

The Silent Subject

Reflections on the Unborn
in American Culture

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Chapter 12

The Effective Enforcement of Abortion Law Before *Roe v. Wade*

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[How] can [we] look our daughters in the eye and tell them that it is somehow consistent with freedom for them to trample on the human rights of their unborn offspring. We're going to have to find the courage one of these days to tell people that freedom is not an easy discipline. Freedom is not a choice for those who are lazy in their heart and in their respect for their own moral capacities. Freedom requires that at the end of the day you accept the constraint that is required . . . a respect for the laws of nature and nature's God that say unequivocally that your daughters do not have the right to do what is wrong, that [your] sons do not have the right to do what is wrong. They do not have the right to steal bread from the mouths of the innocent, they do not have the right to steal life from the womb of the unborn.

—Dr. Alan Keyes¹

There must be a limit to a liberty so mistaken in its foundations, so far-reaching in its malignant consequences, and so deadly in its exercise.

—Judge John T. Noonan, Jr.²

INTRODUCTION

For the past generation in American life, there has been virtually no enforcement of the criminal abortion laws that were on the books in every state just thirty years ago.³ This is due to the Supreme Court's 1973 decision in *Roe v. Wade*,⁴ which legalized abortion in every state, for virtually any reason, at any time of pregnancy. Today's generation can barely remember a time when police and prosecutors regularly worked to shut down abortionists. Yet, certain images surrounding the enforcement of abortion law still retain their power—the dirty and fearful “back alley,” the specter of thousands of women dying from illegal abor-

tions, and the belief that millions of illegal abortions made a mockery of the laws. Numerous books and articles seek to perpetuate these images.⁵ Whether these images are, in fact, an accurate portrait of the impact of abortion laws is hardly known.

Yet, a 1990 Gallup Poll indicates that, if it were not for the power of the federal courts, significant public opinion would even now support some prohibition of elective abortion at some time in pregnancy.⁶ If the Supreme Court were ever to overrule *Roe v. Wade*, and the political authority returned to the states to enact and enforce laws against abortion, it would be necessary to assess whether such laws could effectively save lives. Would they be good public policy? Insofar as the Supreme Court in its 1992 decision in *Planned Parenthood v. Casey*⁷ believed that the country could not "go back," it is important to reassess the presumptions about what it is that Americans would "go back to."

If Americans examined the history of abortion law—after 22 years of experience with legalized abortion on demand—they might be surprised by what they found. Abortion history is heavily laden with numerous myths. But a number of truths are apparent. Abortion laws were uniformly enforced against physicians and virtually never against women, who were considered second victims of abortion. The medical reasons that called for therapeutic abortions (to save the life of the mother) had steadily declined by 1960 due to advances in medical care. The number of women who died by illegal abortion had steadily declined before 1960 due to advances in antibiotics. By 1972, women did not die by illegal, "back alley" abortions to a significantly greater extent than women die today from legal abortion. Generally, abortion laws were regularly enforced before *Roe v. Wade*, and they effectively inhibited the performance of abortions.

This history, in turn, must be compared with our current experience of abortion-on-demand and its affect on women's and children's lives. What is the truth about abortion as it is practiced in this country today? The number of abortions—and the repeat abortion rate—has dramatically increased since nationwide legalization. Most abortions are performed in high volume, assembly-line clinics. Counseling is usually done in groups, by nonphysicians, and never by doctors. The woman never sees the doctor until she is gowned and in stirrups, the abortion takes six to eight minutes, and she never sees the doctor again. If she has complications, the clinic is not equipped to serve her, but instead refers her to the nearest emergency room. Women are still killed and injured by abortion, and medical malpractice claims against abortionists are proliferating. Many women experience negative psychological consequences from abortion.

After twenty two years, abortion-on-demand has failed to fulfill its promises of reducing illegitimacy, ending child abuse, and improving women's lives. Long periods of popular frustration with failed public policies have sometimes sparked dramatic public reaction—witness the growing national consensus today (1995) on some reform of welfare and the culture of dependency. Such could be the future of the abortion debate in America if the public were educated on the

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THE HISTORICAL DEVELOPMENT OF MEDICINE AND ABORTION LAW

In Anglo-American culture, laws against abortion have been enforced since at least the thirteenth century. But the nature of that enforcement has been subject to constant change and development. Our knowledge about pregnancy—its onset, determination, progress, and the causes of its termination—has been limited by medical science.⁸ The law of abortion and the law of homicide developed very differently in the history of Anglo-American law as a direct result of medical knowledge. The text and scope of abortion statutes, the mechanisms of enforcement, and the protection for women and unborn children have changed over the past five hundred years as medical science has improved. In addition, the target of abortion laws has changed—from midwives to doctors—as the nature of the medical profession has changed. It is seldom recognized that the language and enforcement of abortion laws have been necessarily tied to the contemporary state of medical science, and yet that relationship must be understood before any accurate analysis of the purpose, method, and shortcomings of the enforcement of abortion law can be undertaken.

THE STATE OF MEDICAL SCIENCE AT COMMON LAW

The 1990s is an age of ultrasonography, in utero surgery and transfusions, and fetal medicine and therapy.⁹ Medicine can identify and treat the health problems of the unborn child in the womb earlier and earlier in gestation.¹⁰ It is not often recognized just how new this technology is, or how radically it has changed and enhanced society's understanding of life in the womb.

The most important medical aspect of abortion law enforcement has always been determining the existence of a live fetus and the cause of any injury or death. It is clear that the mere detection of early pregnancy was quite difficult for medicine from the fourteenth to the twentieth century.¹¹ Pregnancy tests for the detection of HCG (Human Chorionic Gonadotropin) performed on urine were developed only fifty years ago and were relatively unreliable up to the 1960s.¹² Early treatises on midwifery (the forerunner of obstetrics) devoted entire chapters to determining the "signs" or indications of pregnancy. Consequently, for purposes of legal proof the common law fixed upon the phenomenon called "quickening"—the physical sense by the mother of movement of the child in utero—as the first true sign of pregnancy. Since "quickening" does not usually occur until 16-18 weeks of pregnancy, however, it was virtually impossible before the twentieth century for medicine to prove a live pregnancy before 16-18

weeks of gestation. Therefore it was impossible for the law to apply the homicide law to abortion.¹³ Before quickening, all other primitive signs of pregnancy were considered ambiguous and uncertain.¹⁴ Quickening was thus an evidentiary distinction, not a moral one. Because of these evidentiary problems, the law of abortion developed independent of the law of homicide.

One significant development of common law regarding abortion was the so-called "born alive rule." In the event of an assault on a pregnant woman that ended in fetal death, it would be necessary for the law to determine that the child was alive at the time of the assault, and that death was caused by the assault and not by natural means. As a result, the common law created the "born alive rule" as an evidentiary buffer against false charges and ambiguous medical evidence.¹⁵ The term "born alive" means expulsion from the womb alive; it does not relate to any particular time of gestation.¹⁶

Consequently, no homicide law could be applied against an abortion unless the child was expelled from the womb (born) alive and died thereafter. It was virtually impossible for the law to prove a homicide (the killing of a human being) unless the child was expelled alive, observed outside the womb, and died only thereafter. Hence, a child could die in the womb or shortly after birth for myriad reasons. These reasons could not be easily identified, and the natural causes could not be readily separated from the criminal causes. Since homicide, at common law, was invariably a capital crime, judges and juries were reluctant to convict on uncertain evidence. Viability, though prominently emphasized in *Roe v. Wade*, was never a concern of the common law.¹⁷

THE LAW AGAINST ABORTION

It is now beyond any doubt that the common law prohibited abortion in order to protect the right to life of the unborn child to the greatest extent possible, given contemporary medical science.¹⁸ It is often falsely assumed that because the law did not treat abortion before quickening as *homicide*, it did not treat abortion before quickening as any *crime*.¹⁹

There is an important distinction, however, between the recognition of legal rights and their enforcement. Declaring a principle and proving its violation are two different things. Thus, William Blackstone, one of the foremost common law historians, could declare the unborn child to be a person at the earliest moment that it could be determined to be alive, but enforcement of the law protecting the child's life, which depended on evidence, was entirely another matter.²⁰ The law was constantly hampered by problems of evidence.

Recent historical research has eclipsed the numerous myths about the history of abortion law that were adopted by the Supreme Court in *Roe v. Wade*.²¹ There, the Court relied almost entirely on the work of one law professor, Cyril Means, who happened to be chief counsel for NARAL (National Abortion

Rights Action League).²² Relying entirely on two English cases from the 1300s, Means argued that abortion was a common law liberty.²³ But Means mischaracterized those cases,²⁴ and overlooked many other common law cases of punishment for abortionists.²⁵ Yet, the Court's erroneous adoption of Means' claims has sustained the modern myth, repeatedly asserted, that English law did not treat abortion as a crime *before* quickening.²⁶ Several U.S. courts accepted the view of Blackstone that it was necessary to allege quickening in order to indict,²⁷ and state courts repeatedly held that abortion after quickening was a crime at common law, without regard to statutory authority.²⁸ However, there was a trend among American courts later in the nineteenth century toward reconsidering that notion and holding that abortion was a crime at common law without regard to quickening (or at any stage of pregnancy).²⁹ This position was supported by leading, authoritative commentators on the criminal law.³⁰ Today, there can be no question, if the historical facts are considered, that abortion was considered a crime of some degree by the common law at *every* stage of gestation and was *never* protected as a right.

A second myth of abortion history is that there were no abortion laws in America until the first abortion statute was enacted in Connecticut in 1821. Yet, the American colonies imported the English common law against abortion and enforced it, to the extent possible given primitive medical science. Common law abortion cases have been discovered in a number of American colonies.³¹

A third myth of abortion history is that the nineteenth century American abortion statutes were enacted to protect only the mother, and not the child. This notion has been exploded in recent years by extensive scholarship. It is now recognized that sixty five court decisions from forty states recognized that their nineteenth-century state statutes were intended to protect the life of the unborn child.³²

A fourth myth surrounding the history of abortion is that abortion was a commonly accepted and frequent practice among American women before the nineteenth century. The independent research of Professors Joseph Dellapenna and Marvin Olasky has undermined that myth. Dellapenna demonstrates that there were no safe and effective techniques—intrusion or ingestion—throughout the nineteenth century.³³ In addition, as medical science developed, the law became increasingly sophisticated in dropping all limitations to prohibit abortion at any stage of gestation. Professor Olasky has shown that abortion was closely connected to prostitution, and was not widely dispersed through the populace.³⁴ Thus, due to both uniform social prohibition and practical unavailability, abortion could not have been widely accepted or practiced.

Despite the obstacles posed by primitive medical science, and the evidentiary problems that crippled effective enforcement at various times, the purpose of abortion law in Anglo-American law has been to protect the life of the unborn child and protect the mother from death or injury. These purposes have been consistent throughout Anglo-American history, even though the means for fulfilling

those purposes were often technologically limited.

PROBLEMS OF ENFORCEMENT

Although abortion was consistently treated as a crime, enforcement of abortion laws required proof of the crime, and proof was dependent on medical evidence. As Professor Dellapenna explains, "The technological dimension . . . explains why there were so few reported prosecutions of abortion before 1840 and why those and later prosecutions so often resulted in acquittal or conviction for lesser offenses."³⁵ As medical understanding of pregnancy developed, changes in the law evolved to assist enforcement, and enforcement improved and became more sophisticated. Enforcement improved with technology.

Enforcement Against Abortionists, Not Women

A key aspect was the target of abortion laws. Male physicians did not perform obstetrical or gynecological procedures before the early-to-mid-nineteenth-century because of cultural attitudes that forbade them from attending women during pregnancy. Rather, female midwives attended to women in pregnancy. Thus, midwives, as abortionists, were the targets of the earliest abortion laws. For example, in order to prevent abortion, ordinances were enacted in New York and Virginia in the 1700s which prohibited abortion by midwives.³⁶ These ordinances were blanket prohibitions on the induction of abortion.

A fifth myth of abortion history is that aborting women were the target of abortion law before *Roe v. Wade*. Although some state laws in the nineteenth century allowed the prosecution of aborting women, there is apparently no reported appellate decision in American history upholding the conviction of a woman for self-induced abortion or for submitting to an abortion.³⁷ Dellapenna also provides evidence that treating women as a second victim was "based on both the rarity in practice of voluntary, elective abortion and the danger of the procedure when it did occur."³⁸ Although there is evidence that, at common law, women were occasionally subject to criminal prosecution for participation in abortion, the common law gave way to the pragmatic judgments of modern abortion law that the abortionist is the most significant culprit, that the woman is a second victim of abortion after the child, and that criminalizing women's participation undermined effective law enforcement. A parallel can be found, perhaps, in the disinclination to charge girls as accessories to the crime of statutory rape.³⁹

Most states expressly treated women as the second victim of abortion.⁴⁰ This was so even for self-abortion.⁴¹ "[W]omen were never charged with murder, only seldom . . . named co-conspirators, and still more rarely . . . regarded as accomplices."⁴² Thirty nine of the forty state courts which considered whether aborted

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women were accomplices concluded that they were not.⁴³ As one commentator has aptly summarized the law:

The primary issue in the complicity cases was not the guilt of the woman but of her abortionist. The defense—not the prosecution—sought to have such women named as accomplices because they often were the only eyewitnesses to their abortions. Since most states required that the testimony of an accomplice be corroborated before being admitted into evidence, the abortionist would typically allege that the woman was his accomplice in the performance of the abortion. The defense hoped thereby to make the woman's testimony inadmissible and thus, in the absence of corroborating evidence, to win acquittal.⁴⁴

In other words, if the abortionist could convince the court to treat the woman as an accomplice, and her testimony could not be corroborated by another person, her testimony would not be admitted and the case would dissolve. As late as 1968, Ruth Barnett—the abortionist cast as the hero in a 1994 book, *The Abortionist*—used this tactic, unsuccessfully, in her appeal from her conviction.⁴⁵

The most that the states did in the way of penalizing women for abortion was to prohibit any person—male or female—from *soliciting* abortion. At the time of *Roe v. Wade*, seventeen states still had such laws on the books.⁴⁶ But there is no known prosecution of any woman under these laws. Whether these laws effectively inhibited women from soliciting abortion is unknown; certainly their mere existence supported the aim of general deterrence by stigmatizing abortion as a criminal act. Some historians, like Leslie Reagan, charge that although women were not arrested, prosecuted or incarcerated for abortion, the intimate nature of the investigations was a form of “punishment.” But even Reagan concedes that “[n]o evidence suggests that officials consciously designed their investigative procedures to harass women. . . .” and these same investigative procedures were applied evenhandedly to men.⁴⁷

The policy considerations in favor of not treating women as accomplices extended beyond the evidentiary necessities. If a woman was considered an accomplice or criminally liable, she might be unable to recover for the negligence of an abortionist.⁴⁸ The inhibiting influence of negligence actions against abortionists might suggest that an injured woman *should* recover even if she submitted to an illegal act. This policy of treating women as the second victims of abortion controlled the modern enforcement of abortion law throughout the twentieth century.⁴⁹

Questions of Intent and Evidence

Early state abortion statutes often created evidentiary problems by their own definition of the elements of the crime, but, with experience, these were often eliminated by amendment.⁵⁰ For example, Illinois adopted its first abortion stat-

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ute in 1827 and, to its credit, was especially progressive in not containing any quickening limitation. However, between 1867 and 1874, the Illinois statute included a broad exception ("unless the same were done for *bona fide* medical or surgical purposes"), and experience found that it "was a comparatively easy matter to show, in case a prosecution was attempted, if an operation was done for *bona fide* medical or surgical purposes."⁵¹ This language remained in place until 1874, when the Illinois legislature deleted the loophole, which was viewed as "uncertain, unbounded, and undefined," and replaced it with the phrase, "unless same were done as necessary for the preservation of the mother's life."⁵² Similar problems of intent persisted in other states as late as the middle of the nineteenth century when states began to amend their statutes to eliminate requirements of quickening and proof of pregnancy.⁵³

Evidentiary problems caused by the lack of medical proof continued to plague law enforcement. The problem of gathering evidence was commonly raised by physicians and lawyers. At a Chicago medical symposium in 1905, one physician noted:

Notwithstanding the prevalence of the crime there are few accusations or indictments for inducing abortion unless the death of the mother results when of course the indictment is for murder. In the few cases of indictment for producing abortion the action was brought because of the serious injury to the mother. Ordinarily it is very difficult to get satisfactory evidence against a professional abortionist. The relatives or others interested in the case are generally very anxious to prevent any publicity for obvious reasons and even in case of the death of the mother it is frequently impossible to get any member of the family to take action in the matter. Outside parties cannot be expected to interest themselves with such matters which can concern them only in a very indirect way and which would bring them only great annoyance and perhaps place them in a very embarrassing position. This difficulty of securing evidence and initiating an accusation is the reason why the abortion law is so much of a dead letter.⁵⁴

Nevertheless, at the turn of the century, efforts were undertaken by the coroner for Cook County, Illinois, to increase the effectiveness of law enforcement efforts, and several abortionists were convicted and imprisoned.⁵⁵

The Law of Attempt

The relation of an attempt to the completion of a crime has been a traditional problem in the enforcement of the criminal law.⁵⁶ To ease the problem, the law of attempt is often specifically set forth in state statutes. For example, in Illinois, "a person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense."⁵⁷ Generally, "it is not necessary for an 'attempt' that the

last proximate act to the completion of the offense be done.”⁵⁸ Justice Holmes distinguished between mere preparation to commit a crime and an attempt in the following terms:

But combination, intention, and overt act may all be present without amounting to a criminal attempt,—as if all that were done should be an agreement to murder a man 50 miles away, and the purchase of a pistol for that purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offense.⁵⁹

The importance of the law of attempt to the successful enforcement of abortion law was demonstrated by the Amen investigations in New York in the 1940s. In New York, an offer did not constitute an attempt to commit an abortion for purposes of the criminal law, but an offer could be used in professional disciplinary proceedings. New York Assistant Attorney General John Harlan Amen then proposed a bill to make it “a misdemeanor to offer to perform an abortion,” but this bill failed to pass.

Prior to *Roe v. Wade*, some American courts exercised a leniency toward finding that an attempt to perform an abortion had been committed. In *People v. Cummings*,⁶⁰ for example, a California court held that the fact that a woman was not pregnant was no defense to a conviction for attempted abortion, when the abortionist had begun the performance of the abortion. Impossibility was found to be a factual matter that was no defense to a charge of attempt.⁶¹

Elimination of Abortion Advertising

Another policy which states adopted to curb abortion was to prohibit the advertising of abortion. Contrary to some historical accounts, legal restrictions on abortion clinic advertising did not begin with the Comstock laws of the 1870s. Rather, they began at least as early as 1845, when California passed legislation making it a felony to “willfully write, compose or publish any notice or advertisement of any medicine or means for producing or facilitating a miscarriage or abortion.”⁶² Early in the twentieth century, the Chicago Medical Society began a successful campaign to get Chicago newspapers to cease abortion advertising.⁶³ At least fifteen states banned the advertisement of abortion services or abortifacients.⁶⁴

Enforcement in the Nineteenth Century

Prosecutors in the last half of the nineteenth century were vigorous and successful in many cities, which is where abortion and prosecutions predominated. Abortion advocates note the abortion trade of Madame Restell in New York City and offer it as evidence of social tolerance of abortion, but they ignore the re-

peated prosecutions of her, which eventually led to her suicide before she could be tried yet another time.⁶⁵ Similarly, Dr. Isaac Hathaway of Philadelphia was convicted of performing abortions in 1883 and sentenced to seven years at hard labor.⁶⁶ Dr. McGonegal of New York City was convicted of first degree manslaughter and sentenced to fourteen years in prison in 1890.⁶⁷ In 1894, in New York City, police arrested five abortionists and ten midwives.⁶⁸ The *New York Times* reported the arrests and trials of several other doctors between 1894 and 1896 (Drs. Van Ziles, Lee, Thompson, Kolb).⁶⁹ While there may be evidence that police and prosecutors were lax in their enforcement in some cities, prosecutions were undertaken in major metropolitan areas in every decade throughout the last half of the nineteenth century.⁷⁰

PROGRESS IN ENFORCEMENT IN THE 20TH CENTURY

The Early Decades

Prosecutors throughout the country enforced abortion laws in the early decades of the twentieth century. In the 1930s, prosecutions against abortionists were regularly noted in some newspapers. As usual, evidence was critical. Thomas P. Peters, an assistant Kings County, New York district attorney, in 1929 contrasted the prosecutions with convictions, stating, "prosecutions are frequent, but in my experience convictions are seldom obtained."⁷¹ Dr. Maurice Sturm went on trial for abortion in March, 1930 in New York City. Prosecutions were also brought in New York against Dr. George Rothenberg, Dr. George Haley, Dr. Mulholland, Dr. William Gibson (a county coroner), Dr. Gilbert Ashman, and Dr. Edward Mandell.⁷² A Pacific coast abortion ring was publicized and targeted in the 1930s.⁷³ In a 1936 Los Angeles trial, Reginald Rankin and others were prosecuted for operating the ring. In 1946, authorities in San Francisco prosecuted Dr. Charles B. Caldwell, who was accused of committing an abortion that resulted in a maternal death.⁷⁴ In the 1940s and 1950s, prosecutions for abortion were brought in many states, including New York⁷⁵ and Texas.

The Amen Investigations

Every state in America enacted and enforced laws against abortion in the twentieth century. However, there are a few points in history where sustained, coordinated efforts to improve the enforcement of criminal abortion laws were undertaken. One example is the campaign conducted by New York State Assistant Attorney General John Harlan Amen (1898-1960) in the late 1930s and early 1940s. Amen's investigations grew out of a three year probe that he conducted, upon the appointment of the governor, into municipal corruption in Kings County (Brooklyn), New York. Part of the corruption unearthed included bribery

of assistant district attorneys to obstruct the prosecution of abortionists.⁷⁶

Based on his investigations, Amen identified three primary obstacles to the effective legal control of criminal abortion.⁷⁷ First, abortion prosecution must deal with obtaining evidence against the abortionist. Amen noted that the abortionist, a nurse, and the aborted woman were usually the only persons with knowledge of the crime. The aborted woman would rarely come forward to provide evidence. Evidentiary problems were such that the most effective investigation and prosecution occurred only in those "rare exceptions" when the patient tragically died.

Second, Amen noted that it was difficult to "set the enforcement machinery in motion with the same vigor and efficiency which is displayed in the prosecution of crimes of violence."⁷⁸ This was affected by public opinion, and when "the moral or common sense of the community looks upon criminal abortion with complacency or toleration, it is most difficult for prosecuting officials and courts to extend themselves to the utmost in an effort to secure convictions."⁷⁹

We all know that public opinion plays a large part, not only in placing laws on the statute books, but also in their enforcement. When the moral and common sense of the community are in accord that some particular kind of behavior is wrong, the problem of enforcement becomes relatively simple. Violations are infrequent since there are few who wish to commit them. When committed, the violators are dealt with promptly, vigorously and efficiently.

On the other hand, when public opinion is lukewarm or divided, the problem of law enforcement is tremendously increased. . . . [A] more complete solution of the problem lies in a still further aroused public opinion. Therefore, I think it is safe to say that the greatest obstacle so far encountered to the legal control of abortions is public indifference. So long as there is a widespread public feeling that under certain circumstances an induced abortion should be permissible or justified, certain results inevitably follow. There will be a large market for the services of the criminal abortionist. This practice will remain a profitable field of medical activity. These facts will aid certain doctors in convincing themselves that they are performing a useful public service. The enormous number of abortions performed and the secrecy naturally surrounding them, will impose an insurmountable burden upon the State's investigative and enforcement agencies.⁸⁰

Third, Amen identified the difficulty of "securing punishment sufficiently severe to act as an effective deterrent."⁸¹ He noted that, in New York, abortionists faced not only the criminal abortion statute, but also professional disciplinary provisions involving revocation of their medical license under the Education Law.⁸² As a practical matter, Amen noted that an offer to perform an abortion could subject an abortionist to disciplinary action under the Education Law, but not under the criminal abortion law, where an offer did not constitute an attempt,

which was narrowly defined as "an act performed in an effort to accomplish the actual abortion."⁸³ Thus, under the criminal law, there could "be no criminal prosecution except on proof of an abortion actually performed or attempted."⁸⁴

To make an offer prosecutable as an attempt, Amen recommended to the New York State Legislature that the Penal Law be amended to make it a misdemeanor to offer to perform an abortion. This bill had two purposes. First, it would promote a simpler and speedier form of prosecution by allowing abortion prosecutions to be brought in the New York Court of Special Sessions, where, at that time, misdemeanor cases were tried by three judges. Second, the prosecutions in the Court of Special Sessions could use the same evidence used in the professional disciplinary hearings under the Education Law. The bill was introduced in the New York Legislature, but it failed to pass.

The problem of obtaining evidence was exacerbated in New York by the fact that women who submitted to abortion were technically subject to penalties under the law, even though this was apparently never enforced.⁸⁵ With the constitutional privilege against self-incrimination, an aborted woman could not be compelled to give testimony against an abortionist that could be used simultaneously against her, and thus defense counsel usually urged silence. This privilege could be removed, however, by a grant of immunity from prosecution for the testimony. Such immunity statutes are of two types—"use immunity" and "transaction immunity"—and the statutes compel the testimony and immunize the witness from any prosecution arising from the testimony. Consequently, Amen initiated the introduction of a bill in the New York Legislature that would have made it clear that such immunity applied to abortion prosecutions. The bill was passed and signed by then-Governor Herbert Lehman.⁸⁶

The use of "testers" enhanced the enforcement of abortion law by counteracting the problem of witnesses. Testers are individuals who pose as prospective applicants to "test" the response of the parties who might violate the law. For example, in housing rights cases, testers pose as prospective buyers or renters before real estate agents or landowners. As long ago as the 1930s, testers (or "paid investigators" as they were called in some cases) were used in professional disciplinary investigations in New York State.⁸⁷ As Amen described it, "[i]n abortion cases, a pair of female investigators were often sent to the office of the suspected doctor with the purpose of discovering whether the doctor would offer to perform an abortion. If sufficient evidence of an offer to perform an abortion were secured, charges were prepared on the basis of the investigators' reports and the proceeding was started on the basis of such charges."⁸⁸ Sometimes a man and woman, posing as a husband and wife, would solicit an abortionist. Amen indicates that the use of testers was intimately connected with the law of attempt.

This practice of using female testers seems to have encountered some skepticism in the New York courts in the 1940s. Some courts rejected disciplinary action against abortionists based solely on the testimony of testers without some independent corroboration.⁸⁹ Finally, in 1946, New York's highest court affirmed

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the use of testers, holding that the testimony of two women investigators was sufficient, and did not require independent corroboration.⁹⁰ Female testers seem to have been used in Baltimore too.⁹¹

A fourth essential element relating to the effective enforcement of abortion law was perhaps too obvious for Amen to mention—conscientious and ethical enforcement of the law by public officials. One sociologist suggested that the abortion trade was inevitably connected with (and greatly dependent on) corruption of police and other public officials.⁹² Abortion rights proponents often portray what in fact was official corruption as “official support.”⁹³ The corruption that the Kings County New York Grand Jury documented in a 1941 report may explain the low number of successful administrative complaints reported by the New York Board of Medical Examiners between 1928 and 1934.⁹⁴ Corruption designed to obstruct abortion law enforcement also seems to have been a factor in Portland, Oregon and Los Angeles.⁹⁵ To the extent that there are any facts supporting the abortion proponents’ claim that abortion law was “rarely enforced” in the 1930s but “often enforced” in the 1950s, corruption in New York and Los Angeles may have contributed.⁹⁶ By whatever name, official corruption sometimes impeded law enforcement.

Professional Disciplinary Proceedings

Another method of abortion enforcement, independent of the constraints of the criminal law and the court system, was professional disciplinary proceedings against physician-abortionists. This method was civil, not criminal, and, as a result, one advantage of this method was that a lower standard of proof—one appropriate for civil proceedings—was applied.⁹⁷ With abortion—an area of law where the nature of the offense made evidentiary proceedings particularly difficult—this lower standard of proof was significant.

Although it might be assumed that “self-policing” by physicians might be prone to abuse, New York State in particular seems to have used the professional disciplinary proceeding effectively against abortionists. For nearly thirty five years, between 1936 and 1970, New York successfully suspended or revoked the licenses of abortionists in a series of cases.⁹⁸

As a result of his investigations, John Harlan Amen sought to increase the vigor of the professional disciplinary proceedings. Formerly, the Education Law allowed revocation of license for “a physician [who] did undertake in any manner or by any ways or means whatsoever to do or perform any criminal abortion. “The 1941 Kings County grand jury concluded that this lacked vigor because the law did not make clear that it applied to “the corner druggist, the solicitor” or a physician who did not perform abortions but referred women to abortionists. The grand jury concluded that “effective control of the problem required the imposition of some such punishment” to deter such action because the “vast numbers of criminal operations [abortions] resulted from recommendations of this kind.”⁹⁹

Amen initiated two bills in the New York Legislature to meet this problem. The first bill amended the Education Law to make a referring physician subject to disciplinary proceedings. This was passed and signed on May 8, 1942. A second bill would have amended the Penal Law to make it a misdemeanor for any person to give referral information "as to where or by whom an abortion could be performed." This bill died in the legislature. Unknown to Amen at the time, this action would have serious implications twenty five years later when abortion activists initiated an abortion referral service in New York which undermined the enforcement of the abortion law and led to its eventual repeal in 1970.¹⁰⁰

Finally, Amen sought to streamline the procedures for professional disciplinary proceedings. The Kings County grand jury had found the procedures to be so cumbersome as to be inadequate to deal with the number of disciplinary cases for abortion. Delay was a most significant obstacle, and delay was in the interest of abortionists since they were not suspended during the pendency of the hearings but could continue to practice.¹⁰¹ Amen initiated another bill which would have provided for four significant changes in the disciplinary proceedings: (1) establishment of a full-time medical grievance committee, compensated by the state, (2) elimination of the requirement that representatives of different schools of medicine be on the committee, (3) hearings by the full committee of each case, with the presentation of evidence and legal counsel by an assistant attorney general, and (4) the unanimity requirement for recommendation of punishment reduced to majority vote. Amen believed that such a bill would have gone a long way to "removing some of the serious obstacles to effective legal control of criminal abortion."¹⁰² Although the bill was backed by certain medical societies, it was apparently never introduced. An alternative, compromise measure—not containing the reforms supported by Amen—was apparently introduced with support by members of the Grievance Committee. It passed but was vetoed by Governor Lehman, based on Amen's recommendation.

The result of Amen's singular attempt to invigorate the enforcement of abortion laws in New York is uncertain. Amen went off to Germany at the end of World War II as a Nuremberg war crimes prosecutor. Olasky concluded that the anti-abortion drive in New York in the 1930s lost momentum in the 1940s for three reasons: abortionists used their financial resources to fight the media and legal attack; procedural difficulties hindered the introduction of evidence; and World War II commenced. Yet, even in the early 1950s, a decade after Amen's historic investigations, the Kings County district attorney initiated a vigorous prosecution of abortionists in Kings County.¹⁰³

"THERAPEUTIC ABORTION" COMMITTEES

One new method for monitoring physicians' decision making about induced

abortion—the so-called therapeutic abortion committee—developed in the 1950s. This institution was created not by state legislatures or law enforcement authorities but by doctors and hospitals, to protect themselves from violations of the law.¹⁰⁴ The practice was for a physician contemplating the performance of a “therapeutic” abortion (to save the mother’s life) to obtain an opinion concurring in the judgment from a committee of physicians.¹⁰⁵ According to Dr. Alan Guttmacher—a prominent advocate of the legalization of abortion—in a 1954 article,

The mechanics for authorization of therapeutic abortion vary from hospital to hospital. Each institution has its own rules. These fall into four general patterns: 1. Consultation with one or two other physicians; 2. Review and decision by the chief of the obstetrical and gynecological service; 3. Review and decision by the chief of staff or the medical director of the institution, and 4. Review and decision by a therapeutic abortion committee.¹⁰⁶

Guttmacher predicted that the therapeutic abortion committee would become “standard procedure in another decade.”¹⁰⁷ It was used in other cities, including Baltimore and Chicago.¹⁰⁸

The committee system seems to have inhibited physicians’ individual, arbitrary approval of elective abortions. Guttmacher found that when a therapeutic abortion committee system was used, “a material reduction in the number of requests for therapeutic interruption occurs since cases of questionable merit have little likelihood of being accredited for operation.”¹⁰⁹ He found that this was due to the fact that “the board system has the advantage of consultation among several senior physicians and does not depend on the views of one or two who frequently may have personal interests in affirmative decisions.” He even “praise[d]” it for that reason.¹¹⁰ He declared that “[t]he physicians with no hospital administrative responsibility for the certification and selection of cases for therapeutic abortion advocate the operation far more freely than those who do.”¹¹¹ This sentiment was seconded by Herbert Packer in 1959.¹¹²

Perhaps for the very reason that the committee system inhibited individual, arbitrary decisions approving elective abortions, it served to protect physicians from prosecution. One physician concluded that “no adverse decisions were discovered where there was adequate consultation beforehand and approval by hospital staff committees.”¹¹³

Enforcement Up to *Roe v. Wade*

Abortion rights proponents, relying on anecdotes by fellow opponents of abortion laws, contend that the enforcement of abortion laws before *Roe* was lax.¹¹⁴ However, there is substantial evidence that law enforcement authorities regularly enforced the abortion laws until the Supreme Court’s decision in *Roe*

v. *Wade* in January, 1973. This is seen in reported appellate cases involving abortion in the states in the 1950s and 1960s.¹¹⁵ There were celebrated trials of abortionists in many states. These included Dr. G. Lotrell Timanus of Baltimore, Dr. Roy Odell Knapp of Akron, Ohio, Dr. Robert Spencer in Ashland, Pennsylvania, Geraldine Rhoades in Sacramento in the 1950s, Sophie Miller in St. Louis in 1951, Mary Pagan in Cincinnati in 1953, Grace Schaumer in Wichita in 1954, and San Diego abortionist Laura Miner.¹¹⁶ In 1966, in a state as "liberal" as Oregon, officials prosecuted and shut down an elderly abortionist, Ruth Barnett.¹¹⁷ As late as May, 1972, seven abortionists were arrested in Chicago.¹¹⁸ Massachusetts successfully prosecuted Dr. Benedict Kudish on the eve of *Roe v. Wade*.¹¹⁹ This record suggests that, generally speaking, state officials were not among those advocating legalization of abortion in the 1960s.

Likewise, between 1966 and 1973, many states modified their abortion law, but none to the extent that abortion was liberalized in *Roe v. Wade*—on demand, throughout pregnancy, even in the third trimester. In 1973, thirty one states still retained their pre-*Roe* laws prohibiting abortion except to save the life of the mother. New York modified its law in 1970, but the legislature repealed the change the following year, and that repeal was vetoed by Governor Nelson Rockefeller. Two states—Michigan, by 62 to 28 percent, and North Dakota, by 79 to 21 percent,—rejected modifications of their law by state referenda in late 1972, on the eve of the *Roe* decision. In *state* constitutional challenges to state abortion laws before *Roe v. Wade*, 75 percent of the state courts upheld their abortion laws.¹²⁰ The Supreme Court shut down state prosecutions in January 1973; they were not voluntarily suspended.

The regularity of enforcement is also seen in passing references in histories of abortion. For example, in a 1993 book intended to support legalized abortion, the author notes that of the "former abortionists" she interviewed, "almost all of them had at least one brush with the law."¹²¹ The same author cites a Baltimore doctor in the 1940s and 1950s who refused to perform abortions "because the personal risk to me was too great. There was no way in the world I was going to jeopardize my entire family and risk going to jail."¹²² Although she was extolled as having operated an abortion trade between 1918 and 1968 in Portland, Ruth Barnett indicated that by 1965 "the number of women she was able to help had fallen to a 'relative trickle'."¹²³ Marian Faux, in her history of *Roe v. Wade*, notes that Jane Roe never got an abortion (but placed her child for adoption) because she could not find an abortionist in Texas, despite her original claim (later admitted to be false) that she was pregnant by a gang rape.¹²⁴ Reagan records that persistent police investigations even without prosecutions served as an effective deterrent.¹²⁵

THE EFFECTS OF ENFORCEMENT

An essential function of law is social control. In evaluating law as a method of social control, lawyers and policy analysts reflect on what conduct should be considered criminal, what goals are served by making the conduct criminal, and whether making the conduct criminal is a means well adapted to serving the end of the law.¹²⁶ The criminal law can have both an individual prevention effect and a general prevention effect. Individual prevention involves "the effect of punishment on the punished."¹²⁷ General prevention involves "the ability of criminal law and its enforcement to make citizens law-abiding."¹²⁸ Punishment is understood to have three distinct effects of general prevention: "it may have a *deterrent* effect, it may strengthen *moral inhibitions* (a *moralizing* effect), and it may stimulate habitual *law-abiding conduct*."¹²⁹ The effectiveness or ineffectiveness of a law is not usually relevant to its constitutionality.¹³⁰ As a matter of policy, however, if these questions are *neutrally* applied to the enforcement of abortion law, in the *same* manner they are applied to other areas of law enforcement, they demonstrate the effectiveness of abortion law enforcement up to the time of the Supreme Court's decision in *Roe v. Wade*.

In the assault on abortion law in the 1960s, however, these enforcement questions were *not* neutrally applied to abortion law. The movement to abolish abortion law in the 1960s focused its attack on the effects of enforcement. Opponents contended that the effects outweighed the utility of enforcement. Two themes drove the attack: the number of illegal abortions and the number of women killed or injured by illegal abortion (maternal mortality and morbidity). Usually, incidents of lawbreaking provoke calls for more effective law enforcement, not the abolition of the law itself. For example, during the 1980s, there was an average of more than twenty thousand persons murdered annually in the United States; yet, in slightly less than half of those cases was there a conviction.¹³¹ There are tens of thousands of vehicular homicides, rapes, robberies, and burglaries each year.¹³² It is never suggested that any of these crimes should be legalized because the law is broken or because so many crimes go unpunished. As Professor John Hart Ely wrote in reaction to the *Roe* decision, with considerable understatement, "it is a strange argument for the unconstitutionality of a law that those who evade it suffer."¹³³ Even Justice Blackmun, in his majority opinion in *Roe v. Wade*, noted that "[t]he prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed."¹³⁴ Opponents of abortion law usually ignored any benefit of the law in protecting the unborn, and required that abortion law justify its own utility by demonstrating its general prevention effect to a *higher degree* than that required for any other area of criminal law, or by requiring the complete *elimination* of the crime.¹³⁵ In other words, it was claimed that abortion laws were ineffective because the laws were broken. This type of reasoning, of course, is usually not applied by Policy makers to

other areas of law enforcement, and for good reason.

Some may argue that the only appropriate level of crime is no crime at all. But while it may be technically possible to eradicate crime, the cost of such a policy would most likely be exorbitant, especially in view of the multitude of other demands on public coffers. If there is not an unending supply of public funds and if there are more demands on public coffers than there are funds to satisfy these demands, then the public sector is faced with economic problems of choice and scarcity.¹³⁶

Certain areas of criminal law—like laws against rape—continue to operate without regard to proof of general prevention and despite claims that the incidence of the crime is increasing undeterred.¹³⁷

The disagreement over the importance of general prevention is of course largely due to the fact that its effectiveness cannot be measured. We do not know the true extent of crime. In certain areas of crime there is reason to believe that the figures available for offenses which are prosecuted and punished corresponds roughly to the true incidence of crime. In other areas recorded crimes represent only a small fraction of the true incidence. We know still less about how many people *would* have committed crimes if there had been no threat of punishment.¹³⁸

It was rarely recognized that general deterrence of abortion in a state could be accomplished by one successful, well-publicized prosecution.¹³⁹

Another common argument against abortion laws was that abortion laws “discriminated” against the poor because rich women could “always” procure abortions.¹⁴⁰ This argument, of course, betrays the underlying presumption that abortion is a virtue and not a vice. It ignores the common understanding that society does not repeal criminal laws simply because the rich, unlike the poor, can afford the higher cost of vices caused by criminalization itself (as with narcotics and prostitution, for example).

Illegal Abortions

Much has been written about quantitative studies on numerous aspects of the abortion issue.¹⁴¹ Concerning much of abortion data, there are considerable problems. Judith Leavitt has summarized analogous problems with statistics on childbirth:

We simply do not know how often women in the past found themselves pregnant or even how frequently women labored to give birth. It is only in the twentieth century that the recording of births (live and still) began to be noted reliably by local and state health departments, and even today we cannot cal-

culate precisely the risks women face each time they become pregnant. Because we can not be sure about the number of labors or pregnancies, our statistical conclusions have limited meaning.¹⁴²

These same problems apply, at least in part, to abortion statistics before *Roe v. Wade*. Even since *Roe*, the availability and quality of data has been criticized.¹⁴³

Throughout the twentieth century, social scientists have made widely varying estimates of the number of illegal abortions.¹⁴⁴ In the early part of this century, ambiguous estimates of the number of abortions were expressed by physicians and medical societies in their efforts to suppress illegal abortion. It was frequently stated that illegal abortion was widespread. But there were no data available, and no scientific efforts were made to estimate the numbers.¹⁴⁵ Anecdotal evidence was not evaluated for its representativeness—it was presumed to stand on its own—and to the extent that it came out of large cities, it was most unrepresentative.¹⁴⁶ The problem with all of these early estimates is that there were no hard data, and general labels such as “large” lacked the necessary context for comparison. In effect, the commentators—who seemed to invariably support the legalization of abortion—were often reduced to saying “We can only guess how many there are but it’s a lot.”¹⁴⁷

At a 1942 national abortion conference, it was admitted by a number of physicians and statisticians that it was not possible to estimate reliably the number of illegal abortions, and, often, in making these estimates, distinctions were not drawn between spontaneous, therapeutic, or illegally induced abortions. They acknowledged that there was presently a lack of knowledge and “reliable figures are not available.”¹⁴⁸

A 1991 review by Professor Gerald Rosenberg listed more than twenty estimates of illegal abortions performed nationwide between 1936 and 1972. Another 1994 reviewer cited most of the same estimates.¹⁴⁹ Nearly all of these estimates were either by abortion advocates or by newspapers and magazines without original research. Rosenberg took them at face value despite a significant concession:

while most students of illegal abortion agree that the number was substantial, they have differed markedly on the figures. By the mid-1960’s, however, the range seemed to be settling around 1 million. For obvious reasons of partisanship and lack of hard data, these figures can only be taken as very rough estimates.¹⁵⁰

The best critical analysis of these statistical claims is still Germain Grisez’s 1968 review.¹⁵¹

Most estimates of illegal abortion begin with Frederick Taussig, the leading medical proponent of legalized abortion in the 1930s. His 1936 book on abor-

tion first suggested a figure of 681,600 illegal abortions annually in the United States, and, because his estimate was novel and had the appearance of scientific objectivity, it was widely cited and relied upon.¹⁵² As Grisez and Olasky point out, however, Taussig's figures were extrapolations based on speculations based on isolated figures that could not be demonstrated to be representative. Olasky writes:

Basing his calculations on the records of a New York City birth control clinic, Taussig decided that one abortion took place for every 2.5 confinements [for delivery] in urban areas; he did not note that visits to still-controversial birth control clinics were hardly typical jaunts. He also postulated a rural total of one abortion for every five confinements throughout the United States; his evidence for that were estimates by some physicians in "the rural districts of Iowa." Dubious techniques yielded totals of 403,200 abortions in urban areas and 278,400 in rural areas, for a nationwide annual total of 681,600.¹⁵³

In fact, it is rarely pointed out that Taussig subsequently repudiated his 1936 figure and adopted a lower estimate at a 1942 conference:

I would like . . . to apologize for the very meager information contained in my book, which was published in 1935, on the actual number of abortions and abortion deaths. We had, at that time, the wildest estimates as to the number of abortions and the number of abortion deaths both in Europe and in this country, and I thought the numbers were conservative.

Since 1936, I have reviewed the figures carefully. . . . They were trimmed down considerably, particularly as to the number of abortion deaths. . . . I think we can positively say there do not occur over 5,000 abortion deaths annually in this country, no matter how we try to cull the various brackets in the mortality statistics.¹⁵⁴

J. E. Bates also questioned Taussig's 1936 estimate.¹⁵⁵

Three other studies—by Marie Kopp, Regine Stix, and Alfred Kinsey—are also often cited.¹⁵⁶ Taussig relied on Kopp for his 1936 estimate, but recognized that Kopp's study was unrepresentative. At the 1942 Conference, Dunn was critical of both Kopp and Taussig.¹⁵⁷ Stix acknowledged her own earlier sample to be unrepresentative.¹⁵⁸ The Kinsey study is perhaps the most important because it is the only basis for the 1.2 million "upper limit" suggested by the 1955 Planned Parenthood Conference and the major authority for the standard "1 million" claim in the 1960s. The Kinsey study was based on a sample that was projected for the entire country, but the statistics committee for the 1955 conference doubted the representativeness of the study.¹⁵⁹ Others, like Robert G. Potter, also doubted the reliability of the Kinsey study.¹⁶⁰ Nevertheless, from 1960-1995, abortion advocates have continued to rely on Taussig, Kopp, Stix, or Kin-

sey without acknowledging their admitted weaknesses.¹⁶¹

The widely quoted 1955 Planned Parenthood Conference figure of 200,000-1,200,000 illegal abortions annually was based on meager data and was substantially contradicted by the conference participants themselves. The figure is taken from the statistics committee for the conference, which, in arriving at the figure, significantly qualified its foundation in fact: "There is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency."¹⁶² Indeed, the committee provided no authority for any "objective basis" for any figure *lower* or *higher* than those estimates. In addition, individual conference participants indicated that there were no reliable figures on illegal abortions.¹⁶³

Despite the lack of factual basis for enormous estimates, they were allowed to be taken as common wisdom without verification. For example, a 1962 law review article cited a figure of "more than 1 million" illegal abortions annually based on "the mounting evidence that one out of every five pregnancies in this country terminates in illegal abortion."¹⁶⁴ This was "based upon a conservative estimate of illegal abortions per year, contrasted with the known birth rate" (which begs the question), and then four studies are cited, three of which were published no later than 1936. As late as 1964, J. E. Bates and Edward Zawadzki cited a figure of 1 million abortions annually. They based this figure on four sources: Taussig's 1936 figures, the figures by Kopp that Taussig relied on in 1936,¹⁶⁵ Stix's 1935 figures,¹⁶⁶ and Kinsey/Gebhard's.¹⁶⁷ Still, the figure of 1 million annually was said by Planned Parenthood's statistician, Christopher Tietze, to have become widely accepted in the 1960s.¹⁶⁸

Other contradictory claims by abortion advocates refute the notion of hundreds of thousands of illegal abortions. Zad Leavy and Jerome M. Kummer cited the Planned Parenthood conference in 1955 for the proposition that "an extremely small number of physicians are believed to be engaged in the performance of illegal abortions" and they cited the conference for the proposition that "most of them [physicians] scrupulously refuse even to discuss abortion with their patients."¹⁶⁹ At the same time, Mary Calderone, the medical director of Planned Parenthood who edited the papers of that conference, stated that "90 per cent of all illegal abortions are presently being done by physicians."¹⁷⁰ These two facts together would make it impossible for there to be hundreds of thousands of illegal abortions annually, because it would be impossible for those "extremely small number of physicians" to perform large numbers. High volume has been achieved only since nationwide legalization of abortion by *Roe v. Wade* in 1973.

Another claim is that *Roe v. Wade* did not significantly increase the number of abortions because a high percentage would have occurred anyway. For example, Rosenberg cites figures by abortion rights activists that 70 percent of abortions performed after *Roe* merely *replaced* illegal abortions before *Roe*.¹⁷¹ A 1974 study suggested that "between two-thirds and three fourths—of all legal abortions

in the United States in 1971 were replacements for illegal abortions."¹⁷² The replacement argument, of course, cannot verify pre-*Roe* estimates because it assumes accurate statistics of pre-*Roe* abortions as the denominator in the equation.

In addition to the unreliability of the pre-*Roe* estimates, there are significant reasons now to believe—twenty years after abortion was legalized nationwide—that the claims of even hundreds of thousands of illegal abortions annually in the United States before *Roe v. Wade* were much exaggerated. In light of the conceded lack of data and the widely varying estimates, the most compelling data on the actual number of illegal abortions before *Roe v. Wade* are the data from states which loosened their abortion laws between 1966 and 1973 and the actual increase in the number of legal abortions that were reported after abortion was legalized. If hundreds of thousands of illegal abortions were performed annually in the United States before legalization, there is no reason why these *illegal* abortions would not be reflected in figures on *legal* abortions after legalization. States which legalized abortion between 1967 and 1973 did not report a significant number of abortions in the initial years. For example, California reported only five thousand legal abortions in 1968, the first full year of legalized abortion after the new law became effective in November, 1967.¹⁷³ If there were one hundred thousand illegal abortions annually in California before 1967, why were there only five thousand reported abortions in the first full year of legalization? As a whole, the most dramatic rise in reported abortions came between 1966 and 1972, as nineteen states loosened their laws, not after *Roe*. The numbers grew as legalization grew. The rise in the number of abortions nationally between 1972 (the last year abortion was illegal in most states) and 1974 (the second year after abortion was legalized) was small.¹⁷⁴ Not until 1975—two years after abortion was legalized on demand nationwide and eight years after the states began to loosen their laws—did the number of induced abortions reach one million.

The great rise in the number of abortions *after* abortion was legalized is confirmed by the rise in the *repeat* abortion rate after legalization. The percentage of repeat abortions (the second or third abortion for the woman aborting) has almost tripled since 1973.¹⁷⁵ This, too, shows that legalization dramatically increased the availability of induced abortions.

Maternal Mortality Before *Roe v. Wade*

The fact that some women died from illegal abortions can be reliably determined from abortion prosecutions in the nineteenth and twentieth centuries.¹⁷⁶ The significance of that tragic fact for defining a sound public policy, however, can only be understood by evaluating a number of other factors, including the increase in the number of abortions since legalization and the loss of unborn lives, the threat of injury and death to women from *legal* abortion every year since abortion was legalized, and broader qualitative factors affecting women's

health.

Tales of pain and fear from illegal abortion were the common currency of the abortion reform movement of the 1960s.¹⁷⁷ The constant refrain was that restrictive abortion laws prevented abortions from being performed "under proper conditions and by proper persons."¹⁷⁸ Typical of this genre is Pat Miller's 1993 book, *The Worst of Times* and Rickie Solinger's 1994 book, *The Abortionist*, which recasts Portland abortionist, Ruth Barnett, as an unsung hero. Miller's book is a series of undocumented vignettes. Solinger's book is long on claims and self-justifications but short on facts and documentation. Solinger tries to make out the grossly unrepresentative (by her own account) case of Ruth Barnett to be typical. Conveniently enough, Ruth Barnett died twenty five years ago. The book contains not one footnote citing authorities, references or sources, nor any index, and only a sparse bibliography.

Solinger's overriding themes are belied by the the book's numerous contradictions. For example, Solinger claims that Oregon's law was "tolerant," but the careful reader finds that it treated abortion as manslaughter if either the mother or unborn child was killed. Ruth Barnett supposedly operated undisturbed in Portland between 1930 and 1951, indicating "tolerance," but her boyfriend was a captain in the Police Department.¹⁷⁹ Portland society "tolerated" the abortion trade, but Ruth and her daughter were social pariahs. Public officials "tolerated" abortion, but the "young, politically ambitious" district attorney elected in 1950 was "the sort of official Ruth Barnett had always associated with abortion prosecutions."¹⁸⁰ Ruth was a caring hero who didn't do abortions for the money, but she made (by her own account) \$17 million doing abortions and was financially pressured to maintain her lavish life-style and that of her profligate daughter who could not support herself.¹⁸¹ Abortion was "tolerated" in the 1930s, but a large West Coast abortion operator, Reginald Rankin, was prosecuted in Los Angeles in 1936 and Rankin went to considerable lengths to avoid the law, including successfully bribing an employee of the California State Board of Medical Examiners to dispose of evidence in at least two abortion prosecutions.¹⁸² Abortion was "tolerated" and abortion laws were ineffective, but Barnett was prosecuted numerous times between 1951 and 1968, hindered from performing abortions, under "persistent danger of arrest and imprisonment that dogged her for years," and finally imprisoned as an elderly woman in the late 1960s.¹⁸³ Barnett was revered and admired, but her sister and her cousins did not "like what Ruth did for a living one bit," and Ruth carried on a "war against Portland society" for many years.¹⁸⁴ Everyone in Portland knew what she was doing and tolerated it, but law enforcement "experts never considered the possibility of an abortionist like Ruth. . . ."¹⁸⁵ Even the slick book jacket, with the picture of a beautiful, youthful Ruth in expensive clothes, is belied by the reality of a profligate life-style, a family life in shambles, and a daughter who was married nine times, was an abortion patient of her mother's several times,¹⁸⁶ and could not support herself.¹⁸⁷ The irony is entirely lost on Solinger.

A review of maternal deaths from illegal abortion must begin with a statement by Mary Calderone, the medical director of Planned Parenthood, before the campaign for abortion rights in the 1960s got underway. Calderone said:

Abortion is no longer a dangerous procedure. This applies not just to therapeutic abortions as performed in hospitals but also to so-called illegal abortions as done by physicians. In 1957 there were *only 260 deaths in the whole country attributed to abortions of any kind*. . . . Two corollary factors must be mentioned here: first, chemotherapy and antibiotics have come in, benefiting all surgical procedures as well as abortion. Second, and even more important, the [1955 Planned Parenthood] conference estimated that *90 percent of all illegal abortions are presently done by physicians*. Call them what you will, abortionists or anything else, they are still physicians, trained as such; and many of them are in good standing in their communities. They must do a pretty good job if the death rate is as low as it is. Whatever trouble arises usually comes after self-induced abortions, which comprise approximately 8 percent, or with *the very small percentage that go to some kind of nonmedical abortionist*. Another corollary fact: physicians of impeccable standing are referring their patients for these illegal abortions to the colleagues whom they know are willing to perform them, or they are sending their patients to certain sources outside of this country where abortion is performed. . . . So remember fact number three: abortion, whether therapeutic or illegal, is in the main no longer dangerous, because it is being done well by physicians.¹⁸⁸

This general sentiment was also expressed the year before by Dr. Alan Guttmacher—a participant in the 1955 Conference—in his 1959 book.¹⁸⁹

Three key medical developments before *Roe v. Wade* must be emphasized. First, because of advances in medicine, cases of maternal mortality from all types of causes declined dramatically throughout the first half of the twentieth century.¹⁹⁰ Ironically, as professional support for abortion laws seemingly weakened, the medical need for therapeutic abortions was declining: As Dr. Ewen Cameron wrote in the foreword to Harold Rosen's 1954 book, *Therapeutic Abortion*:

The progress of medicine is rendering therapeutic abortion less and less important, and less and less frequent. The rachitic pelvis is disappearing. The safety of Caesarian section has been immeasurably increased. Tuberculosis is a vanishing disease; and we are by no means so positive as we once were that the offspring of the mentally-deficient woman will be similarly afflicted.¹⁹¹

Doctors were increasingly able to treat pregnant mothers and sustain the pregnancy, and the medical reasons (indications) for therapeutic abortion were consistently decreasing.¹⁹² As early as 1954, Alan Guttmacher said that "[t]he truly legal abortions, in which the procedure is *absolutely essential* to preserve a woman's life are relatively few."¹⁹³ Mary Calderone reached the same conclusion

in 1960: "Medically speaking, that is, from the point of view of diseases of the various systems, cardiac, genitourinary, and so on, *it is hardly ever necessary today* to consider the life of the mother as threatened by a pregnancy."¹⁹⁴ Likewise, Leavy & Kummer wrote in 1962: "The advance of medical science has made rare the situation where illness in a pregnant woman cannot be treated so that her life is not immediately endangered by the pregnancy."¹⁹⁵ By the 1960s, it was widely acknowledged that, with advances in medical science, it was hardly ever necessary to perform an abortion to preserve the life of the mother.¹⁹⁶

Second, owing to the same advances in medicine and the use of antibiotics occurring after World War II, deaths from illegal abortion (the primary reason being infection) were declining because infection was increasingly capable of being treated with medicine.¹⁹⁷ As Dr. Robert Nelson stated at the 1955 conference, "Since that time [1940-43] the deaths from septic abortions [in the District of Columbia] have ranged between five and none."¹⁹⁸ Likewise, Milton Halpern, the Chief Medical Examiner of New York City, stated at the 1955 conference that "annual incidence figures for abortion deaths in New York City . . . show a progressive drop" from one hundred forty four in 1921 to fifteen in 1951.¹⁹⁹ Consequently, as one scholar wrote, "By 1967, the year the [*New York Times*] was declaring 4,000 women dead annually from abortion, there were 133 such deaths on record. The *New York Times* had allowed itself an editorial adjustment of slightly more than 3,000 percent."²⁰⁰ Dr. Bernard Nathanson, a founder of NARAL and a former abortionist who managed a clinic that performed tens of thousands of abortions in the early 1970s, wrote in retrospect:

How many deaths were we talking about when abortion was illegal? In N.A.R.A.L. we generally emphasized the drama of the individual case, not the mass statistics, but when we spoke of the latter it was always "5,000 to 10,000 deaths a year." I confess that I knew the figures were totally false, and I suppose the others did too if they stopped to think of it. But in the "morality" of our revolution, it was a *useful* figure, widely accepted, so why go out of our way to correct it with honest statistics? The overriding concern was to get the laws eliminated, and anything within reason that had to be done was permissible.²⁰¹

Even abortion proponents occasionally recognize the dramatic drop in maternal deaths due to antibiotics.²⁰²

Third, abortion technology improved up to the time of *Roe v. Wade* and after. These three aspects mean that maternal mortality, both generally and from abortion specifically, declined dramatically in the years preceding *Roe v. Wade*. They also mean that even if elective abortion is again criminalized, maternal mortality would continue to be at least as low as it was on the eve of *Roe v. Wade*, if not still lower.

Despite the unreliability of pre-World War II figures and the 1957 figure of 260 maternal deaths from abortions of all kinds, the common claim in the 1960s

was that five thousand to ten thousand women died every year from illegal abortion,²⁰³ and that claim is still made in 1994.²⁰⁴ No author citing a figure of five thousand abortion deaths a year relied on any scientific, official, or government study. The common currency was anecdotes from coroners, or doctors, usually from unrepresentative locations such as public hospitals in the largest cities in the country.²⁰⁵ But even these anecdotes fall far short of supporting the notion that maternal deaths were numerous. For example, Patricia Miller cites an autopsy technician working at a hospital in a large Pennsylvania city from the middle 1950s until 1966 (i.e., the year legalization of abortion started in nineteen states): "At the coroner's office, we would see 3 or 4 deaths a year from illegal abortion."²⁰⁶ These anecdotes never explain how it was medically known that the cause of death was abortion. Nevertheless, based on such anecdotes, the common logic was to speculate, with absolutely no evidence, about "the tip of the iceberg."

In light of Calderone's comment that there were only 260 deaths nationwide in 1957 "attributable to abortions of any kind," what is the five thousand figure based on? That figure was derived from the large estimates of the 1930s, like Taussig's, that preceded World War II and the medical developments that brought about the dramatic decrease in general maternal mortality as well as abortion mortality in the decades after World War II. Even Robert Hall, a leading proponent of legalized abortion in the 1960s, repudiated the claim of five thousand to ten thousand maternal deaths.²⁰⁷

The official figures for maternal deaths from illegal abortion dropped still further in the fifteen years leading up to *Roe v. Wade*. Consequently, in 1972—the last year before *Roe v. Wade*, by which time nineteen states had loosened their laws—the Federal Centers for Disease Control (CDC) reported thirty nine deaths from illegal abortion and twenty four deaths from legal abortion.²⁰⁸ This must be compared with the current figure of at least fifteen deaths per year from legal abortion.²⁰⁹

The Impact on Women's Health

Another major indication of the impact of the enforcement of abortion law is more qualitative. How has legalized abortion affected the overall health and well-being of women compared to the conditions that would prevail if abortion were illegal?²¹⁰

One factor is the danger from *legal* abortion. The argument that death and injury from illegal abortion before *Roe* were directly attributable to abortion laws is based on individual, dramatic stories, not on reliable data. Yet, each pre-*Roe* anecdotal account of abortion deaths and injuries can be matched with a similar account from a legal abortion between 1973 and 1995. Each account of a fearful woman suffering before *Roe* can be matched by another fearful woman after *Roe*. Today, many abortions are done on a cash basis, most counseling is group coun-

seling by nonphysicians, women never meet the abortionist until they are gowned and in stirrups, the abortion takes eight minutes, and the woman never sees the abortionist again.²¹¹

The common claim is that *illegal* abortion is invariably unsafe and *legal* abortion is invariably safe. Yet, the safety of abortion (for the woman) depends on technology, medicine, and the experience of the abortionist. The technology has reached a significant level, and that same technology would exist even if elective abortion were prohibited. Most of the pre-*Roe* maternal deaths—from all causes—were due to infection, and when antibiotics were introduced widely in the 1940s, maternal deaths declined precipitously. Again, as Mary Calderone wrote in 1960, there were only 260 maternal deaths from all causes in 1957.²¹² Yet, some of the most experienced physician-abortionists still cause the death of women through abortion.²¹³ Legal proscriptions on abortion would not change these developments in medicine and technology.

In addition, twenty one years of legalized abortion has done little to shed abortion of its negative social and medical stigma, which is directly caused by consciously taking human life. That stigma still dissuades most ethical and competent physicians from getting into the business, and, consequently, it means that many abortionists lack high standards of skill and medical ethics.²¹⁴

In fact, hundreds of women have died from legal abortion since 1973.²¹⁵ For each anecdote of a maternal death before *Roe*, there is an incident of maternal death from legal abortion since *Roe*. Take the case of thirteen-year-old Dawn Ravenell, who died after an abortion in New York City in January, 1985;²¹⁶ or twenty one-year-old Angelica Duarte, who bled to death from a perforated uterus after an abortion at the Women's Place Clinic in Las Vegas in October, 1991; or seventeen-year-old Latachie Veal, who died in Houston in November 1991 after an abortion at the West Loop Clinic; or thirteen-year-old Deanna Bell, who died in Chicago in September, 1992 after an abortion at the Albany Medical Surgical Center; or Guadalupe Negron, the thirty three-year-old mother of four who died in July 1993 in New York City from a punctured uterus and resulting blood loss; or Pamela Colson, who died from a perforated uterus, lacerated uterine artery, and loss of blood after an abortion in June 1994 at Women's Medical Services in Pensacola, Florida;²¹⁷ or Magdalena Ortega Rodriguez, a twenty three-year-old who died from a perforated uterus in December 1994 after an abortion in San Ysidro, California.²¹⁸ Numerous abortion malpractice suits are filed in local courts around the country every year for injuries short of death. Today, the "back alley" is on Michigan Avenue.

Besides the evidence of mortality and morbidity from legal abortion is additional evidence about the broader impact of legalized abortion on women's health. One indication of the impact on women's health is the repeat abortion rate, which had climbed to at least 42 percent of all abortions by 1988.²¹⁹ Numerous studies indicate that many women suffer psychological pain from abortion. Although "unwanted children" was a common reason cited for the need for

legal abortion before *Roe v. Wade*, the illegitimacy rate has only increased since 1973.²²⁰ Abortion has not solved "child unwantedness;" on the contrary, reported cases of child abuse have dramatically increased in the past twenty years.²²¹ Female deaths from AIDS have increased dramatically over the past decade.²²² There has been a five-fold increase in hospitalizations for ectopic pregnancies over the past twenty years.²²³ Recently, researchers with the National Cancer Institute reported that women may face a higher risk of breast cancer after abortion.²²⁴ Many of these negative health trends for women are associated with sexual behavior patterns as well as with the legalization of abortion, and, as such, they impact on the merits of legal abortion.

CONCLUSION

Abortion laws can be successfully enforced, and abortion can be contained. This is demonstrated by the enforcement of abortion laws in the nineteenth and twentieth centuries as medical science developed more effective means of determining pregnancy, proving abortion, and reducing the medical indications for therapeutic abortion.

But the history of abortion law enforcement teaches us that attention must be given to several considerations. First, complete reliance for curtailing abortion should not be placed on criminal abortion laws. They are a necessary part of containing abortion, but the surrounding cultural and sociological conditions that create the demand for abortion must be understood and counteracted in concert with the enforcement of criminal prohibitions. Second, public opinion must be respected and cultivated. We must remember that print and electronic media can either assist or undermine abortion law enforcement. Third, abortion should be recognized as a business, and the market conditions that sustain it must be understood and inhibited. By understanding the market conditions that make abortion thrive, and by inhibiting them, reliance on criminal prohibitions can be reduced. Fourth, progress in medical science that allows fetal therapy, treatment, and surgery in utero clearly demonstrate the full humanity of the unborn child, and can be utilized to prove the *corpus delicti* of the crime with increasing sophistication. Finally, consideration must be given to the desperation with which some women seek abortion, and compassionate public or private social services must be increased and improved to support and complement the successful enforcement of abortion law.

A number of general conditions have marked the conduct of the abortion industry since nationwide legalization of abortion on demand by *Roe v. Wade*. Attention to these conditions will be necessary to successfully suppress the market after *Roe* is overturned. Legalization under *Roe* is virtually absolute and characterized by a significant lack of regulation, except for the requirement that the abortionist be a licensed physician. State and municipal health departments do

very little to regulate clinics, and when they do, the courts often issue injunctions.²²⁵ Within five years after the *Roe* decision, it became clear that the social stigma against doctors for performing elective abortion was not going to disappear, and that abortions were not going to be performed generally by the medical profession. Nor were hospitals going to get into the business of providing a high volume of elective abortions. The notion that abortion was "between a woman and her physician" quickly became a myth. Few women sought abortions from their family or personal physician; most sought abortions from high volume abortionists whom they had never seen before. As a result, the abortion business became limited to a relatively small number of abortionists practicing in about eight hundred assembly-line specialty clinics. By limiting the business to a small number of abortionists in assembly-line clinics, the abortion industry became dependent on high volume operation—a situation which requires physicians, if they wish to stay in business, to spend very little time with their patients, provide little counseling, and operate on an outpatient basis. Thus, it would seem that reducing high volume by itself would make abortion unprofitable.

The criminal law has played an essential role in the enforcement of abortion law for centuries. It has played a teaching role, emphasizing that abortion is the taking of human life. It has also inhibited the performance of abortions, and it has resulted in criminal convictions. But the best evidence indicates that the effectiveness of the criminal law in inhibiting abortion and protecting women and children from abortion has gone through an ebb and flow over the decades. It has not been entirely successful in stopping abortion. When the mixed record of effectiveness of other criminal laws is considered, this fact is unsurprising. The historical evidence indicates that supplementary enforcement schemes and nonlegal mechanisms are needed to bolster the effectiveness of the criminal law. The criminal law is a relatively blunt instrument in inhibiting abortion. Other steps must be taken to relieve the burden of reducing abortion from the criminal law, these include: significantly reducing unplanned pregnancies and the desperate pressure that induces women to consider abortion; encouraging men to assume responsibility and support for women they have impregnated; offering realistic, practicable alternatives for women in crisis pregnancies. These difficult but essential measures will not only ease the burden from the criminal law, but thereby make the criminal law more effective in protecting human life. This is asking no more than society asks of other aspects of criminal law, all of which depend on general deterrence along with the habits and character of the populace.

Support for such broader efforts has been ongoing throughout the United States. Public and private services exist throughout the country. There are thousands of private pregnancy care centers. But, as yet, these public and private services have been unsuccessful in stemming the tide of abortions, a tide that swelled to the rate of 1.6 million per year in the 1980s.

The overruling of *Roe v. Wade* will provide an essential first step in produc-

ing the climate in which a more meaningful balance can be achieved, with public and private services, between the rights of women to full civil, economic, and political equality of opportunity and those of the unborn child. *Roe's* policy of abortion on demand clearly increased the number of abortions dramatically, fostered the widest possible advertising of abortion, crippled the states from inhibiting the abortion industry, and eliminated the economic attractiveness of any alternatives to abortion on demand. By raising the cost of abortion, other alternatives can be made more attractive. New coordination and publicity about available public and private services are needed to make them more attractive to women, and to help women avoid the tragic and deadly choice of abortion.

NOTES

1. Alan Keyes, in a speech given to the New Hampshire Republican State Committee, 19 February 1995.

2. John T. Noonan, Jr. *A Private Choice* (New York: Free Press, 1979), p. 192.

3. I am grateful for comments on an earlier draft by Joseph Dellapenna, Marvin Olasky, Paul Linton, Paige Cunningham, Lynn Murphy and Brian Clowes, for the research assistance of Kirsten Hildebrand (J.D. expected, University of Wisconsin, 1996) and John Little (J.D. Jones College of Law, expected 1996), and for the technical assistance of Margee Connolly and Roger Lewis. (*Since this essay is researched and written in the manner of a legal review, the notation style is different from the other chapters in this book—Ed.*)

4. 410 U.S. 113 (1973).

5. See e.g., Rickie Solinger, *The Abortionist: A Woman Against the Law* (New York: Free Press, 1994); Patricia G. Miller, *The Worst of Times* (New York: Harper-Collins, 1993); Ellen Messer and Kathryn E. May, *Back Rooms: Voices from the Illegal Abortion Era* (Buffalo, N. Y.: Prometheus Books, 1988); Mark A. Graber, "The Ghost of Abortion Past: Pre-Roe Abortion Law in Action," 1 *Va. J. Soc. Pol. and Law* 309 (1994); Rickie Solinger, "A Complete Disaster: Abortion and the Politics of Hospital Abortion Committees, 1950-1970," 19 *Feminist Studies* 241 (Summer 1993); Carole Joffe, "Portraits of Three Physicians of Conscience: Abortion Before Legalization in the United States," 2 *J. Hist. Sexuality* 46 (July 1991); Leslie J. Reagan, "About to Meet Her Maker: Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940," 77 *J. Amer. Hist.* 1240 (March 1991); Samuel W. Buell, "Criminal Abortion Revisited," 66 *N.Y.U.L. Rev.* 1774 (1991).

6. James Davison Hunter, *Before the Shooting Begins: Searching for Democracy in America's Culture Wars* 95 (New York: Free Press, 1994), (reporting that one-half of those surveyed in a 1990 Gallup Poll said that "the right to be born outweighs the right to choose at the instant of conception," *Ibid* at 95, and that 47 percent of those self-identified as "pro-choice" "favor a restriction of abortions after the third month of pregnancy unless it is required to save a woman's life." *Ibid* at 101).

7. 112 S.Ct. 2792 (1992).

8. See generally, Joseph W. Dellapenna, "The History of Abortion: Technology, Morality and Law," 40 *U. Pitt. L. Rev.* 359 (1979); Clarke D. Forsythe, "Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms," 21 *Val. U.L. Rev.* 563 (1987).

9. See generally, *The Fetus As A Patient '87: Proceedings of the Third Inter'l Symposium* held in Matsue, Japan, 20-23 July 1987, (Kazuo Maeda ed., New York: Elsevier Science Publications, 1987); *The Fetus As A Patient, Proceedings of the First Inter'l Symposium* held in Sveti Stefan, Yugoslavia, 4-7 June 1984, (Asim Kurjak ed., New York: Elsevier Science Publications, 1985); M. Harrison et al., *The Unborn Patient: Prenatal Diagnosis and Treatment* (Orlando, Florida: Grune and Stratton, 1984); E. Volpe, *Patient in the Womb* (Macon, Georgia: Mercer, 1984); Michael R. Harrison, et al., "Successful Repair in Utero of a Fetal Diaphragmatic Hernia after Removal of Herniated Viscera from the Left Thorax," 322 *N. Eng. J. Med.* 1582 (1990).

10. Joseph D. Schulman, "Treatment of the Embryo and the Fetus in the First Trimester," 35 *Am. J. Med. Genetics* 197 (1990).

11. See generally, Forsythe, *supra* note 8.

12. Carl J. Pauerstein, ed., *Clinical Obstetrics* 110-114 (New York: John Wiley & Sons, 1987); Miller, *The Worst of Times*, 19.

13. See generally, Forsythe, *supra* note 8. As one mid-nineteenth century treatise stated:

The signs of abortion, as obtained by an examination of the female, are not very certain in their character. It is seldom, indeed, that an examination of the living female is had, and especially at a period early enough to afford any valuable indications. When abortion occurs in the early months, it leaves but slight and evanescent traces behind it.

James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* 72 (New York: Oxford University Press, 1980) (quoting Francis Wharton and Moreton Stille, *Treatise on Medical Jurisprudence* 277 (Philadelphia, 1855)).

14. As late as the first decade of the twentieth-century, medical conferences of the American Medical Association recorded expressions of frustration by physicians that the public still held to the notion that the life of the child began with quickening and that the truth that human life began with conception was not widely understood. See, e.g., Walter Dorsett, M.D., "Criminal Abortion in its Broadest Sense," 51 *J. Amer. Med. Assoc.* 957 (19 Sept. 1908) (statement during discussion by R.W. Holmes, M.D. of Chicago: "The fact should be taught that life begins with conception and not with quickening. Many now make themselves believe that there is no life until the movements are felt."); *Ibid.* at 961 ("If our statutes are to accomplish the results they should we must first educate the public mind and morals to the belief that conception means human life, and that the interruption or destruction of that conception means murder just as much as if the child had been murdered with a bludgeon after it had been delivered into the world.") (Statement of Dr. Florus F. Lawrence).

15. See generally, Forsythe, *supra* note 8.
16. *Ibid.*
17. See generally, Forsythe, *supra* note 8.
18. See Joseph Dellapenna, *Dispelling the Myths of Abortion History*, Part XV, at 1-3 (unpublished manuscript) (hereafter Dellapenna, *Dispelling*).

Thereafter, English courts prosecuted abortions fairly routinely under the early Stuarts, Cromwell's Commonwealth and the Restoration. With the exception of Sir Matthew Hale's holding that the death of a mother from an abortion was a felony homicide, these later seventeenth-century cases produced convictions only for misdemeanors, lending credence to Coke's conclusion that abortion before quickening was only a misdemeanor. All important later commentators on the criminal law followed Coke's dictum in describing the law relating to abortions. By the opening of the eighteenth century, then, the criminality of abortion under the common law was well-established: courts had rendered clear holdings that abortion was a crime, no decision indicated that any form of abortion was lawful, and secondary authorities similarly uniformly supported the criminality of abortion.

See also Philip A. Rafferty, *Roe v. Wade: The Birth of a Constitutional Right* (Ann Arbor: U. M. I. dissertation services, 1992).

19. See, e.g., Glanville Williams, *The Sanctity of Life and the Criminal Law* 152 (New York: Knopf, 1957) ("Abortion before quickening was no crime."); Zad Leavy, "Criminal Abortion: Facing the Facts," *Los Angeles B. Bull.* 355 n.1 (Oct. 1959) (citing Williams, *supra*).

20. Cf. 1 William Blackstone, *Commentaries on the Laws of England* 125 (Chicago: U. Chi. Press edition, 1979), (concluding that "[l]ife is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb") (on the "Rights of Persons") with 4 Blackstone 198 ("To kill a child in it's [sic] mother's womb, is now no murder, but a great misprision: but if the child be born alive, and dieth by reason of the potion or bruises it received in the womb, it is murder in such as administered or gave them.").

21. See generally, John Keown, *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (New York: Cambridge University Press, 1988); Joseph W. Dellapenna, "The History of Abortion: Technology, Morality and Law," 40 *U. Pitts. L. Rev.* 359 (1979); Joseph Dellapenna, "Brief of the American Academy of Medical Ethics as Amicus Curiae in Support of Defendants-Appellants, *Hope v. Perales*," 83 N.Y.2d 563, 634 N.E.2d 183, 611 N.Y.S.2d 811 (1994) [hereinafter Brief of AAME]; Joseph W. Dellapenna, "The Historical Case Against Abortion," 13 *Continuity* 59 (1989).

22. Cyril C. Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," 14 *N.Y. Law Forum* 411 (1968); Cyril C. Means, "The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?," 17 *N.Y. Law Forum* 335

(1971). NARAL was first the National Association for the Repeal of Abortion Law, then the National Abortion Rights Action League, now the National Abortion and Reproductive Rights Action League. See also Rafferty, *Roe v. Wade: The Birth of a Constitutional Right*.

23. *Rex v. de Bourton* (The Twinslayer's Case), Y.B. Mich. 1 Edw. 3, f. 23, pl. 28 (K.B. 1327); *Rex v. Anonymous* (The Abortionist's Case), in Sir Anthony Fitzherbert, *Graunde Abridgement* tit. Corone, f. 268, pl. 263 (1st ed. 1516)[K.B. 1348]. Although Means implies that he discovered these cases, they were known by several judges and authorities before 1900, and no one before Means had ever suggested that the cases established any abortion "liberty." Justice Holmes cited them in his opinion for the Massachusetts Supreme Judicial Court in *Dietrich v. Northampton*, 138 Mass. 14 (1884). See Clarke D. Forsythe, "The Legacy of Oliver Wendell Holmes," 69 *U. Det. Mercy L. Rev.* 677, 685-689 (1992).

24. Dellapenna, *Dispelling*, supra note 18; Robert A. Destro, "Abortion and the Constitution: The Need for a Life-Protective Amendment," 63 *Cal. L. Rev.* 1250 (1975); Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," 41 *Fordham L. Rev.* 807 (1973).

25. At least fifteen cases for abortion have been discovered, dating back to 1256. Dellapenna, Brief for the American Academy of Medical Ethics (AAME), supra note 21, at 13 n.18 (citing *R. v. Haule*, JUST 1/547A, m.20d (London Eyre 1321); *R. v. Kultavenan*, Calendar of Justiciary Roles or Proc. in the Ct. of the Justiciar of Ireland I to VII Years of Edward II, at 193 (Dublin Stationary Off., n.d.) (Cork, Ireland 1311); *R.v. Code*, JUST 1/789, m.1. (Hampshire Eyre 1281) [see Appendix B, at B-3]; *R. v. Ragoun*, JUST 1/547A, m.55d (London Eyre 1310); *R. v. Eppinge*, JUST 1/547A, m.46 (ms. dated 1321) (London Eyre 1304); *R. v. Hervy*, JUST 1/547A, m. 40d (1300, ms. dated 1321); *R. v. Hokkestere*, JUST 1/547A., m.3. (London Eyre 1298, ms. date 1321); *R. v. Scot*, JUST 1/547A, m.22 (1291, ms. dated 1321); *R. v. Dada*, JUST 1/547A, m.19d (1290, ms. dated 1321); *R. v. Cliston*, JUST 1/1011, m.62 (Wiltshire Eyre 1288); *R. v. Mercer*, JUST 1/710, m.45 (Oxford Eyre 1285) [see Appendix B, at B-4]; *R. v. Brente*, JUST 1/186, m.30 Devon Eyre 1281); *R. v. Code*, supra; *R. v. Scharp*, The London Eyre of 1276, at 23 (no. 76) (London Rec. Soc'y 1976); *Juliana's Appeal* (1256?) Somerset Pleas (Civ. and Crim.) from the Rolls of the Itinerant Justices 321 (no. 1243) (1897) [see Appendix B, at B-3]; *Erneburga's Appeal*, JUST 1/175, m.38 (1249). See also *R. v. Haunsard*, JUST 1/548, m.4. (London Eyre 1329) (defendant convicted of causing an abortion in the course of extorting money); *R. v. Clouet*, (1304), Cal. Ch. Warrants in the Pub. Rec. Off. Prepared under the Superintendence of the Deputy Keeper of the Rec., A.D. 1244-1326, at 232 (London 1927) (pardon; Island of Guernsey); *R. v. Cheney*, JUST 1/323, m.47d (Hertfordshire Eyre 1278) (defendant amerced in trespass for an accidental abortion caused by defendant's horse); *R. v. Cordwaner*, The London Eyre of 1276, at 18 (no. 62) (London Rec. Soc'y 1976) (defendant outlawed for causing the birth of a child; unclear whether the child died). There is stronger evidence, beginning in the 1500s, that elective abortion was treated as a crime. *Ibid.* at 14 (citing *R. v. Lichefeld*, K.B. 27/974, Rex. m.4 (1505)). In two other cases, a man was indicted for encouraging a woman to take an abortifacient and a woman was sentenced to death for

performing an abortion by "witchcraft." Ibid. (citing *R. v. Wodlake*, K.B. 9/513/m.23, K.B. 9/513/j.23d (1530), K.B. 29/162/m.11d (1531); *R. v. Turnour*, Assize 35/23/29 (Essex 1581)).

In 1732, there was a misdemeanor conviction for a prequickening abortion. *Rex v. Beare*, 2 *The Gentleman's Magazine* 931 (Aug. 1732). See also 2 *The Newgate Calendar* 315-16 (Andrew Knapp and William Baldwin eds. 1825). See also Rafferty, *Roe v. Wade: The Birth of a Constitutional Right*.

26. See, e.g., Norma McCorvey, *I Am Roe: My Life, Roe v. Wade, and Freedom of Choice* 8 (New York: HarperCollins, 1994) ("English law...held that abortion was legal up until the moment a fetus 'quickened'....In England, an abortion after quickening became a crime in 1803."); See also generally Solinger, *The Abortionist*, supra note 5; Reagan, supra note 5, at 1241.

27. *State v. Cooper*, 22 N.J. (2 Zab.) 52 (1849); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845).

28. *Eggart v. State*, 40 Fla. 527, 25 So. 144, 145 (Fla. 1898) (dictum in case decided under statute abolishing quickening distinction); *Arnold v. Gaylord*, 16 R.I. 573, 576, 18 A. 177, 178-79 (R.I. 1889) (dictum in loss of services case); *People v. Sessions*, 58 Mich. 594 (1886); *State v. Emerick*, 13 Mo.App. 492, 495-98 (1883) (dictum in case decided under statute), aff'd, 87 Mo. 110 (1885); *Mitchell v. Commonwealth*, 78 Ky. 204, 205-10 (1879) (reversing conviction where indictment failed to allege that "the woman was quick with child"); *Evans v. People*, 49 N.Y. 86, 88 (1872) (dictum in case reversing conviction under manslaughter statute); *Smith v. Gaffard*, 31 Ala. 45 (1857) (dictum in slander case); *Abrams v. Foshee*, 3 Iowa 273 (1856) (dictum in slander case); *Smith v. State*, 33 Me. 48 (1851); *Commonwealth v. Parker*, 50 Mass. (9 Met.) 263 (1845); *State v. Cooper*, 22 N.J.L. 52 (1849) (dictum in case upholding indictment charging defendant with assault); *Commonwealth v. Bangs*, 9 Mass. 387, 387-88 (1812) (arresting judgment where indictment failed to allege that "the woman was quick with child").

29. It was recognized that:

[A]s the life of an infant was not supposed to begin until it stirred in the mother's womb, it was not regarded as a criminal offense to commit an abortion in the early stages of pregnancy. A considerable change in the law has taken place in many jurisdictions by the silent and steady progress of judicial opinion; and it has been frequently held by Courts of high character that abortion is a crime at common law without regard to the stage of pregnancy.

Lamb v. State, 67 Md. 524, 533, 10 A. 208 (Md. 1887). See also, *State v. Reed*, 45 Ark. 333, 334 (1885); *State v. Slagle*, 82 N.C. 630, 632 (1880); *Mills v. Commonwealth*, 13 Pa. 630, 632-33 (1850); *Marmaduke v. People*, 45 Colo. 357, 361-62, 101 P. 337, 338 (Colo. 1909).

30. Bishop, *Statutory Crimes* § 744, at 447 (2d ed. 1883); F. Wharton, *American Criminal Law* § 1220-30, at 210-18 (6th rev. ed. 1868). In the 20th century, Burdick said that these two authors were "the two most frequently cited American writers" on the criminal law." W. Burdick, *Law of Crime* v (foreword) (New York: M. Bender and

Co., 1946).

31. Julia Cherry Spruill refers to the case of Captain Mitchell in Maryland in 1652, who "was accused of a number of crimes, among which was attempted abortion." J. Spruill, *Women's Life and Work in the Southern Colonies* 325-26 (New York: Russell & Russell, 1938). She also refers to the seventeenth-century case of Elizabeth Robins, who was accused of "taking medicine to destroy her child." *Ibid.* at 325-26. A Rhode Island case of 1683 has also been discovered. There, a Deborah Allen was convicted and punished for "indeavoringe the dithuchion of the Child in her womb." L. Koehler, *A Search for Power: The "Weaker Sex" in Seventeenth-Century New England* 329 and n. 132 (Urbana: University of Illinois Press, 1980).

There are few reported cases and this may be because there were few abortions. At least historian Catherine Scholten has concluded that "few [women] tried to limit their pregnancies by birth control or abortion." C. Scholten, *Childbearing in American Society 1650-1850* 9 (New York: New York University Press, 1985).

32. Paul Linton, "Planned Parenthood v. Casey: The Flight From Reason in the Supreme Court," 13 *St. Louis Pub. L. Rev.* 15, 109-113 (1994) (Appendix A).

33. Dellapenna, *Dispelling*, supra note 18, at Part VIII; Mohr, supra note 13, at 276 n.15 ("[t]he nineteenth century had no preparations capable of directly producing abortion, though contemporary physicians and the public believed otherwise").

34. Marvin Olasky, *Abortion Rites: A Social History of Abortion in America* 43-59 (Wheaton, Ill.: Crossway Books, 1992).

35. Dellapenna, *Dispelling*, supra note 18, at Part IX, p. 38.

36. See Dennis J. Horan and Thomas J. Marzen, "Abortion and Midwifery: A Footnote in Legal History," in *New Perspectives on Human Abortion* 199 (Thomas W. Hilgers, et al., eds., Frederick, Md.: University Publications of America, 1981) (citing 3 Minutes of the Common Council of the City of New York 121 (1712-1729)); S. Massengill, *A Sketch of Medicine and Pharmacy* 294 (Bristol, Tenn.: S. E. Massengill Co., 2d ed. 1942).

37. Otto Pollak, *The Criminality of Women* 45-46 (Philadelphia: U. Penn. Press 1950, Perpetua paper ed. 1961)

The best illustration of the degree to which the criminal behavior of the abortee herself is disregarded by our law-enforcing agencies can be found in the proceedings against the Pacific Coast Abortion Ring...in the thirties. Not one of the women who had engaged the services of this organization seems to have been prosecuted, however.

See also, Reagan, supra note 5, at 1243-44 ("women were not arrested, prosecuted, or incarcerated for having abortions..."); Paul Linton, "Enforcement of State Abortion Statutes after Roe: A State-By-State Analysis," 67 *U. Det. Mercy L. Rev.* 157, 163-64 and n. 31 (1990).

38. Dellapenna, *Dispelling*, supra note 18, Part VIII at 25 and n.78.

39. Cf. Pollak, supra note 37, at 2 ("being an accessory to statutory rape is hardly ever charged to a woman").

40. See, e.g., *People v. Reinard*, 33 Cal.Rptr. 908, 912, 220 Cal.App.2d 720, 724 (Cal. Dist. Ct. App. 1963) ("The abortee is considered the victim of the crime."); *Basoff v. State*, 208 Md. 643, 654, 118 A.2d 917, 923 (1956) ("regarded by the law as a victim of the crime, rather than as a participant in it."); *Thompson v. United States*, 30 App.D.C. 352, 363 (1908) ("She is regarded as his victim, rather than an accomplice."); *People v. Dunn* (NY).

41. See, e.g., *Petition of Vickers*, 371 Mich. 114, 115, 123 N.W.2d 253, 254 (Mich. 1963) ("The majority view is that not only may she not be held for abortion upon herself but neither as an accomplice.").

42. Paul D. Wohlers, *Women and Abortion: Prospects of Criminal Charges* 1 (Washington D. C.: The American Center for Bioethics, undated).

43. See, e.g., *State v. Barnett*, 249 Or. 226, 228, 437 P.2d 821, 822 (Or. 1968); *Zutz v. State*, 52 Del. 492, 160 A.2d 727 (Del. 1967); *People v. Kutz*, 9 Cal.Rptr. 626, 187 Cal.App.2d 431 (Cal. Dist. Ct. App. 1961) (not an accomplice); *State v. Miller*, 364 Mo. 320, 261 S.W.2d 103 (Mo. 1953); *People v. Stone*, 89 Cal.App.2d 853, 202 P.2d 333 (Cal. Dist. Ct. App. 1949); *People v. Clapp*, 24 Cal.2d 835, 151 P.2d 237 (Cal. 1944); *Commonwealth v. Sierakowski*, 154 Pa.Super.Ct. 321, 327, 35 A.2d 790, 793 (Pa. 1944) ("not an accomplice or particeps criminis."); *People v. Blank*, 283 N.Y. 526, 29 N.E.2d 73 (N.Y. 1940); *State v. Burlingame*, 47 S.D. 332, 337, 198 N.W. 824, 826 (S.D. 1924) (regarded as victim rather than an accomplice or participant); *State v. McCurtain*, 52 Utah 63, 172 P. 481 (Utah 1918); *Gray v. State*, 77 Tex. Crim. 221, 229, 178 S.W. 337, 341 (Tex. Crim. App. 1915) (not an accomplice); *Seifert v. State*, 160 Ind. 464, 67 N.E. 100 (Ind. 1903); *State v. Pearce*, 56 Minn. 226, 230, 57 N.W. 652, 653 (Minn. 1894) ("She was the victim of a cruel act."); *People v. McGonegal*, 136 N.Y. 62, 32 N.E. 616 (N.Y. 1892); *People v. Vedder*, 98 N.Y. 630, 632 (1885).

The only apparent exception was Alabama. *Trent v. State*, 15 Ala.App. 485, 73 So. 834 (Ala. Ct. App. 1916). See also *Dykes v. State*, 30 Ala.App. 129, 1 So.2d 754 (Ala. Ct. App. 1941); *Steed v. State*, 27 Ala.App.263, 170 So. 489 (Ala. Ct. App. 1936). As in the other cases, the woman's guilt was not the issue but whether her status as an accomplice prevented the introduction of evidence without corroboration. The court concluded, however, that the woman should be considered an accomplice because the statute would otherwise lose its moral force. This rationale, however, never influenced other states.

44. Wohlers, *supra* note 42, at 2.

45. *State v. Barnett*, 249 Or. 226, 228, 437 P.2d 821, 822 (1968) ("The acts prohibited are those which are performed upon the mother rather than any action taken by her. She is the object of the acts prohibited rather than the actor.").

46. See generally, *Linton*, *supra* note 37, at 163-64 n.31.

47. *Reagan*, *supra* note 5, at 1244.

48. Cf. Wohlers, *supra* note 42, at 8-10 (citing *Gaines v. Wolcott*, 119 Ga.App. 313, 167 S.E.2d 366 (Ga. Ct. App. 1969), *aff'd*, 225 Ga. 373, 169 S.E.2d 165 (Ga. 1969) (woman can sue abortionist for negligence); *Henrie v. Griffith*, 395 P.2d 809 (Okla. 1965); *Castronovo v. Murawsky*, 3 Ill.App.2d 168, 120 N.E.2d 871 (Ill. App.

Ct. 1954) (woman cannot recover for negligence); *True v. Older*, 227 Minn. 154, 34 N.W.2d 200 (1948) (woman could recover); *Nash v. Meyer*, 54 Idaho 283, 31 P.2d 273 (Idaho 1934) (woman cannot recover for negligence); *Martin v. Morris*, 163 Tenn. 10, 42 S.W.2d 207 (Tenn. 1931) (woman cannot recover); *Andrews v. Coulter*, 163 Wash. 429, 1 P.2d 320 (Wash. 1931) (woman could not recover damages for abortion but could recover for negligent treatment after abortion); *Martin v. Hardesty*, 91 Ind.App. 239, 163 N.E. 610 (Ind. App. 1928) (estate could recover after abortion death); *Szadiwicz v. Cantor*, 257 Mass. 518, 154 N.E. 251 (Mass. 1926) (woman could not recover); *Milliken v. Heddeshheimer*, 110 Ohio St. 381, 144 N.E. 264 (Ohio Ct. App. 1924) (woman's estate could recover); *Hunter v. Wheate*, 63 App.D.C. 206, 289 F. 604 (D.C. Cir. 1923) (woman could not recover even if she was not an accomplice); *Lembo v. Donnell*, 117 Me. 143, 103 A. 11 (1918) (woman could recover); *Larocque v. Couneim*, 87 N.Y.S. 625, 42 Misc. 613 (N.Y. Sup. Ct. 1904); *Wells v. New England Mutual Life Ins. Co.*, 191 Pa. 207, 43 A. 126 (Pa. 1899) (estate cannot recover); *Goldnamer v. O'Brien*, 98 Ky. 569 (1896) (cannot recover from person urging her to have abortion); *Miller v. Bayer*, 94 Wis. 123, 68 N.W. 869 (Wis. 1896) (woman could recover).

49. *Williams*, supra note 19, at 153-54.

50. *Dellapenna, Dispelling*, supra note 18, at Part VIII, at 26-27.

51. Paul B. Linton and Kevin J. Todd, "Abortion Under the Illinois Constitution: The Framers Did Not Incorporate A Right to Abortion," 81 *Ill. Bar. J.* 31 (Jan. 1993); J.M. Sheean, "The Common and Statute Law of Illinois," 7 *Ill. Med. J.* 37, 38 (January 1905).

52. *Ibid.*

53. See generally, *Olasky*, supra note 34, at 83-105.

54. C.S. Bacon, "The Duty of the Medical Profession in Relation to Criminal Abortion," 7 *Ill. Med. J.* 18, 21 (January 1905).

55. John E. Traeger, "Criminal Abortion As It Comes Before the Coroner's Office," 7 *Ill. Med. J.* 35 (January 1905).

56. See generally, R. Perkins and R. Boyce, *Criminal Law and Procedure* 263-288 (5th ed. 1977); Jerome Hall, "Criminal Attempt: A Study of Foundations of Criminal Liability," 49 *Yale L.J.* 789 (1940).

57. 720 Ill. Compiled Statutes 5/8-4(a) (1992).

58. *People v. Paluch*, 78 Ill.App.2d 356, 222 N.E.2d 508 (1966).

59. *Hyde v. United States*, 225 U.S. 347, 387-88 (1911) (Holmes, J., dissenting).

60. 141 Cal.App.2d 193, 296 P.2d 610 (Cal. Dist. Ct. App. 1956).

61. See also, Jeffrey F. Ghert, "Annotation, Comment Note-Impossibility of Consummation of Substantive Crime As Defense in Criminal Prosecution for Conspiracy or Attempt to Commit Crime," 37 *A.L.R.* 3d 375 (1971 and Supp. 1994); Arnold N. Enker, "Impossibility in Criminal Attempts: Legality and the Legal Process," 53 *Minn. L. Rev.* 665 (1969).

62. Cal. Penal Code § 317 (1915) (advertising to produce miscarriage). Subsequently, the scope of the statute was judicially narrowed. See *People v. McKean*, 243 P. 898 (Cal. Dist. Ct. App. 1925).

63. See generally, Olasky, *supra* note 34, at 194-96 and n.96-102; Marvin Olasky, *The Press and Abortion, 1838-1988* (Hillsdale, N. J.: Lawrence Erlbaum Associates, 1988).
64. See generally, Paul Linton, "Enforcement of State Abortion Statutes After Roe: A State-by-State Analysis," 67 *U. Det. L. Rev.* 157 (1990).
65. Dellapenna, *Dispelling*, *supra* note 18, at Part IX, p. 42; Olasky, *supra* note 34.
66. Olasky, *supra* note 34, at 170.
67. *Ibid.*, at 170-71.
68. *Ibid.*
69. *Ibid.*
70. Note, "A Functional Study of Existing Abortion Laws," 35 *Col. L. Rev.* 87, 91 n.17-18 (1935).
71. Samuel B. Burk, "The Development of the Law of Criminal Abortion," 57 *Medical Times* 153, 158 (June, 1929).
72. Olasky, *The Press and Abortion*, *supra* note 63, at 68.
73. Pollak, *supra* note 37, at 45.
74. See Olasky, *The Press and Abortion*, *supra* note 63, at 80 (citing *San Francisco Examiner*, 22 May 1946, p. 8; "Four Seized in Alleged Illegal Operation Raids," *Los Angeles Times*, 30 Sept. 1948, p. 2).
75. "Illegal Operation Nets M.D. Three Years," *N.Y. J.-Am.*, 5 May 1950; "Three Doctors and 4 others Plead Guilty of Abortion," *N.Y. Tribune*, 18 Feb. 1952; "Charges M.D., Hospitals Hush Abortion Cases," *N.Y. Post*, 10 Dec. 1953.
76. See *In re Lurie*, 263 App. Div. 660, 34 N.Y.S.2d 247 (N.Y. App. Div. 1942); *In re Madden*, 24 N.Y.S.2d 127 (N.Y. App. Div. 1940). See also J. Bennett and J. Amen, "A Presentment on the Suppression of Criminal Abortions, By the Grand Jury for the Extraordinary Special and Trial Term," (New York Supreme Court, 15 October 1941) (hereafter Amen Report); J.E. Bates, "The Abortion Mill: An Institutional Study," 45 *J. Crim. Law and Crimin.* 157, 163-66 (1954).
77. John Harlan Amen, "Some Obstacles to Effective Legal Control of Criminal Abortions," in "The Abortion Problem," Proceedings of the conference held under the auspices of the National Committee on Maternal Health, Inc., at the New York Academy of Medicine, 19 and 20 June 1944, Howard C. Taylor Jr., chairman. Proceedings published by Williams and Wilkins, Baltimore, 1944. [Hereinafter "The Abortion Problem"].
78. *Ibid.*, at 135.
79. *Ibid.*
80. *Ibid.*, at 135.
81. *Ibid.*
82. *Ibid.*, at 136.
83. *Ibid.*, at 136.
84. *Ibid.*, at 136.
85. Dellapenna, *Dispelling*, *supra* note 18, at Part IX, p. 39, n.90, 40. See also *People v. Candib*, 129 N.Y.S.2d 176 (N.Y. Sup. Ct. 1954).
86. 1942 N.Y. Laws, ch. 791, §1.

87. Weinstein v. Board of Regents of Univ. of State of New York, 267 App. Div. 4, 44 N.Y.S.2d 917, 918 (N.Y. App. Div. 1943).

88. "The Abortion Problem," supra note 77, at 139.

89. See Epstein v. Board of Regents of University of New York, 267 A.D. 27, 44 N.Y.S.2d 921 (N.Y. App. Div. 1943), rev'd, 295 N.Y. 154, 65 N.E.2d 756 (N.Y. 1946); Weinstein v. Board of Regents of Univ. of State of New York, 267 A.D. 4, 44 N.Y.S.2d 917 (N.Y. App. Div. 1943), rev'd, 292 N.Y. 682, 56 N.E.2d 104 (N.Y. 1944); Rothenberg v. Board of Regents, 267 A.D. 24, 44 N.Y.S.2d 926 (N.Y. App. Div. 1943), appeal denied, 267 A.D. 852, 47 N.Y.S.2d 284 (N.Y. App. Div. 1944).

90. Epstein v. Board of Regents of University of New York, 295 N.Y. 154, 65 N.E.2d 756 (1946).

91. Miller, supra note 5, at 35.

92. Bates, supra note 76, at 166.

93. See generally Solinger, *The Abortionist*, supra note 5; Graber, supra note 5, at 325-28. Many if not most of Graber's sources consist of anecdotes by the most committed abortion rights supporters regurgitating claims made in the 1960s that were designed to undermine the laws.

94. See Note, supra note 70, at 91 n.18; Amen Report, supra note 76. The Amen investigation received much publicity. See Weinstein v. Board of Regents of Univ. of State of New York, 267 App. Div. 4, 44 N.Y.S.2d 917, 919 (N.Y. App. Div. 1943).

95. See generally Solinger, *The Abortionist*, supra note 5, esp. at 149-168.

96. Ibid.

97. Zimmerman v. Board of Regents, 31 A.D.2d 560, 294 N.Y.S.2d 435 (N.Y. App. Div. 1968).

98. See, e.g., Zimmerman v. Board of Regents, 31 A.D.2d 560, 294 N.Y.S.2d 435 (N.Y. App. Div. 1968); Sos v. Bd of Regents, 26 A.D.2d 741, 272 N.Y.S.2d 87 (N.Y. App. Div. 1966) (annulled Board's determination based on insufficient evidence), aff'd, 19 N.Y.2d 990, 281 N.Y.S.2d 831 (N.Y. 1967); Shapiro v. Bd of Regents, 22 A.D.2d 243, 254 N.Y.S.2d 906 (N.Y. App. Div. 1964), Walsh v. New York State Liquor Authority, 16 N.Y.2d 783, 209 N.E.2d 821, 262 N.Y.S.2d 503 (1965); Ciofalo v. Bd of Regents, 23 A.D.2d 926, 258 N.Y.S.2d 881 (N.Y. App. Div. 1965); Robinson v. Bd of Regents, 4 A.D.2d 359, 164 N.Y.S.2d 863 (N.Y. App. Div. 1957); Genova v. Board of Regents of University of N.Y., 272 A.D. 1085, 74 N.Y.S.2d 729 (N.Y. App. Div. 1947); Friedel v. Board of Regents of University of New York, 296 N.Y. 347, 73 N.E.2d 545 (1947); Jablon v. Board of Regents of University of State of New York, 296 N.Y. 1027, 73 N.E.2d 904 (1947); Jablon v. Board of Regents of University of State of N.Y., 271 A.D. 369, 66 N.Y.S.2d 340 (N.Y. App. Div. 1946); Newman v. Regents of University of State of N.Y., 270 A.D. 964, 61 N.Y.S.2d 841 (N.Y. App. Div. 1946); Neshamkin v. Board of Regents of University of New York, 295 N.Y. 755, 66 N.E.2d 124 (1946); Application of Neshamkin, 269 A.D. 891, 56 N.Y.S.2d 146 (N.Y. App. Div. 1945); Neshamkin v. Board of Regents of University of State of New York, 281 N.Y. 683, 23 N.E.2d 16 (N.Y. 1939); Epstein v. Board of Regents of University of New York, 267 A.D. 27, 44 N.Y.S.2d 921 (N.Y. App. Div. 1943), rev'd, 295 N.Y. 154, 65 N.E.2d 756 (1946); Weinstein v. Board of Regents of Univ. of State of New York, 267 A.D. 4, 44 N.Y.S.2d 917 (N.Y. App. Div. 1943),

rev'd, 292 N.Y. 682, 56 N.E.2d 104 (1944); *Rothenberg v. Board of Regents*, 267 A.D. 24, 44 N.Y.S.2d 926 (N.Y. App. Div. 1943), appeal denied, 267 A.D. 852, 47 N.Y.S.2d 284 (N.Y. App. Div. 1944); *Kasha v. Board of Regents of University of State of New York*, 290 N.Y. 630, 48 N.E.2d 712 (1943); *Kahn v. Board of Regents of University of State of New York*, 254 A.D. 798, 4 N.Y.S.2d 233 (N.Y. App. Div. 1938); *Kahn v. Board of Regents of University of State of New York*, 281 N.Y. 684, 23 N.E.2d 16 (1939); *Reiner v. Board of Regents of the University of the State of New York*, 254 A.D. 920, 6 N.Y.S.2d 356 (N.Y. App. Div. 1938); *Minton v. Board of Regents of the University of State of New York*, 247 A.D. 838, 287 N.Y.S. 502 (N.Y. App. Div. 1936).

99. "The Abortion Problem," supra note 77, at 137-38.

100. See generally Lawrence Lader, *Abortion II: Making the Revolution* (Boston: Beacon Press, 1973).

101. Any determination by a sub-committee would only be reviewed by a full committee at its semi-annual meeting. Amen did not believe that the cases received careful attention, since the full committee primarily relied on the recommendation of the subcommittee and rarely reviewed the record. Furthermore, the finding of guilt by the subcommittee, and recommendation of punishment to the Board of Regents, had to be unanimous. The proceedings were voided if a member was absent or did not vote.

102. "The Abortion Problem," supra note 77, at 142.

103. See *In re Abortion in Kings County*, 206 Misc. 830, 135 N.Y.S. 2d 381 (1954); *Application of Grand Jury of Kings County*, 286 A.D. 270, 143 N.Y.S.2d 501 (1955).

104. See Williams, supra note 19, at 168.

105. Zad Leavy and Jerome M. Kummer, "Criminal Abortion: Human Hardship and Unyielding Laws," 35 *S. Cal. L. Rev.* 123, 128 and n.42 (1962).

106. Alan F. Guttmacher, "Therapeutic Abortion: The Doctor's Dilemma," 21 *J. Mt. Sinai Hosp.* at 111, 118 (1954). See also, Guttmacher, "The Law that Doctors Often Break," 63 *Redbook* 24 (Aug. 1959).

107. *Ibid.*, (citing K.P. Russell, "Therapeutic Abortions in California in 1950," 60 *West. J. Surg. Ob. Gyn.* 497 (1952) (according to which the procedure was "the system of choice in 11 per cent of 61 hospitals in California in 1950")). See *Stewart v. Long Island College Hospital*, 58 Misc.2d 432, 296 N.Y.S.2d 41 (N.Y. Sup. Ct. 1968), affirmed as modified, 35 A.D.2d 531, 313 N.Y.S.2d 502 (N.Y. App. Div. 1970).

108. Miller, supra note 5, at 37; Peter Broeman and Jeannette Meier, "Therapeutic Abortion Practices in Chicago Hospitals—Vagueness, Variation, and Violation of the Law," 4 *Law and Soc. Order* 757 (1971).

109. Guttmacher, supra note 106, 21 *J. Mt. Sinai Hosp.* at 118.

110. *Ibid.*

111. *Ibid.* Guttmacher stated that "[u]nrestricted therapeutic abortion leads to loose medical thinking. Flouting the abortion law also acts as a springboard for unorthodox, borderline medical ethical practices." *Ibid.*, at 119.

112. Herbert L. Packer and Ralph J. Gampell, "Therapeutic Abortion: A Problem in Law and Medicine," 11 *Stan. L. Rev.* 417 (1959).

113. Leavy and Kummer, *supra* note 105, at 128 (citing Russell, "Sterilization and Therapeutic Abortion," 1 *Clin. Obst. N.Y.* 967 (1958)).

114. See e.g., Graber, *supra* note 5.

115. See, e.g., *State v. Millette*, 112 N.H. 458, 299 A.2d 150 (1972); *State v. Coleman*, 17 N.C.App. 11, 193 S.E.2d 395 (1972); *State v. Campbell*, 263 La. 1058, 270 So.2d 506 (1972).

116. See, e.g., Solinger, *The Abortionist*, *supra* note 5; *Time*, 12 March 1956, at 46.

117. *State v. Barnett*, 249 Or. 226, 437 P.2d 821 (1968).

118. Charles King, "Calling Jane: The Life and Death of a Women's Illegal Abortion Service," 20 *Women and Health* 75 (1993).

119. *Commonwealth v. Kudish*, 289 N.E.2d 856 (Mass. 1972).

120. Finding constitutional: *Nelson v. Planned Parenthood*, 19 Ariz.App. 142, 505 P.2d 580 (Ariz. Ct. App. 1973); *Cheaney v. State*, 259 Ind. 138, 285 N.E.2d 265 (Ind. 1972); *State v. Abodeely*, 179 N.W.2d 347 (Iowa 1970); *Sasaki v. Commonwealth*, 485 S.W.2d 897 (Ky. 1972); *State v. Campbell*, 263 La. 1058, 270 So.2d 506 (1972); *State v. Moretti*, 52 N.J. 182, 244 A.2d 499 (1968); *State v. Kruze*, (Ohio 1972), vacated and remanded, 410 U.S. 951 (1973); *Spears v. State*, 257 So.2d 876 (Miss. 1972); *Rodgers v. Danforth*, 486 S.W.2d 258 (Mo. 1972); *Byrn v. New York City*, 31 N.Y.2d 194, 286 N.E.2d 887 (1972); *State v. Munson*, 86 S.D. 663, 201 N.W.2d 123 (1972); *Thompson v. State*, 493 S.W.2d 913 (Tex. Crim. App. 1971); *State v. Bartlett*, 128 Vt. 618, 270 A.2d 168 (1970).

Finding unconstitutional: *People v. Belous*, 71 Cal.2d 954, 458 P.2d 194 (1969); *State v. Barquet*, 262 So.2d 431 (Fla. 1972); *State v. Nixon*, 42 Mich.App. 332, 201 N.W.2d 635 (1972); *Beecham v. Leahy*, 130 Vt. 164, 287 A.2d 836 (1972).

121. Miller, *supra* note 5, at 9.

122. Miller, *supra* note 5, at 32.

123. Solinger, *The Abortionist*, *supra* note 5, at 4.

124. Marian Faux, *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision that Made Abortion Legal* (New York: Macmillan, 1988); McCorvey, *supra* note 26 at 104-106.

125. Reagan, *supra* note 5.

126. See generally, R. Donnelly, et al., *Criminal Law* 252-523 (New York: Free Press of Glencoe, 1962).

127. Johs Andenaes, "General Prevention: Illusion or Reality?," 43 *J. Crim. L. Criminology and Pol. Sci.* 176, 180 (1952).

128. *Ibid.*, at 179.

129. *Ibid.*, at 180 (emphasis in original).

130. Cf. Gerald Gunther, *Learned Hand: The Man and the Judge* 451 (New York: Knopf, 1994). ("As an observer from the sidelines, Hand could and did criticize New Deal programs with regularity. But as a judge, Hand knew that his doubts about the effectiveness of these reforms could not legitimately affect the exercise of his official duties.")

131. David Savage, *Turning Right: The Making of the Rehnquist Supreme Court*

80 (New York: John Wiley & Sons, 1992).

132. Statistical Abstract of the United States 180 (112th ed. 1992) (Table No. 287) (83,000 forcible rapes in 1980; 102,600 in 1990), (23,000 murders in 1980, 23,400 in 1990), (566,000 robberies in 1980, 639,000 in 1990), (673,000 aggravated assaults in 1980, 1,055,000 in 1990).

133. John H. Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale L. J.* 920, 923 n.26 (1973).

134. 410 U.S. 113, 150 (1973).

135. See, e.g., Williams, *supra* note 19, at 212 ("The effect of the law is not to eliminate abortion but to drive it into the most undesirable channels."); Graber, *supra* note 5, at 321 (citing a number of general claims which rely on other unsubstantiated claims); Leavy and Kummer, *supra* note 105, at 126 and n.20 (1962) ("[f]or professional abortionists there exists a low rate of prosecution and an even lower rate of conviction").

136. Jeffrey Leigh Sedgwick, *Law Enforcement Planning: The Limits of An Economic Analysis* 42 (Westport, Conn.: Greenwood Press, 1984). ("The technique [for determining the optimal amount of crime in society] involved identifying the physical and psychic harm from crime, the costs of apprehension and conviction, the costs of wrongful conviction and punishment, and the social costs of punishing criminals." *Ibid.*, at 56.).

137. Cf. Lawrence M. Friedman, *Crime and Punishment in American History* (New York: Basic Books, 1993), (arguing that crime has been a constant throughout American history and that criminals are never really deterred).

138. Andenaes, *supra* note 127, at 180 (emphasis in original).

139. See Olasky, *supra* note 34; Andenaes, *supra* note 127, at 179 ("General prevention may depend on the mere frightening or deterrent effect of punishment—the risk of discovery and punishment outweighs the temptation to commit crimes.").

140. See e.g., Graber, *supra* note 5, at 313.

141. A good overview is contained in Germaine Grisez, *Abortion: The Myths, the Realities, and the Arguments* 35–65 (New York: Corpus Books, 1970). See also Graber, *supra* note 5, at 315–16.

142. Judith Leavitt, *Brought to Bed: Childbearing in America, 1750–1950* 24 (New York: Oxford University Press, 1986). Another scholar has written: "The numerical base for the history of American prenuptial pregnancy and illegitimacy has serious gaps and limitations [beyond] the normal problems of data reliability." See Daniel Scott Smith, "The Long Cycle in American Illegitimacy and Prenuptial Pregnancy," in *Bastardy and Its Comparative History* (Peter Laslett, ed., Cambridge, Mass.: Harvard University Press, 1980).

143. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* 178 (Chicago: University of Chicago Press, 1991); Paige Cunningham and Clarke D. Forsythe, "Is Abortion the 'First Right' for Women?," in *Abortion, Medicine, and the Law* 100 (J. Douglas Butler and David F. Walbert, eds., 4th ed., New York: Facts on File, 1992).

144. See generally, Rosenberg, *supra* note 143, at 353–55 (Appendix 6); Grisez, *supra* note 141, at 35–42; Pollak, *supra* note 37, at 45.

145. See Olasky, *supra* note 34.

146. For example, in 1903, a physician at the annual meeting of the Illinois Medical Society, stated that criminal abortion was "startlingly frequent." Others opined that "every physician" is, at one time or another, approached to perform elective abortion. In 1904, at a Chicago Medical Society symposium, a physician estimated that "probably 6,000 to 10,000 abortions [are] induced in Chicago every year." See Bacon, *supra* note 54, at 18. In 1921, a physician speaking at the 34th Annual meeting of the American Association of Obstetricians and Gynecologists and Abdominal Surgeons in St. Louis stated that it had been estimated that there were 80,000 criminal abortions annually in New York City. Others in 1921 suggested that criminal abortion was "practiced extensively."

147. See e.g., Graber, *supra* note 5; "The Abortion Problem," *supra* note 77, at 155 ("In the light of our present knowledge...we can only guess at the number of abortions that occur in the United States each year, since reliable figures are not available. We do know that their number is legion.") (statement of Herman N. Bundesen).

148. "The Abortion Problem," *supra* note 77, at 155 (Dr. Herman N. Bundesen).

149. See Graber, *supra* note 5.

150. Rosenberg, *supra* note 143, at 353-55 (Appendix 6). See also Solinger, *The Abortionist*, *supra* note 5, at ix; Graber, *supra* note 5, at 316 and n.28.

151. Grisez, *supra* note 141, at 35-42.

152. Frederick Taussig, *Abortion, Spontaneous and Induced* (1936). *Time* magazine blessed his book as "authoritative" and concluded that his calculations resulted from "careful figuring." *Time*, 6 March 1936, at 52.

153. Olasky, *The Press and Abortion*, *supra* note 63, at 70.

154. "The Abortion Problem," *supra* note 77, at 28.

155. J. E. Bates, *supra* note 76, at 8. Cf. Graber, *supra* note 5, at 322 (citing Taussig's 1936 estimate).

156. Marie E. Kopp, *Birth Control in Practice* (New York: R. M. McBride and Co., 1934); Regine Stix, "A Study of Pregnancy Wastage," 13 *Milbank Memorial Fund Q.* 347 (1935); Paul Gebhard, et al., *Pregnancy, Birth and Abortion* (Westport, Conn. Greenwood Press 1958). The Kinsey study was published posthumously by Gebhard, et al. in 1958. Alfred Kinsey died in 1956.

157. "The Abortion Problem," *supra* note 77, at 5.

158. Regine K. Stix and Dorothy G. Wiehl, "Abortion and the Public Health," 28 *Am. J. Pub. Health* 621, 623 and fig. 1 (1938).

159. *Abortion in the United States* 179 (Mary Calderone, ed. New York: Hoeberharper, 1958), (The Kinsey data "do not provide an adequate basis for reliable estimates of the incidence of induced abortion in the urban white population of the United States, much less in the total population."). *Abortion in the United States* consists of the papers of the 1955 conference sponsored by Planned Parenthood, which were edited and published by Mary Calderone, who was at that time the medical director of Planned Parenthood.

160. Robert G. Potter, Jr., "Abortion in the United States," 37 *Milbank Mem. Fund Q.* 92, 94 (January 1959) (Book Review) ("The lower estimate is based on a ratio

of 3.1 induced abortions per 100 pregnancies found by C. Kiser and P.K. Whelpton for their Indianapolis sample and also by D.G. Wiehl and K. Berry for a New York City sample. The upper limit is based on a ratio of 18.9 induced abortions per 100 pregnancies reported by the staff of the Institute of Sex Research [Kinsey] from their analysis of 5,293 women. The appropriateness of the upper limit is placed in doubt by an appendix in which Tietze analyzes the representativeness of the ISR respondents in relation to estimates of 1945 distributions for urban white women in the United States. Tietze concludes that the ISR respondents are usefully representative but his tables contradict this conclusion by showing not only gross differences with respect to age, education, and marital status, but also and more important, tangible differences with respect to age-specific marital fertility.”)

161. See e.g., Graber, *supra* note 5, at 316 n.28 (citing Kopp).

162. *Abortion in the United States* 180 (Mary Calderone, ed. *supra* note 159), (hereafter Calderone). (“Taking into account the probable trend of the abortion ratio since the interwar period, a plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1,200,000 per year, depending upon the assumptions made as to the incidence of abortion in the total population as compared with the restricted group for which statistical data are available, and upon the assessment of the discretion and magnitude of bias inherent in each series of data. There is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency.” *Ibid.*, at 180).

163. Calderone, *supra* note 159, at 37 (“Of course, we don’t know what the total number of criminal abortions performed in the United States happens to be...” (Dr. Harold Rosen); *Ibid.*, at 18 (“The incidence of criminal abortions is not better known in Norway than in the United States, the figures we have being mostly based on estimations or guesswork.”) (Dr. Bard Brekke); *Ibid.* at 50 (“I think we have all been penalized in our thinking by lack of actual knowledge about illegal abortion...In the first place, there are no good figures that I know of that in any way depict the incidence. Taussig’s book pulls out a nice round number, but when you try to analyze the formulae by which the number is derived, you could have substituted other values and gotten quite a different answer...we talk a lot about the practice of illegal abortion and how it is carried on—again without any factual data.”) (Alan Guttmacher); *Ibid.*, at 70 (“We have absolutely no hope of getting reports...of illegal induced abortions unless the woman requires subsequent hospital care, and...not even with all of these.”) (Carl Erhardt, Director of Records and Statistics, Dept. of Health, NYC); *Ibid.* at 110 (“[T]he number of [illegal abortions] which we are aware of must be only a fraction of the problem, and it is doubtful if any combination of sources can give us reliable figures on this purposefully hidden area.”) (Dr. Sophia Kleegman); See also Harold Rosen (ed.), 3–6 *Therapeutic Abortion: Medical, Psychiatric, Legal, Anthropological and Religious Considerations*, (New York: Julian Press, 1954) (330,000 illegal abortions, Dr. Russell Fisher). See also, Rosen, *Therapeutic Abortion*, at 180 (“There are no accurate figures on the number of spontaneous and induced abortions that occur annually in the United States.”) (Dr. Manfred Guttmacher); Also, Joseph P. Kennedy, Jr. Foundation, *The Terrible Choice: The Abortion Dilemma* (R. Cooke, et al., eds., New York: Bantam Books, 1968), (figures on criminal abortion are “based on per-

sonal estimates"; "no way has yet been found of obtaining reliable statistics that would give an exact figure for the total population").

164. Leavy and Kummer, *supra* note 105, at 124.

165. Kopp, *Birth Control in Practice*. A number of subsequent researchers and historians have emphasized the probable bias of Kopp's sample. Pollak, *supra* note 37, at 47; "The Abortion Problem," *supra* note 77, at 5.

166. Regine Stix, "A Study of Pregnancy Wastage," 13 *Milbank Memorial Fund. Q.* 347 (1935); Stix and Wiehl, "Abortion and the Public Health," 28 *Am. J. Pub. Health* 623 (1938).

167. Paul H. Gebhard, et al., *supra* note 156, *Pregnancy, Birth and Abortion*.

168. Graber, *supra* note 5, at n.28 (citing Tietze).

169. Leavy and Kummer, *supra* note 105, at 125 (citing Calderone, *supra* note 159, *Abortion in the United States*).

170. M. Calderone, "Illegal Abortion as a Public Health Problem," 50 *Am. J. Pub. Health* 948, 949 (1960).

171. Rosenberg, *supra* note 143, at 355 (citing Christopher Tietze, "Two Years Experience with a Liberal Abortion Law: Its Impact on Fertility Trends in New York City," 5 *Fam. Plan. Perspect.* 36 (1973)). See Graber, *supra* note 5, at 316, 317 n.28.

172. June Sklar and Beth Berkov, "Abortion, Illegitimacy, and the American Birth Rate," 185 *Science* 909 (13 Sept. 1974).

173. Alan F. Guttmacher, "The Genesis of Liberalized Abortion in New York: A Personal Insight," in *Abortion, Medicine, and the Law* 246 n.16, ed. by J. Douglas Butler and David F. Walbert, *supra* note 143.

174. 745,000 in 1973 versus 586,800 in 1972. Statistical Abstract of the United States 70 (1989) (Tables No. 103 and 104).

175. Lynn D. Wardle, "Time Enough: Webster v. Reproductive Health Services and the Prudent Pace of Justice," 41 *Fla. L. Rev.* 881 (1989) (Appendix).

176. See e.g., *State v. McMahan*, 57 Idaho 240, 65 P.2d 156 (1937) (abortion homicide); *Willis v. O'Brien*, 151 W.Va. 628, 153 S.E.2d 178 (1967), cert. denied, 389 U.S. 848 (1969) (abortion homicide). See also, Ernest F. Oakley, Jr., "Legal Aspect of Abortion," 3 *Am. J. Ob. Gyn.* 37 (Jan. 1922); Reagan, *supra* note 5.

177. See generally, Miller, *supra* note 5; Brian Clowes, "The Role of Maternal Deaths in the Abortion Debate," 13 *St. Louis U. Pub. L. Rev.* 327 (1993); Leavy and Kummer, *supra* note 105, at 124 and n.8 ("[T]he amount of human suffering at the hands of unskilled abortionists is inestimable.").

178. See e.g., Graber, *supra* note 5, at 319 (citing Glanville Williams).

179. He had to stop seeing Barnett after a new district attorney was elected who sought to vigorously enforce the law and his investigators discovered the relationship.

180. Solinger, *The Abortionist*, *supra* note 5, at 18.

181. *Ibid.*, at 22, 37.

182. *Ibid.*, at 65, 67, 69-72.

183. *Ibid.*, at 53; *State v. Barnett*, 249 Or. 226, 437 P.2d 821 (1968).

184. Solinger, *The Abortionist*, *supra* note 5, at 26.

185. *Ibid.*, at 36.

186. *Ibid.*, at 33.

187. *Ibid.*, at 50-53.

188. Mary Calderone, *supra* note 170 at 948, 949 (July 1960) (emphasis added). See U.S. Dept. of Health, Education and Welfare, Public Health Service, Vital Statistics of the United States, 1957 cxxxix (1959) (Table CZ) (for 260 deaths attributed to abortions of all kind out of total 1,746 maternal deaths from all causes).

189. "The technique of the well-accredited criminal abortionist is usually good. They have to be good to stay in business, since otherwise they would be extremely vulnerable to police action." Alan Guttmacher, *Babies by Choice or by Chance* 216 (Garden City, N.Y.: Doubleday, 1959).

190. See Barbara J. Syska, et al., "An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy," in *New Perspectives on Human Abortion* 168 (Thomas W. Hilgers, et al., eds. *supra* note 36), (citing National Center for Health Statistics data, showing drop in maternal deaths from 7,466 in 1940 to 2,697 in 1950, to 1,328 in 1960, to 684 in 1970 to 554 in 1972); See also Moore and Randall, "Trends in Therapeutic Abortion: A Review of 137 Cases," 63 *Am. J. Ob. Gyn.* 34 (1952).

191. Rosen, *Therapeutic Abortion*, *supra* note 163 at xvii. Rosen's book was re-published in 1967 under the title *Abortion in America* (Boston, Beacon Press, 1967). In passing, it is important to note here that even as Dr. Cameron purports to address the "needs" for "therapeutic" abortion, his description sweeps well beyond the traditional definition of "therapeutic" as meaning "necessary to save the life of the mother."

192. See, e.g., Edwin M. Gold, "Therapeutic Abortions in New York City: A 20-Year-Review," 55 *Am. J. Pub. Health* 964, 969 (July 1965); Alan Guttmacher, "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion," in Rosen, *Therapeutic Abortion*, *supra* note 163 at 12.

193. Guttmacher, *supra* note 106, at 119, emphasis added. Furthermore, he said, "Legitimate hospitals accept in addition some cases in a quasi-legal bracket, but only accept those of crying necessity. The greater the incidence of abortion in a given institution, the greater the proportion from the quasi-group, for the truly legal cases have a more or less constant incidence all over the country." *Ibid.* Guttmacher was once director of the obstetrical department at Mt. Sinai and a member of its therapeutic abortion committee.

Under the notion of abortion as a part of the constitutional right of privacy, the physician is viewed as a contractual agent of the patient who submits to her request to implement her constitutional right. Contrast this with Guttmacher's sentiment in 1954: "I do not feel that the obstetrician-gynecologist is simply the patient's agent who presents her request for interruption of pregnancy without himself evaluating it. I think he should pass this request on to the hospital authorities...only if he is convinced of the wisdom of the request. If he thinks the procedure unjustified, it behooves the physician consulted to discuss the matter in great detail with the patient and to attempt to persuade her to his viewpoint. If he fails to do this he has no further responsibility in the case." *Ibid.*, at 119.

194. Calderone, *supra* note 170, at 948-49, emphasis added.

195. Leavy and Kummer, *supra* note 105, at 126 (citing Guttmacher, "The Shrinking Non-Psychiatric Indications for Therapeutic Abortion," in Rosen, *Therapeutic Abortion*, *supra* note 163).

196. See Daniel Callahan, "Abortion: Some Ethical Issues," in *Abortion, Society and the Law* 96 (David F. Walbert and J. Douglas Butler, eds., Cleveland: Press of Case Western Reserve University, 1973): "Except in the now-rare instances of a direct threat to a woman's life, an abortion cures no known disease and relieves no medically classifiable illness.;" "Abortion: The Doctor's Dilemma," 35 *Modern Medicine* 12, 14-16 (24 April 1967) (quoting Dr. David Decker of Mayo Clinic based on poll of 40,000 American physicians in 1967: there were "few, if any, absolute medical indications for therapeutic abortion in the present state of medicine").

197. Miller, *supra* note 5, at 327.

198. Calderone, *supra* note 159, at 65.

199. *Ibid.*, at 67-68.

200. James Burtchaell, *Rachel Weeping: And Other Essays on Abortion* 65 (Toronto: Life Cycle edition, 1990).

201. Bernard Nathanson, *Aborting America* 193 (Garden City, N.Y.: Doubleday, 1979).

202. Miller, *supra* note 5, at 327.

203. See, e.g., Leavy, 1959 *Los Angeles Bar Bull.*, at 357 (between five and ten thousand annually) (citing 31 *S. Cal. L. Rev.* 181 (1958)).

204. Graber, *supra* note 5, at 318 n.33. Graber does not take notice of the dramatic decline in maternal deaths from all causes after World War II but relies on pre-World War II studies.

205. Lerner, "Death and Abortion," *N.Y. Post*, 9 April 1954 (claiming 5,000-6,000 maternal deaths per year).

206. Miller, *supra* note 5, at 13.

207. Robert E. Hall, "Commentary," in B. James George, et al., *Abortion and the Law* 228 (David T. Smith, ed., Cleveland: Press of Case Western Reserve University, 1967). Hall said:

I would quarrel with Niswander on only one point, namely, his perpetuation of Tausig's thirty-year-old claim that five thousand to ten thousand American women die every year as the result of criminal abortions. Whether this statistic was valid in 1936 I do not know, but it certainly is not now. There are in fact fewer than fifteen hundred total pregnancy deaths in this country per annum; very few others could go undetected and of these fifteen hundred probably no more than a third are the result of abortion. Even the 'unskilled' abortionist is evidently more skillful and/or more careful these days. Although criminal abortion is of course to be decried, the demand for its abolition cannot reasonably be based upon thirty-year-old mortality statistics.

208. U.S. Public Health Service, Centers for Disease Control, *Abortion Surveillance*, 61 (Nov. 1980).

209. See H.W. Lawson, et al., "Abortion Mortality, United States, 1972 through

1987," 171 *Am. J. Ob. Gyn.* 1365 (Nov. 1994).

210. See generally, Cunningham and Forsythe, *supra* note 143 at 100-158.

211. See, e.g., Cunningham and Forsythe, *supra* note 143, at 125-153; Dalton, "Doctor probed after abortion causes death," *San Diego Union*, 13 Dec. 1994, at B-1, B-3.

212. Calderone, *supra* note 170.

213. See, e.g., Moore, *Estate of v. Bickham*, 1993 WL 599846 (Cook Co. Cir. Ct.) (\$2.05 million verdict for abortion death).

214. See, e.g., Signor, "Doctor's License Revoked," *St. Louis Post-Dispatch*, 15 Dec. 1993; (revocation of license of Dr. Bolivar M. Escobedo of St. Louis County because of botched 1986 abortion); Alexander, *N.Y. Newsday*, 16 Dec. 1993 (sentencing New York gynecologist Maxen Samuel to prison for performing abortions after his license was suspended); "Abortion Doctor Loses License," *Chicago Tribune*, 24 April 1994 (case of Mississippi doctor Thomas Tucker losing license in Mississippi and Alabama); *People Magazine*, 15 Aug. 1994 (abortionist Dr. Britton who was killed in Pensacola, FL in 1994 was investigated and disciplined by Florida medical authorities); Smothers, "Abortion Doctor Is Linked to Complaints in 5 States," *N.Y. Times*, 30 Sept. 1994, at A-19 (Dr. Steven Chase Brigham, who replaced Dr. Britton after killing in Pensacola, FL, had his medical license suspended in New York and Georgia and was investigated in New Jersey); Dalton, "Doctor probed after abortion causes death," *San Diego Union*, 13 Dec. 1994, at B-1, B-3 (case of San Ysidro abortionist Dr. Suresh Gandotra after death of Magdalena Ortega-Rodriguez, previously convicted of 17 felony and misdemeanor charges). See generally Cunningham and Forsythe, *supra* note 143, at 130-137.

215. H.W. Lawson, et al., "Abortion Mortality, United States, 1972 through 1987," 171 *Am. J. Ob. Gyn.* 1365 (Nov. 1994) (between 1972 and 1987, 240 women died as a result of legal induced abortions); Hani K. Atrash, et al., "Legal Abortion in the U.S.: trends and mortality," 35 *Contemp. Ob. Gyn.* 58 (1990) (213 legal abortion deaths 1973-1985); Hani K. Atrash, et al., "Legal abortion mortality and general anesthesia," 158 *Am. J. Ob. Gyn.* 420 (1988) (193 deaths 1972-1985); David A. Grimes, et al., "Fatal Hemorrhage from Legal Abortion in the United States," 157 *Surg. Gyn. and Ob.* 461 (Nov. 1983) (194 deaths 1972-1979); Scot A. LeBolt, et al., "Mortality from Abortion and Childbirth," 248 *J. Amer. Med. Assoc.* 188 (1982) (138 deaths 1972-1978); Willard Cates, Jr., et al., "Assessment of Surveillance and Vital Statistics Data for Monitoring Abortion Mortality, United States, 1972-1975," 108 *Am. J. Epidemiol.* 200 (1978) (204 deaths between 1972-1975, 104 from legal abortion).

These quantitative studies are sometimes flawed by their narrow definition of causation and by inadequate recordkeeping and reporting. The leading factors in death to due legal abortion include complications of anesthesia, hemorrhaging, infection, and anmiotic embolism. Deaths from complications of anesthesia are sometimes deleted from mortality statistics, though common sense would say that the deaths were due to the abortion procedure if but for undergoing the abortion, the woman would have lived.

CDC statistics relied on death certificates provided by states. One CDC official was reported as saying, "There have always been problems identifying deaths secondary to abortion. Death certificates are not the best source of death information, and we've always had concerns we're not getting all the deaths through the death certificate system." Price, "Statistics may be misleading on deaths caused by abortion," *Washington Times*, 4 June 1994, at A5. The official also stated that it is "likely" that many abortion-related deaths might not be reported. *Ibid.*

216. *Ravenell, Estate of v. Eastern Women's Center*, 1990 WL 467656 (N.Y.Sup.Ct.) (\$1.2 million verdict).

217. *St. Petersburg Times*, 29 June 1994; *USA Today*, 30 June 1994. Police ended their investigation after one day, saying the abortion "was cared for by a licensed doctor in a licensed facility." "Woman Dies From Bleeding After Abortion," *Tallahassee Democrat*, 30 June 1994, at 1.

See generally, *Cunningham and Forsythe*, *supra* note 143, at 130-37. See also, *Ruckman, Estate of v. Barrett*, 1991 WL 444085 (Green Co., Mo. Cir. Ct.) (\$25,000,000 verdict for abortion death); *Redding v. Bramwell*, 1990 WL 468158 (Cobb Co., Ga. Sup. Ct.) (\$500,000 verdict for abortion death); *Poteat, Estate of v. Dern*, 1987 WL 232018 (Charleston Co. Com. Pl. Ct.) (\$35,000 for abortion death).

218. The physician's lawyer was quoted as saying, "This is a standard risk of the procedure...We don't believe this was below the standard of care nor do we believe it is malpractice." Dalton, "Doctor probed after abortion causes death," *San Diego Union*, 13 December 1994, at B-1, B-3.

219. *Wardle*, *supra* note 175 (Appendix).

220. *Statistical Abstract of the United States* 67 (111th ed. 1991) (Table no. 92).

221. *Statistical Abstract of the United States* 182 (111th ed. 1991) (Tables No. 305 and 306).

222. *Statistical Abstract of the United States* 98 (111th Ed. 1994) (Table No. 130).

223. *Centers for Disease Control*, 44 *Morbidity and Mortality Weekly Report* No. 3, at 46 (January 27, 1995), ("The reported number of hospitalizations for ectopic pregnancy increased from 17,800 in 1970 to 88,400 in 1989.").

224. *Janet R. Daling, et al.*, "Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion," 86 *J. Nat'l Cancer Inst.* 1584 (1994).

225. Shortly after *Roe* was decided, the City of Chicago attempted to regulate Friendship Medical Center after a woman died at the clinic. The federal courts in Chicago prevented regulation. *Friendship Medical Center v. Chicago Board of Health*, 505 F.2d 1141 (7th Cir. 1974). Later, after the *Chicago Sun-Times* and the Better Government Association conducted an undercover investigation and published, in November 1978, a twelve part series on the unsafe conditions in Chicago abortion clinics, the department of health issued emergency regulations and the Illinois General Assembly passed additional legislation. But, seven years later, the federal courts, ignoring this history, enjoined against the regulations. *Ragsdale v. Turnock*, 841 F.2d. 1358 (7th Cir. 1988), appeal dismissed, 112 S.Ct. 1309 (1992).