

THE GEORGETOWN LAW JOURNAL

VOLUME 49

Spring 1961

NUMBER 3

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

* This is the second installment of a two-part article; the first part appeared in the winter issue, 49 Georgetown L.J. 173 (1960).

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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, Ikhnaton, *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 slowly"⁷⁹ 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

Okla. 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).

[*Reported by* REGINALD TOWNSEND, ESQ., *Barrister-at-Law.*]

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