time of conception until it is born alive."

Wis. Rev. Stat. ch. 133, §§ 10, 11 (1849).

Section 10: "The wilful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree."

Section 11: "Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever"

Wis. Rev. Stat. ch. 164, §§ 10, 11 (1858).

Section 10: "The willful killing of an unborn child, by an injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree."

Section 11: "Every person who shall administer to any woman pregnant with a child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree."

Wis. Rev. Stat. ch. 169, §§ 58, 59 (1858).

Section 58: "Every person who shall administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman to take, any medicine, drug, or substance or thing whatever, or shall use or employ any instrument or other means whatever, or advise or procure the same to be used, with intent thereby to procure the miscarriage of any such woman, shall upon conviction be punished by imprisonment in a county jail, not more than one year nor less than three months, or by fine, not exceeding five hundred dollars, or by both fine and imprisonment, at the discretion of the court."

Section 59: "Every woman who shall take any medicine, drug, substance, or thing whatever, or who shall use or employ any instrument, or shall submit to any operation or other means whatever, with intent to procure a miscarriage, shall upon conviction be punished by imprisonment in a county jail, not more than six months nor less than one month, or by fine, not exceeding three hundred dollars, or by both fine and imprisonment, at the discretion of the court."

Wis. Sess. Laws ch. 4, at 6 (1925).

[This chapter merely provides a chart for renumbering the sections in the Wisconsin statutes whereby all of the numbers are converted to the decimal system.]

Wis. (Terr.) Stat. § 6, at 365 (1839).

"That if any woman shall conceal the death of any issue of her body, which, if born alive, would be a bastard, so that it may not be known whether such issue was born alive or not, or whether it was not murdered, she shall be punished by imprisonment in the county jail, not more than one year, nor less than six months or by fine not exceeding three hundred dollars, nor less than one hundred dollars." [Unchanged in Rev. Stat. 1849, ch. 139, § 7.]

WYOMING

Wyo. Stat. Ann. §§ 6-77, -78 (1957).

Section 77: "Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine, or substance whatever, with intent thereby to procure the miscarriage of such woman; or with like intent uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than fourteen years." [Unchanged from Comp. Stat. Ann. § 9-223 (1945).]

Section 78: "Every woman who shall solicit of any person any medicine, drug or substance or thing whatever, and shall take the same, or shall submit to any operation

or other means whatever, with intent thereby to procure a miscarriage (except when necessary for the purpose of saving the life of the mother or child), shall be fined not more than five hundred dollars and imprisoned in the county jail not more than six months; and any person who, in any manner whatever, unlawfully aids or assists any such woman to a violation of this section, shall be liable to the same penalty." [Unchanged from Comp. Stat. Ann. § 9-224 (1945).]

Wyo. (Terr.) Laws 1st Sess., ch. 3, §§ 25, 26, at 104 (1869).

Section 25: "Any person who shall willfully and maliciously administer, or cause to be administered to, or taken by any person, any poison or other noxious or destructive substance, or liquid, with the intention to cause the death of such person, and being thereof duly convicted, shall be punished by confinement in the penitentiary for a term not less than one year, and not more than ten years; and any person who shall administer, or cause to be administered, or taken, any such poison, substance or liquid, or who shall use, or cause to be used, any instrument of whatsoever kind, with the intention to procure the miscarriage of any woman then being with child, and shall thereof be duly convicted, shall be imprisoned for a term not exceeding three years, in the penitentiary, and fined in a sum not exceeding one thousand dollars; and if any woman by reason of such treatment shall die, the person, or persons, administering, or causing to be administered such poison, substance, or liquid, or using or causing to be used, any instrument, as aforesaid, shall be deemed guilty of manslaughter, and if convicted, be punished by imprisonment for a term not less than three years in the penitentiary, and fined in a sum not exceeding one thousand dollars, unless it appear that such miscarriage was procured or attempted by, or under advice of a physician or surgeon, with intent to save the life of such woman, or to prevent serious and permanent bodily injury to her."

Section 26: "If any woman shall endeavor privately, either by herself or the procurement of others, to cause the death of any issue of her body, male, or female, which if born alive would be illegitimate, so that it may not come to light, whether it shall have been murdered or not; every such mother being convicted thereof, shall suffer imprisonment in the county jail for a term not exceeding one year; *Provided*, However, that nothing herein contained shall be so construed as to prevent such mother from being indicted and punished for the murder of such illegitimate child."

Wyo. Laws ch. 73, §§ 31, 32, at 131 (1890).

Section 31: "Whoever prescribes or administers to any pregnant woman, or to any woman whom he supposes to be pregnant, any drug, medicine or substance whatever, with intent thereby to procure the miscarriage of such woman; or with like intent uses any instrument or means whatever, unless such miscarriage is necessary to preserve her life, shall, if the woman miscarries or dies in consequence thereof, be imprisoned in the penitentiary not more than fourteen years."

Section 32: "Every woman who shall solicit of any person any medicine, drug or substance or thing whatever, and shall take the same, or shall submit to any operation or other means whatever, with intent thereby to procure a miscarriage (except when necessary for the purpose of saving the live of the mother or child), shall be fined not more than five hundred dollars and imprisoned in the county jail not more than six months; and any person, who, in any manner whatever, unlawfully aids or assists any such woman to a violation of this section, shall be liable to the same penalty."

APPENDIX II

R. v. Bourne, [1938] 3 All. E.R. 615 (K.B.).

R. v. BOURNE

[CENTRAL CRIMINAL COURT (Macnaghten, J.), July 18, 19, 1938.]

A young girl, not quite 15 years of age, was pregnant as the result of rape. A surgeon, of the highest skill, openly, in one of the London hospitals, without fee performed the operation of abortion. He was charged under the Offences against the Person Act, 1861, s. 58, with unlawfully procuring the abortion of the girl.

The jury were directed that it was for the prosecution to prove beyond reasonable doubt that the operation was not performed in good faith for the purpose only of preserving the life of the girl. The surgeon had not got to wait until the patient was in peril of immediate death, but it was his duty to perform the operation if, on reasonable grounds and with adequate knowledge, he was of opinion that the probable consequence of the continuance of the pregnancy would be to make the patient a physical and mental wreck.

[EDITORIAL NOTE. As the accused was found not guilty, the statement as to the law in this matter is in the form of the direction to the jury. The judge carefully distinguishes between danger to life and danger to health, and between the act of the professional abortionist and an operation openly performed by a qualified surgeon. The case is one of first impression, and is, therefore, the only statement of the law as to the duties of a surgeon in such cases.

AS TO ABORTION, see HALSBURY, Hailsham Edn., Vol. 9, pp. 458-460, paras. 783-785; and FOR CASES, see DIGEST, Vol. 15, pp. 836-838, Nos. 9190-9205.]

TRIAL OF AN INDICTMENT WITH A JURY. The defendant was charged under the Offences against the Person Act, 1861, s. 58, that he unlawfully procured the abortion of a girl aged about 15 years. The facts are fully stated in the summing up.

The Attorney-General (Sir Donald Somervell, K.C.), L. A. Byrne and H. Elam for the Crown.

Roland Oliver, K.C., and Gerald Thesiger for the defendant.

MACNAGHTEN, J.: Members of the jury, now that you have heard all the evidence and the speeches of counsel, it becomes my duty to sum up the case to you and to give you the necessary directions in law, and then it will be for you to consider the facts in relation to the law as laid down by me, and, after consideration, to deliver your verdict. You no doubt are aware that, under our system for the administration of justice, in a trial by jury it is for the judge to give directions to the jury upon matters of law, and it is for the jury to determine the facts. The jury, and the jury alone, are the judges of the facts in the case.

The charge against Mr. Bourne is the very grave charge under the Offences against the Person Act, 1861, s. 58, that he unlawfully procured the abortion of the girl who was the first witness in the case. It is so grave a crime that the punishment may be penal servitude for life. It is one of those crimes, like murder, which is only triable by the judges of the High Court, and, judging by the cases that come before the court, it is a crime by no means uncommon. This is the second case at these July sessions at this court where a charge of

an offence against that section has been preferred, and I mention that case only to show you how different the case now before you is from the type of case which usually comes before a criminal court. In that case a woman without any medical skill or any medical qualifications did what is alleged against Mr. Bourne here: she unlawfully used an instrument for the purpose of procuring the miscarriage of a pregnant girl. She did it for money. £2 5s. was her fee, and she came from a distance to a place in London to do it. £1 had to be paid to make the appointment. She came, she used her instrument, and, within an interval of time measured not by minutes but by seconds, the victim of her malpractice was dead on the floor. She was paid the rest of her fee and she went away. That is the class of case that usually comes before the court. The case here is very different. A man of the highest skill, openly, in one of our great hospitals, performs the operation. Whether it was legal or illegal you will have to determine, but he performs the operation as an act of charity, without fee or reward, and unquestionably believing that he was doing the right thing, and that he ought, in the performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it. That is the case that you have to try to-day.

It is, I think, true that it is a case of first instance, first impression. So far as I know, the matter has never arisen before a jury for them to determine in circumstances such as these, and there was, it seems, even amongst counsel some doubt as to what was the proper expression of the law in such a case as this. So, yesterday, in response to a request by Mr. Oliver, I indicated to you my view of the law. You will take the law from me. If I err in stating to you what the law is, and if you find the accused guilty, there is a Court of Criminal Appeal which will put the matter right. I have had an opportunity of reading the direction that I gave you yesterday, and I see no reason to alter or to modify it at all. The question that you have got to determine is whether the Crown has proved to your satisfaction beyond reasonable doubt that the act which Mr. Bourne admittedly did was not done in good faith for the purpose only of preserving the life of the girl. If the Crown has failed to satisfy you of that, Mr. Bourne is entitled, by the law of this land, to a verdict of acquittal. On the other hand, if you are satisfied beyond all real doubt that Mr. Bourne did not do it in good faith for the purpose only of preserving the life of the girl, your verdict should be a verdict of guilty.

There has been much discussion before you as to the meaning of the words "preserving the life of the mother." I will deal with that in a moment, but, before doing so, I desire to say that I fully agree with the criticism of Mr. Oliver that the Infant Life (Preservation) Act, 1929, is dealing with the case—indeed, I think I explained it to you yesterday—where the child is killed while it is being delivered from the body of the mother. It provides that no one is to be found guilty of the offence created by the Act—namely, "child destruction"—unless it is proved that:

... the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

Those words express what, in my view, has always been the law with regard to the procuring of an abortion, and, although not expressed in sect. 58 of the Act of 1861, they are implied by the word "unlawful" in that section. No person ought to be convicted under sect. 58 of the Act of 1861 unless the jury are satisfied the act was not done in good faith for the purpose only of preserving the life of the mother. My view is that it has always been the law that the Crown have got to prove the offence beyond reasonable doubt, and it has always been the law that, on a charge of procuring abortion, the Crown have got

to prove that the act was not done in good faith for the purpose of preserving the life of the mother. It is said—and, I think, rightly—that this is a case of great importance to the public, and more especially to the medical profession, but you will observe that it has nothing to do with the ordinary cases of procuring abortion to which I have already referred. In those cases, the operation is performed by a person of no skill, with no medical qualifications, and there is no pretence that it is done for the preservation of the mother's life. Cases of that sort are in no way affected by the consideration of the question that is put before you. In the ordinary cases, no question of that sort can arise. It is obvious that that defence could not be available to the professional abortionist. As I say, you have heard a great deal of discussion as to the difference between danger to life and danger to health. It may be that you are more fortunate than I am, but I confess that I have felt great difficulty in understanding what the discussion really meant. Life depends upon health, and it may be that health is so gravely impaired that death results. There was one question that was asked by the Attorney-General in the course of his cross-examination of Mr. Bourne, where the matter was put thus:

I suggest to you, Mr. Bourne, that there is a perfectly clear line—there may be borderline cases—there is a clear line of distinction between danger to health and danger to life?

That is the question that the Attorney-General put, and he assumes that it is so. Is it? Of course there are maladies that are a danger to health without being a danger to life. Rheumatism, I suppose, is not a danger to life, but a danger to health. Cancer is plainly a danger to life. But is there a perfectly clear line of distinction between danger to life and danger to health? I should have thought not. I should have thought that impairment of health might reach a stage where it was a danger to life. The answer of Mr. Bourne was:

I cannot agree without qualifying it. I cannot say just yes or no. I can say there is a large group whose health may be damaged, but whose life almost certainly will not be sacrificed. There is another group at the other end whose life will be definitely in very great danger.

Then he added:

There is a large body of material between those two extremes in which it is not really possible to say how far life will be in danger, but we find, of course, that the health is depressed to such an extent that their life is shortened, such as in cardiac cases, so that you may say that their life is in danger, because death might occur within measurable distance of the time of their labour.

He is speaking of a case such as this. If that is a view which commends itself to you, so that you cannot say that there is this division, into two separate classes with a dividing line between them, then it may be that you will accept the view that Mr. Oliver put forward when he invited you to give to the words "for the purpose of preserving the life of the mother" a wide and liberal view of their meaning. I would prefer the word "reasonable" to the words "wide and liberal." Take a reasonable view of the words "for the preservation of the life of the mother." I do not think that it is contended that those words mean merely for the preservation of the life of the mother from instant death. There are cases, we were told—and indeed I expect you know cases from your own experience—where it is reasonably certain that a woman will not be able to deliver the child with which she is pregnant. In such a case, where the doctor expects, basing his opinion upon the experience and knowledge of the profession, that the child cannot be delivered without the death of

the mother, in those circumstances the doctor is entitled—and, indeed, it is his duty—to perform this operation with a view to saving the life of the mother, and in such a case it is obvious that the sooner the operation is performed the better. The law is not that the doctor has got to wait until the unfortunate woman is in peril of immediate death and then at the last moment snatch her from the jaws of death. He is not only entitled, but it is his duty, to perform the operation with a view to saving her life.

Here let me diverge for one moment to touch upon a matter that has been mentioned to you—namely, the various views which are held by different people with regard to this operation. Apparently there is a great divergence of view even in the medical profession itself. Some there may be, for all I know, who hold the view that the fact that the woman desires the operation to be performed is a sufficient justification for it. That is not the law. The desire of a woman to be relieved of her pregnancy is no justification for performing the operation. On the other hand, no doubt there are people who, from what are said to be religious reasons, object to the operation being performed at all, in any circumstances. That is not the law either. On the contrary, a person who holds such an opinion ought not to be a doctor practising in that branch of medicine, for, if a case arose where the life of the woman could be saved by performing the operation and the doctor refused to perform it because of some religious opinion, and the woman died, he would be in grave peril of being brought before this court on a charge of manslaughter by negligence. He would have no better defence than would a person who, again for some religious reason, refused to call in a doctor to attend his child, where a doctor could have been called in and the life of the child saved. If the father, for a so-called religious reason, refused to call in a doctor, he also would be answerable to the criminal law for the death of his child. I mention those two extreme cases merely to show that the law—whether or not you think it a reasonable law is immaterial—lies at any rate between those two. It does not permit of the termination of pregnancy except for the purpose of preserving the life of the mother. As I have said, I think that those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor, who, in those circumstances, and in that honest belief, operates, is operating for the purpose of preserving the life of the woman.

These general considerations have got to be applied to the particular facts of this case. The verdict of the jury must depend on the facts of the case proved before them. No doubt—and I think the evidence now makes it clear—it is very undesirable that a young girl should be delivered of a child. Parliament has recently raised the age of marriage for a girl from 12 to 16, presumably on the view that it is very undesirable that a girl under the age of 16 should marry and have a child. The medical evidence given here establishes that view. Apparently the pelvic bones are not set until a girl is 18, and it is an observation that appeals to one's common sense that it must be undesirable that a girl should go through the state of pregnancy, and, finally, of labour, when she is of tender years. Then, too, you must consider the evidence about the effect of rape, especially on a child, as this girl was, under the age of 15. Within the last ten days she has reached the age of 15. Here you have the evidence of Dr. Rees, a gentleman of eminence in the profession, that, from his experience and his knowledge, the mental effect produced by pregnancy brought about by the terrible rape which Dr. Gorsky described to you must be most prejudicial. You are the judges of the facts, and it is for you to say what weight you give to the testimony of

the witnesses, but no doubt you will think it is only common sense that a girl who for 9 months has to carry in her body the reminder of the dreadful scene and then go through the pangs of childbirth must suffer great mental anguish, unless, indeed, she is a girl of a very exceptional character, such as a feeble-minded girl, or one belonging to the class described as "the prostitute class," some girl "marked cross from the womb and perverse." In the case of an ordinary decent girl, brought up in an ordinary decent way, you may well think that Dr. Rees was not over-stating the effect on her mind of giving birth to her child. So far as danger to life is concerned, you cannot, of course, be certain of the result unless you wait until a person is dead. Nobody suggests that the operation only becomes legal when a patient is dead. The case was mentioned of a person suffering from acute appendicitis, and the circumstances that would justify the surgeon in performing the operation for the removal of the appendix. Take the case of a child suffering from symptoms which the doctor diagnoses as appendicitis. The symptoms subside, and the doctor says: "The symptoms have subsided, and the child will probably get quite well, but at the same time I am not sure that they have definitely subsided, and to-morrow the child may be much worse." The doctor says to the parents: "If you will let me operate today, I can guarantee the life of your child. The operation can be performed, and can be performed with perfect safety. If, however, the child gets worse, and the appendicitis becomes acute, I may have to operate, and I will have to operate then in such circumstances that I cannot guarantee the life of the child. I will do my best, but the child may die." Supposing that choice is put to a parent: "Will you have the operation to-day or will you wait until to-morrow to see if the operation becomes immediately necessary?" What man or woman can answer the question except by saying: "Do it, and do it now. Do it while it is still safe to do it. Do not wait to see whether she is near death." When the operation is performed, it may be found that the appendix is not inflamed, and that the diagnosis was mistaken, but is the surgeon to blame for performing the operation? He used his best judgment. There you have a case where only the result can prove whether the diagnosis was right or wrong, whether the anticipation was right or wrong. In the case that we are considering—that of the danger to the child—the doctor or the surgeon who has to decide the matter can only base his opinion on knowledge and experience, and, if he in good faith thinks that it is necessary for the purpose of preserving the life of the girl, in the circumstances that I have explained to you, then not only is he entitled to perform the operation but it is also his duty to do so. With regard to any other operation on the human body, obviously no difficulty arises. The surgeon is justified in cutting off an arm or a leg, or taking out an eye, if, in his honest opinion, he thinks it is desirable to do so for the sake of the patient's health. The difficulty that arises in the case of abortion is that by the operation the potential life of the unborn child is destroyed. The law of this land has always held human life to be sacred, and the protection that the law gives to human life it extends also to the unborn child in the womb. The unborn child in the womb must not be destroyed unless the destruction of that child is for the purpose of preserving the yet more precious life of the mother.

I do not think it is necessary for me to recapitulate the evidence that has been given before you with regard to the reasons why Mr. Bourne in this case thought it right to perform the operation. He has given his evidence, and the Attorney-General accepts his evidence as a frank statement of what actually passed through his mind. In view of the age of the girl and the fact that she had been raped with great violence, he thought that the operation ought to be performed. As I told you yesterday, and as I tell you today, the question that you have got to determine is not whether you are satisfied that he did

it in good faith for the purpose of preserving the life of the girl. The question is whether the Crown have proved the negative of that. Have the Crown proved that he did not remove the pregnancy of this girl in good faith for the purpose of preserving her life? That is the question you have got to answer when you come to consider the facts. If the Crown have satisfied you beyond reasonable doubt—if there is a doubt, by our law the accused is always entitled to be acquitted—that he did not do this act in good faith for the purpose of preserving the life of the girl, then he is guilty of the offence with which he is charged. If the Crown have failed to satisfy you of that, then by the law of England he is entitled to a verdict of acquittal. The case is a grave case, and no doubt raises matters of grave concern both to the medical profession and to the public. As I said at the beginning of my summing up, it does not touch the case of the professional abortionist. As far as the members of the medical profession themselves are concerned—and they alone could properly perform such an operation—we may hope and expect that none of them would ever lend themselves to the malpractices of professional abortionists. As Mr. Bourne said, in cases of this sort no doctor would venture to act except after consulting some other member of the profession of high standing, so as to confirm his view that the circumstances were such that an operation ought to be performed and that the act was legal.

Solicitors: *The Director of Public Prosecutions* (for the Crown); *Le Brasseur & Oakley* (for the defendant).

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BIBLIOGRAPHY

- Accursius, Franciscus—*Corpus Juris Civilis: Institutiones*, Vincent, B. (ed.) (Lugdoni, 1577).
- Acta Apostolicae Sedis (Vatican official bulletin) (Rome, 1909-).
- Acta Sanctae Sedis, 41 vols. (Rome, 1865-1908).
- Adams, F.—see Hippocrates.
- Aelianus, Claudius—*Variae Historiae*, Gronovius, A. (ed.), Latin translation by Vulteius, 2 vols. (Leiden, 1731).
- Albertus Magnus—*De Animalibus Libri XXVI*, nach der Colner Urschrift, Stadler, H. (ed.) (Münster i. W., Aschendorff, 1916-1920).
- American Ecclesiastical Review, 32 vols. (1889-1905).
- Ance, M. and Marx, Y.—see Codes Pénaux Européens.
- "Anomaly"—*The Invert and His Social Adjustment* (London, 1948).
- Antoninus, Marcus Aurelius—*The Thoughts of the Emperor*, English translation by Long, G., rev. ed. (London, 1887).
- Haines, C. (ed.) (London, 1916).
- Apuleius, Madaurensis—*Metamorphoses or The Golden Ass*, English translation by Adlington, W. (New York, 1927).
- Aquinas, St. Thomas—*Summa Contra Gentiles*, Pegis, A. (ed.) (New York, 1955-1956).
- Summa Theologica*, Pegis, A. (ed.) (New York, 1912-1925).
- Opera*, Leonine Edition, 16 vols. to date (Rome, 1882-).
- Aristotle (Aristoteles)—*Works of Aristotle* (Oxford, 1949-1956).
- De Generatione et Corruptione*, Joachim, H. (ed.) (Oxford, 1922).
- Historia Animalium*, Taylor, T. (ed.) (London, 1809).
- Politics*, Gillies, J. (ed.), 3d ed. (London, 1813).
- Arnold, E. V.—*Roman Stoicism* (Cambridge, 1911).
- Aryas—*Sacred Laws of: Apastamba*, Buehler, G. (ed.), in *The Sacred Books of the East*, Müller, F. M. (ed.), vol. 2 (Oxford, 1879).
- Assyrian Laws—see: Driver, G.; Luckenbill, D.; Meek, T.
- Atharva-Veda—see Bloomfield.
- Augustine of Hippo, St. (Augustinus, Aurelius)—"De Immortalitate Animae," "De Quantitate Animae," "Quaestiones in Exodus," "Quaestiones Veteris et Novi Testamentum," in *Writings of St. Augustine*, 16 vols. (New York, 1947-1957).
- Augustine (Bachofen), C. A.—*Commentary on the New Code of Canon Law*, 3d ed., 8 vols. (St. Louis, 1925-1931).
- Balestrini, R.—*Aborto, Infanticidio, d'Infante*, E. (ed.) (Rome, 1888).
- Bar, K. L. von—*History of Continental Criminal Law* (Boston, 1916).
- Barnett, A.—*Human Species: A Biology of Man* (New York, 1950).
- Beck, T.—*Elements of Medical Jurisprudence*, 2 vols. (Albany, 1823).
- Belkin, S.—*Philo and Oral Law*, Harvard Semitic Series, vol. 162 (Cambridge, 1940).

- Bernheim, B. M.—*A Surgeon's Domain* (New York, 1947).
- Bishop, J. P.—*Commentaries on the Law of Criminal Procedure*, 2d ed. (Boston, 1872).
- Bloomfield, M.—*Hymns of Atharva-Veda*, in *The Sacred Books of the East*, Müller, F. M. (ed.), vol. 42 (Oxford, 1879-1891).
- Borchard, E. M.—*Guide to Law and Legal Literature of Germany* (Washington, 1912).
- Borghesi, B.—*Préfets du Prétoire, d'Auguste à Constantin; depuis Constantin*, in *Oeuvres Complètes de Bartolomeo Borghesi*, 10 vols. (Paris, 1862-1897).
- Bouscaren, T. L.—*Ethics of Ectopic Operations* (Chicago, 1933).
- *Canon Law Digest*, 2 vols. (Milwaukee, 1934); *Supplement* (Milwaukee, 1938).
- Bracton, H. de—*De Legibus et Consuetudinibus Angliae*, Twiss, T. (ed.) (London, 1878-1883).
- Brasiello, U.—*La Repressione Penale in Diritto Romano* (Naples, 1937).
- Bremer, F. P. (ed.)—*Jurisprudentia Antehadriana Quae Supersunt*, 2 vols. (Leipzig, 1896-1901).
- Bryce, J.—*Studies in History and Jurisprudence*, 2 vols. (New York, 1901).
- Buckland, W.—*Textbook of Roman Law, Augustus-Justinian* (Cambridge, 1950).
- Buehler, G.—see *Aryas*.
- Cabanellas, G.—*El Aborto, su Problema Social, Medico y Juridico* (Buenos Aires, 1945).
- Cambridge Ancient History*, 1st ed. (Cambridge, 1923-1939).
- Canciani, P.—*Barbarorum Leges Antiquae*, 5 vols. (Venice, 1781-1792).
- Cangiamila, F.—*Embriologia Sacra* (Palermo, 1745).
- Cassius Dio Cocceianus—*Dio's Roman History*, Cary, E. (ed.), 9 vols. (New York, 1914-1927).
- Castiglioni, A.—*Storia della Medicina* (Milan, 1927); 2d ed. (New York, 1947).
- Cavaignac, E.—*Le Problème Hittite* (Paris, 1936).
- "Ceram, C. W." (Marek, Kurt W.)—*The Secret of the Hittites*, English translation by Winston, R. and C. (New York, 1956).
- Cervantes, L.—*And God Made Man and Woman* (Chicago, 1959).
- Cervantes, L. and Zimmerman, C.—*Marriage and Family* (Chicago, 1956).
- Cicero, M. Tullius—"Letters to Pomponius Atticus," "Orations for Caecina, Cluentius, Flaccus, Roscius Amerinus," "Treatise De Republica, De Legibus," in *M. Tulli Ciceronis Scripta Quae Manerunt Omnia*, Mueller, C. F. R. (ed.), 10 vols. (Leipzig, 1889-1902).
- Cicognani, A.—*Canon Law*, English translation by O'Hara, M. and Brennan,

- F. (Philadelphia, 1934).
- Clemens, Titus Flavius—Clement of Alexandria, Butterworth, G. W. (ed.) (New York, 1919).
- Clement of Rome (Pope Clement I)—Letter to Corinthians, in *Apostolic Fathers* (London, 1876).
- Cocchi, G.—*Commentarium in Codicem Juris Canonici*, 4th ed., 8 vols. (Turin, 1931).
- Codes Pénaux Européens—Ancel, M. and Marx, Y. (eds.), 3 vols. (Paris, 1956-1959).
- Codex Juris Canonici—Gasparri (ed.) (Rome, 1934).
- Codex Theodosianus—Mommsen, T. and Meyer, P. (eds.) (Berlin, 1905).
- Coke, E.—*Institutes of the Laws of England*, 4 pts. (London, 1628-1644); Third Part, 3d ed. (London, 1660).
- Comte, L.—*L'interruption Thérapeutique de la Grossesse* (Fribourg, 1943).
- Conte a Coronata, Mattaeus—*Institutiones Juris Canonici*, 2d ed., 5 vols. (Turin, 1933-1936).
- Corpus Juris Canonici: I. *Decretum Magistri Gratiani*; II. *Decretalium Collectiones Gregorii IX* (Raymond Penafort)—Friedberg, A. (ed.), 2d ed. (Leipzig, 1922).
- Corpus Juris Civilis, Codex—Krueger, P. (ed.), 3 vols. (Berlin, 1954).
- Corpus Juris Civilis, Digest—Mommsen, T. (ed.) (Berlin, 1868-1870).
- Cowley, A. (ed.)—*Aramaic Papyri of Fifth Century B.C.* (Oxford, 1923).
- *Hittites* (Oxford, 1920).
- Crawley, A.—*Foeticide*, in *Encyclopaedia of Religion and Ethics*, vol. 6 (New York, 1925).
- Cronin, M.—*Science of Ethics*, vol. 2 (New York, 1949).
- Cug, E.—*Études sur le droit Babylonien, les lois Assyriennes et les lois Hittites* (Paris, 1929).
- Cyprian, St. (Cyprianus)—*The Writings of Cyprian, Bishop of Carthage*, Wallis, R. (ed.), 2 vols. (Edinburgh, 1868-1869).
- Danish Criminal Code of 1930—Giersing, E., translation for Danish Committee on Comparative Law (Copenhagen, 1958).
- Dante Alighieri—*Divina Comedia*, English translation by Carlyle, J. A. and Wicksteed, P. H. (eds.) (New York, 1944).
- D'Arcy, M. C., S.J.—*Pain and the Providence of God* (Milwaukee, 1935).
- da Vinci—see Leonardo da Vinci.
- Davis, H., S.J.—*Moral and Pastoral Theology*, 4th ed. (London, 1945).
- Deimel, A.—*Codex Hammurabi* (Rome, 1930).
- *Sumerisches Lexikon* (Rome, 1930-1937).
- DeLaporte, L.—*Les Hittites* (Paris, 1936).
- de Robertis—see Robertis.
- Devereux, G.—*A Study of Abortion in Primitive Societies* (New York, 1955).
- Didache (The Two Ways)—1 The Apostolic Fathers (New York, 1919).
- Didascalia et Constitutiones Apostolorum—see Funk.

- Digby, K.—Two Treatises (London, 1669).
- Dio Cocceianus, Chrysostomus, of Prusa—Cohon, J. W. (ed.), 5 vols. (London, 1932-1951).
- Dio Cocceianus Cassius—see Cassius Dio Cocceianus.
- Diognetus, Epistle to—2 The Apostolic Fathers (New York, 1917).
- Dionysius of Hallicarnassus—The Roman Antiquities of Dionysius of Hallicarnassus, Cary, E. (ed.) (London, 1937-1950).
- Doellinger, J. J. I. von—Heidenthum und Judenthum (Regensburg, 1857).
- The Gentile and the Jew in the Courts of the Temple of Christ, Darnell, N. (ed.), 2d ed., 2 vols. (London, 1906).
- Driver, G. and Miles, J.—Babylonian Laws, 2 vols. (Oxford, 1952-1955).
- Dunbar, H.—Emotions and Bodily Changes (New York, 1946).
- Dunn, L. and Dobzhansky, T.—Hereditiy, Race and Society, rev. ed. (New York, 1952).
- Duns Scotus, J.—Opera Omnia, 12 vols. (Lyon, 1639).
- De Primo Principio, Roche, E. (ed.) (St. Bonaventure, 1949).
- Dumolin du Fraisse, G.—L'avortement, en droit pénal, depuis le Code de la Famille (Paris, 1944).
- Duruy, V.—History of Rome, Mahaffy, J. (ed.), English translation by Ripley and Clarke, 8 vols. (Boston, 1883).
- Eastman, M. and Rosin, J.—The Road to Abundance (New York, 1953).
- Ecclesiastical Review (1905-).
- Echegollen Melo, A.—Aborto y Feticidio (Mexico, 1952).
- Ellis, H.—Studies in the Psychology of Sex, 3d ed., vol. 1 (New York, 1910).
- Emerson, R.—Legal Medicine and Toxicology (New York, 1909).
- Epictetus—The Discourses as Reported by Arrian, Oldfather, W. (ed.), 2 vols. (New York, 1926-1928).
- Erman, A.—Die Literatur der Aegypter (Leipzig, 1923).
- The Literature of the Ancient Egyptians, Blackman (ed.) (London, 1927).
- Eschbach—Disputationes Physiologico-Theologicae, 3d ed., vol. 2 (Rome, 1913).
- Eshnunna, Laws of—Götze, A. (ed.), in Ancient Near Eastern Texts Relating to the Old Testament, Pritchard, J. (ed.) (Princeton, 1955).
- Expedition to Mesopotamia—see Field Museum.
- Fallon, H.—Temp-o-Graf: The Basal Temperature Method of Determining Date of Ovulation (Kansas City, 1949).
- Family Today, The—Family Life Bureau (Washington, 1944).
- Fecht, K.—Das Recht der Ungeborenen (Karlsruhe, 1947).
- Ferlet, J.—L'abaissement de la Natalité à Rome (Paris, 1902).
- Field Museum—Oxford University Joint Expedition to Mesopotamia, vol. 4 (Paris, 1930).
- Finney, P.—Moral Problems in Hospital Practice (St. Louis, 1922).
- rev. ed., O'Brien, P. (ed.) (St. Louis, 1956).

Firdausi—see Zimmern.

Five Great Encyclicals, Treacy, G. (ed.) (New York, 1939).

Fleta—see Richardson.

Frankfort, H.—*Intellectual Adventure of Ancient Man* (Chicago, 1946).

Freud, Sigmund—*General Introduction to Psycho-Analysis*, Riviere, J. (ed.) (New York, 1935).

Funk, F. (ed.)—*Didascalia et Constitutiones Apostolorum*, 2 vols. (Paderborn, 1905).

— *Patres Apostolici* (Tubingen, 1901).

Furlani, G.—*Religione degli Hittiti* (Bologna, 1936).

Gaius—*Commentaries of Gaius and Rules of Ulpian*, 3d ed., Abdy, J. and Walker, B. (eds.) (Cambridge, 1885).

— *Institutes*, de Zulueta F. (ed.) (Oxford, 1946).

Galen (Galenus, Claudius)—“*An quod in utero est sit Animal*,” vol. 5, Galeni *Omnia Quae Extant Opera*, 7 vols. (Venice, 1565).

Gardthausen, V.—*Augustus und seine Zeit*, 2 vols. (Leipzig, 1891-1904).

Gasparri, P. (ed.)—*Codicis Juris Canonici Fontes*, 9 vols. (Rome, 1923-1939).

Gebhard, P., and others—*Pregnancy, Birth, and Abortion* (New York, 1958).

Gellius, Aulus—*Noctes Atticae*, 9 vols. (Rome, 1469).

— Beloe, W. (ed.) (London, 1795).

— Rolfe, J. (ed.) (New York, 1927-1928).

Gibbon, E.—*The History of the Decline and Fall of the Roman Empire*, 13 vols. (London, 1795).

— Bury, J. (ed.), 7 vols. (London, 1926-1929).

Gilson, E.—*God and Philosophy* (New Haven, 1941).

— Jean Duns Scot: *Introduction à Ses Positions Fondamentales* (Paris, 1952).

Glass, D.—*Population Policies and Movements in Europe* (Oxford, 1940).

Glazer, W., Riesman, D. and Denney, R.—*The Lonely Crowd* (Garden City, 1953).

Gonzalez, T., Vance, M., Helpern, M. and Umberger, C.—*Legal Medicine, Pathology and Toxicology*, 2d ed. (New York, 1954).

Goodwin, G. and Lambert, S.—*Medical Leaders from Hippocrates to Osler* (Indianapolis, 1929).

Gorer, G.—*The Marquis de Sade* (New York, 1934).

Götze, A.—*Das Hethiter-Reich, seine Stellung zwischen Ost und West* (Leipzig, 1928).

— *Handbuch der Altertumswissenschaft*, III, i, 3 *Kulturgeschichte des altern Orients* (1933). See Eshnunna; Hittite Laws.

Gregorovius, F.—*The Emperor Hadrian*, Robinson, M. (ed.) (New York, 1898).

Gregory of Nyssa (Gregorius, St.)—“*On the Making of Man*,” “*On the Soul and the Resurrection*,” in *Select Writings and Letters of Gregory, Moore*,

- W. and Wilson, H. (eds.), *A Select Library of Nicene and Post-Nicene Fathers of the Christian Church*, 2d ser., vol. 5 (London, 1893).
- Gressman, H.—*Altorientalische Texte und Bilder zum Alten Testament*, 2d ed. (Berlin, 1926).
- Griffith, R. T. H.—*The Hymns of the Rigveda*, 3d ed., 2 vols. (Benares, 1920-1926).
- Grotjahn, A.—*Eine Kartothek zu § 218* (Berlin, 1932).
- Guttmacher, A. F.—*Babies by Choice or by Chance* (New York, 1959).
- Haldane, J.—*Heredity and Politics* (New York, 1938).
- Hammurabi, Code of—see Deimel; Meek.
- Hartland, E.—*Primitive Law* (London, 1924).
- Harvey, W.—“Anatomical Exercises on the Generation of Animals” (*Exercitationes de Generatione Animalium*), in *Works of William Harvey*, Willis, R. (ed.) (London, 1847).
- Hastings, J. (ed.)—*Encyclopaedia of Religion and Ethics*, 13 vols. (New York, 1924-1927).
- Heron, W.—*Clinical Applications of Suggestion and Hypnosis* (Springfield, 1950).
- Hippocrates—*Corpus Medicorum Graecorum*, Opera ed., vol. 1, pt. 1 (Leipzig, 1927).
- Hippocratic Collection, in *The History of Medicine*, Jones, W. H. S. (Cambridge, 1924).
- *Oeuvres Complètes*, Littré, E. (ed.), 10 vols. (Paris, 1839-1861).
- *The Genuine Works of Hippocrates*, Adams, F. (ed.), 2 vols. (London, 1849).
- Hittite Laws—see Neufeld, E.; Smith, J.M.P.; Götze, A.
- Holland, T.—*Institutes of Justinian*, 2d ed. (Oxford, 1881).
- Hollingworth, H.—*Psychology and Ethics* (New York, 1949).
- Holmes, T. R.—*The Architect of the Roman Empire* (Oxford, 1928-1931).
- Homiletic and Pastoral Review (New York, 1900-).
- Horace (Q. Horatius Flaccus)—see Martin.
- Horne, C., and others (eds.)—*The Sacred Books and Early Literature of the East*, 14 vols. (New York, 1917).
- Howard, G.—*History of Matrimonial Institutions* (Chicago, 1904).
- Huard, P. and Ming Wong—*Médecine Chinoise au cours des Siècles* (Paris, 1959).
- Huhner, M.—*Diagnosis and Treatment of Sexual Disorders in Male and Female* (Philadelphia, 1945).
- Huser, R. J.—*The Crime of Abortion in Canon Law* (Washington, 1942).
- Ignatius of Antioch, St.—*Epistolae* (Letters), Wintetswyl, L. A. (ed.) (Friburg, 1954).
- Ikhnoton (Amenhotep IV)—“Hymn to Sun God Aton,” in *Cambridge Ancient History*, vol. 2 (Cambridge, 1928).

- Jaffé, P. (ed.)—*Regesta Pontificum Romanorum ab condita Ecclesia (to 1304)*, 1st ed. (Berlin, 1851).
- Jastrow, M.—“An Assyrian Law Code,” 41 *J. Am. Oriental Soc’y* 1 (New Haven, 1921).
- Jean, C.—*Littérature des Babyloniens et des Assyriens* (Paris, 1924).
- Jennings, H.—*Genetics* (New York, 1935).
- Jewish Encyclopedia* (New York, 1906).
- Johns, C. H. W.—*Assyrian Deeds and Documents*, 4 vols. (London, 1898-1923).
- *Babylonian and Assyrian Laws, Contracts and Letters* (Edinburgh, 1904).
- *The Relation Between the Laws of Babylonians and the Laws of the Hebrew Peoples* (London, 1914).
- Juvenalis, Decimus Junius—*Satires*, English translation by Gifford, W. and Evans, L. (London, 1882).
- Keith, A.—*Classical Sanskrit Literature* (Oxford, 1923).
- *The Religion and Philosophy of the Veda and Upanishads*, 2 vols. (Cambridge, 1925).
- *A History of Sanskrit Literature* (Oxford, 1928).
- Kelly, G.—*Medico-Moral Problems* (St. Louis, 1958).
- Kiefer, O.—*Sexual Life in Ancient Rome* (New York, 1953).
- King, L.—*A History of Sumer and Akkad* (London, 1910).
- *A History of Babylon* (London, 1915).
- Kramer, S.—*Sumerian Mythology* (Philadelphia, 1944).
- *Lipit-Ishtar Code*, in *Ancient Near Eastern Texts*, Pritchard, J. (ed.) (Princeton, 1955).
- *History Begins at Sumer* (Garden City, 1959).
- Lambert, S. and Goodwin, G.—*Medical Leaders from Hippocrates to Osler* (Indianapolis, 1929).
- Langdon, S. (ed.)—“Excavations at Kish,” in *Oxford Editions of Cuneiform Texts*, vol. 5 (Oxford, 1923).
- *Alte Orient* (Oxford, 1928).
- Larochelle, S.—*Handbook of Medical Ethics* (Westminster, 1943).
- Larue—see Vesine Larue.
- Lecky, W. E. H.—*History of European Morals, from Augustus to Charlemagne*, 3d ed. (New York, 1903).
- Leonardo da Vinci—*Quaderni d’Anatomia, Vangensten, Fohnahn and Hopstok* (eds.) (Christiana, 1911-1916).
- Lewin, L.—*Die Fruchtabtreibung durch Gifte und andere Mittel* (Berlin, 1925).
- Lewis, C. S.—*The Problem of Pain* (New York, 1944).
- Licht, H. (pseud. Brandt, P.)—*Sexual Life in Ancient Greece*, Dawson, L. (ed.) (London, 1932).
- Lipit-Ishtar Code*—see Kramer; Steele.

- Liszt, E. Ritter von—Die kriminelle Fruchtabtreibung (Zurich, 1910-1911).
- Littre, E.—see Hippocrates.
- Livy (Titus Livius)—The Romane Historie, Holland, P. (ed.) (London, 1600).
- Foster, B. (ed.) (New York, 1919).
- Longpré, E.—Philosophie du Duns Scotus (Paris, 1924).
- Lowie, R.—Primitive Society (New York, 1920).
- Luckenbill, D.—Ancient Records of Assyria and Babylonia (Chicago, 1926-1927).
- (ed.)—Assyrian Laws, in The Origin and History of Hebrew Law, Smith, J. M. P. (Chicago, 1931).
- Macdonell, A.—A History of Sanskrit Literature (London, 1905).
- India's Past (Oxford, 1927).
- Macdonell, A. and Keith, A.—Vedic Index, 2 vols. (London, 1912).
- MacGillivray, G. (ed.)—Moral Principles and Practices (New York, 1933).
- Mahoney, E.—Questions and Answers (London, 1946).
- Malinowski, B.—Crime and Custom in Savage Society (New York, 1926).
- Manu, Laws of—Buehler, G. (ed.), in The Sacred Books of the East, Müller, F. M. (ed.), vol. 25 (Oxford, 1879-1891).
- Martin, T. (ed.)—Odes of Horace (London, 1860).
- Martinez, J.—Aborto Illicito y Derecho al Aborto (Havana, 1942).
- Marx, Y. and Ancel, M.—see Codes Pénaux Européens.
- McCarthy, J.—Psychosurgery and Medico-psychological Therapy, in Supplement 2, Catholic Encyclopedia (New York, 1951).
- McFadden, C.—Medical Ethics, 2d ed. (Philadelphia, 1949).
- Meek, T. (ed.)—Neo-Babylonian Laws, Assyrian Laws, Code of Hammurabi, in Ancient Near Eastern Texts, Pritchard, J. (ed.) (Princeton, 1955).
- Meissner, B.—Babylonien und Assyrien, 2 vols. (Heidelberg, 1920-1925).
- (ed.)—Neo-Babylonian Laws, in Sitzungsberichte der preussischen Akademie der Wissenschaften (1918).
- Merkelbach, B.—Quaestiones Pastorales, Nos. 2, 3 (Liege, 1928).
- Summa Theologiae Moralis, 3 vols. (Paris, 1935-1936).
- Miles, J. and Driver, G.—Babylonian Laws, 2 vols. (Oxford, 1952-1955).
- Mills, D. S.—"Medico Legal Analysis of Abortion Statutes," 31 So. Cal. L. Rev. 181 (1958).
- Minucius Felix—Octavius (London, 1931).
- Mommsen, T.—Römische Geschichte, 4 vols. (Berlin, 1889-1903).
- Dickson, W. (ed.), 5 vols. (New York, 1903).
- Moore, E.—The Case Against Birth Control (New York, 1931).
- Moore, T.—Principles of Ethics, 4th ed. (Philadelphia, 1943).
- Mueller, G. O. W. (ed.)—American Series of Foreign Penal Codes, (South Hackensack, 1960).
- Musonius, Rufus—C. Musonii Rufi Reliquiae, Hense, O. (ed.) (Lipsiae, 1905).
- Myerson, Ayer, Putnam, Keeler and Alexander—Eugenic Sterilization, Committee Report for the Investigation of Eugenical Sterilization, American Neurological Ass'n, 3d ed. (New York, 1957).

- Needham, J.—History of Embryology, 2d. ed., rev. (Cambridge, 1934).
- Neufeld, E.—The Hittite Laws (London, 1951).
- O'Donnell, T.—Morals in Medicine, rev. ed. (Westminster, 1959).
- O'Malley, A.—Ethics of Medical Homicide and Mutilation (New York, 1919).
- Origen—*Contra Celsum*, Chadwick, H. (ed.) (Cambridge, 1953).
- Our Bishops Speak (Annual Statement, Nov. 17, 1950) (Milwaukee, 1952).
- Ovid (P. Ovidius Naso)—*Heroides and Amores*, The Loeb Classical Library, Page, T. and Rouse, W. (eds.) (London, 1914).
- Paquin, J.—*Morale et Médecine* (Montreal, 1955).
- Patres Apostolici—see Funk.
- Paulys, A., Wissowa, G. von, and Kroll, W. von—*Abortio*, *Real-Encyclopädie der classischen Altertumswissenschaft*, vol. 1 (Stuttgart, 1894-1941).
- Payen, P. G.—*Déontologie médicale d'après le droit naturel*, 2d ed. (China, 1935).
- Pearson, F. and Harper, F.—*The World's Hunger* (Ithaca, 1945).
- Persius Flaccus, Aulus—*Satires*, Dryden (ed.) (London, 1693).
- Ramsey (ed.) (Cambridge, 1950).
- Petronius, Arbiter—*The Satyricon*, English translation by Wilde, O. (Chicago, 1927).
- Phelps, H.—*Contemporary Social Problems*, 3d ed. (New York, 1947).
- Pius XI—"Encyclical on Christian Marriage," in *Five Great Encyclicals*, Treacy, G. (ed.) (New York, 1939).
- Plato—*Republic*, Shorey, P. (ed.), 2 vols. (New York, 1930-1935).
- *Theaetetus*, Fowler H. (ed.) (New York, 1917).
- Plautus, Titus Maccius—*The Miles Gloriosus* of T. Maccius Plautus, Tyrrell, R. (ed.) (New York, 1899).
- Pliny the Elder (C. Plinius Secundus)—*The Natural History of Pliny*, Bostock, J. and Riley, H. (eds.), 3 vols. (New York, 1890).
- Pliny the Younger (G. Plinius Caecilius Secundus)—*Letters*, Melmath, W. (ed.) (New York, 1915).
- Ploss, H., Bartels, M. and Bartels, P.—*Das Weib in der Natur- und Völkerkunde*, Reitzenstein, F. (ed.), rev. ed., 3 vols. (Berlin, 1927).
- Plutarch (Plutarchus)—*Parallel Lives*, North, T. (ed.), in *Tudor Translations*, 6 vols. (London, 1895-1896).
- *Plutarch's Lives*, Perrin, B. (ed.), 11 vols. (New York, 1914-1926).
- *Moralia*, Holland, P. (ed.) (New York, 1936).
- Podolsky, E.—*Red Miracle* (New York, 1947).
- Pollak, O.—*The Criminality of Women* (Philadelphia, 1950).
- Potthast, A. (ed.)—*Regesta Pontificum Romanorum ab condita Ecclesia* (from 1198 to 1304), 2d ed. (Leipzig, 1885-1888).
- Pritchard, J. (ed.)—*Ancient Near Eastern Texts Relating to the Old Testament* (Princeton, 1955).
- Puiula, J.—*De Medicina Pastoralis* (Rome, 1948).

- Querlin, M.—*Les Ventres Maudits: Les Filles-mères* (Paris, 1928).
 — *Enfants de l'Amour* (Paris, 1948).
- Quintillian (Marcus Fabius Quintilianus)—*The Institutio Oratoria* of Quintilian, Butler, H. (ed.), 4 vols. (New York, 1921-1922).
- Quran (Koran)—in *The Sacred Books of the East*, Müeller, F. M. (ed.), vols. 6, 9 (Oxford, 1880).
- Regesta Pontificum Romanorum ab condita Ecclesia*—see Jaffé; Potthast.
- Riesman, D., Glazer, W. and Denney, R.—*The Lonely Crowd* (New Haven, 1950).
- Ricci, J.—*The Genealogy of Gynaecology* (Philadelphia, 1943).
- Richardson, H. and Sayles, G. (eds.)—*Fleta* (London, 1955).
- Rig-Veda—see Griffith.
- Robertis, F. de—*Funzione della pena in diritto Romano*, in *Studii in Onore de Siro Solazzi* (Naples, 1948).
- Rodallec, M.—*La Lutte contre l'Avortement Criminel en France* (Trevoux, 1939).
- Rolfe, J. (ed.)—*Suetonius* (New York, 1914).
- Ronge, P.—*Problem § 218* (Rudolstadt, 1947).
- Rosin, J. and Eastman, M.—*The Road to Abundance* (New York, 1953).
- Rostovtsev, M.—*The Social and Economic History of the Roman Empire* (Oxford, 1926).
- Roy, J.—*Avortement, fléau national: Causes, Conséquences, Remèdes*, 2d ed., rev. (Paris, 1944).
- Russell, W.—*Russell on Crime*, 9th ed. (London, 1936).
- Sacred Books and Early Literature of the East*, The—see Horne.
- Scheinfeld, A.—*The New You and Heredity* (New York, 1950).
- Schmiedeler, E.—*Sterilization in the United States* (Washington, 1943).
- Seneca, Lucius Annaeus (Seneca the Elder)—“*Controversiae*,” in *Oratorum et Rhetorum*, Kiessling, A. (ed.) (Leipzig, 1872).
- Seneca, Lucius Annaeus—“*De Ira*,” in *Seneca Moral Essays*, Basore, J. (ed.), vol. 1 (New York, 1928).
- “*De Consolatione Ad Marciam*,” “*De Consolatione Ad Helviam*,” “*De Consolatione Ad Polybium*,” in *Seneca Moral Essays*, Basore, J. (ed.), vol. 2 (New York, 1932).
- “*On Drunkenness*,” in *Seneca Ad Lucilium Epistulae Morales*, Gummere, R. (ed.), vol. 2 (New York, 1920).
- Sigerist, H.—*A History of Medicine*, 2 vols. (New York, 1951).
- *Essays on the History of Medicine*, Marti-Ibanez, F. (ed.) (New York, 1960).
- *On Sociology of Medicine*, Roemer, M. (ed.) (New York, 1960).
- *Socialized Medicine in the Soviet Union* (New York, 1937).
- Smith, J. M. P.—*The Origin and History of Hebrew Law* (Chicago, 1931).
- Smith, W.—*Kinship and Marriage in Early Arabia*, 2d ed. (London, 1903).

- Sophocles—*Antigone*, in *Fifteen Greek Plays*, Murray, G., and others (eds.) (Oxford, 1943).
- Soranus of Ephesus—*De Arte Obstetricia Morbisque Mulierum Quae Supersunt* (On Midwifery and Diseases of Women) (1838).
- *Gynaecia*, Rose, V. (ed.) (Leipzig, 1882).
- Statius, Publius Papinius—*The Silvae of Statius*, Slater, D. (ed.) (Oxford, 1908).
- Steele, F.—“The Code of Lipit-Ishtar,” 52 *Am. J. of Archaeology* 425-50 (1948).
- Stephen, J.—*A History of the Criminal Law of England*, 3 vols. (London, 1883).
- Stern, K.—*The Third Revolution* (New York, 1954).
- Storer, H. and Heard, F.—*Criminal Abortion: Its Nature, Its Evidence, and Its Law* (Boston, 1868).
- Strabo—*The Geography of Strabo*, Jones, H. (ed.), 8 vols. (New York, 1917-1933).
- Strachan-Davidson, J.—*Problems of the Roman Criminal Law*, 2 vols. (Oxford, 1912).
- Suetonius Tranquillus, C.—*Lives of Twelve Caesars*, Holland, P. (ed.) (London, 1606). See Rolfe.
- Sullivan, J.—*Morality of Mercy Killing* (Westminster, 1950).
- Surbled, G.—*La morale dans ses rapports avec la médecine et l'hygiène*, rev. ed. (Paris, 1896).
- *La vie à deux: hygiène du mariage* (Paris, 1896).
- Sutherland, H.—*Laws of Life* (New York, 1936).
- *Control of Life* (London, 1944).
- Tacitus, Cornelius—*Annals*, 2 vols. (London, 1904-1909).
- *Histories*, 2 vols. (London, 1923).
- Tallet, X.—*Les Délits Contre Natalité, Avortement et Propagande Anticonceptionnelle* (Avignon, 1938).
- Tamez González, H.—*El Aborto Autorizado* (Art. 328, Código Penal Tamaulipas) (Mexico, 1944).
- Tarakdjii, A.—*L'avortement Criminel* (Toulouse, 1937).
- Tardieu, A.—*Étude Médico-Légale sur l'Avortement* (Paris, 1907).
- Taylor, T. R.—“Liability for Negligent Injury to the Unborn,” 36 *Dicta* 323 (1959).
- Terentius, Afer P.—*The Heautontimorumenos of Terence* (London, 1901).
- *The Women of Andros (Andria)*, Copley, F. (ed.) (New York, 1949).
- Tertullianus, Q. Septimus Florens—“*De Anima*,” in *Tertullian*, Bindley, T. (ed.) (New York, 1914).
- *Apology*, Glover, T. (ed.) (New York, 1931).
- Thomas, E.—*Pétrone* (Paris, 1902).
- Thucydides—*The Peloponnesian War*, English translation by Crawley, R. (New York, 1934).

- Treacy, G.—see Five Great Encyclicals.
- Treub, H., Oppenraay, R. and Vlaming, F.—The Right to Life of the Unborn Child (New York, 1903).
- Ur-Nammu Code—see Kramer, History Begins at Sumer.
- Valerius Maximus—*Romae Antiquae Descriptio* (London, 1684).
- “Factorum et Dictorum Memorabilium,” in *Selections of Valerius Maximus*, Smith, C. (ed.) (New York, 1895).
- Vedas—Sama-veda (London, 1843).
- Rig-veda (Edinburgh, 1870).
- Atharva-veda (New Haven, 1881).
- Yajur-veda (Cambridge, 1914).
- Velleius, Paterculus C.—*History of Rome*, Watson, J. (ed.) (London, 1852).
- Vendidad—Part One of The Zend-avesta, Darmesteter, J. (ed.), in *The Sacred Books of the East*, Müller, F. M. (ed.), vol. 4 (Oxford, 1880).
- Vesine Larue, E. de—*Essai sur l'Avortement* (Paris, 1886).
- Vinogradoff, P.—*Outlines of Historical Jurisprudence*, 2 vols. (New York, 1920).
- Visco, A.—*L'aborto Criminoso nel diritto penale, nella medicia legale, nelle politica demografica* (Milan, 1941).
- Vogt, W.—*Road to Survival* (New York, 1948).
- Walker, C.—*Too Many People* (New York, 1948).
- *Man and Food: The Lost Equation?* (New York, 1949).
- Wallin, W.—*Children with Mental and Physical Handicaps* (New York, 1949).
- Westermarck, E.—*The Origin and Development of the Moral Ideas*, 2d ed. (London and New York, 1912-1917).
- *History of Human Marriage*, 5th ed., 3 vols. (New York, 1922).
- Williams, G.—*The Sanctity of Life and the Criminal Law* (London, 1958).
- Winternitz, M.—*A Concise Dictionary of Eastern Religions*, in (Index) *The Sacred Books of the East*, Müller, F. M. (ed.) (Oxford, 1910).
- Wolff, H.—*Roman Law, An Historical Introduction* (Norman, 1951).
- Wooley, C.—*Digging Up the Past* (London, 1930).
- Woytinsky, W. S. and Woytinsky, E. S.—*World Population and Production* (New York, 1953).
- Woywod, S.—*A Practical Commentary on the Code of Canon Law*, 5th ed., 2 vols. (New York, 1939).
- Wright, W.—*The Empire of the Hittites* (New York, 1884).
- Zeiger, I.—*Historia Juris Canonici*, 2 vols. (Rome, 1939).
- Zend-Avesta Yasts—Darmesteter, J. (ed.), in *The Sacred Books of the East*, Müller, F. M. (ed.), vol. 4 (Oxford, 1883).
- Zimmern, H.—*Shah-nameh, Stories Retold from Firdausi* (New York, 1906).