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# THE ALLEY BEHIND FIRST STREET, NORTHEAST: CRIMINAL ABORTION IN THE NATION'S CAPITAL, 1872-1973

DOUGLAS R. MILLER\*

## I. INTRODUCTION

Thirty-two years ago, the United States Supreme Court struck down the conception-to-birth prohibitions on abortion that had operated for at least a century in almost every state.<sup>1</sup> As women learned they no longer needed to choose between involuntary parenthood and the secretive, often fatal underworld of criminal abortion, the impact of the ruling resonated across the nation. The practices *Roe* ended that day in 1973 were by no means remote. The streets and back alleys in the shadow of One First Street, NE had witnessed a rich history of illegal abortion for decades before the Court's stately edifice was erected on that site. Since the comprehensive prohibition statute of 1872, Washington, D.C. had been home to the nameless practitioners, clandestine contacts, bribery, raids, arrests, and prosecutions that typified the illegal practice of abortion in America.

To explore the District of Columbia's experience of criminal abortion, this article undertakes an historical survey of the state and the development of law before prohibition; the enactment, evolution, and justification of prohibition; and the records left by those who fell afoul of the law. Part II of this article examines the history of abortion regulation from theological, philosophical, and political perspectives. Beginning with Greek and Hebrew approaches to fetal development and tortious miscarriage, Part IIA proceeds through early Christian and medieval reasoning to arrive at the 'quickening' distinction used in the common law, which designated the first fetal movement as the moment of ensoulment and, thus, of full legal protection. Part IIB then examines the nineteenth century physicians' campaign that engendered the District's 1872 statute. This section inquires into the

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1. See *Roe v. Wade*, 410 U.S. 113 (1973).

self-interested motivations of the American Medical Association in restricting abortion to its members' control, together with the dubious physiological and social arguments the campaign proffered in support of its cause. Part III examines the various proposed and enacted District of Columbia statutes that grew out of the nineteenth century anti-abortion movement. Part IV of this article constructs an anecdotal history of criminal abortion experiences based on published opinions of District of Columbia courts. This history yields narratives of desperate women's tragic deaths, their legal disabilities and ordeals in the courts, targeting of physicians by the government, bribery of witnesses and police by the accused, and defenses ranging from the obvious to the bizarre. The survey of cases culminates with *United States v. Vuitch*,<sup>2</sup> the test case that, for a brief period, made D.C. the most liberal abortion jurisdiction in the United States and galvanized the nationwide legal challenge to abortion prohibitions.

The history of criminal abortion is no mere academic curiosity. The debate over abortion regulation continues to divide America, and the future of unrestricted abortion remains in doubt. Both sides of the debate are myopic in their rhetoric: abortion rights supporters advocate personal autonomy without reference to fetal protection; abortion opponents champion fetuses while dismissing women's interests in self-determination. In order to effectively rule and legislate on abortion, jurists and politicians must understand the complex philosophical history that underlies the moral and political debate. More importantly, they must understand the social history of criminal abortion in order to comprehend the inevitable consequences of prohibition. This article's choice of focus is motivated by the belief that a social history unfolding in the very neighborhoods where national leaders live and work will prove especially compelling.

## II. THE PHILOSOPHICAL AND POLITICAL BACKGROUND OF ABORTION REGULATION

Within the span of seventy-two years, District of Columbia law progressed from a complete absence of codified abortion regulations to a near total ban on the practice. In order to understand the pre-statute legal status of abortion and the rapid move to prohibition, this section begins with the first principles and traces the philosophical and political history of abortion from classical antiquity into the nineteenth century.

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2. 402 U.S. 62 (1971).

### *A. The Common Law View of Abortion*

The essential conflict in the modern debate over abortion is between women's personal autonomy and privacy interests and the putative fetal interest in avoiding injury and death. Given the subordinate status women held in most cultures from at least the agricultural revolution into the twentieth century, the historical abortion debate was not conducted in those terms. Female autonomy was hardly a concern of natural and religious philosophers for whom the propriety of abortion would depend solely on fetal status. Nonetheless, what the law does not proscribe, it tacitly allows, so any restriction of abortion based on fetal personhood necessarily required some rational justification if it were to legitimately abridge a previously unrestricted practice. One necessary element of this rational foundation must be a determination of the gestational moment at which the proposed fetal protection attaches. Logically, there are three temporal options from which to choose. The fetus may acquire protected status at the moment of conception, at the moment of birth, or at some intermediate moment. The ultimate solution of the common law, an intermediate gestational point known as 'quickening,' resulted from centuries of evolution and synthesis among natural, legal, and religious philosophy.<sup>3</sup>

#### *1. The biblical origins of mid-gestational legal protection*

The fountainhead of Western theological reasoning on fetal status is the tortious miscarriage provision of *Exodus* 21: 22-25:

And if two men are fighting and one should strike a pregnant woman so that her fruits come forth, but there is no harm, then he shall certainly be fined as the woman's husband imposes on him, and he shall pay as the judges assess. But if harm should occur, then you must give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise.<sup>4</sup>

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3. See *infra* notes 27-30 and accompanying text.

4. *Exodus* 21: 22-25. This English version is the author's and represents a compromise among the King James, J.P.S., New Revised Standard, Everett Fox, and New J.P.S. English translations. Because of these verses' contentious subject matter, their translations tend to reflect the political and theological views of the translators. The author has attempted to provide the most neutral rendering of the text for the purposes of this discussion. Hence he has used the literal "fruits" rather than "children," and the literal "come forth" rather than "are born," "abort," or "miscarry." He has also refrained from interpolating "further" before "harm," as some modern versions do, because it is not supported by the literal text and

The precise meaning of this passage is obscure. Under one interpretation, it means that tortious miscarriage is punishable by fine only, but harm to the adult woman is punishable according to the *lex talionis*.<sup>5</sup> Under this reading, the fetus enjoys a lesser legal protection than the mother, or possibly no protection at all because the fine paid to the father may be seen as compensation for the loss of an heir, rather than as a penalty to punish commission of a wrong.<sup>6</sup> Thus, this reading places the point of legal protection at birth.

An alternative interpretation holds that, because the word *ṣon* (*ṣon*, 'harm') takes no indirect object in the text, and because the tortious wounding or killing of an adult is proscribed elsewhere in the *Pentateuch*<sup>7</sup> thus obviating the need for a special provision protecting pregnant women independent of their fetuses, *lex talionis* does apply to fetal harm.<sup>8</sup> Indeed, because the passage can be read as referring to premature birth as well as miscarriage, the law may contemplate intermediate punishments for non-fatal harm to the fetus; should the child be born disfigured or disabled, the appropriate *lex talionis* corporeal or monetary sanction would be imposed on the tortfeasor.<sup>9</sup> Under this viewpoint, the fetus does enjoy equal protection with the mother, because the same scale of penalties applies to those who harm either of the two. Furthermore, no intermediate gestational date must be achieved by the fetus to obtain the law's protection under this reading. In theory, the fully-protected status would attach at conception, obvious evidentiary problems notwithstanding.

Regardless of which of these interpretations is 'correct,' it is clear that by the third century B.C., the Alexandrian Jewish community had adopted the former.<sup>10</sup> The *Septuagint* (the Alexandrian Jews' translation of the Hebrew bible into the Greek vernacular), renders the *ṣon* rule as turning not on whether 'harm' or 'no harm' is present, but rather on whether or not the child is born *εξεικονισμενον* (*exeikonismenon*, 'fully formed').<sup>11</sup> In other words, if tortious injury to a pregnant woman caused the miscarriage of a fetus not fully formed, then a fine would apply, but

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prejudices the solution to the ambiguity addressed in this discussion.

5. Mark S. Scott, Note, *Quickening in the Common Law: The Legal Precedent Roe Attempted and Failed to Use*, 1 MICH. L. & POL'Y REV. 199, 202 (1996).

6. *Id.*

7. See Exodus 21: 12-14; Leviticus 24:19-20; Numbers 35: 9-34; Deuteronomy 4: 41-43.

8. Scott, *supra* note 5, at 203.

9. *Id.*

10. *Id.* at 204.

11. *Id.* at 205.

if a fully formed fetus were stillborn, the tortfeasor was liable according to the *lex talionis*.<sup>12</sup> Thus, by at least the third century B.C., *Exodus* 21: 22-25 had come to signify a mid-gestational point for the attachment of fetal protection under the law.

*2. Development of the quickening concept from the mid-gestational onset of legal protection*

The *Septuagint* became the basis for early Christian Latin versions of the *Pentateuch*, and thus the Alexandrian interpretation of fetal personhood as attaching at mid-gestation became the accepted view within the early Christian church.<sup>13</sup> The exact point at which protection attached was not defined; the distinction between tortious miscarriage and capital feticide was determined only post hoc, based on the evidentiary standard of *ξεικονισμενον*.<sup>14</sup> In forming a more precise rule of fetal law, the early church turned its attentions to ideas developed a century before the *Septuagint*'s translation: the natural philosophy of Aristotle and his contemporaries at the Lyceum.<sup>15</sup>

Aristotle reasoned that gestation encompassed three stages during which the fetus possessed three distinct 'souls': the *ψυχή θρεπτική* (*psyche threptike*, 'nutritive soul'), *ψυχή αίσθητική*, (*psyche aisthitike*, 'sensitive soul'), and *ψυχή διανοητική* (*psyche dianoitike*, 'rational soul').<sup>16</sup> Before infusion with the rational soul, the fetus was not human but, rather, an undifferentiated animal: sentient, but without reason.<sup>17</sup> Indeed, the classical Greek world view, linked as it was to that society's mythological tradition, did not exclude the notion that a human might give birth to a lesser animal or indeed a monster.<sup>18</sup>

Aristotle's natural philosophy thus presented the early church with a more concrete basis for the mid-gestational commencement of human status and legal entitlement.<sup>19</sup> The Christian Neoplatonists developed Aristotle's concept of *ψυχή*, and particularly *ψυχή διανοητική*, into the Christian notion of *anima*, or 'immortal

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12. *Id.*

13. *Id.* at 208-09.

14. *Id.* at 205-06.

15. *Id.* at 209.

16. *Id.* at 210-11.

17. *Id.* at 211.

18. *Id.* (indicating that children who were deformed or extremely mentally retarded could be considered monsters).

19. *Id.*

soul.<sup>20</sup> This *anima* is the rational and uniquely human essence believed to inhabit and survive the human body, ultimately to be reunited with it through resurrection conditioned on salvation.<sup>21</sup> Saint Augustine subsequently applied the Christian concept of *anima* to Exodus 21: 22-25, distinguishing the soulless, and thus unprotected, fetus (*embryo inanimatus*)<sup>22</sup> from the legally protected, ensouled embryo (*embryo animatus*).<sup>23</sup>

It was Saint Augustine's Neoplatonic understanding of gestation and ensoulment that formed the basis for Saint Thomas Aquinas's interpolation of mid-gestational fetal protection into the canon law some eight centuries later.<sup>24</sup> "[O]ne would be guilty of homicide," Aquinas announced, "if the death either of the mother or the ensouled fetus were to result from a blow to a pregnant woman."<sup>25</sup>

In medieval England, the word *cwike* (*cwuca* in Old English, later *quycke*, *quicke*, and eventually *quick*) had come to mean both 'alive' and 'moving'.<sup>26</sup> The conflation of these dual meanings, as applied to Neoplatonist Christian dogma, resulted in a rather novel solution to the fetal status problem: the fetus's first kick was believed to signify the arrival of the rational soul.<sup>27</sup> This result was justified by either of two explanations. Under the first, a kick was a 'sensible' motion, and thus only achievable once the work of the sensitive soul was finished (i.e. the moment at which the rational soul was ready to take over).<sup>28</sup> Under the second, a kick was a 'voluntary' motion, and thus impossible until the rational soul had taken hold.<sup>29</sup> The English religious understanding of ensoulment at quickening therefore provided a precise moment at which the canon law distinction between pre-ensoulment fetal death and post-ensoulment homicide could be drawn.

The common law's adoption of the canon law distinction did not occur immediately. According to Henri de Bracton's understanding of the common law around A.D. 1230, "If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened,

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20. *Id.*

21. *Id.* at 213-14.

22. The Latin usage of *embryo* and *puerperium*, translated as 'fetus,' does not correspond with the embryo/fetus distinction in modern English.

23. Scott, *supra* note 5, at 214.

24. *Id.* at 217.

25. ST. THOMAS AQUINAS, 2 QUÆSTIO DISPUTATA DE SPIRITUALIBUS CREATURIS 64, quoted in Scott, *supra* note 5, at 218.

26. OXFORD ENGLISH DICTIONARY (2d ed. 1989).

27. Scott, *supra* note 5, at 221-22.

28. *Id.* at 222.

29. *Id.*

he commits homicide."<sup>30</sup> This formulation does not comport precisely with the canon law view. To Bracton, the abortion of any *puerperium formatum* ('formed fetus') was homicide; the abortion of a *puerperium animatum* ('quickened fetus'), was more egregious, but it was not the sole act punishable as abortion.<sup>31</sup> Thus Bracton seems to have believed that legal protection attached to the fetus at some point earlier in pregnancy.

Half a century later, however, Fleta<sup>32</sup> restated Bracton's rule with the following alteration: "if the foetus was already formed *and* quickened."<sup>33</sup> By replacing *vel* with *et*, Fleta harmonized the common law view with the contemporary canon law, attaching legal protection to the fetus only at the moment of quickening.<sup>34</sup>

The recognition of quickening as the point of ensoulment and legal protection seems to have continued through the common law's history. In 1680, Edward Coke stated the law of abortion and tortious miscarriage thus:

If a woman be quick with childe, and by potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe; this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, battery or other cause, this is murder . . . . And so horrible an offence should not go unpunished. And so was the law holden in Bracton's time . . . [a]nd herewith agreeth Fleta.<sup>35</sup>

Coke thus imposes an additional (perhaps evidentiary) standard of live birth to draw the line between misdemeanor feticide and murder, although the requirement of quickening for any legal protection remains constant.<sup>36</sup> Blackstone apparently adopted Coke's view in compiling his *Commentaries* sixty years later:

[T]o kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and dieth by

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30. 2 HENRI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 341 (Samuel E. Thorne, ed. 1968) (1230 A.D.), *quoted in* Scott, *supra* note 5, at 224.

31. Scott, *supra* note 5, at 224-25.

32. Fleta was the anonymous author of the primary thirteenth century commentary on Bracton and was possibly an inmate of London's Fleet Prison.

33. 2 FLETA, SEU COMMENTARIUS JURIS ANGLICANI 60-61 (H.G. Richardson & G.O. Sayles, eds. 1955) (1290 A.D.) (emphasis added).

34. Scott, *supra* note 5, at 225.

35. 3 EDWARD COKE, INSTITUTES \*50.

36. *See id.*



reason of the potion or bruises it received in the womb, it seems, by the better opinion, to be murder in such as administered or gave them.<sup>37</sup>

Because Blackstone and Coke became the most important secondary sources of common law in the eighteenth century American colonies, it is reasonable to assume that the earliest United States jurists shared Blackstone's and Coke's understanding of abortion. At the time of American independence, the state of the law therefore appears to have been as follows: pre-quickening abortion was not illegal, post-quickening abortion was misdemeanor feticide, and post-quickening abortion that resulted in the birth of a live child which subsequently died of its injuries was murder.

Hence, some fifteen years after American independence, the new District of Columbia became heir to a common law abortion framework which represented the synthesis of over two millennia of Jewish, Greek, Christian, and English moral, natural, and legal reasoning.

### *B. The Nineteenth-Century American Campaign for Birth-to-Conception Prohibition*

Abortion remained subject to common law regulation in England and the United States until 1803. In that year, the British parliament passed Lord Ellenborough's Act,<sup>38</sup> making post-quickening abortion a capital offense.<sup>39</sup> Pre-quickening abortion was deemed a non-capital felony, rendering the convict "liable to be fined, imprisoned, set in and upon the Pillory, publicly or privately whipped . . . or to be transported beyond the Seas for any Term not exceeding fourteen Years."<sup>40</sup>

American legislatures did not take up abortion until two decades later, and when they did, the new laws resembled poison control measures more than attempts to curb abortion per se.<sup>41</sup> Crucially, they did not abolish the quickening distinction, and they did not prohibit abortion so much as the commercial sale of patent abortifacients.<sup>42</sup> Highly restrictive laws which, until 1973, criminalized most abortions from conception onward, emerged as the result of a

37. 2 WILLIAM BLACKSTONE, COMMENTARIES \*198.

38. 43 Geo. 3, c. 58, §§ 1-2 (1803) (Eng.).

39. *Id.*

40. *Id.*

41. LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME 10 (1997).

42. *Id.*

concerted effort begun in 1857 by the newly-formed American Medical Association (AMA).<sup>43</sup> At the campaign's head was Dr. Horatio Robinson Storer, a Boston gynecologist and surgeon.<sup>44</sup> The success of this campaign was such that, within a quarter century of its inception, nearly every jurisdiction (including the District of Columbia) had enacted a statute criminalizing abortion from conception onward.<sup>45</sup>

Physicians, the most common abortion defendants in the twentieth century, and among the foremost proponents of its decriminalization (thus the familiar refrain 'a choice between a woman and her doctor'), had engaged in a virulent campaign to outlaw the practice scarcely a century earlier. In fact, this campaign arose out of questionably self-interested motives, presented a somewhat fanciful view of 'scientific' embryology, and relied on rather predictable appeals to gendered and ethnic animus.

### *1. Motivations behind the campaign*

While the medical campaign against abortion reflected the legitimate moral and social beliefs of its participants, another more practical motivation is apparent. The formation of the AMA represented a concerted effort on the part of rigorously trained graduates of elite allopathic medical schools to restrict the medical franchise to themselves.<sup>46</sup> Prior to this time, 'regulars,' as these physicians were known, faced virtually unrestrained competition from homeopaths, faith healers, midwives, and self- or apprenticeship-trained practitioners. Collectively, these latter groups were known as 'irregulars.'<sup>47</sup>

Competition was particularly fierce in the arena of reproductive medicine, to which scientific obstetrics and gynecology were fledgling latecomers.<sup>48</sup> Most women employed midwives for their obstetrical needs, and in some cases those needs extended to abortion.<sup>49</sup> Obstetrician/gynecologists sought to demarginalize themselves within the medical profession, where even the most learned among them were referred to as 'professors of midwifery.'<sup>50</sup> Indeed, their

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43. *Id.*

44. *Id.* at 11.

45. Reva Siegel, *Reasoning From the Body: A Historical Perspective of Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 279-80 (1992).

46. REAGAN, *supra* note 41, at 10-11.

47. *Id.* at 11.

48. Siegel, *supra* note 45, at 283.

49. *Id.* at 283-84.

50. *Id.*

moral status in the community at large was often suspect because these were men who made a profession of examining female genitalia.<sup>51</sup>

Despite reservations that they might have had about their colleagues' choice of specialty, regular physicians as a whole united with obstetrician/gynecologists in attempts to wrest control of reproductive medicine from irregulars.<sup>52</sup> Partially because it concerned a significant area of competition, this struggle was central to the AMA's interests. Driving midwives out of business was beneficial for all physicians because nearly every family was likely to need reproductive medical services at some point.<sup>53</sup> The regulars feared that families who regularly employed the neighborhood midwife might, from habit or familiarity, turn to her as the first source of treatment for any ailment.<sup>54</sup> By controlling reproductive medicine, the AMA hoped to control the 'gateway' to medicine as a whole.<sup>55</sup> Thus, for reasons that may have served business as much as morals or public health, the medical anti-abortion movement proffered a number of arguments grounded in contemporary scientific and social beliefs.

## 2. *The physiological argument*

The canon law and common law views of abortion reflected both women's understandings of their bodily functions<sup>56</sup> and Judeo-Greco-Christian religious understanding of natural philosophy. The popular view of gestation comported with the maternal experience of detecting a separate, involuntary movement within the womb at a point approximately halfway through pregnancy.<sup>57</sup> This moment, at which the experience of pregnancy transformed from mere physiological changes in the self to the direct experience of another, independent actor within the body, marked a logical point at which to draw the distinction between mother/child as a single entity and mother and child as distinct entities.

Indeed, many women in a pre-scientific age may not have recognized early gestation as pregnancy at all, but rather as a period of 'blocked menses,' which was sometimes, but by no means always, a precursor to quickening and true pregnancy.<sup>58</sup> The perceptual

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51. REAGAN, *supra* note 41, at 12.

52. ROSALIND POLLACK PETCHESKY, ABORTION AND WOMAN'S CHOICE 81 (1984).

53. *Id.*

54. *Id.*

55. *Id.*

56. REAGAN, *supra* note 41, at 8.

57. See *supra* notes 27-30 and accompanying text.

58. REAGAN, *supra* note 41, at 8.

disconnect between cessation of menstruation and the onset of pregnancy is perhaps explainable by the frequency of spontaneous early miscarriage, and the prevalence of true (i.e. non-gestational) amenorrhea as a symptom of illness or malnutrition.<sup>59</sup> Thus, when some women took home preparations, and later patent medicines — made up of pennyroyal, tansy, ergot, snakeroot, cotton root, or savin (juniper extract) — it is possible that they did not conceptualize them as abortifacients terminating pregnancies, but rather as remedies that would ‘bring on the menses’ (i.e. cure their amenorrhea).<sup>60</sup>

As discussed in section IIA, legal and religious understandings of abortion were premised on metaphysical notions of rational ensoulment but dovetailed with popular understandings of the body in that they adopted quickening as the moment of delineation. Not surprisingly, organized medicine, which saw itself as a scientific movement at odds with folk or religious natural philosophy, set about attacking these traditional understandings of gestation.<sup>61</sup> The medical movement dismissed quickening as lacking scientific significance<sup>62</sup> and ensoulment theory as ‘metaphysical speculation.’<sup>63</sup> It sought instead to introduce contemporary embryology as the model by which fetal rights should be determined.

Autonomous life, the movement argued, began at conception, because at that point the embryo possessed an independent capacity for growth.<sup>64</sup> The fact that a fetus was generally not viable before seven months did not matter to Dr. James Whitmire, who proclaimed that “[t]he truly professional man’s morals . . . are not of that easy caste, because he sees in the germ the probable embryo, in the embryo the rudimentary foetus, and in that, the seven months viable child and the prospective living, moving, breathing man or woman.”<sup>65</sup> Furthermore, because the embryo was attached to the mother only by the umbilicus, and then only via the placenta, the movement argued that the embryo was in a scientific sense an independent being.<sup>66</sup>

This notion of physical and moral disconnect from the mother was crucial to the movement’s proffered explanation of gestation. Storer announced that an unfertilized egg “may perhaps be

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59. *Id.* at 8-9.

60. *Id.* at 9.

61. Siegel, *supra* note 45, at 288.

62. REAGAN, *supra* note 41, at 12.

63. Siegel, *supra* note 45, at 288.

64. *Id.*

65. James S. Whitmire, *Criminal Abortion*, 31 CHI. MED. J. 385, 392 (1874), quoted in Siegel, *supra* note 45, at 291.

66. Siegel, *supra* note 45, at 288.

considered as a part and parcel" of a woman before conception, "but not afterwards."<sup>67</sup> He compared the embryo to a nursing infant, asserting that:

This is no fanciful analogy; its truth is proved by countless facts. In the kangaroo, for instance, the offspring is born into the world at an extremely early stage of development . . . and then is placed by the mother in an external, abdominal, or marsupial pouch, to portions of which corresponding, so far as function goes, at once to teats and to the uterine sinuses, these embryos cling by an almost vascular connection, until they are sufficiently advanced to bear detachment, or in reality to be born . . . The first impregnation of the egg, whether in man or in kangaroo, is the birth of the offspring to life; its emergence into the outside world for wholly separate existence is, for one as for the other, but an accident in time.<sup>68</sup>

The physiological picture of gestation presented by the nineteenth-century medical anti-abortion movement was a systematic attempt to discredit the popular and religious understanding of the fetus as one with its mother throughout pregnancy and not uniquely human until the moment of quickening. Instead, the movement sought to substitute a view of a protected, miniature (usually male) adult, who, though he appears at first as "the invisible product of conception," inevitably "develop[s], grows, passes through the embryonic and foetal stages of existence, appears as the breathing and lovely infant, the active, the intelligent boy, the studious moral youth, the adult man, rejoicing in the plenitude of his corporeal strength and intellectual powers, capable of moral and spiritual enjoyments."<sup>69</sup>

In an age when science was worshiped almost as a new religion, the practitioners of a scientific profession were at a distinct advantage in winning the public over to their cause. If its arguments bent the finer points of biological understanding for a rhetorical purpose, the physicians' movement doubtless felt this small mendacity justified. Physicians likely reasoned that removing irregulars from the practice of reproductive medicine was to everyone's benefit because it resulted in the general substitution of scientific healing for folk medicine.<sup>70</sup> Victorian America had other

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67. HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* 17 (Boston, Lee & Shepard 1866), *quoted in* Siegel, *supra* note 45, at 289.

68. *Id.* at 29-30, *quoted in* Siegel, *supra* note 45, at 289-90.

69. HUGH HODGE, *FOETICIDE, OR CRIMINAL ABORTION* 25 (Lindsay & Blakiston 1869), *quoted in* Siegel, *supra* note 45, at 290.

70. PETCHESKY, *supra* note 52, at 81 (discussing regular physicians).

preoccupations, however, and it was to these that the anti-abortion movement next appealed.

### 3. *The social order argument*

Abortion, its medical critics urged, threatened to undermine the social order because it distracted women from their physiologically determined roles as wives and mothers and made them easier prey for the misguided proponents of feminism.<sup>71</sup> Women selfishly sought abortions, it was argued, "to avoid the labor and the expense of rearing children, and the interference with pleasurable pursuits, fashions, and frivolities,"<sup>72</sup> and by doing so chose "an indolent, selfish life, neglecting the work God ha[d] appointed [them] to perform."<sup>73</sup>

The physicians' anti-abortion movement was openly hostile to the feminist movement, which the physicians' movement saw as promoting female abandonment of maternal duty:

"Woman's rights" now are understood to be, that she should be a man, and that her physical organism, which is constituted by Nature to bear and rear offspring, should be left in abeyance, and that her ministrations in the formation of character as mother should be abandoned for the sterner rights of voting and law making.<sup>74</sup>

Indeed, the notions of reproductive choice and electoral choice were conflated by members of the movement who warned that women sought not only to vote for political leaders, but also to 'elect' how many children they would have.<sup>75</sup> Although the nineteenth century feminist movement was almost monolithic in its opposition to abortion, which it viewed as an evil forced upon women by lustful husbands and deceitful suitors,<sup>76</sup> the anti-abortion movement nonetheless blamed feminists for tacitly encouraging abortion through engendering an illicit desire to shirk female responsibilities.<sup>77</sup>

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71. See Siegel, *supra* note 45, at 302-02 (discussing the connection between abortion and social issues about women).

72. ANDREW NEBINGER, CRIMINAL ABORTION; ITS EXTENT AND PREVENTION 11 (Collins 1876), *quoted in* Siegel, *supra* note 45, at 302.

73. AUGUSTUS K. GARDNER, CONJUGAL SINS AGAINST THE LAWS OF LIFE AND HEALTH 225 (J.S. Redfield 1870), *quoted in* Siegel, *supra* note 45, at 303.

74. Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 MED. ARCHIVES 193, 205 (1869), *quoted in* Siegel, *supra* note 45, at 303-304.

75. Siegel, *supra* note 45, at 304.

76. REAGAN, *supra* note 41, at 12.

77. Siegel, *supra* note 45, at 303.

The rhetorical genius of the anti-abortion movement's attack on feminism was its success in turning feminist arguments about marriage and sexual morality precisely on their heads. Nineteenth century feminism advocated 'voluntary motherhood,' which essentially meant female control of marital sexuality.<sup>78</sup> The classical legal understanding of marriage bestowed on the husband rights to his wife's labor and sexuality, in exchange for his duty of support.<sup>79</sup> The feminist movement saw this arrangement as little better than legalized prostitution.<sup>80</sup> Further, it argued, the approach to sexuality that society imposed on females — chastity until marriage, monogamy afterwards — was morally superior to the standard it tacitly approved for males — lifelong patronization of (actual) prostitutes and marital infidelity.<sup>81</sup>

The anti-abortion movement reversed this rhetoric, lobbing it back at its source with Dr. Horatio Storer's charge that women who aborted (and thus, presumably, many feminists) committed a sin of precisely equal gravity as men who visited prostitutes.<sup>82</sup> Indeed, abortion further threatened female morality, it was argued, because it threatened female chastity and thus every family's interests in descent.<sup>83</sup> While the medical anti-abortion movement was directed primarily at married women, the charge that abortion permitted unmarried women to have sex was also of importance.<sup>84</sup> With the availability of abortion, female chastity could not so easily "be enforced with severe social and legal sanctions, among which fear of pregnancy function[s] effectively and naturally."<sup>85</sup>

The medical anti-abortion movement further appropriated the 'legalized prostitution' metaphor, arguing that it was marriage *without child bearing*, rather than 'ordinary' marriage, which gave rise to this condition.<sup>86</sup> The physicians argued that "so long as man's natural sexual urge [sic] were allowed expression in marriage *without* reproductive consequence,"<sup>87</sup> marriage represented legalized prostitution. Thus, "the very aspiration to avoid maternity [was] an expression of unnatural egoism or immoral license."<sup>88</sup> Indeed, at

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78. REAGAN, *supra* note 41, at 12.

79. Siegel, *supra* note 45, at 305.

80. *Id.* at 308.

81. REAGAN, *supra* note 41, at 12.

82. *Id.*

83. PETCHESKY, *supra* note 52, at 82.

84. REAGAN, *supra* note 41, at 12.

85. LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 261 (1976), *quoted in* PETCHESKY, *supra* note 52, at 82.

86. Siegel, *supra* note 45, at 308.

87. *Id.* at 309 (emphasis in original).

88. *Id.* at 310.

least one physician implied that not only might feminism cause the evil of abortion, abortion might cause the evil of feminism.<sup>89</sup> William Goodell argued that women engaging in contraception or abortion turned to feminism because

[t]he sexual instinct has been given to man for the perpetuation of the species. . . . Dissociate one from the other, and . . . wedlock lapses into licentiousness; the wife is degraded into a mistress . . . [and she] takes distorted views of life and of the marriage relation, and harbors resentment against her husband as the author of all her ills.<sup>90</sup>

The elite physicians who led the anti-abortion campaign of the nineteenth century were predominantly American-born men of English and German lineage.<sup>91</sup> Given the social concerns of the time, it is understandable that their arguments should also play on 'native' fear of immigrant elements.<sup>92</sup> Fertility among the native-born, Protestant classes had declined relative to that of immigrants by 1850, and some attributed this disparity to the disproportionate practice of abortion among native-born women.<sup>93</sup> One year after the surrender at Appomattox, Storer asked his readers whether "the fertile savannas of the South, now disinthralled [sic] and first made habitable by freemen . . . [would] be filled by our own children or by those of aliens?"<sup>94</sup> At the same time as "gaps in our population . . . have late been made by disease and the sword . . . the great territories of the far West . . . offer homes for countless millions yet unborn," he mused, and charged that the ethnic makeup of those future Americans was "a question that our own women must answer; upon their loins depends the future destiny of the nation."<sup>95</sup>

This fear of ethnic outnumbering was widespread among the anti-abortionists. Augustus Gardner dedicated his tract "[t]o the Reverend Clergy of the United States who by example and instruction have the power to arrest the rapid extinction of the Native American People."<sup>96</sup> It was explicitly political, as attested to by Dr.

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89. *Id.* at 309.

90. William Goodell, *Clinical Lecture on Conjugal Onanism and Kindred Sins*, PHILA. MED. TIMES, Feb. 1, 1872, at 161, quoted in Siegel, *supra* note 45, at 309.

91. PETCHESKY, *supra* note 52, at 83.

92. REAGAN, *supra* note 41, at 11.

93. *Id.*

94. STORER, *supra* note 67, at 85, quoted in Siegel, *supra* note 45, at 299.

95. *Id.*

96. GARDNER, *supra* note 73, at 5, quoted in Siegel, *supra* note 45, at 298.



H.S. Pomeroy's observation that "our voters — and so our lawmakers and rulers, indirectly, if not directly — come more and more from the lowest class, because that class is able and willing to have children, while the so-called better classes seem not to be."<sup>97</sup>

Thus, the anti-abortion movement successfully exploited Victorian concerns about the effect of sexual and reproductive control on women's propensity to violate social norms and shirk prescribed maternal duties.<sup>98</sup> It effectively appropriated the rhetoric of the nineteenth century feminist movement, forcing its idiom through the looking glass of moral blame, and accusing feminists of the very licentiousness they attributed to men.<sup>99</sup> As the movement attacked the women of its members' own social and ethnic class for their behavior, it likewise sought to persuade them that all class members should unite against the common enemy of immigrant domination.<sup>100</sup>

Much like the rest of the nation, the District of Columbia had inherited a common law abortion view drawn on centuries of personal, religious, and philosophical understandings of pregnancy and the body. Yet just seven decades after the creation of the District, it bowed to a self-interested pressure group's quasi-scientific, anti-feminist, and anti-immigrant campaign to ban abortion. During a brief period of home rule, the District's legislature passed a prohibition that would drive its women and its abortion providers underground for over 100 years.

### III. ABORTION STATUTES IN THE DISTRICT OF COLUMBIA

#### A. *The Law Prior To 1872*

At the time of its creation in 1800, the District of Columbia was subject to existing Maryland and Virginia statutes, and, if not superceded, to pre-1776 English common law and statutes in force prior to 1776.<sup>101</sup> The common law understanding of abortion was

97. H. S. POMEROY, *THE ETHICS OF MARRIAGE* 39 (New York, Funk & Wagnalls 1888), quoted in Siegel, *supra* note 45, at 298.

98. Siegel, *supra* note 45, at 303.

99. REAGAN, *supra* note 41, at 12.

100. *Id.* at 11.

101. *History of the D.C. Code*, in D.C. CODE 1 (2001 Ed.). Although comprising a unified political entity, the District's two counties were subject to different laws. *Id.* Washington County, the land east of the Potomac River ceded by Maryland, was subject to Maryland law; Alexandria County, the land west of the Potomac River ceded by Virginia, was subject to Virginia law. *Id.* When Alexandria County was retroceded to Virginia in 1847, Virginia

apparently sufficient for the District; no mention of abortion appears in the first compilation of D.C. laws (the 'Cranch Code') or in the municipal ordinances of the City of Washington.<sup>102</sup>

In 1855, an Act of Congress called for the creation of a code for the District to be approved by a popular vote of District residents.<sup>103</sup> Chapter 130, sections fifteen through seventeen of the code would have provided D.C.'s first abortion statute.<sup>104</sup> The language is somewhat akin to the common law pre- versus post-quickening standard,<sup>105</sup> but potentially ambiguous:

Sec. 15. Any physician or other person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use any instrument or other means with intent to destroy such child, shall, in case of the death of such child or mother in consequence thereof, be imprisoned in the penitentiary not less than two nor more than ten years.

Sec. 16. Any physician or person who shall willfully administer to any pregnant woman, any medicine, drug, or substance whatever, or use any instrument or other means, with the intent thereby to procure the miscarriage of such woman, shall, upon conviction, be punished by imprisonment in the penitentiary not less than one nor more than five years.

Sec. 17. No person shall be punished by reason of any act mentioned in the two sections immediately preceding, where such act is done in good faith, with the intention of saving the life of such woman or child.<sup>106</sup>

Precisely what distinction the drafters sought to create between section fifteen and section sixteen is uncertain.<sup>107</sup> Literally read, the sections criminalize both attempted and successful pre-quickening abortion, but only successful post-quickening abortion.<sup>108</sup> This reading seems problematic because the greater penalty for post-

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law ceased to apply anywhere within the District of Columbia.

102. See generally W. CRANCH, ED., CODE OF LAWS FOR THE DISTRICT OF COLUMBIA (Washington, Davis & Force 1819); LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON (Washington, De Kraft 1833); 1 CORPORATION LAWS OF THE CITY OF WASHINGTON (Washington, Waters 1853).

103. Act of Mar. 4, 1855, ch. CLXXIV 10 Stat. 642.

104. ROBERT OULD & WILLIAM B. B. CROSS, EDs., REVISED CODE OF THE DISTRICT OF COLUMBIA 516 (1857) (citing D.C. CODE ANN. §§ 15-17).

105. See discussion *supra* Part II.

106. OULD & CROSS, *supra* note 104, at 516.

107. See *id.*

108. See *id.*

quickenings abortion suggests that the drafters believed it the more serious crime.<sup>109</sup> It is therefore unlikely that they would have excused its attempt, while criminalizing unsuccessful pre-quickenings abortions.<sup>110</sup>

It is plausible that, taken together with section fifteen, 'pregnant' in section sixteen implies quickening.<sup>111</sup> Under this reading, pre-quickenings abortion would be no crime; post-quickenings abortion would be criminal, and the penalties would differ for completion and attempt.<sup>112</sup> This ambiguity would doubtless have proven fruit for vigorous judicial construction, but the proposed code was never ratified, and abortion in D.C. would remain subject to the common law for another fifteen years.<sup>113</sup>

### *B. The 1872 Act*

In 1872, the short-lived Legislative Assembly for the District of Columbia passed a comprehensive abortion prohibition.<sup>114</sup> Section one provides that

[a]ny person who shall administer, or cause to be administered, to any woman *in any condition of pregnancy*, any medication, drug, substance, or thing whatsoever, with the intention thereby to produce a miscarriage . . . or shall use on any such woman any instruments, or any other means for said purposes, shall, in case of the death of said woman . . . or in case of the death of the child therefrom, *be guilty of manslaughter*, and be punished . . . by imprisonment at hard labor . . . for a period of not less than four no more than seven years, and be fined in a sum not exceeding one thousand dollars.<sup>115</sup>

The differences between the 1857 and the 1872 statutes are significant. First, the quickening distinction is abolished; the prohibition applies to abortions "in any condition of pregnancy."<sup>116</sup> Second, the law explicitly equates abortion with homicide, rendering the abortion provider guilty of manslaughter, not the separate crime of abortion.<sup>117</sup>

109. *See id.*

110. *See id.*

111. *See id.*

112. *See id.*

113. *History of the D.C. Code, supra* note 101, at 8.

114. *See generally* ACTS & RESOLUTIONS OF THE SPECIAL SESSIONS OF THE FIRST LEGISLATIVE ASSEMBLY OF THE DISTRICT OF COLUMBIA 26 (Chronicle 1872) [hereinafter ACTS & RESOLUTIONS].

115. *Id.* at 26-27 (emphasis added).

116. *Id.*

117. *Id.*

Section two provides somewhat lesser penalties for aiders and abettors, but defines these categories widely, to sweep in not only procurers and assistants, but also anyone who chooses to “advise, direct, or counsel” abortion, or even merely “countenance or approve”<sup>118</sup> the procedure. It is conceivable that attempted abortion might be prosecutable under this section’s broad language.<sup>119</sup>

Section three provides a life-of-the-mother exception, with an additional requirement that at least one other physician concur in the decision.<sup>120</sup> Sections four and five prohibit the sale of abortifacients except on the written prescription of a licensed “graduated” physician,<sup>121</sup> and require that pharmacists keep a separate register of all such dispensations.<sup>122</sup> Section six forbids the advertisement of abortifacients, although it cleverly avoids the appearance of prior restraint by providing a five day notice requirement before charges may be brought.<sup>123</sup> Section seven requires the District Coroner to analyze all suspected abortifacients and abortion instruments whenever there is suspicion of an abortion.<sup>124</sup> Section eight permits co-conspirators in abortion to testify against one another and provides both civil and criminal immunity to such testimony.<sup>125</sup>

### *C. Section 22-201*

In 1901, all previous D.C. statutes were superceded by the Congressional Act to Establish a Code of Law for the District of Columbia.<sup>126</sup> The 1901 code pared the 1872 Act down to a single paragraph:

SEC. 809. PROCURING MISCARRIAGE.— Whoever, with intent to procure the miscarriage of any woman, prescribes or administers to her any medicine, drug, or substance whatever, or with like intent uses any instrument or means, unless when necessary to preserve her life or health and under the direction of a competent licensed practitioner of medicine, shall be

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118. *Id.*

119. *Id.* at 27.

120. *Id.*

121. *Id.*

122. *Id.* at 27-28.

123. *Id.* at 28.

124. *Id.* at 28-29.

125. *Id.* at 29.

126. District of Columbia Code, 56th Cong. ch. 854, 31 Stat. 1189 (1901).

imprisoned for not more than five years; or if the woman or her child dies in consequence of such act, by imprisonment for not less than three nor more than twenty years.<sup>127</sup>

The 1901 code thus adopted the 1872 statute's from-conception prohibition.<sup>128</sup> It retained the life-of-the-mother exemption and added a health exemption.<sup>129</sup> It eliminated the complex regulation of pharmacists, although presumably the unauthorized sale of abortifacients was proscribed by the "administers . . . unless . . . under the direction of" language.<sup>130</sup> It reintroduced the statutory distinction between attempted and completed abortion and it imposed quite a severe maximum penalty on the latter: twenty years, as opposed to only seven under the 1872 Act.<sup>131</sup>

Section 802, recodified as Section 22-201 in 1940,<sup>132</sup> persisted in this form until 1953. In that year, Congress passed the District of Columbia Law Enforcement Act of 1953.<sup>133</sup> As part of this Act, Section 22-201 was amended to read:

Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, *or attempts to procure or produce* an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than one year or not more than ten years; *or if the death of the mother results therefrom, the person . . . shall be guilty of second degree murder.*<sup>134</sup>

As indicated, this statute eliminates the distinction between attempted and completed abortion, and thereby raises the maximum penalty for the former, while lowering the maximum penalty for the latter.<sup>135</sup> It also dramatically increases the consequences of killing the patient.<sup>136</sup> While earlier laws had recognized patient death as

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127. *Id.* § 809 (recodified at D.C. CODE ANN. § 22-201 (1940)) (current version at D.C. CODE ANN. § 22-101 (2001)).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*; ACTS & RESOLUTIONS, *supra* note 114, at 24.

132. D.C. CODE ANN. § 22-201 (1940).

133. District of Columbia Law Enforcement Act of 1953, 83 Pub. L. No. 85, § 203, 67 Stat. 90 (codified as amended at D.C. Code § 22-201 (1966)) (current version at D.C. CODE ANN. § 22-101 (2001)).

134. *Id.* (emphasis added).

135. *Id.*

136. *Id.*

essentially an aggravating circumstance of abortion, the 1953 statute labels the hapless abortion provider as murderer, regardless of his or her actual intent, and without even a showing of recklessness in performing the operation.<sup>137</sup> An earlier version of the 1953 Act would have removed the health-of-the-mother exception, but this provision was abandoned for reasons which are not apparent from the legislative history.<sup>138</sup>

Section 22-201, later recodified as Section 22-101,<sup>139</sup> remained in force as amended until rendered unconstitutional in 1973 by *Roe v. Wade*.<sup>140</sup> Curiously, it has never been repealed, and remains in the current D.C. Code.<sup>141</sup> While its survival might superficially suggest oversight, it is notable that a typographical error within the text of the 1953 Act's abortion section was corrected by the D.C. Council in 1989, as part of a Technical Amendments Act that eliminated numerous other obsolete sections.<sup>142</sup> Three decades into its obsolescence, Section 22-101 remains the first offense enumerated in D.C.'s criminal code, a vestigial reminder of a century of criminalized abortion.

### III. THE EXPERIENCE OF CRIMINAL ABORTION IN THE DISTRICT OF COLUMBIA AS REFLECTED IN THE REPORTED CASES

Abortion is by its nature private, and countless thousands doubtlessly took place without record during the District's century of prohibition. Where, however, the private act of abortion was forced into public view by a criminal prosecution, judicial opinions provide an historical window into this illegal practice. Appellate records are imperfect sources of history for numerous reasons. Facts are subordinated to law, and only those relevant to the issues on appeal need be reported. Appealed cases are by no means representative of all cases brought — the stories of those defendants who pled guilty, were acquitted, or lacked financial means to appeal left no mark on the published case reports. Even given these limitations, the reported cases permit a rare glimpse into the social, practical, and legal troubles faced by participants in the shadow world of criminal abortion.

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137. *Id.*

138. *Hearing on the District of Columbia Law Enforcement Act Before the House Comm. on the District of Columbia*, 83d Cong. 55, 57 (1954) (statement of Hon. Samuel Spencer, Comm'r, District of Columbia), *microformed on* CIS no. 83 HD-T.13 (Cong. Info. Serv.).

139. D.C. CODE ANN. § 22-101 (1973).

140. 410 U.S. 113 (1973).

141. D.C. CODE ANN. § 22-101 (2001).

142. Technical Amendments Act of 1988, preamble, § 28, 36 D.C. Reg. 492 (codified as amended at D.C. CODE ANN. § 22-101 (2001)).

The D.C. reported cases<sup>143</sup> concern twenty-one charged abortions or attempts of abortion, although a number of cases refer to additional abortions as evidence of the charged abortion or other offenses.<sup>144</sup> Of these twenty-one abortions, six allegedly resulted in the death of the patient.<sup>145</sup> Of twenty-nine identifiable defendants, twenty-one were accused of performing abortions themselves, and five of aiding and abetting as go-betweens, assistants, or, in one case, the paramour of the patient.<sup>146</sup> Twenty-one defendants were

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143. *United States v. Vuitch*, 402 U.S. 62 (1971); *Laughlin v. United States*, 344 F.2d 187 (1965); *Copes v. United States*, 345 F.2d 723 (D.C. Cir. 1964); *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963); *Hunt v. United States*, 301 F.2d 255 (D.C. Cir. 1962); *Bush v. United States*, 301 F.2d 255 (D.C. Cir. 1962); *Hopkins v. United States*, 275 F.2d 155 (D.C. Cir. 1960); *Agee v. United States*, 248 F.2d 757 (D.C. Cir. 1957); *McAllister v. United States*, 239 F.2d 76 (D.C. Cir. 1956); *Brown v. United States*, 239 F.2d 75 (D.C. Cir. 1956); *Harper v. United States*, 239 F.2d 945 (D.C. Cir. 1956); *Peckham v. United States*, 226 F.2d 34 (D.C. Cir. 1955); *Peckham v. United States*, 210 F.2d 693 (D.C. Cir. 1954); *Spriggs v. United States*, 205 F.2d 885 (D.C. Cir. 1953); *Goodloe v. United States*, 188 F.2d 621 (D.C. Cir. 1951); *Miller v. United States*, 169 F.2d 967 (D.C. Cir. 1948); *Williams v. United States*, 138 F.2d 81 (D.C. Cir. 1943); *Hart v. United States*, 105 F.2d 792 (D.C. Cir. 1939); *Crichton v. United States*, 92 F.2d 224 (D.C. Cir. 1937); *Harrod v. United States*, 29 F.2d 454 (D.C. Cir. 1928); *Kemp v. Board of Medical Supervisors*, 46 App. D.C. 173 (D.C. Cir. 1917); *Kemp v. United States*, 41 App. D.C. 539 (D.C. Cir. 1914); *Thompson v. United States*, 30 App. D.C. 352 (D.C. Cir. 1908); *Maxey v. United States*, 30 App. D.C. 63 (D.C. Cir. 1907); *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969), *rev'd* 402 U.S. 62 (1971); *United States v. Vincent*, 292 F. Supp. 729 (D.D.C. 1968); *United States v. Harper* 137 F. Supp. 4 (D.D.C. 1956), *aff'd* 239 F.2d 945 (D.C. Cir. 1956); *In re Quantz* 106 F. Supp. 557 (D.D.C. 1952); *Warren v. United States*, 310 A.2d 228 (D.C. 1973). Citations to historical District of Columbia cases can be confusing due to the shifting jurisdiction of 'state' law between local and federal courts and the inconsistent duplication of citation forms. At various points in the twentieth century, trial jurisdiction of D.C. 'state' criminal offenses was held by the United States District Court for the District of Columbia (D.D.C.), the trial term of the now-defunct Supreme Court of the District of Columbia (D.C.), and the Superior Court of the District of Columbia (D.C. Super. Ct.). Before the creation of the District of Columbia Court of Appeals (D.C.) in 1970, both 'state' and federal appeals were taken to the United States Court of Appeals for the District of Columbia Circuit (D.C. Cir.) and its predecessor, the Court of Appeals of the District of Columbia (D.C. Cir.). See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 196-97 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

144. See cases cited *supra* note 143.

145. *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963); *Hopkins v. United States*, 275 F.2d 155 (D.C. Cir. 1960); *Spriggs v. United States*, 205 F.2d 885 (D.C. Cir. 1953); *Hart v. United States*, 105 F.2d 792 (D.C. Cir. 1939); *Maxey v. United States*, 30 App. D.C. 63 (D.C. Cir. 1907); and *Warren v. United States*, 310 A.2d 228 (D.C. 1973).

146. *Laughlin v. United States*, 344 F.2d 187 (D.C. Cir. 1965); *Copes v. United States*, 345 F.2d 723 (D.C. Cir. 1964); *Wayne v. United States*, 318 F.2d 205 (D.C. Cir. 1963); *Hunt v. United States*, 301 F.2d 255 (D.C. Cir. 1962); *Hopkins v. United States*, 275 F.2d 155 (D.C. Cir. 1960); *Agee v. United States*, 248 F.2d 757 (D.C. Cir. 1957); *McAllister v. United States*, 239 F.2d 76 (D.C. Cir. 1956); *Brown v. United States*, 239 F.2d 945 (D.C. Cir. 1956); *Peckham v. United States*, 226 F.2d 34 (D.C. Cir. 1955); *Peckham v. United States*, 210 F.2d 693 (D.C. Cir. 1954); *Spriggs v. United States*, 205 F.2d 885 (D.C. Cir. 1953); *Goodloe v. United States*, 188 F.2d 621 (D.C. Cir. 1951); *Miller v. United States*, 169 F.2d 967 (D.C. Cir. 1948); *Ladrey v. United States*, 155 F.2d 417 (D.C. Cir. 1946); *Hart*

male; eight were female.<sup>147</sup> Of the twenty-one alleged principal abortion providers, eleven were identified as medical doctors, seven were identified as non-physicians, and three were not identifiable by qualification.<sup>148</sup>

### A. Abortion Narratives

Amid the legal analysis, the reported cases contain some compelling, first hand accounts of illegal abortion as experienced by patients, providers, and police in the District of Columbia. It was apparently a world fraught with dangers: arrest and imprisonment for the provider, morbidity or death for the patient. Even if such risks did not manifest themselves, surely the secrecy — the code names, the intermediaries, and the anonymous offices — weighed heavily on all the parties, forced as they were into this underworld by a legal regime that excoriated their conduct.

Sadie Volk was a domestic cook who found herself three months pregnant in October of 1905.<sup>149</sup> She later told a court that

she went to the house of the defendant . . . and was shown into his office. She inquired of defendant, who was alone, if he operated. He said "Yes," and that he would perform the operation. He then inquired how long she had been pregnant, and her answer was "three months." He caused her to recline on a sofa in the office, lifted her clothes, and performed an operation on her. She could not see what he did. He operated about ten minutes. She paid him \$15, and he told her if the operation did not have effect to return on the third day thereafter.<sup>150</sup>

Three days later, a Dr. McKay (presumably a "regular" physician) was summoned to Sadie's house where

[He] found her in her room, in bed, covered with clothes and soaked with blood. Found membrane projecting from her vagina which meant that a child had recently been brought forth. He

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v. United States, 105 F.2d 792 (D.C. Cir. 1939); Crichton v. United States, 92 F.2d 224 (D.C. Cir. 1937); Harrod v. United States, 29 F.2d 454 (D.C. Cir. 1928); Thompson v. United States, 30 App. D.C. 352 (D.C. Cir. 1908); Maxey v. United States, 30 App. D.C. 63 (D.C. Cir. 1907); United States v. Vincent, 292 F. Supp. 729 (D.D.C. 1968); United States v. Harper 137 F. Supp. 4 (D.D.C. 1956), *aff'd* 239 F.2d 945 (D.C. Cir. 1956); *In re Quantz* 106 F. Supp. 557 (D.D.C. 1952); Warren v. United States, 310 A.2d 228 (D.C. 1973).

147. See cases cited *supra* note 143.

148. See cases cited *supra* note 143.

149. Thompson v. United States, 30 App. D.C. 352, 353-56 (D.C. Cir. 1908).

150. *Id.* at 354.



examined into her condition. She told him that her baby was under the bed, and he found it there. She showed symptoms [sic] of having absorbed some poison, and he had her conveyed to the hospital for treatment. The foetus was seven or eight inches long and without life in it. She was apparently a stout, robust woman, and he saw nothing to indicate the necessity of an operation to produce a miscarriage in order to save her life.<sup>151</sup>

Claudia Parrish was only sixteen years old when she became pregnant by Paul Meagher in 1906.<sup>152</sup> She was initially uncertain about the cause of her missed menstrual periods;<sup>153</sup> her doctor attributed them to a cold and gave her "some simple remedy."<sup>154</sup> Her sister May suggested Hunyadi Water.<sup>155</sup> When Claudia's condition became more obvious, May wrote to Meagher, telling him that "it is up to you to do something."<sup>156</sup> May would later testify that by "do something," she meant that Meagher would either marry Claudia, or come forward and admit the pregnancy to her father — she "did not expect anything more."<sup>157</sup>

Nevertheless, May accompanied Claudia to meet Meagher at Seventh Street and Pennsylvania Avenue, NW, from whence they rode the streetcar to G Street, SW.<sup>158</sup>

Claudia was crying on the way. Meagher told them they should tell "Mrs. Pierce" that Claudia was married, and that "Mrs. Rock" had sent them to her. He showed them the house of "Mrs. Pierce," which was No. 41 G Street, S. W. He said he would not go past the house with them, because she would think detectives were watching her. Just before getting to the house he got behind a woodpile at the corner, and stood there. He gave Claudia \$10. "Mrs. Maxey" answered the knock at the door, and said she supposed she was the person looked for. She asked if the visit was about "abortion business." She told them to sit down, as she had a patient in the back room. Returning she asked them if they knew "Mrs. Rock," and they said yes. She said she did not see why Claudia should not get over it, and said she had had many patients. Finally she took Claudia up stairs.

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151. *Id.* at 354-55.

152. *Maxey v. United States*, 30 App. D.C. 63, 65 (D.C. Cir. 1907).

153. *Id.* at 66.

154. *Id.* at 70.

155. *Id.* at 66. Hunyadi water was the bottled product of a well in Budapest, and the subject of a patent dispute that reached the United States Supreme Court. *See Saxlehner v. Eisner & Mendelson Co.*, 179 U.S. 19 (1900).

156. *Maxey*, 30 App. D.C. at 67.

157. *Id.*

158. *Id.* at 65.

She came down in about twenty minutes, with a towel in her hands that showed blood upon it. Holding it up she said it was unusual to get so much blood the first time. She gave Claudia some medicine, and told her to return the day after to-morrow. She said there was a possibility that Claudia might have to go to bed, and that she knew a "colored lady" who would take her in if she got sick; would find out and let her know [when Claudia returned] . . . [Claudia and May] left and met Meagher on the corner, and told him what had occurred. He asked if she inquired if they knew "Mrs. Rock," and they said yes, and that they told the woman they knew "Mrs. Rock" very well, and also that Claudia was married. He asked if the money was sufficient, and if Claudia was coming again. He was told that the money was sufficient, and that Claudia was to return on Wednesday. He rode part of the way home with them, furnishing the car tickets.<sup>159</sup>

The night of the abortion (Monday), Claudia had "two chills."<sup>160</sup> By Tuesday night she was very sick, and by Wednesday she could barely walk. On Thursday morning, she dragged herself to the Riggs Hotel, where May worked as a telephone operator.<sup>161</sup> May sent her immediately by carriage to Columbia Hospital.<sup>162</sup> There, the following morning, 'Mrs. Pierce's' treatment had its intended effect; despite the surgical resident's efforts to prevent miscarriage, a four-month fetus was delivered lifeless at 11:00 a.m.<sup>163</sup> Mrs. Pierce's catheter, however, had brought with it something else: "puerperal septicaemia."<sup>164</sup> That night, Claudia became delirious.<sup>165</sup> Over the next three days, Claudia's temperature reached 105 degrees, and her pulse rose at times to 160 beats per minute.<sup>166</sup> As her condition worsened, an inflammatory mass larger than the surgeon's fist protruded from her uterus.<sup>167</sup> Despite an operation to drain the uterus, Claudia died on the morning of June 27, 1906.<sup>168</sup>

On the advice of a 'contact,' Mr. and Mrs. Carl Meinardus traveled from Brooklyn, New York to Washington, D.C. in December of 1967.<sup>169</sup> As instructed, they checked into the Skyline

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159. *Id.* at 65-66.

160. *Id.* at 66.

161. *Id.*

162. *Id.*

163. *Id.* at 67.

164. *Id.* This term is sufficiently non-specific as to be obsolete in modern medical usage. A possible modern diagnosis given the history and symptoms would be chorioamniitis.

165. *Id.*

166. *Id.*

167. *Id.* at 68.

168. *Id.*

169. *United States v. Vincent*, 292 F. Supp. 729, 730 (D.D.C. 1968).

Inn at South Capitol and I Streets, SW, and telephoned 'Mary' at 554-4849.<sup>170</sup> 'Mary' arrived for Mrs. Meinardus in a taxi the following afternoon, and took her to 1425 Fourth Street, SW, apartment A-505.<sup>171</sup> They were greeted by a man who identified himself as 'Dr. Ewing' (actually Thomas Phillip Martini, who had been convicted of criminal abortion in 1957 and arrested again on that charge in 1966).<sup>172</sup> 'Dr. Ewing' gave Mrs. Meinardus several pills and injections, and then took her into a bedroom that had been outfitted with a gynecologist's examination table.<sup>173</sup> Mrs. Meinardus placed her legs in the stirrups, and the 'doctor' began the procedure.<sup>174</sup> 'Mary' returned Mrs. Meinardus to the Skyline Inn that evening; she had been gone approximately six and one half hours.<sup>175</sup> Although it was late, the Meinarduses drove the 230 miles back to Brooklyn that night.<sup>176</sup> The next morning, Mrs. Meinardus suffered severe cramps and was admitted to Community Hospital in Brooklyn, where she was listed in critical condition due to a septic abortion.<sup>177</sup> While sixty years of medical progress since Claudia Parrish's death saved Mrs. Meinardus's life, it could not save her fertility.<sup>178</sup> Antibiotics controlled the infection, but she underwent a hysterectomy to remove her destroyed womb.<sup>179</sup>

Six decades separate the abortions of Claudia Parrish and Mrs. Meinardus, but the experience of criminal abortion did not change significantly over that period. A universe of clandestine contacts, pseudonyms, anonymous buildings, and the potential for medical complications still awaited any woman seeking to terminate a pregnancy outside the limited purview of medically sanctioned abortion.

### *B. Legal Disability And Ordeal In The Courts*

District of Columbia courts, in truth, posed no direct threat to abortion patients as potential defendants. No reported District of Columbia case involves the prosecution of a patient.<sup>180</sup> By 1908, courts explicitly interpreted the language of section 809 of the

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170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. See cases cited *supra* note 143.

District of Columbia Code<sup>181</sup> (later section 22-201) as applying only to the abortion provider.<sup>182</sup> Although a patient was formally viewed as a "victim, rather than an accomplice,"<sup>183</sup> her standing in court was often significantly tainted by virtue of her abortion.

In at least one case, evidence that a witness had undergone the abortion about which she testified was deemed a proper bad act for impeachment of her credibility.<sup>184</sup> The trial judge in *Thompson* instructed the jury that "according to the testimony of Sadie Volk, while she is not an accomplice, strictly speaking, inasmuch as, from her own evidence, she morally implicates herself in the act, the jury should consider that circumstance as bearing on her credibility."<sup>185</sup>

Because patients often provided the strongest evidence against their clients, defense attorneys in abortion cases had strong incentives to target them for character assassination. In the trial of Dr. Henry Peckham, Jr., defense counsel Dorsey Offutt attempted to introduce evidence that Mary Ott, the complaining witness, had received psychiatric treatment at Bethesda Naval Hospital, and had undergone a string of earlier, unrelated abortions.<sup>186</sup> Offutt also subpoenaed Ott's mother<sup>187</sup> who, although unable to provide any relevant testimony, was forced to travel from Erie, Pennsylvania and listen to her daughter describe her abortion in open court.<sup>188</sup> He also asked Ott, "When were you arrested in this case?"<sup>189</sup> This was a clearly disingenuous question intended to prejudice the jury since

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181. D.C. CODE ANN. § 809 (1901).

182. *Thompson v. United States*, 30 App. D.C. 352, 362-63 (D.C. Cir. 1908) (noting the similar construction of statutes in Massachusetts, New Jersey, Kentucky, Minnesota, and Texas).

183. *Id.* at 363.

184. *Id.* at 362.

185. *Id.* at 362-63. The taint of abortion on credibility also seems to have applied to physicians and attorneys. In *Mostyn v. United States*, 64 F.2d 145, 146 (D.C. Cir. 1933), the government called a physician who had examined the victim of a police assault. The victim had apparently been referred to the physician by his attorney, and the defense attempted to impeach the physician with evidence that the attorney had represented him during a previous grand jury abortion investigation. *Id.*

186. *Peckham v. United States*, 210 F.2d 693, 698 (D.C. Cir. 1954) [hereinafter *Peckham I*].

187. Much of this account is drawn from *Offutt v. United States*, 208 F.2d 842 (D.C. Cir. 1953), *rev'd* 348 U.S. 11 (1954). *Offutt* falls within an interesting line of cases on criminal contempt and the difficulties of securing fair adjudication by the same judge who makes the initial finding. See also *Offutt v. United States*, 232 F.2d 69 (D.C. Cir. 1956) (appeal of second contempt conviction on remand from Supreme Court). Peckham's conviction was reversed partly on the basis of the antagonism with which the trial judge treated Offutt, *Peckham I*, 210 F.2d at 702, but he was subsequently convicted at his new trial, and this conviction was affirmed by the U.S. Court of Appeals for the District of Columbia. *Peckham II*, 226 F.2d at 34.

188. *Offutt*, 208 F.2d at 843.

189. *Id.*

arrest and prosecution of a patient were almost unknown in the District of Columbia.<sup>190</sup>

This sort of attempt to "besmirch a witness"<sup>191</sup> appears again in *In re Quantz*, where the petitioner's trial counsel sought to introduce evidence of the extramarital affair that had resulted in the complaining witness's pregnancy.<sup>192</sup> Counsel also attempted to question the witness about previous miscarriages and abortions, about whether she had been completely naked when the abortion was performed, and about "an alleged fight between [the witness] and a Chinese woman."<sup>193</sup>

A patient injured by a negligently performed abortion was also disadvantaged in the eyes of the court. Abortion's illegality necessarily precluded recovery under a breach of contract theory, because contracts concerning illegal acts are generally unenforceable. The moral taint of the plaintiff's abortion also denied recovery under a tort theory in the D.C. case of *Hunter v. Wheate*.<sup>194</sup> The court refused to sustain an action arising "*ex turpi causa*,"<sup>195</sup> finding it "hardly necessary to say that in voluntarily participating in the miscarriage upon herself the appellee engaged, not only in an unlawful act, but also in one which was immoral."<sup>196</sup>

### C. Race

It is somewhat surprising that, given the District of Columbia's history of segregation and racial discord, race does not play a significant role in the District's reported abortion cases. Most cases do not comment on the race of either provider or patient. A notable exception, however, is *Harrod v. United States*, which expressed the moral danger blacks posed to whites in the public imagination of 1928.<sup>197</sup> The defendant, Amanda Harrod, was an "elderly colored woman," convicted of performing, for a fee of \$30, three surgical treatments on Edna K. Steinbrucker, resulting in a miscarriage.<sup>198</sup> The police apparently interviewed Steinbrucker and her paramour Jolliffe after "they had observed numerous young white couples

190. *Id.*

191. *Id.*

192. 106 F. Supp. 557, 559 (D.D.C. 1952).

193. *Id.* at 559-60.

194. 289 F. 604 (D.C. Cir. 1923).

195. *Id.* at 606 (quoting *Higgins v. McCrea*, 116 U.S. 671, 686 (1886)).

196. *Id.* at 606-07.

197. 29 F.2d 444, 454 (D.C. Cir. 1928).

198. *Id.*

going into [Harrod's] house and leaving after brief visits."<sup>199</sup> Upon entering the house, the police discovered "several white people in the house [who] declared that they were there for similar treatments."<sup>200</sup>

The fear that blacks were contributing to white corruption by performing or aiding in the performance of abortions is alluded to in *Maxey*, as the court apparently found it significant that Kate Maxey promised to send Claudia Parrish to a "colored lady" for nursing if the abortion made her sick.<sup>201</sup> Otherwise, race remains absent from the judicial discussion of abortion in the District of Columbia, albeit with the curious exception of Dr. Quantz's charge that his patient had engaged in a fight with a "Chinese woman."<sup>202</sup>

#### *D. Governmental Targeting*

While the local police seem to have enforced D.C.'s abortion laws passively, by waiting for hospitals to report providers careless or unfortunate enough to maim or kill their patients, on at least one occasion, the United States Post Office Department employed a sting operation to enforce its own federal statute.<sup>203</sup>

On November 14, 1912, Postal Inspector James Woltz sent the following letter from Concord, North Carolina, to Dr. Thomas J. Kemp in his home office at 433 G. Street NW:

My Dear Doctor: –

I trust you will pardon my writing you as I am, but I am in such great distress and so anxious to find some way out of it, that this is my only excuse. I am a young man, married, and have been unfortunate enough to have gotten a young woman friend into trouble, to be plain, she is in a family way. Of course, I cannot marry her, and the condition she is in makes it necessary that she be afforded relief at as early a period as possible. She cannot permit the matter to go to full period either, as that would mean the ruin of her reputation, a thing not to be thought of. The girl is only twenty-two years old and is about two and a half months gone. If you can and will take this matter for us and relieve the girl of her trouble, will you please let me know what it will cost and about how long she would have to stay up there in

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199. *Id.* at 455.

200. *Id.*

201. *Maxey*, 30 App. D.C. at 66.

202. *Quantz*, 106 F. Supp. at 560.

203. *Kemp v. United States*, 41 App. D.C. 539, 539 (D.C. Cir. 1914). The federal statute made it illegal to send letters through the mail providing information on how to obtain an abortion. *Id.*

Washington? Will it be necessary for her to go to a Hospital or could the business be done here by the use of medicines? I want to be frank and tell you that we have tried two or three things we saw advertised and got at the drug store here, but they have been without effect.

Sincerely,  
Quincy Compton.<sup>204</sup>

Dr. Kemp responded to the (fictitious) Mr. Compton general delivery at the Concord, North Carolina Post Office as follows: "Dear Sir:- Your letter received and would say it would cost about two hundred & would have to stay here one week — destroy this letter — Can't write about this better come — This is answer to your letter won't sign my name."<sup>205</sup> Some days later, a Detective Honvery arrived at 433 G. Street, and introduced himself to Kemp as "Quincy Compton."<sup>206</sup> Kemp told Honvery that he would not perform the operation in his office, but rather in a room at the Metropolitan Hotel, which he proceeded to reserve for the supposed patient.<sup>207</sup>

Dr. Kemp was subsequently convicted under the United States Code section, which proscribed sending any advertisement or information about abortion services through the mail.<sup>208</sup> On appeal, he argued that his letter facially contained no abortion information, that the offense was impossible since both the letter's purported author and the patient were fictitious persons, and that he had been entrapped by the postal inspectors.<sup>209</sup> The Court of Appeals ruled that the letter's meaning could be taken in the context of the document to which it replied and Dr. Kemp's subsequent statements and actions.<sup>210</sup> It further held that the non-existence of author or patient was immaterial, since the offense under section 1461 was complete upon mailing of the letter.<sup>211</sup> The court also rejected Kemp's entrapment defense on the grounds that:

[The letter] was not such an inducement to commit crime as the law condemns. It left the way open to defendant . . . either to act the part of an honest man or the part of a criminal. Without any influence from anyone he chose the latter course . . . . "[T]he

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204. *Id.* at 542-43.

205. *Id.* at 543.

206. *Id.*

207. *Id.*

208. *Id.* at 541-42 (convicting Kemp under 18 U.S.C. § 1461 (1911)).

209. *Kemp I*, 41 App. D.C. at 544-48.

210. *Id.* at 544-46.

211. *Id.* at 546.

allegation of the defendant would be but the repetition of the plea as ancient as the world . . . 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver and . . . has never since availed to shield crime . . . and it is safe to say that under any code of civilized, not to say Christian ethics, it never will."<sup>212</sup>

Kemp was sentenced to two years in federal prison, but his sentence was commuted to a fine of \$500 by President Woodrow Wilson.<sup>213</sup> The four-line letter did not ultimately cost Dr. Kemp his freedom, but it did cost him his medical license: the Board of Medical Supervisors revoked it on May 29, 1916.<sup>214</sup> This administrative decision was reviewable by the Court of Appeals, wherein Kemp argued that his crime — the mailing of a letter — was not one of moral turpitude, and thus could not be the basis for discipline on that ground.<sup>215</sup> The court upheld the revocation, finding that "[a]bortion is held to involve moral turpitude. . . . Analyzing [appellant's] motive . . . but one conclusion can be reached; namely, a willful and intentional disposition on his part, for a small pecuniary consideration, to prostitute his high profession."<sup>216</sup>

### *E. Bribery Of Witnesses*

As a class of defendants, physicians are likely to have greater financial resources than most individuals. The collateral consequences of conviction also tend to be greater than for other defendant classes, because physicians' livelihoods are dependant on both reputation and government licensing. It is not surprising, then, that physicians often spent considerable sums litigating their defenses. On occasion, the combination of a strong motivation to escape conviction and economic wherewithal to finance payoffs and bribes led District of Columbia physicians to influence justice by illicit means.

Dr. Henry M. Ladrey was indicted in October of 1943 for performing an abortion on Hazel Queenan.<sup>217</sup> Three months later, Queenan informed Metropolitan Police detectives that the doctor's wife, Eva, had scheduled a meeting at Queenan's home for the

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212. *Id.* at 547 (quoting *Bd. of Comm'rs of Excise v. Backus*, 29 How. Pr. 33, 42 (N.Y. Sup. 1864)).

213. *Kemp v. Board of Medical Supervisors*, 46 App. D.C. 173, 175 (D.C. Cir. 1917).

214. *Id.*

215. *Id.* at 181.

216. *Id.* at 181-82 (internal citations omitted).

217. *Ladrey v. United States*, 155 F.2d. 417, 418 (D.C. Cir. 1946).



evening of January 7th.<sup>218</sup> That night, Police Sergeants Scott and Crooke listened from a back room while Mrs. Ladrey offered Queenan \$260 to "drop the charges."<sup>219</sup> Mrs. Ladrey produced an envelope containing \$100, and promised the rest (\$100 to complete the bribe and \$60 as a refund of the abortion fee) once the charges were dropped.<sup>220</sup>

Mrs. Ladrey was immediately arrested, and, according to Scott and Crooke's testimony, did not deny her purpose in coming to Queenan's home.<sup>221</sup> Scott and Crooke told Mrs. Ladrey that they planned to search the area for anyone who might have brought her to the house.<sup>222</sup> According to the policemen, Mrs. Ladrey then declared, "Well, I will tell you, I am Mrs. Ladrey. Dr. Ladrey is waiting at 6th and Trumbull for me."<sup>223</sup> As promised, Dr. Ladrey was discovered waiting by his car at that intersection. When questioned, he admitted dropping Mrs. Ladrey off in the vicinity, but denied knowing where she was going or what she intended to do.<sup>224</sup> Unsurprisingly,

[the jury] regarded as incredible the declaration of a man who lived in Alexandria, Virginia, that he had let his wife out of the car in the darkness of a winter evening at Georgia Avenue and Trumbull Street, some miles from their residence, but that he did not know where she was going or what she was going to do.<sup>225</sup>

The Ladreys were convicted of attempted bribery under D.C. Code section 22-701, and their convictions were affirmed in May, 1946.<sup>226</sup> The outcome of Dr. Ladrey's underlying abortion charge is uncertain, but his brush with the law evidently did not deter him from performing abortions upon completion of his sentence. In November 1954, Ladrey instructed a man by the name of Matthews to bring an anonymous patient to Ladrey's N Street office.<sup>227</sup> Ladrey performed a surgical abortion, complications from which subsequently proved fatal to the patient.<sup>228</sup> After making a

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218. *Id.*

219. *Id.* It is not clear from the opinion whether the government could or would have successfully prosecuted the case without the complaining witness.

220. *Id.*

221. *Id.* at 419.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 420.

226. *Id.* at 418.

227. *Ladrey v. Comm'n on Licensure to Practice the Healing Art*, 261 F.2d 68, 72 (1958).

228. *Id.* at 69.

statement at police headquarters, Matthews agreed to telephone Ladrey while a homicide detective listened on an extension.<sup>229</sup> While Ladrey was not charged in the death, his incriminating statements were sufficient evidence for the Medical Licensure Commission to revoke Ladrey's license on grounds of professional misconduct.<sup>230</sup> Curiously, loss of his license did not prevent Dr. Ladrey from becoming Imperial Director of the Shrine Tuberculosis and Cancer Research Foundation the following year, a post he held until 1982.<sup>231</sup>

The pattern of an accused physician attempting to bribe his patient through a female intermediary was repeated in 1950 by Dr. William Goodloe.<sup>232</sup> Goodloe was under grand jury investigation for allegedly attempting an abortion on Gloria Huffman.<sup>233</sup> Dr. Goodloe's offer was more substantial than Dr. Ladrey's: he intended to relocate Huffman to California at his expense if she would depart before she was subpoenaed.<sup>234</sup> Goodloe employed a female acquaintance named Alice Galusha to negotiate with Huffman, who was reluctant to accept.<sup>235</sup> Galusha rode with Goodloe to Huffman's Baltimore home on several occasions, where she was ultimately arrested by policemen who observed her from a closet as she produced \$600 and offered to purchase an airline ticket for Huffman.<sup>236</sup> Based largely on Huffman's grand jury testimony, Dr. Goodloe was indicted for abortion, conspiracy, and attempted bribery; he was convicted on all counts and sentenced to seven years imprisonment.<sup>237</sup>

Dr. Allen Forte, previously convicted of abortion in North Carolina in 1942, moved his practice to Washington, D.C. at some point before 1961.<sup>238</sup> In that year, Forte was indicted for allegedly performing an abortion on Jean Smith of Baltimore.<sup>239</sup> Despite Smith's trial testimony, Forte was acquitted, based on his defense that the alleged abortion had been fabricated as part of a "shakedown" by a rogue D.C. police officer.<sup>240</sup> Forte's accusations led to a grand jury investigation of the policeman, but the investigation soon revealed quite a different picture of events.<sup>241</sup> When the initial

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229. *Id.* at 72.

230. *Id.* at 69.

231. *History of Magnus Temple #3* at <http://www.geocities.com/acejuly/magnushistory.html>.

232. *Goodloe v. United States*, 228 F. Supp. 621, 621 (D.C. Cir. 1951).

233. *Id.*

234. *Id.* at 622.

235. *Id.*

236. *Id.*

237. *Id.* at 621.

238. *Laughlin v. United States*, 385 F.2d 287, 293 (D.C. Cir. 1967) [hereinafter *Laughlin VI*].

239. *Id.* at 289.

240. *Id.*

241. *Id.*

police investigation of the alleged abortion had ensued, Forte and his attorney James Laughlin had apparently retained the services of Baltimore police officer Bernice Gross.<sup>242</sup> Not only did Gross attempt to obstruct the investigation on Forte and Laughlin's behalf, she also acted as a go-between in their attempts to bribe Jean Smith.<sup>243</sup> Smith, it turned out, had accepted cash and baby clothes from Gross in return for writing a letter to the United States Attorney asking to be excused as a witness.<sup>244</sup>

As a result of their bribery and the subsequent cover-up (chiefly Laughlin's denial to the grand jury that he had had any contact with Gross despite wiretap evidence to the contrary),<sup>245</sup> Laughlin and Forte embarked on a legal odyssey of at least five separate proceedings involving a mistrial, convictions for perjury, conspiracy, witness tampering, reversal of these convictions, and eventual reconviction.<sup>246</sup> Interestingly, while Laughlin retained counsel on his own behalf, he continued to represent Forte himself.<sup>247</sup> Laughlin may not have been a particularly sympathetic character in the Washington legal community. In 1949, he defended Mildred Gillars, also known as "Axis Sally," the American Nazi propagandist of Radio Berlin.<sup>248</sup> He reportedly accused Jean Smith of being a prostitute and had apparently leveled that charge against a female witness in a previous case.<sup>249</sup> One witness commented that the grand jury investigation should be held "on a little higher standards than Jim Laughlin's concept of trying a law case."<sup>250</sup>

### F. Defenses

Whatever their feelings about the social utility of their services, abortion defendants stood accused of a serious criminal offense.

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242. *Id.*

243. *Id.* at 289-90.

244. *Id.* at 289.

245. *United States v. Laughlin*, 222 F. Supp. 264, 264 (D.D.C. 1963) [hereinafter *Laughlin I*].

246. See *Laughlin V*; *Laughlin v. United States*, 344 F.2d 187 (D.C. Cir. 1965) [hereinafter *Laughlin IV*]; *United States v. Laughlin*, 226 F. Supp. 112 (D.D.C. 1964) [hereinafter *Laughlin III*] (denying government motion to vacate dismissal); *United States v. Laughlin*, 223 F. Supp. 623 (D.D.C. 1963) [hereinafter *Laughlin II*] (dismissing indictment); *Laughlin I*, 222 F. Supp. 264.

247. *Laughlin I*, 222 F. Supp. at 264; *Laughlin II*, 223 F. Supp. at 624; *Laughlin IV*, 344 F.2d at 188.

248. See Dale P. Harper, *Axis Sally*, *WORLD WAR II*, Nov. 1995, available at <http://womenshistory.about.com/library/prm/blaxissally2.htm>.

249. *Laughlin V*, 385 F.2d at 292.

250. *Id.*

When hailed into court, it was rarely prudent for them to rely on the political philosophy behind the provision of abortion. Rather, like all accused criminals, abortion providers needed to advance some legal or factual theory that would place their conduct outside the prohibitions of the statute.

"I didn't do it" is of course the simplest defense to any crime. When there is a dead body to be explained, this defense often results in the classic 'plan B' — casting suspicion on another culprit. When death occurs from septic abortion, the most obvious 'plan B' culprit is the victim herself. Kate Maxey's defense to the abortion death of Claudia Parrish was accordingly straightforward: Claudia had induced the miscarriage and resulting infection herself.<sup>251</sup>

The difficulty with this theory was that two witnesses put Claudia (heretofore a stranger) in Mrs. Maxey's house on the day of the abortion.<sup>252</sup> Police subsequently discovered a catheter in a bedroom.<sup>253</sup> Maxey's counsel advanced what may be grotesquely termed the 'pencil defense'.<sup>254</sup> He first persuaded the government's medical witness to admit on cross-examination that the uterine injury could have resulted from vaginal insertion of a lead pencil.<sup>255</sup> He next put Maxey's daughter-in-law, Mary Lackey, on the stand.<sup>256</sup> Lackey testified that she overheard Claudia tell Maxey that she was pregnant, that she was "bound to get rid of it . . . [and was] going to do something very rash."<sup>257</sup> She explained that she had used Hunyadi water and "some kind of pill."<sup>258</sup> On Lackey's cross-examination, she added to the deceased's former statement of using Hunyadi water and a pill, a "lead pencil to bring on a miscarriage."<sup>259</sup> The catheter, Lackey claimed, belonged to her; Maxey often used it on Lackey to "draw water" (on medical orders), but she had never known Maxey to perform an abortion.<sup>260</sup> Not surprisingly, the jury did not afford this defense very much weight — Kate Maxey was convicted along with Claudia's paramour Paul Meagher.<sup>261</sup>

Another defense was available for licensed physicians who could legitimately perform gynecological procedures: the operation

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251. *Maxey v. United States*, 30 App. D.C. 63, 71 (D.C. Cir. 1907).

252. *Id.* at 70.

253. *Id.*

254. *Id.* at 69.

255. *Id.*

256. *Id.* at 70.

257. *Id.*

258. *Id.*

259. *Id.* at 71.

260. *Id.*

261. *Id.* at 64.

took place, but it was not an abortion. Dr. Alva Harper advanced this defense in 1956, claiming that his patient had presented with a complaint of vaginal bleeding.<sup>262</sup> The procedure during which he "inserted some medicine into her body through an instrument known as a speculum" was not an attempt to abort the pregnancy, he claimed, but rather to preserve it.<sup>263</sup> Unfortunately for Dr. Harper, the government called two rebuttal witnesses, each of whom testified that Harper had previously performed abortions on them.<sup>264</sup> Although seemingly in violation of the character propensity ban on prior-crimes evidence, this testimony was admitted as evidence of Harper's intent.<sup>265</sup> Harper's objection, motion for a new trial, and appeal on this point were rejected; he was convicted and his conviction affirmed.<sup>266</sup>

Dr. Harper also attempted to raise a second defense: that his patient may not have been pregnant when the procedure was performed.<sup>267</sup> This defense would likely have failed on the facts, as the evidence indicated that Dr. Harper's patient *was* pregnant.<sup>268</sup> Curiously, however, this sort of impossibility defense had been rejected as a matter of law the previous year in *Peckham II*.<sup>269</sup> In that case, the D.C. Circuit approved the district court's instruction to the jury that the patient's actual pregnancy was immaterial so long as the defendant believed he was inducing a miscarriage.<sup>270</sup> Comparing the statutes of various states, it found that while many explicitly required pregnancy, many others did not, and still others (including D.C. since the 1901 code) were silent on the matter.<sup>271</sup> The court held that this silence should be interpreted as making pregnancy unnecessary, although the only support it could find for this ruling was contained in two nineteenth century English cases.<sup>272</sup>

Given the language of the D.C. statute, an obvious defense to abortion is therapeutic necessity. If the life or health of the patient were threatened, then abortion was permissible in the District of

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262. *United States v. Harper*, 137 F. Supp. 4, 5 (D.D.C. 1956).

263. *Id.*

264. *Id.*

265. *Id.* at 7.

266. *Id.* at 8; *Harper v. United States*, 239 F.2d 945, 947 (D.C. Cir. 1956).

267. *Harper I*, 137 F. Supp. at 7-8.

268. *Id.* at 8.

269. *Peckham II*, 226 F.2d at 34-35.

270. *Id.* at 34.

271. *Id.*

272. *Id.* (citing *R. v. Titley*, 14 Cox. Crim. Cases 502 (Q.B. 1880); *R. v. Goodall*, 2 Cox. Crim. Cases 41 (Q.B. 1846)).

Columbia.<sup>273</sup> This was a very liberal standard compared to the majority of states, which allowed only a life-of-the-mother exception.<sup>274</sup> It is, however, not immediately obvious from the statute whether the exception is intended as an affirmative defense or as a necessary element in the government's *prima facie* case.<sup>275</sup> This ambiguity was settled in 1943 when raised by the defendants in *Williams v. United States*.<sup>276</sup> The court relied on a two-prong test, articulated by Justice Cardozo in *Morrison v. California*,<sup>277</sup> in order to determine whether a statutory excuse requires proof by the defendant or disproof by the government.<sup>278</sup> Under this test, the burden of proving excuse properly belongs to the defense when the act is 'sinister' in character (unless excused), or when there exists "a manifest disparity in convenience of proof and opportunity for knowledge."<sup>279</sup> In *Williams*, the court found, on the second prong, that evidence of whether an abortion was medically necessary is clearly more available to the person who performs it.<sup>280</sup> On the first prong, it determined that Cardozo's 'sinister act' requirement was met because

abortion is generally regarded as heinous in character . . . . The performance of an abortion for [non-medical] purposes is so offensive to our moral conception that it does not seem unjust to put on the defendant who has committed an abortion the burden of producing evidence that the act was justified on therapeutic grounds.<sup>281</sup>

This requirement remained a part of D.C.'s abortion jurisprudence for twenty-eight years, until the United States Supreme Court shifted the burden back to the government in *United States v. Vuitch*.<sup>282</sup> The Court, authorized, at that time, to interpret D.C. statutes *de novo* found that when Congress passed the District of Columbia abortion law in 1901 and amended it in 1953, it expressly authorized physicians to perform such abortions as are necessary to preserve the mother's "life or health."<sup>283</sup> Because abortions were authorized only in more restrictive circumstances under previous

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273. D.C. CODE ANN. § 809 (1901).

274. See *Williams v. United States*, 138 F.2d. 81, 83-84 (D.C. Cir. 1943).

275. See *id.* at 81.

276. *Id.*

277. 291 U.S. 82, 88 (1934).

278. *Williams*, 138 F.2d. at 82-83.

279. *Id.* at 82 (quoting *Morrison*, 291 U.S. at 91).

280. *Id.* at 83.

281. *Id.*

282. *United States v. Vuitch*, 402 U.S. 62, 70-71 (1971).

283. *Id.* at 70.

D.C. law, the change must represent a judgment by Congress that it is desirable for women to be able to obtain abortions for the preservation of their lives or health.

It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell within that category. Placing such a burden of proof on a doctor would be peculiarly inconsistent with society's notions of the responsibilities of the medical profession. Generally, doctors are encouraged by society's expectations, by the strictures of malpractice law, and by their own professional standards to give their patients such treatment as is necessary to preserve their health. We are unable to believe that Congress intended that a physician be required to prove his innocence.<sup>284</sup>

Perhaps the most unusual answer to a District of Columbia abortion charge was the insanity defense raised by Catherine Hopkins in 1959.<sup>285</sup> After a series of telephone calls, Hopkins traveled to the home of an unnamed woman on March 3, 1956.<sup>286</sup> Shortly after arriving, Hopkins summoned her sister, Mrs. Simmons.<sup>287</sup> On Simmons' arrival, she met a woman who "wished to get rid of a child," and wanted Simmons to babysit her young daughter while she and Hopkins remained upstairs.<sup>288</sup> Simmons warned Hopkins "not to do anything that would get her into trouble," but agreed to watch the girl and answer the door if anyone came to the house.<sup>289</sup> What happened upstairs is unclear, but it apparently involved fifty dollars,<sup>290</sup> a catheter,<sup>291</sup> and took place in "an outrageous and brutal manner, the details of which are too repulsive for recital as a part of [a judicial] opinion."<sup>292</sup> As a result of the surgery, Mrs. Simmons and her husband had to rush the woman to D.C. General Hospital.<sup>293</sup> After identifying Hopkins as her abortion provider, she died.<sup>294</sup>

Less than four months later, Hopkins herself was admitted to

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284. *Id.* at 71.

285. *Hopkins v. United States*, 275 F.2d 155, 156 (D.C. Cir. 1959).

286. *Id.* at 159 (Bastian, J., dissenting).

287. *Id.* (Bastian, J., dissenting).

288. *Id.* at 160 (Bastian, J., dissenting).

289. *Id.* (Bastian, J., dissenting).

290. *Id.* at 159 (Bastian, J., dissenting).

291. *Id.* at 161 (Bastian, J., dissenting).

292. *Id.* at 158 (Bastian, J., dissenting).

293. *Id.* (Bastian, J., dissenting).

294. *Id.* at 158-59 (Bastian, J., dissenting).

D.C. General.<sup>295</sup> She would spend two months there before being transferred to St. Elizabeth's Hospital (the District's mental health facility) with a diagnosis of schizophrenic reaction, schizoaffective type.<sup>296</sup> After nearly two years in St. Elizabeth's, Hopkins stood trial for second-degree murder, which had become the available charge in fatal abortion cases under the 1953 amendment to Section 22-201.<sup>297</sup> At trial, the defense presented several psychiatrists, as well as Hopkins' mother, who testified that ever since an ear operation at the age of eight, Hopkins had "just acted plum different."<sup>298</sup> Her mother explained that as a teenager Hopkins complained of hearing voices, tore out her hair, and attempted to jump out of windows.<sup>299</sup> Hopkins' mother testified that, on one occasion, her daughter had "called the undertaker and sent him to a girl friend's home on Eleventh Street. She sent flowers to the girl, and told me the girl was dead. And I called and they said she wasn't dead."<sup>300</sup>

Sitting without a jury, the district court convicted Hopkins, finding that she was not legally insane at the time of the abortion.<sup>301</sup> The court of appeals reversed, finding that "[i]n the present case, the evidence of insanity was plainly substantial."<sup>302</sup> It remanded the case for entry of a verdict of not guilty by reason of insanity and an order committing Hopkins to a mental hospital.<sup>303</sup>

Although the preceding defenses range from the obvious to the bizarre, all turn on either the statute's application to the defendant's conduct or on whether the conduct is otherwise excusable. None question the propriety of the law itself. For that type of challenge, Washington, D.C. would have to wait for a pugnacious Yugoslav backed by a cadre of civil libertarians.

### *G. The Constitutional Attack of United States v. Vuitch*

Milan Vuitch was not unused to conflict. Born in Serbia in 1915, he had completed his medical training in Hungary only to be captured during the Nazi invasion and conscripted into the Army Medical Corps of the Third Reich.<sup>304</sup> Vuitch immigrated to D.C.,

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295. *Id.* at 156 (majority opinion).

296. *Id.*

297. *Id.*

298. *Id.* at 156.

299. *Id.*

300. *Id.*

301. *Id.* at 155.

302. *Id.* at 157.

303. *Id.* at 158.

304. LAWRENCE LADER, *ABORTION II: MAKING THE REVOLUTION* 9 (1973).



where he openly flouted Section 22-201, bringing his skill at abortion (common in Yugoslavia) first to the Eastern European immigrant community and later to the community at large.<sup>305</sup> He appears to have been motivated by compassion rather than profit. He generally charged between \$100 and \$200, which was a fraction of the 'going rate' for abortion services.<sup>306</sup> Vuitch once explained, "Women cry for help, and doctors just chase them away. I saw people dying like flies in the war, and I couldn't do much. If I can help now, why shouldn't I?"<sup>307</sup> Indeed, Vuitch continued to perform abortions even after two arrests and a trial, which ended in a hung jury.<sup>308</sup>

Vuitch's passion for his work and belief in its social value made him an ideal subject for the test case planned by a civil rights committee which would later become the National Abortion Rights Action League (NARAL).<sup>309</sup> The District's prohibition was targeted for a number of reasons. First, a trial in the nation's capital would have strong symbolic significance.<sup>310</sup> Second, the federal courts' unique supervision of D.C.'s 'state' law meant that an appellate court would have broad powers of statutory interpretation.<sup>311</sup> Third, Section 22-201 was rare in that it permitted abortion to save the health of the patient as well as her life.<sup>312</sup> This ambiguity would provide the primary basis for Dr. Vuitch's challenge.

Vuitch undertook a course of action calculated to result in his arrest. He instructed normally clandestine referral services to openly provide his name and phone number.<sup>313</sup> Instead of performing abortions early in the morning or late at night, as had been his practice, he mixed them in with his general surgery patients during the daytime.<sup>314</sup> Additionally, he abandoned the use of code words and middlemen common to the illegal abortion community.<sup>315</sup>

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305. *Id.* at 10.

306. *Id.* at 9.

307. *Id.* at 8.

308. *Id.* at 11. After these incidents, which occurred in Maryland and Virginia, Vuitch restricted his abortion practice to the District of Columbia, where he believed the more liberal health exception of § 22-201 would render him less liable to prosecution. *Id.*

309. *Id.* at 11-16.

310. *Id.* at 3.

311. *Id.* at 3.

312. *Id.*

313. *Id.* at 2.

314. *Id.*

315. *Id.*

These actions inevitably forced the police to take action.<sup>316</sup> They also removed the potential that secretive behavior could be used as evidence of a guilty state of mind.<sup>317</sup>

On May 1, 1968, the Metropolitan Police Department Homicide Squad raided Vuitch's office.<sup>318</sup> They had been tipped off by a patient's husband, who had impregnated his estranged wife during a temporary reconciliation.<sup>319</sup> This informant, Donald R., arrived at Dr. Vuitch's office with his wife and \$300 in marked bills.<sup>320</sup> Once Mrs. R was on the table, Donald signaled the police, who seized the operating table and instruments, arrested Dr. Vuitch, and transported Mrs. R. (whether voluntarily is unclear) to D.C. General Hospital for examination.<sup>321</sup>

Mrs. R. had inadvertently proven the perfect 'victim' for the test case. As the 'health' justification for her abortion was a purely mental health condition, premised on social grounds, it fell at the margin of health risks that Section 22-201 might conceivably permit.<sup>322</sup> Vuitch asserted that: "This woman had described her mental suffering — her husband's frequent desertions and extramarital affairs, an unwanted pregnancy by a husband she detested — it was all down on my chart. Only I, as her doctor, could decide whether her health had been threatened."<sup>323</sup> For "the police . . . [and] some district attorney"<sup>324</sup> to make this judgment instead of the physician created a "vague requirement, altogether lacking acceptable standards" under which "there will never be an instance in which a physician is able to defend his actions successfully where the evidence shows an exercise of medical judgment."<sup>325</sup> Thus, Vuitch could argue, application of the law violated his own due process rights.

Vuitch's challenge went beyond 'void-for-vagueness' due process and struck at the very notion of the government's legitimacy in regulating abortion. In what would become the familiar twin challenges to abortion regulation in the United States, Vuitch argued that Section 22-201 violated both the fundamental rights

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316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 2-3 (relating the story of 'Mr. R.,' who impregnated not only his estranged wife but also another woman and a sixteen-year-old girl).

320. *Id.* at 3.

321. *Id.*

322. *Id.*

323. *Id.* at 3.

324. *Id.*

325. *Id.* at 14.

and the equal protection guarantees implied in the Fifth Amendment (the Fourteenth Amendment not applying to the District of Columbia).<sup>326</sup> His equal protection argument concerned the disproportionate impact of Section 22-201 on poor and black women in the District,<sup>327</sup> and his fundamental rights due process argument followed the holdings of *Griswold v. Connecticut* and *Loving v. Virginia*.<sup>328</sup>

The public interest in the Vuitch case was so strong that Judge Arnold Gesell read his memorandum opinion from the bench to a full courtroom of spectators.<sup>329</sup> Gesell announced that the exceptions portion of the statute was void for vagueness because "[t]he jury's acceptance or nonacceptance of an individual doctor's interpretation of the ambivalent and uncertain word 'health' should not determine whether he stands convicted of a felony, facing ten years' imprisonment."<sup>330</sup> Gesell went so far as to say that Section 22-201's "many ambiguities are particularly subject to criticism for the statute unquestionably impinges to an appreciable extent on significant constitutional rights of individuals."<sup>331</sup> Despite agreeing with the Equal Protection and fundamental rights arguments in principle, he was unwilling to strike down the statute as a whole. He suggested that "Congress should re-examine the statute promptly in the light of current conditions,"<sup>332</sup> but ultimately concluded that "[t]he court cannot legislate."<sup>333</sup>

Briefly, Washington became the only American jurisdiction in which legal abortion was available throughout pregnancy on the judgment of a single physician.<sup>334</sup> Vuitch's practice boomed, and patients frequently waited up to four weeks for an appointment.<sup>335</sup> Even at the height of his success, Vuitch continued to charge no more than \$300 per abortion and often operated on indigent women free of charge.<sup>336</sup> This brief interlude in the life of Dr. Vuitch and the women of Washington, D.C. came to an end, however, when the Supreme Court determined that 'health' was not overly vague and reversed the district court's dismissal of the indictment.<sup>337</sup>

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326. *United States v. Vuitch*, 305 F. Supp. 1032, 1035 (D.D.C. 1969) [hereinafter *Vuitch I*].

327. *Id.* at 1035.

328. *Id.* (citing *Griswold*, 381 U.S. 479 (1965) and *Loving*, 388 U.S. 1 (1967)).

329. LADER, *supra* note 304, at 15.

330. *Vuitch I*, 305 F. Supp. at 1034.

331. *Id.*

332. *Id.* at 1035-36.

333. *Id.* at 1035.

334. LADER, *supra* note 304, at 15.

335. *Id.*

336. *Id.* at 9.

337. *United States v. Vuitch*, 402 U.S. 62, 64 (1971).

Despite this defeat, the *Vuitch* test case had achieved a great deal. In its ruling, the Supreme Court found that Section 22-201 could not be read to place the burden of proving medical necessity on the defendant.<sup>338</sup> It thereby overturned the onerous rule of *Williams*.<sup>339</sup> Furthermore, in finding that 'health' was not overly vague, the Court explicitly ruled that purely psychological injuries were permissible grounds for abortion.<sup>340</sup> Section 22-201 was thus considerably weakened for the two years it survived before *Roe v. Wade*. Perhaps most importantly, the *Vuitch* test case inspired dozens like it in jurisdictions throughout the country. It shaped both the jurisprudence and the popular will that would ultimately lead to the recognition of legal abortion as a constitutional right.

#### IV. CONCLUSION

At the time of its creation, the District of Columbia possessed no written laws to govern its citizens' practice of abortion. The legal tradition to which the District was heir, however, encompassed a rich history of reasoning on its legitimacy. The tortious miscarriage provisions of 21 *Exodus* 21: 22-25 began the recorded legal history of fetal protection law in Western civilization. Although ambiguous in the original Hebrew text, by the third century B.C., the language of *Exodus* was interpreted to signify a mid-gestational attachment of fetal protection. Following Aristotelian notions of fetal development, the early and medieval Christian church adopted this delineation as consistent with the Augustine notion of ensoulment.

In England, the point of attached protection was defined precisely at quickening, the first fetal movements that were taken as evidence of the rational soul's arrival. Thus, the District inherited a common law abortion rule arguably in tune with women's subjective experiences of their own bodies: the law of homicide protected the fetus as an independent being only after its manifestation at quickening.

The nineteenth century physicians' anti-abortion campaign sought to change this status quo by criminalizing abortion at all stages of pregnancy. The American Medical Association's motivations for this movement were, to a large degree, self-interested and independent of the moral justifications it advanced. The campaign was arguably as much about restraining competition from

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338. *Id.* at 69-70.

339. *Id.*

340. *Id.* at 72.

'irregulars' (especially midwives) as it was about preserving fetal life. Employing imagery that ranged from miniature men suspended in amniotic fluid to infant kangaroos suckling in a pouch, the anti-abortion movement presented dubious physiological arguments against the practice of abortion. The movement also drew heavily on contemporary social concerns, painting abortion as a byproduct of misguided feminism, a threat to female morality and family order, and a tool by which immigrants would displace native-born Protestants as the dominant American class. In response to this campaign, the Legislative Assembly of the District of Columbia passed a comprehensive conception-to-birth abortion prohibition in 1872.

Life under this prohibition presented numerous dangers for the women of Washington D.C. and the abortion providers who continued to serve them despite the legal condemnation of their conduct. While women were not prosecuted for obtaining abortions, their reliance on undertrained practitioners working at remote locations without medical backup often proved injurious or fatal in an age before the existence of antibiotics or widespread understanding of sterile techniques. Women who had undergone abortions faced legal disabilities before the courts: their testimony was discounted, they were subject to vicious cross-examination, and they were barred from recovery for injury sustained from negligence during their abortions.

Abortion providers were the most frequent defendants under the District's abortion prohibition. In addition to incarceration, they faced the loss of their livelihoods through license revocation and loss of the good reputation so essential to the maintenance of a medical practice. Generally, they escaped punishment if they did not maim or kill their patients, but occasionally the government was more aggressive, targeting providers through 'sting' operations. While physicians generally used their money and influence to defend themselves through legal means, a few succumbed to temptation and sought to bribe witnesses and police.

Abortion providers advanced a range of defenses to their alleged crimes. Some put forth fanciful blame-the-victim theories. Others claimed that the operation in question had been something other than abortion, or abortion but with therapeutic justification. At least one defendant claimed to have been insane at the time she killed her client.

D.C.'s abortion prohibition ultimately yielded to a constitutional challenge, and though it was reinstated by the Supreme Court, it had been significantly weakened and would survive only two more

years before being struck down by the Supreme Court in *Roe v. Wade*. Although the century of criminal abortion in the nation's capital came to an end a generation ago, its lessons remain valuable as the battle over abortion rights continues in the city's corridors of power.

While judges and politicians may be tempted to regard the abortion question as arising from contemporary social and scientific considerations, its legal and philosophical bases stretch back into classical antiquity. While abortion opponents speak publicly of protecting fetal life, their intellectual predecessors acted from quite different motivations and appealed to agendas that arguably remain below the surface of the current rhetoric. While abortion rights proponents focus their arguments solely on female privacy and autonomy, they ignore centuries of fetal protection jurisprudence, which must be conscientiously addressed if it is to be subordinated or abandoned. Most importantly, jurists and policy makers must understand that abortion has always been a part of human experience and remains so even when prohibited. Throughout the nation, as in its capital, women will seek abortions, whether access to the procedure is guaranteed by or prohibited by the law.