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TO "BRING DOWN THE FLOWERS":¹ THE CULTURAL CONTEXT OF ABORTION LAW IN EARLY MODERN ENGLAND

CARLA SPIVACK*

ABSTRACT

This article takes issue with claims made by Joseph Dellapenna in his 2006 book, *Dispelling the Myths of Abortion History*, which claims to correct the "distortions of the history" of abortion law underlying *Roe v. Wade*, 410 U.S. 113 (1973). Dellapenna argues that, contrary to Justice Blackmun's historic analysis in *Roe*, "abortion was considered a serious crime throughout most of European history" and that "courts did . . . punish abortions before quickening during the Middle Ages." This article shows that Dellapenna's argument relies on serious misreading of cases and ignorance of the relevant historical, medical, and cultural context, and that pre-quickening or intra-marital self-induced abortion was of little concern to the law.

First, the author describes the fear of social disorder that pervaded society at this time, and shows that contemporary thinkers traced this perceived disorder to women and illicit sex. Thus, their concerns with abortion were based on its providing a means to enable or conceal extra-marital sex, not on any condemnation of abortion per se. Next, the article discusses the contemporary medical context, and examines medical and midwife manuals to show that the early-stage fetus was not accorded full human status.

The article then turns to the legal context, reviewing abortion law from the time of the earliest Anglo-Saxon laws, and reviews specific cases, many of which are cited by Dellapenna. It shows that most of the cases he cites in support of the illegality of abortion are in fact tort cases brought by pregnant women against people who had assaulted them, causing the loss of a fetus in the process. These cases thus offer

1. ANGUS MCLAREN, *REPRODUCTIVE RITUALS: THE PERCEPTION OF FERTILITY IN ENGLAND FROM THE SIXTEENTH CENTURY TO THE NINETEENTH CENTURY* 102 (1984).

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no evidence of the illegality of abortion. The article argues overall that the structure of the common law was not meant to capture incidents of intra-marital abortion. With respect to the Church courts, cases examined in detail in the article show the same tort characteristics or concern with illicit sex, as with the common law court cases.

INTRODUCTION

I. DEFINITIONS

II. SOCIAL AND CULTURAL CONTEXT

A. *The Fear of Disorder*

B. *Medical Knowledge and Experience*

III. LEGAL CONTEXT

A. *The Laws*

B. *The Structure of the Early Common Law System*

C. *Church Courts*

CONCLUSION

INTRODUCTION

In 2006, Joseph Dellapenna, Professor of Law at Villanova University School of Law,² published a book called *Dispelling the Myths of Abortion History*, in which he claims to correct the “distortions of the history”³ of abortion law underlying *Roe v. Wade*, 410 U.S. 113 (1973).⁴ Contrary to Justice Blackmun’s conclusions in *Roe*,⁵ and to Cyril Mean’s interpretation of English law informing those conclusions,⁶ Dellapenna claims that “[a]bortion was considered a serious crime throughout most of European history” and that “courts did . . . punish abortions before quickening during the Middle Ages.”⁷ Dellapenna’s book is a recent example of analysis which distorts the evidence to press an absolutist position about the legal history, ignoring context and culture to do so. Bypassing the importance of intellectual and social history to an understanding of the law,⁸ Dellapenna

2. Villanova University School of Law Faculty Profiles, <http://old.law.villanova.edu/faculty/facultyprofiles/faculty/dellapenna/dellapenna.asp> (last visited Sept. 3, 2007).

3. JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* xii (2006).

4. *Id.* at xi.

5. *Roe v. Wade*, 410 U.S. 113, 132-36 (1973).

6. See Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbra or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971).

7. DELLAPENNA, *supra* note 3, at 18, 260.

8. See generally William W. Fisher III, *Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History*, 49 STAN. L. REV. 1065 (1997) (discussing how recent American legal historians have been influenced by four methodologies (Structuralism, Contextualism, Textualism, and New Historicism) developed by intellectual historians).

himself falsifies the record. His historical coverage is broad,⁹ and this article responds only to his discussion of fifteenth- through seventeenth-century England; I leave his analysis of early American law to those more qualified in that field. An examination of the law's cultural context in early modern England establishes that abortion before quickening generally was not "a serious crime,"¹⁰ and the feudal appeals system, wherein women were only permitted to prosecute felony appeals based on "the murder of her husband in her arms, rape, and abortion," on which Dellapenna bases much of his argument, fails to support his claims.¹¹ Moreover, whether abortion was a crime at all depended on who performed the procedure, and under what circumstances.¹²

What this article investigates is the culture — folklore, popular beliefs, and attitudes of society as a whole — surrounding the act of self-induced abortion in early modern England. Despite growing acknowledgment that statutes and case law are better understood as part of the culture in which they are embedded,¹³ no one has yet applied such a methodology to this topic. Some scholars have examined the history of abortion and contraception,¹⁴ and many on both sides argue about the legal history of abortion as it appears in cases and statutes.¹⁵ This article seeks to combine these two approaches by reading the relevant legal texts alongside other cultural texts pertaining to the issue, such as midwife manuals, medical books, pamphlets about crime, and even works of literature. This article will also draw on contemporary beliefs about the body, sex, sin, public and private spheres, pregnancy, and fetal formation to draw a full contextual picture.

A nuanced and shifting landscape emerges from this investigation. As the debates over this issue have shown, both sides can muster evidence: there is case law — albeit very little — that seems to classify abortion as murder without reference to stages of fetal development,¹⁶ and there are cases and other material which seem to regard abortion as less serious, some appearing to disregard it altogether.¹⁷ Part of the reason for this very real confusion is that medieval and early modern

9. See DELLAPENNA, *supra* note 3, at xi.

10. *Contra id.* at 18.

11. *See id.* at 131, 135-36.

12. MCLAREN, *supra* note 1, at 107.

13. *See generally* Fisher, *supra* note 8, at 1068.

14. *See, e.g.*, AUDREY ECCLES, *OBSTETRICS AND GYNAECOLOGY IN TUDOR AND STUART ENGLAND* (1982); MCLAREN, *supra* note 1.

15. *See, e.g.*, DELLAPENNA, *supra* note 3; Means, *supra* note 6.

16. DELLAPENNA, *supra* note 3, at 138-39.

17. Means, *supra* note 6, at 341.

England did not have a single unified legal system,¹⁸ though one was evolving: law was still partly related to local custom and could vary from place to place;¹⁹ multiple court systems were in play;²⁰ ecclesiastical law and common law had contested and at times overlapping jurisdiction.²¹ At the level of enforcement — often this is all the records show us — officers of the law were “often partisan or highly erratic in their performance.”²² These factors make it difficult to establish the conclusive answers each side in the modern abortion debate seeks. Rather, therefore, than taking part in this “either-or” polemic, this article tries to reconcile seemingly contradictory evidence by putting it in its cultural context and letting the full picture, in all its complexity and ambiguity, emerge.

Ultimately, this article will make several claims. First, I show that the term “abortion” had a different meaning in early modern England from the one we give it today,²³ and this difference itself is important to understanding the texts and statutes. I will also show, based on an analysis of the early modern system of bringing appeals to prosecute serious crimes, that cases in which women brought claims against men who had injured fetuses they were carrying are not abortion cases in any modern sense²⁴ and cannot be used to make a claim that self-induced abortion was illegal or that the law ascribed any legal personhood to the fetus. Rather, these cases resemble modern torts and are based on recognition of the injury done to the woman.²⁵ This misguided reading of these cases is one of the assumptions underlying Dellapenna’s argument.²⁶ I also argue that, to whatever extent the law — secular and ecclesiastical — did frown on abortion, it subsumed this concern within the much greater concern with illicit sex and illegitimacy and imposed counter-measures to punish abortion in a context in which it served to hide, and enable, sex outside of marriage.²⁷ Dellapenna ignores this important context, but understanding attitudes to abortion in this age is impossible without that background. As a corollary to the previous point, I show that abortion within marriage, performed by women as a means of birth control,

18. GREGORY DURSTON, *CRIME AND JUSTICE IN EARLY MODERN ENGLAND: 1500-1750*, at 304 (2004).

19. *See id.* at 422.

20. *See id.* at 435.

21. *Id.*

22. *Id.* at 19.

23. *See* McLAREN, *supra* note 1, at 89-112.

24. *See* DELLAPENNA, *supra* note 3, at 133.

25. *See id.* at 137.

26. *Id.* at 135.

27. *See* FRANCES E. DOLAN, *DANGEROUS FAMILIARS: REPRESENTATIONS OF DOMESTIC CRIME IN ENGLAND, 1550-1700*, at 136 (1994).

was largely outside of the purview of the law, for both structural and cultural reasons.²⁸

The marginal place of such intra-marital abortion in relation to the legal system has contributed to its obscurity as a subject for study, but here I argue that this marginality itself, and its implications for privacy and the purview of the legal regime, is key to understanding it. Most importantly, perhaps, I will show that the pre-quickening fetus, though understood to be alive, was not considered a person in any legal, cultural, or even biological sense; that this theme appears in legal texts and midwife manuals as early as Anglo-Saxon times; and that this premise was consistent with early modern views of humanity and personhood.²⁹ Finally, I will show that early modern notions of the body made induced menstruation — "bring[ing] down the flowers"³⁰ — an acceptable form of early-term, intra-marital abortion.³¹

In Part I, I will clarify definitions, showing how the early modern definition of the term "abortion" differs from the modern one. Part II lays out the sixteenth-century social and medical context, which I assert is crucial to understanding all of the period's laws touching illicit sexuality. First, this discussion will reveal that society was pervaded by a fear of disorder, and this disorder was embodied in illicit female sexuality, and its resultant illegitimate children. The cultural-medical context, including medical textbooks, midwife's manuals, records of the experience of pregnancy and of the body generally, and literary works, sheds light on this discussion, indicating that a fetus in its early stages was not accorded full human status. Part II gives a brief overview of the relevant legal texts, the role of the ecclesiastical courts, and discusses the structural features of the early common law that militate against the prosecution of intra-marital self-induced abortion. Scholars have exhaustively debated the meaning of these texts elsewhere,³² and my only concern here is to shed whatever additional light on them I can by situating them in their cultural and

28. See Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 286 (1992) (establishing that abortion within marriage as a form of birth control was not regulated by the law).

29. See, e.g., TROTULA OF SALERNO, *THE DISEASES OF WOMEN* 19-20 (Elizabeth Mason-Hohl trans., Ward Ritchie Press 1940) (1547) (describing an unborn human as a "child" beginning in the eighth month of gestation); PERCIVAL WILLUGHBY, *OBSERVATIONS IN MIDWIFERY* 263 (Henry Blenkinsop ed., S.R. Publishers 1972) (1863) (distinguishing abortion, or "sudden exclusion of the child, already formed, and alive, before the perfect maturity thereof," from effluxion, or "the falling down of seeds mixed together, and coagulated but for the space of a few days").

30. McLAREN, *supra* note 1, at 102.

31. *Id.* at 107.

32. See, e.g., MARK JACKSON, *NEW-BORN CHILD MURDER: WOMEN, ILLEGITIMACY AND THE COURTS IN EIGHTEENTH CENTURY ENGLAND* 47-51 (1996); McLAREN, *supra* note 1, at 94.

historical moment. Specifically, I will discuss the term *in rerum natura* in light of contemporary ideas about human reason and challenge the claim that it refers merely to a problem of scientific evidence. As to the structure of common law, I make some fundamental points about its organization, suggesting that it was not set up to capture incidents of marital abortion, and that this was inherent to its separation between public and private, masculine and feminine.

I. DEFINITIONS

The word "abortion" *per se* did not necessarily denote an illegal act, or, indeed, any intentional act at all.³³ Rather, it was a physical fact, a risk incidental to pregnancy, usually occurring fairly late in gestation.³⁴ According to Percival Willughby, a seventeenth-century physician and male midwife,³⁵ abortion was "the sudden exclusion of the child, already formed, and alive, before the perfect maturity thereof."³⁶ Abortion occurs when "the conception . . . perish[es] in the womb, and, being turned into a putrid matter, . . . glide[s], and issue[s] forth . . . and this, both in women, and other animals."³⁷ Francis Mauriceau, author of a midwife's manual in 1710,³⁸ defined it this way:

When a Woman casts forth in the Beginning what she had retained by Conception in the Womb, 'tis called an Effluxion, or a sliding away of the Seeds, because they have not yet acquir'd any solid Substance: If they miscarry of a false Conception, which is ordinarily from the latter end of the first to the end of the second Month, it is called an Expulsion; but when the Infant is already formed, and begins to live, if it comes before the time ordain'd and prescrib'd by Nature, it is an Abortion³⁹

Abortion was something to be prevented: Trotula of Salerno advises that parsley, mint, cardamom, and a few other herbs, in "a very fine powder . . . prevents abortion if properly taken."⁴⁰ She also states that "[t]o prevent abortion which is accustomed to happen in the seventh or before the ninth month, we take oil, wax, powder of

33. See SALERNO, *supra* note 29, at 39.

34. See *id.*

35. JACKSON, *supra* note 32, at 69.

36. WILLUGHBY, *supra* note 29, at 263.

37. *Id.*

38. FRANCIS MAURICEAU, *THE DISEASES OF WOMEN WITH CHILD, AND IN CHILD-BED* (Randolph Trumbach ed., Garland Publ'g 1985) (1710).

39. *Id.* at 110.

40. SALERNO, *supra* note 29, at 21.

incense, and mastic; mix and anoint the woman before and behind two or three times a week."⁴¹ Again, in *The Byrth of Mankynde*, Eucharius Rösslin devotes a chapter to prevention of "abortementes or untymely birthes,"⁴² which he defines as synonymous, meaning "when the woman is delyvered before due season & before the frute be rype . . . before the byrth have lyfe, & sumtymes after it hath lyfe . . . beyng by some chaunse dead in the mothers wombe."⁴³

The term the manuals use for the destruction of a fetus early in the pregnancy, intentional or not, was miscarriage.⁴⁴ A woman could procure a miscarriage, although miscarriages could come about by accident and were generally feared and protected against.⁴⁵ The fact that the term miscarriage encompassed both a natural function and an effect intentionally brought about is important to understanding its meaning.⁴⁶ There is no notion of murder, or even killing, although the understanding is evident that procuring a miscarriage could terminate a pregnancy.⁴⁷

II. SOCIAL AND CULTURAL CONTEXT

A. *The Fear of Disorder*

The early modern period in England was a time of great anxiety about the threats to the social order represented by illicit sexual activity.⁴⁸ A basis in fact for these anxieties existed: late Tudor and early Stuart England saw increasing poverty, a succession of bad harvests, inadequate marriage laws, and strict enforcement of parish boundaries, forcing many onto the road;⁴⁹ illegitimacy rates peaked around the turn of the century.⁵⁰ This is an important part of the context for laws regulating women's reproduction, and laws about

41. *Id.* at 39.

42. EUCHARIUS RÖSSLIN, *THE BYRTH OF MANKYNDE: OTHERWYSE NAMED THE WOMANS BOOKE* fol.85 (Classics of Med. Library 1994) (1514).

43. *Id.*

44. See MAURICEAU, *supra* note 38, at 110. Lord Ellenborough's Act of 1803, the first law against abortion before quickening, was also the first statute to use the word "abortion." BERNARD M. DICKENS, *ABORTION AND THE LAW* 23-25 (1966).

45. See MCLAREN, *supra* note 1, at 46-49.

46. See *id.* at 46-49, 89-112.

47. See *id.* at 89-112.

48. PETER C. HOFFER & N.E.H. HULL, *MURDERING MOTHERS: INFANTICIDE IN ENGLAND AND NEW ENGLAND 1558-1803*, at 12 (1984). See generally, A.L. BEIER, *MASTERLESS MEN: THE VAGRANCY PROBLEM IN ENGLAND 1560-1640* (1985) (discussing the vagrancy laws of the Tudor and early Stuart reigns).

49. BEIER, *supra* note 48, at 53.

50. *Id.*

abortion address this broader concern more than the isolated act. Though illegitimacy rates were highest between 1590 and 1610, it remained a disruptive social force throughout the period.⁵¹ Laws regulating women's sexuality must be seen in this context: their objects of concern were the female poor, vagrants, and unmarried, whose sexual incontinence corresponded to their male counterparts' thievery and violence.⁵² One writer described the male vagabond as "a wily fox,"⁵³ presumably in his ability to commit crimes by stealth and deceit, and the female as "a cow . . . that goes to bull every moon, with what bull she cares not."⁵⁴ Contemporaries viewed vagrants as embodying a threat to the status quo, each sex in its own particular way.⁵⁵ These concerns to an extent reflected reality: families of the middling sort — i.e., vulnerable to economic fluctuations — were in crisis by 1610,⁵⁶ and that year saw the passage of a law making it a felony to desert one's family.⁵⁷ In short, there were "[c]ontemporary preoccupations with unmarried women and with the fate of their illegitimate children [that] stemmed from a variety of factors, . . . perhaps most importantly[] from fears about the financial burden of increasing numbers of illegitimate children."⁵⁸

Specifically, as A.L. Beier points out, "[v]agrants were a menace to the social order because they broke with the accepted norms of family life."⁵⁹ These norms were patriarchal, involving marriage, a stable set of kin, and a household — in other words, controlling sexuality.⁶⁰ The source of the disorder vagrants embodied was unlicensed sex.⁶¹ One pamphleteer wrote in 1616 that vagrants were "a promiscuous generation, who are all of kin, and yet know no kindred, no house or home, no law but their sensual lust."⁶² The Elizabethan and Jacobean years saw the attempted passage of many bills on adultery, fornication, and bastardy, although most of them failed due to concerns that their wide nets might catch those of "quality" as well as lower-class individuals.⁶³ One that did make it was the 1576 "Poor

51. SUSAN DWYER AMUSSEN, *AN ORDERED SOCIETY: GENDER AND CLASS IN EARLY MODERN ENGLAND* 111 (1988).

52. See BEIER, *supra* note 48, at 53.

53. *Id.* at 7 (quoting Thomas Harman).

54. *Id.*

55. *Id.* at 7-9.

56. *Id.* at 52.

57. *Id.*

58. JACKSON, *supra* note 32, at 29.

59. BEIER, *supra* note 48, at 51.

60. *Id.*

61. *Id.* at 65-67.

62. *Id.* at 51 (quoting John Downname).

63. MARTIN INGRAM, *CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640*,

Law" that punished those who tried to palm off illegitimate children on the parish⁶⁴ and a 1609 law calling bastardy a "great charge" to the nation.⁶⁵ Marital and family stability were seen as essential to maintaining order in society; the family was a commonwealth in microcosm.⁶⁶ Anxiety about precisely this — the stability of families and their control of sexuality — began to grow in the middle of the sixteenth century.⁶⁷

The sexual aspect of vagrancy was seen as particularly female: female vagrants were generally charged with prostitution while males were more likely to be charged with vagrancy.⁶⁸ As Amussen points out, the birth of an illegitimate child challenged the social and gender order by creating a "household with neither communal approval, financial security nor a father to govern it."⁶⁹ Illegitimacy was a danger for reasons other than those of cultural prejudice, however: Peter Laslett speculates that premarital sexuality was tightly controlled because of the need to prevent the population from outstripping the society's resources.⁷⁰

Many broken families came about through abandonment by the male partner.⁷¹ In addition to deserted wives looking for their husbands, vagrant women fell into two other categories: prostitutes and unmarried pregnant girls.⁷² Indeed, Beier speculates that "[t]he pregnant girl without means or a husband must have been a common sight in Tudor and early Stuart times."⁷³

at 152 (1987).

64. An Acte for the Setting of the Poore on Worke, and for the Avoyding of Ydleness 1576, 18 Eliz., c. 3 (Eng.).

65. An Acte for the Due Execucion of Divers Laws and Statutes Heretofore Made Against Rogues Vagabonde and Sturdye Beggars and Other Lewde and Idle Persons, 1609, 7 Jac. I, c. 4 (Eng.).

66. In his 1622 guide to family life, William Gouge reminds his readers how "[n]ecessary it is that good order be first set in families: for as they were before other polities, so they are somewhat the more necessary: and good members of a family are like to make good members of Church and common-wealth." WILLIAM GOUGE, OF DOMESTICALL DUTIES: EIGHT TREATISES 3 (1622).

67. INGRAM, *supra* note 63, at 125.

68. BEIER, *supra* note 48, at 52.

69. AMUSSEN, *supra* note 51, at 111.

70. See Peter Laslett, *Introduction* to *BASTARDY AND ITS COMPARATIVE HISTORY: STUDIES IN THE HISTORY OF ILLEGITIMACY AND MARITAL NONCONFORMISM IN BRITAIN, FRANCE, GERMANY, SWEDEN, NORTH AMERICA, JAMAICA AND JAPAN* 1, 63 (Peter Laslett et al. eds., 1980) (suggesting that illegitimacy was viewed as a "dangerous liability by everyone" in "times of really desperate shortage").

71. See BEIER, *supra* note 48, at 52 (noting that "[o]ne in every 12 female adult beggars in Warwick in 1587 had been abandoned" by a male partner).

72. *Id.*

73. *Id.* at 53.

The popular literature of the day also makes clear the association of abortion with illicit sex.⁷⁴ The pamphlet *Deeds Against Nature and Monsters by Kinde* tells the story of Martha Scambler, a prostitute facing an unwanted pregnancy who tries to procure an abortion.⁷⁵ The author tells us that “the harlot (delighting in shame and sinne) makes no conscience to be the butcher of her owne seed, nay the Image of God created in her owne body, and now and then in the conception makes spoyle of the bed of creation before it can receive true forme.”⁷⁶ This is an especially telling example because, as we have seen, it is one of the few texts that seems to condemn abortion at a very early stage — “before it can receive true forme.”⁷⁷ The writer connects this condemnation with the woman’s sinful life: she delights in “shame and sinne”⁷⁸ overall; her destruction of her unborn child is only one example.⁷⁹

Increasingly in this period, courts became fora for regulating disorder and social life in general,⁸⁰ and several cases like Martha Scambler’s make clear that sexual disorder, rather than abortion itself, was the root of the concern.⁸¹ For example, the charge against Margaret Manister in 1572 was incest and illicit sex:

[She] lay in bed with one John Gyver being her husband’s brother night by night, sometimes in his clothes and sometimes in his shirt, and one Thomas Browne did lie with her for the space of one week, and then she lay in a chamber severally with herself, and then the said Browne broke though the solar boards to her, but she called for no rescue and drank saven, and that night she fell sick and so was the whole week after.⁸²

74. See *infra* text accompanying notes 75-79.

75. DEEDS AGAINST NATURE, AND MONSTERS BY KINDE: TRYED AT THE GOALE OF DELIVERIE OF NEWGATE, AT THE SESSIONS IN THE OLD BAYLY, THE 18. AND 19. OF JULY LAST, 1614, THE SNE OF A LONDON CRIPPLE NAMED JOHN ARTHUR, THAT TO HIDE HIS SHAME AND LUST, STRANGLED HIS BETROTHED WIFE. THE OTHER OF A LASCIVIOUS YOUNG DAMSELL NAMED MARTHA SCAMBLER, WHICH MADE AWAY THE FRUIT OF HER OWN WOMB, THAT THE WORLD MIGHT NOT SEE THE SEED OF HER OWNE SHAME: WHICH TWO PERSONS WITH DIUERS OTHERS WERE EXECUTED AT TYBURNE THE 21. OF JULY FOLLOWING. WITH TWO SORROWFUL DITTIES OF THESE TWO AFORESAID PERSONS, MADE BY THEMSELVES IN NEWGATE, THE NIGHT BEFORE THEIR EXECUTION (1614), available at <http://eebo.chadwyck.com> (follow “Search” link; then search Title Keyword(s) “deeds against nature”; then follow first result).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. INGRAM, *supra* note 63, at 28.

81. See *infra* text accompanying notes 84-98.

82. F.G. EMMISON, ELIZABETHAN LIFE: MORALS & THE CHURCH COURTS 41 (1973). Saven, also known as savin, was a drug made from the tops of the evergreen bush and was

The charge was incest with her brother-in-law, and the mention of savin seems incidental.⁸³ Attempting abortion was not part of the accusation.⁸⁴ Indeed, at the next session of the court, Margaret's husband "sought the royal indulgence to be granted to her" — that is, a general royal pardon — and she was discharged.⁸⁵

Another case from 1627 suggests that the main concern was something other than the abortion itself.⁸⁶ When Joan Thorpe, a servant, became pregnant:

[F]inding her ordinary monthly courses ceased demanded of her mistress . . . what were good for her to take, and her mistress told her; she thereupon received as was directed, and upon the taking of the same being first a posset of hyssop, and another of wormwood and saffron, she grew very sick therewith and her courses returned and brake out very powerfully upon her and so continued until her delivery as aforesaid.⁸⁷

She gave birth to a "very little" child, which she hid in a pile of waste, and was presumably prosecuted under the 1624 infanticide statute, rather than a law penalizing abortion.⁸⁸

Numerous other cases, including many cited by Dellapenna, emphasize this point.⁸⁹ For example, in 1504, a king's coroner viewed the body of Jane Wynspere of Basford:

[A] single woman, being pregnant, . . . being inspired by the devil drank various bad and [impure] potions in order to kill and destroy the child in her body, . . . as a result of which the said Jane then and there died, and thus the same Jane in manner and form aforesaid feloniously and as a felo de se slew and poisoned herself and the child in her body . . .⁹⁰

The report does not fail to note that the felon was a single woman, suggesting the concerns of the case.⁹¹ The language in the report

both highly poisonous and commonly used to cause abortion. *Id.*; INGRAM, *supra* note 63, at 159; JOHN M. RIDDLE, *EVE'S HERBS: A HISTORY OF CONTRACEPTION AND ABORTION IN THE WEST* 54-55 (1997).

83. See EMMISON, *supra* note 82, at 41 (describing the charges against Margaret Manister).

84. See *id.*

85. *Id.*

86. See AMUSSEN, *supra* note 51, at 114 (recounting the case of Joan Thorpe).

87. *Id.*

88. See *id.* at 114-15.

89. See DELLAPENNA, *supra* note 3, at 177-82 (discussing a number of cases concerning abortions in the sixteenth century).

90. *Id.* at 177-78 (quoting *R. v. Lichenfeld*, (1505) 27 K.B 974).

91. *Id.*

also is relevant in other ways. The word *Dellapenna* translates as "pregnant," *puerpera*, more commonly meant "woman who has been, or is in process of being delivered, of a child."⁹² Thus, the facts as recorded indicate a woman at least in a very advanced stage of pregnancy, if not in actual labor. This is clearly a case of fetal destruction after quickening, at the very least. Moreover, the phrasing of the charge — "as a felo de se slew and poisoned herself and the child in her body"⁹³ — makes clear that the charge is suicide ("felo de se") and not homicide, and the killing of the child was ancillary to that felony.⁹⁴

In another instance, a man named William Wodlake was indicted for "various felonies, murders, and misdemeanors,"⁹⁵ including the rape of a fourteen year old girl, whom he subsequently forced to drink an abortifacient "by reason of which drink the same Katherine was afterwards delivered of that child dead: so that the same William Wodlake feloniously killed and murdered the child with the drink in manner and form aforesaid, against the peace of the lord king etc."⁹⁶ This was not a voluntary self-induced abortion; as such, it does not speak to the woman's right to induce an abortion herself. Another important point about this case, however, is what we might call its "totality of circumstances." Clearly, Wodlake's prosecution is for more than forcing an abortifacient on his victim: it is also about his other serious crimes of rape and murder, as well as various misdemeanors.⁹⁷ As discussed, assaults resulting in abortions, especially in the context of greater social disruption, as this one is, comprised a different category of analysis from intra-marital abortions performed in the private sphere.⁹⁸

The fear of disorder aspect of law enforcement sheds light on the fact, generally agreed upon by legal historians, that courts as late as the early 1500s did not deem infanticide "as heinous as other killings."⁹⁹ When infanticide did become the object of stricter enforcement, harsh punishment, and public concern in general,¹⁰⁰ it was in

92. OXFORD LATIN DICTIONARY 1515 (P.G.W. Glare ed., 1983). *Dellapenna* acknowledges this alternate meaning in a footnote. *DELLAPENNA*, *supra* note 3, at 177 n.427.

93. *DELLAPENNA*, *supra* note 3, at 178 (quoting *R. v. Lichenfeld*, (1505) 27 K.B. 974).

94. Matthew Hale defined *felo de se* as "[t]hat which is committed against his own Life." SIR MATTHEW HALE, *PLEAS OF THE CROWN: A METHODICAL SUMMARY* 26 (P.R. Glazebrook ed., 1972) (1678).

95. *DELLAPENNA*, *supra* note 3, at 178-79 (quoting *R. v. Wodlake*, (1530) 9 K.B. 513).

96. *Id.* at 179.

97. See *DELLAPENNA*, *supra* note 3, at 178-79 (describing Wodlake's indictment for rape and murder).

98. It is remotely conceivable that some of the assault cases were pretexts for voluntary abortions, but in that case it is hard to understand why the women would have brought the case.

99. DURSTON, *supra* note 18, at 143.

100. See *id.* at 143 (noting the "increasingly draconian approach" taken toward

the context of anxiety about illegitimacy and threats to the social order.¹⁰¹ As noted above, the laws targeting infanticide were generally directed at unwed mothers who were suspected of murdering their illegitimate children, not at married women.¹⁰² This context should enlighten the analysis of the legal history of abortion in this period, and can help explain some of the legal landscape's seeming anomalies.

To conclude this section, I invoke a literary work which takes anxiety about sexual energy unharnessed by family life as one of its themes.¹⁰³ Shakespeare's *Measure for Measure*¹⁰⁴ is populated primarily by what Natasha Korda calls "placeless single people" — especially unmarried women.¹⁰⁵ The play, she argues, is "preoccupied" with the problem of the displaced and vagrant and with the legal measures that sought to control them.¹⁰⁶ Each of the single women in the play embodies a threat associated with female sexuality not safely cabined in marriage: Juliet has slept with her betrothed before marriage and is carrying a so-far illegitimate child;¹⁰⁷ Mistress Overdone works as a "bawd";¹⁰⁸ Mariana, while engaged to be married, remains free of a husband's control;¹⁰⁹ Isabella is about to enter a nunnery,¹¹⁰ a site, at least before the Reformation, of female community not controlled by men.¹¹¹ In this parade of transgressive or potentially transgressive

infanticide beginning in the Elizabethan era).

101. See HOFFER & HULL, *supra* note 48, at 13 (noting that "growing concern for social disorder" influenced the creation of the "Elizabethan social control laws," including a law punishing the parents of illegitimate children (citing 1576, 18 Eliz. I, c. 3 (Eng.)).

102. See *supra* text accompanying notes 82-94.

103. Mario Digangi argues:

[T]hat the relentless definition and manipulation of female sexuality in *Measure for Measure* is the graphic symptom of male anxiety about female agency: to unravel male-constructed meanings for erotic pleasure, pregnancy, and abortion is to discover a fear of the dangers thought to ensue from a woman's control over her own body.

Mario Digangi, *Pleasure and Danger: Measuring Female Sexuality in Measure for Measure*, 60 ELH 589, 590 (1993).

104. WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* (S. Nagarajan ed., New Am. Library 1998) (1623) [hereinafter *MEASURE FOR MEASURE*].

105. NATASHA KORDA, *SHAKESPEARE'S DOMESTIC ECONOMIES: GENDER AND PROPERTY IN EARLY MODERN ENGLAND 160* (2002).

106. *Id.* at 161.

107. See *MEASURE FOR MEASURE*, *supra* note 104, at act 1, sc. 2, lines 149-98 (showing Claudio being transported to prison for having "got possession of Julietta's bed").

108. *Id.*, *Dramatis Personae*.

109. See *id.* at act 3, sc. 1, lines 211-78 (describing Mariana's situation after her fiancé "[l]eft her in her tears").

110. See *id.* at act 1, sc. 4, lines 1-14 (describing Isabella's concerns about entering the nunnery with Francisca, a nun).

111. In her article *A Refuge from Men: The Idea of a Protestant Nunnery*, Bridget Hill notes the depiction of nunneries in a 1622 play:

In her play *The Convent of Pleasure*, Lady Happy . . . cloisters herself in a convent because she believes that marriage, even to "best of Men, if any best

female sexuality, there is no mention of abortion.¹¹² The preoccupation with premarital sex, exemplified by Juliet's paramour's death sentence for the offense, indicates that the concern here is with overall social disorder and ways to control it.¹¹³ As the Duke explains:

... Liberty plucks Justice by the nose;
The baby beats the nurse, and quite athwart
Goes all decorum.¹¹⁴

The play's expressions of anxiety in its dramatic choices are consistent with the concerns of the day. Abortion does not warrant mention, and this absence is consistent with the fact that it is only as an enabler of social disorder and poverty, the greater concerns the play addresses, that it seems to have troubled the courts.

B. Medical Knowledge and Experience

Medical knowledge and the experience of the body in the early modern era shed light on the issue of abortion in a number of ways. First, some people had knowledge of abortifacient herbs and medicines, and recipes for such drugs appeared in midwife manuals and family papers.¹¹⁵ Second, pregnancy, especially in the first months, was hard to detect, even for the woman involved, and menstruation might stop for any number of reasons other than conception.¹¹⁶ Finally, theories of fetal development at the time, while allowing for life in the womb from conception, did not recognize fetal life as fully human before quickening.¹¹⁷ For all these reasons, prescriptions for "bringing down the courses," though commonly understood to induce miscarriages, were not, except in rare instances that I will address,

there be[,"] would have "more crosses and sorrows than pleasure, freedom, or happiness, nay Marriage to those that are Vertuous is a greater restrain than a Monastery[." Of women's many troubles men were the worst, and life in a convent, she argues, "bars the life from nothing else but Men[."]

Bridget Hill, *A Refuge from Men: The Idea of a Protestant Nunnery*, PAST & PRESENT, Nov. 1987, at 107, 112 (quoting MARGARET CAVENDISH, *THE CONVENT OF PLEASURE* (1668)).

112. See MEASURE FOR MEASURE, *supra* note 104.

113. See *id.* at act 1, sc. 2, lines 66-74 (describing Claudio's sentence, "within these three days his head to be chopped off," for "getting Madam Julietta with child").

114. *Id.* at act 1, sc. 3, lines 29-31.

115. DOLAN, *supra* note 27, at 136-37.

116. See Patricia Crawford, *Attitudes to Menstruation in Seventeenth-Century England*, 91 PAST & PRESENT 47, 53-54 (1981) (noting that cessation of menstruation, known as amenorrhoea, was treated as a disease and a variety of different cures were invented for it).

117. See Martin J. Buss, *The Beginning of Human Life as an Ethical Problem*, 47 J. RELIGION 244, 245 (1967) ("English common law located the beginning of the human soul at 'quickening,' which occurs at about four months.").

censored or condemned.¹¹⁸ Early self-induced disruptions of pregnancy did not register as fetal murder.¹¹⁹

Both abortion and contraception techniques had probably been known in ancient Rome and throughout the Middle Ages.¹²⁰ Herbs such as ergot of rye, pennyroyal, and savin were known abortifacients: medical and midwifery books, as well as private family recipe books, were full of recipes for them.¹²¹ For example, the mid-sixteenth century manual *The Diseases of Women*, by Trotula of Salerno, instructs, "[i]f women have scanty menses and emit them with pain, take one dram each of *betonica*, pennyroyal, *centonica*, and wormwood; let them be cooked . . . in wine or water. . . . and let it be drunk steaming hot."¹²² A manual from the second half of the fifteenth century gives recipes for herbal suppositories and assures its readers that "though per were a ded childe in here wombe it wold bringe it oute."¹²³

The Jerningham family's private recipe book contains a recipe explicitly described as an abortifacient: a brew of sowbread and fabers syrup of birthwort roots was labeled "a great secret" that "cause[d] miscarriage" and "force[d] away the birth dead or alive as allso the afterbirth."¹²⁴ Elizabeth Freke's personal book of medical recipes lists the ingredients for a concoction that "will strengthen the body and preserve conception iff itt be true; iff nott itt will bring itt away with ease and safty and has done many women good to my knowledge and is a very good medycyne."¹²⁵ Savin and rue were probably effective in causing late term abortions because they cause uterine contractions that would expel the fetus.¹²⁶

In addition to the books containing abortifacient concoctions, references to the use of such medicines appear in personal letters and diaries of the day.¹²⁷ The tone of these allusions is coy more than secretive: it resembles the way women referred to other private matters, such as menstruation or pregnancy itself. For example, a late

118. See generally RIDDLE, *supra* note 82, at 143-48 (discussing herbs commonly recommended to "stimulate the menses" without mentioning the fetus "thereby expelled").

119. See *infra* Part III.A.

120. SHULAMITH SHAHAR, *THE FOURTH ESTATE: A HISTORY OF WOMEN IN THE MIDDLE AGES* 123 (Chaya Galai trans., 1983).

121. DOLAN, *supra* note 27, at 136-37.

122. SALERNO, *supra* note 29, at 7.

123. *THE 'SEKENESSE OF WYMMEN': A MIDDLE ENGLISH TREATISE ON DISEASES IN WOMEN* 37 (M.R. Hallaert ed., 1982).

124. Linda A. Pollock, *Embarking on a Rough Passage: The Experience of Pregnancy in Early-Modern Society*, in *WOMEN AS MOTHERS IN PRE-INDUSTRIAL ENGLAND* 39, 55 (Valerie Fildes ed., 1990).

125. *Id.*

126. *Id.* at 56.

127. See *id.* at 2, 56.

seventeenth century letter from Margaret, Countess of Wemyss, to her daughter Anna, Countess of Leven, stated, "I hear you have been taking a little physick, I hope it will do you good. I should have been sorry if you had so soon fallen with child before you recover some more strength."¹²⁸ Mary Fitton, who was pregnant and unmarried, received a note from her mother warning her against using harsh physick because it might cause an abortion.¹²⁹ Linda Pollock speculates that many categories of miscarriage — those which threatened the mother's life, those in women with closely spaced pregnancies, those late in a woman's child-bearing years, and those late in the pregnancy — may have been intentionally brought about by abortifacients.¹³⁰

Indeed, so common was knowledge of abortifacient herbs, that an audience would have understood Shakespeare's Ophelia to have been pregnant and attempting, or contemplating, an induced miscarriage when she utters her puzzling ditty:¹³¹

There's fennel for you, and columbines. There's rue for you,
and here's some for me You must wear your rue with a
difference.¹³²

This interpretation sheds new light on Ophelia's earlier lamentations about treacherous lovers and maidens who lost their virginity.¹³³ She seems to be regretting a sexual encounter with Prince Hamlet, who has famously broken off their engagement, and is now facing the consequences of her trust.¹³⁴ No sense of sin or transgression seems to attach to her allusions to abortifacients: her sin, if sin there be, arises from the possibility that she committed suicide.¹³⁵

There has been considerable speculation about the recipes for abortifacients published in medical manuals. They call for the use of herbs which were generally known, and acknowledged today, to provoke miscarriages.¹³⁶ Yet very few of the texts include any warning

128. *Id.* at 56.

129. *Id.* at 66 n.112.

130. *Id.* at 57-58.

131. See RIDDLE, *supra* note 82, at 49 ("Shakespeare's contemporary audience would understand [the reference to rue] better than today's readers . . .").

132. WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK* act 4, sc. 5, lines 177-79 (Constance Jordan ed., Pearson Longman 2005) (1623).

133. *Id.* at act 4, sc. 5, lines 57-65.

134. The notion that Hamlet and Ophelia had a sexual encounter is first suggested by her description of an incident in act 2, scene 1. *Id.* at act 2, sc. 1, lines 76-83. Hamlet ends their engagement in act 3, scene 1. *Id.* at act 3, sc. 1, lines 133-38.

135. In act 5, scene 1, after Ophelia's death by drowning, her gravediggers discuss whether she has committed suicide and thereby sinned. See *id.* at act 5, sc. 1, lines 1-52.

136. RIDDLE, *supra* note 82, at 145, 186-87.

about the potential abortifacient effect of these concoctions,¹³⁷ merely labeling them recipes to "bringeth down their Courses,"¹³⁸ or "provoke[] the terms."¹³⁹ Some have speculated that this reticence indicates a kind of code, whereby the recipes could be passed on as harmless medicines when everyone knew for what they were really used.¹⁴⁰ Others have insisted that there is no need to read an abortifacient use into the recipes in an age when malnourishment and disease made amenorrhea common.¹⁴¹ I offer a third way of reading these texts with their lack of acknowledgment of their herbs' abortifacient characteristics. I suggest that the difference between "bring[ing] down their Courses"¹⁴² and causing a miscarriage in the time before quickening was seen as so minimal as not to warrant discussion. Because of uncertainty about the woman's state, and because any conception at an early stage was not seen as fully human, contemporaries may not have seen a significant difference between "provoking the terms"¹⁴³ and causing a miscarriage.

My theory in this regard must of course account for the exceptions — the midwife and medical manuals which did warn against the use of emmenagogues.¹⁴⁴ Jane Sharp, the seventeenth century midwife and author, is a rare example of this.¹⁴⁵ The warning is buried in a paragraph of instructions for bringing on menstruation, which reads as follows:

Ointments and Plaisters are good also, and pessaries made of Aromatical things, and sweet smells, and Fumes; as take *Benzoin*, *Storax Calamita*, *Bdellium*, *Myrrh*, what you please; mingle them, and strew some on a pan of Coles; the woman so placed, that she may receive the Fume by a Tunnel, broad at the lower end, to keep the smoke in: but lest these Fumes cause the head-ach, keep the Fumes down with clothes about the woman, that they come not to her head: But do none of these things to women with child, for that will be Murder: give your remedy a little before the Full Moon, or between the New and the full, for then blood increaseth: but never in the Wane of the Moon, for it doth no good: Sometimes, but seldome the courses stop with Fulness; such must, saith *Riolanus*, be let blood in the arm, but with great care.¹⁴⁶

137. *Id.* at 145-47, 186-87.

138. *Id.* at 187.

139. *Id.* at 186.

140. *Id.* at 189.

141. *See id.* at 26.

142. *Id.* at 187.

143. *Id.* at 186.

144. *See, e.g.,* JANE SHARP, *THE MIDWIVES BOOK: OR THE WHOLE ART OF MIDWIFRY DISCOVERED* 220-21 (Elaine Hobby ed., Oxford Univ. Press 1999) (1671).

145. *Id.*

146. *Id.*

A number of aspects of this passage are interesting. First, the admonition about "murder"¹⁴⁷ is tossed into the middle of the paragraph like an afterthought; it is surrounded by instructions for doing just what it warns against.¹⁴⁸ Second, there would be no way of knowing with any certainty whether a woman were "with child"¹⁴⁹ or not unless she was past quickening.¹⁵⁰ Thus, it is hard to see what purpose the warning serves. A reference to the book as a whole, however, may explain this anomaly. First, it was one of the few manuals written by women,¹⁵¹ and it seems plausible that the author may have added this sentence as a way of establishing credibility with the Church authorities who were in charge of her licensing.¹⁵² Midwives were licensed by the Church of England through the early 1720s and as late as the end of the eighteenth century outside of London.¹⁵³ Historians have speculated that the interest of the Church in having control of midwifery had to do with the importance of baptism and the midwife's role in baptizing the newly born.¹⁵⁴ But, others challenge this assertion, claiming that post-Reformation theology was less adamant on the damnation of the soul of an unbaptized infant, and noting the corresponding decline of the role of the midwife in administering baptism in the post-Reformation years.¹⁵⁵ Whatever the case, Sharp was entering a man's field — not by practicing midwifery but by writing about it.¹⁵⁶ Second, by this date, male practitioners were entering the field of midwifery and discrediting female midwives.¹⁵⁷ In this respect, also, Sharp may have felt the need to toe the Church line to maximize her credibility.¹⁵⁸

With respect to women's experience of pregnancy, the logic of quickening as a transitional moment between indeterminacy and human status makes sense. First, it was extremely hard for anyone, including the woman, to tell in the first few months if a woman was

147. *Id.* at 221.

148. *Id.* at 220-21.

149. *Id.* at 221.

150. See JACKSON, *supra* note 32, at 61.

151. Elaine Hobby, *Introduction* to JANE SHARP, *supra* note 144, at xi, xvi.

152. *Id.* at xi, xiv.

153. DOREEN EVENDEN, *THE MIDWIVES OF SEVENTEENTH-CENTURY LONDON* 24, 26 (2000).

154. *Id.* at 26.

155. *Id.*

156. Hobby, *supra* note 151, at xvi.

157. *Id.* at xii.

158. *Id.* Male practitioners did not try to discredit female midwives by accusing them of performing abortions, as Reva Siegal has shown was the case in the early United States, but did try to do so by claiming they were incompetent, ignorant, and dangerous to maternal health and safety.

pregnant.¹⁵⁹ Due to lack of nutrition and inadequate diets, pregnancy did not cause the weight gain it is associated with causing in the developed modern world.¹⁶⁰ Moreover, contemporary clothes were bulkier and looser, making any weight gain and change in body shape less obvious.¹⁶¹ Medical textbooks and midwives' manuals abound with methods to detect pregnancy.¹⁶² One method considered sure, and resorted to when a single woman was suspected of pregnancy, was for a neighbor woman to demand to inspect her breasts.¹⁶³ If squeezing them produced milk, the woman was deemed to be or have recently been pregnant.¹⁶⁴ Single women, servants, and those without families were much more vulnerable to such inspections; married women's pregnancies aroused little concern, and widows in possession of property and social status were more able to refuse these bodily invasions.¹⁶⁵

Because of this indeterminacy, the concept of quickening as the beginning of personhood makes sense: it is a logical point at which the fetus becomes likely to become part of the human community. Dellapenna, however, challenges the received wisdom about the word "quickening" and its legal meaning.¹⁶⁶ First, he asserts that "the doctrine of quickening [as a prerequisite for criminality of fetal destruction] had not yet taken hold in the courts [in the thirteenth century]." ¹⁶⁷ He claims that the word could have meant "alive," based on its derivation from the Latin concept of animation, or *animatus*.¹⁶⁸ This may very well be true. The point is, however, that biological life and human personhood were not the same.

Midwives' manuals make this distinction clearly.¹⁶⁹ Because a woman showing early signs of pregnancy could not be sure of what was really going on, the manuals offer many warnings about other sources of the symptoms.¹⁷⁰ Sometimes, for example, nature could

159. JACKSON, *supra* note 32, at 62.

160. See Pollock, *supra* note 124, at 43 (discussing numerous common symptoms of pregnancy without mention of weight gain).

161. JACKSON, *supra* note 32, at 63.

162. See *id.* at 60-65 (listing and discussing morning sickness, difficulty urinating, hemorrhoids, lack of menstruation, increase in stomach and breast size, movement of the fetus, internal examination, weight gain, and periods of illness as evidence corroborating suspicious of pregnancy).

163. *Id.* at 72-73.

164. *Id.*

165. See SHAHAR, *supra* note 120, at 95 ("[A] widow who was well provided for enjoyed greater freedom than any other type of woman in medieval society.").

166. See DELLAPENA, *supra* note 3, at 139.

167. *Id.*

168. *Id.*

169. See SHARP, *supra* note 144, at 86.

170. See *id.* at 85-90.

"work[] in vain"¹⁷¹ and produce mere growths in the womb, "ill shaped lump[s] of flesh," despite the fact that "their bellies were swoln so great, and their courses were staid and came not down according to natures custome."¹⁷² One variety of these included the so-called "false Moles," swellings in the womb created by excess of wind, blood, humors, or water.¹⁷³ A mole was "a mishapen piece of flesh without figure or order, it is full of Veins and Vessels with discoloured veins or membranes of almost all colours, without any entrails or bones, or motion."¹⁷⁴ Even if a child were conceived along with the Mole, this is no good, because the Mole "draws the nourishment from the Child."¹⁷⁵ While these failed conceptions can be alive and "have some sense or feeling or true motion," they might also be dead lumps of flesh.¹⁷⁶ In addition, "[m]onsters of all sorts [can] be formed in the womb."¹⁷⁷ These are "error[s] of nature failing of the end she works for, by some corrupted principle."¹⁷⁸ Perhaps, some midwives speculated, they are a form of divine vengeance.¹⁷⁹ As these passages make clear, all sorts of things in the womb could be alive; organic living matter was not the feature that made them human.

Because of such monstrous deviations, "[i]t is very hard to know a false conception from a true until four moneths be past," and thus the concept of quickening: after four months, "the motion of the body of the thing conceived will shew it; for if it be a living Child, that moves quick and lively; but the false conception falls from one side to another like a stone."¹⁸⁰ Motion was the key to determining if the conception was a human: "[t]he Child that is alive moves to all sides, and upward and downward without any help . . . [whereas] [a] false conception may have a motion from the expulsive faculty, but not from it self . . . [but] . . . tumbles to one side or other."¹⁸¹

This lack of personhood of the pre-quickened fetus goes back to Anglo-Saxon medical texts, one of which tells us "[o]n tham thriddum monthe he bith man butan sawle [In the third month he is a man without a soul]."¹⁸² Even this early, the distinction between something

171. *Id.* at 85.

172. *Id.* at 84.

173. *Id.* at 85.

174. *Id.* at 84.

175. *Id.* at 85.

176. *Id.*

177. *Id.* at 87.

178. *Id.* at 89.

179. *Id.* at 117.

180. *Id.* at 86.

181. SHARP, *supra* note 144, at 88.

182. M.S. COTT. TIBERIUS, in 3 LEECHDOMS, WORTCUNNING, AND STARCRAFT OF EARLY ENGLAND 146, 146-47 (Oswald Cockayne ed.), in 35 CHRONICLES AND MEMORIALS OF

that is alive and something that has a soul, and is therefore human, is apparent. *The Midwives Book* sets this development out as follows: "a Man lives successively, first the life of a Plant, then of a Beast, and lastly of a Man. For first the Child grows, then it begins to move, last of all it becomes a reasonable Soul."¹⁸³ These lines make clear that there was no lack of understanding of the fetus as technically alive from an early stage — as indeed was the false conception, the Mole — but even being technically alive did not make it a human,¹⁸⁴ or even endowed with reason or a soul. This was not the salient point, however: it was not until it moved, or quickened, that it became endowed with the qualities which make it partake of full human reason and spirit.¹⁸⁵

Finally, the midwife manual quoted earlier in respect to the definitions of abortion shows clearly that the fetus only gradually approached biological, and then human, status.¹⁸⁶ The first line — "[w]hen a Woman casts forth in the Beginning what she had retained by Conception in the Womb, 'tis called an Effluxion, or a sliding away of the Seeds, because they have not yet acquir'd any solid Substance"¹⁸⁷ — makes short shrift of the idea that human life begins at conception. Only at a later stage is "the Infant . . . already formed, and begins to live" — and this "stage" seems fairly near the end of the pregnancy, because this is when, the author warns, it may "come[] before the time ordain'd and prescrib'd by Nature."¹⁸⁸

This indeterminacy of fetal status may underlie some of the legal thinking about fetal death. For example, Britton denied that a woman could bring an appeal for fetal death, because an appeal on behalf of someone who could not be named was invalid.¹⁸⁹ The author of *The Mirror of Justices* argued that a fetus in its mother's womb could not be the victim of homicide because no one could be sure until birth that it would turn out to be a human and not a monster.¹⁹⁰ Schneebeck

GREAT BRITAIN AND IRELAND DURING THE MIDDLE AGES (Kraus Reprint 1965) (1857).

183. SHARP, *supra* note 144, at 105.

184. *Id.* at 84-85, 105.

185. *Id.* at 105.

186. MAURICEAU, *supra* note 38, at 110.

187. *Id.*

188. *Id.*

189. BRITTON: AN ENGLISH TRANSLATION AND NOTES 95-96 (Francis Morgan Nichols trans., John Byrne & Co. 1901).

190. SELDEN SOC'Y, *THE MIRROR OF JUSTICES* 139 (William Joseph Whittaker ed., Bernard Quaritch 1895). This is not to quarrel with the general agreement that this is a highly unreliable text; my interest in it is the discourse, not the law itself. Frederic William Maitland, *Introduction to SELDEN SOC'Y, THE MIRROR OF JUSTICES*, at ix, x (William Joseph Whittaker ed., Bernard Quaritch 1895).

calls this reasoning "curious,"¹⁹¹ but, seen in context, it makes sense. First, medical techniques and prenatal care of the day was such that many things could go wrong in fetal formation, and there were many forms of false pregnancy.¹⁹² But these views also stem from the fact discussed above, that a fetus before a certain point was not deemed fully human: it did not have a soul, it did not have reason.¹⁹³ These challenges to causes of action for fetal death must be seen in this light. This thinking also comports with the notion that a woman's appeal for fetal death was based on injury to her body, not on injury to the fetus as a legal person.¹⁹⁴

Another aspect of the contemporary discourse of the body important, I believe, to this discussion, is the belief in purging as beneficial to both sexes.¹⁹⁵ This culture saw sickness as an imbalance in the body's humoral system and sought to remedy it by expelling the excessive element.¹⁹⁶ The author of the *Sekenesse of Wymmen*, quoted above, explains that women use suppositories for purging to bring on menstruation just as "men put suppositories yn a mans fundament [rectum] to purge hys wombe."¹⁹⁷ Underlying purging's popularity was the fact that people in the sixteenth century viewed, and experienced, their bodies differently from the way we do, in general, today. They felt their bodies to be more porous, more susceptible to germs and external influences of all kinds.¹⁹⁸ Moreover, humoral theory made purging appealing: a body suffering from too much heat could open a vein in the arm and get relief, blood being considered a source of hot humors.¹⁹⁹ Menstruation was seen as a kind of purging of nourishment that was not needed if the woman was pregnant.²⁰⁰ In fact, women's bodies were thought particularly "leaky" and unstable.²⁰¹ The necessity of purging in the medical context suggests, I argue, a parallel acceptance of the purging of fetal matter.

191. Harold N. Schneebek, Jr., *The Law of Felony in Medieval England From the Accession of Edward I Until the Mid-Fourteenth Century* 233 (Dec. 1973) (unpublished Ph.D. dissertation, University of Iowa) (on file with Law Library, Indiana University).

192. See SHARP, *supra* note 144, at 84-87.

193. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING HIGH TREASON, AND OTHER PLEAS OF THE CROWN AND CRIMINAL CAUSES* 50 (William S. Hein Co. 1986) (1797).

194. *THE LAWS OF THE EARLIEST ENGLISH KINGS* 69 (F.L. Attenborough ed., trans., Russell & Russell 1963) (1922).

195. GAIL KERN PASTER, *THE BODY EMBARRASSED: DRAMA AND THE DISCIPLINES OF SHAME IN EARLY MODERN ENGLAND* 73 (1993).

196. Hobby, *supra* note 151, at xxiv.

197. *THE 'SEKENESSE OF WYMMEN'*, *supra* note 123, at 35.

198. See PASTER, *supra* note 195, at 8-9.

199. See *id.* at 75.

200. *Id.* at 80.

201. See *id.* at 23-63.

III. LEGAL CONTEXT

A. *The Laws*

The earliest legal texts in England are those of the Anglo-Saxon King Aethelbert and date from about 600 A.D.,²⁰² followed by those of Ine, from the early ninth century, and then those of Alfred the Great, written in the late ninth century.²⁰³ I digress from the early modern focus of this article to examine them because they are the predecessors of the early modern English law of trespass and reveal the basis for treating an injury to a pregnant woman's fetus as an injury to the woman, not as murder of the fetus.²⁰⁴ Alfred's laws are the first to contain any kind of fetal destruction provision. Chapter Nine states the following:

If anyone slays a woman with child, while the child is in her womb, he shall pay the full wergeld for the woman, and half the wergeld for the child, [which shall be] in accordance with the wergeld of the father's kindred.²⁰⁵

The surrounding context makes clear that the *wergeld* penalty reflects a loss of a material possession of the husband involved.²⁰⁶ In fact, the subparagraphs of this section contain stipulations regularizing the amount of the fines for stealing other material goods, such as "gold and horses and bees."²⁰⁷ Attenborough calls this shift from human to chattel a "complete change of subject,"²⁰⁸ but this is not necessarily accurate. Rather, as the context makes clear, these sections deal with compensation for material losses.²⁰⁹ For example, the previous paragraph, number eight, establishes the *wergeld* owed by a man who "takes a nun from a nunnery without the permission of the king or bishop," namely, "120 shillings, half to the king, and half to the bishop and the lord of the church, under whose charge the nun is."²¹⁰ Clearly, the two sections are analogous: both address compensation for loss when a lord of some kind loses a female underling's services, procreative or otherwise.²¹¹ In this context, the half *wergeld*

202. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 2 (3d ed. 1990).

203. THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 194, at 34.

204. *See id.* at 69.

205. *Id.*

206. *See id.*

207. *Id.*

208. *Id.* at 195.

209. *Id.* at 69.

210. *Id.*

211. *See id.*

to be paid for the child would most likely represent the lost possibility of an heir.²¹² In this light, recompense for loss of gold, horses, and bees may not be such a non sequitur as Attenborough supposes.

The next significant set of written laws is that of Henry I (*Leges Henrici Primi*) dating from the early twelfth century,²¹³ when the common law began to emerge as a somewhat cohesive body through the aggressive administration and centralization of the Norman conquerors.²¹⁴ The *Leges* are probably based on a combination of some Anglo-Saxon law and patristic and other Church-related texts, continental German codes, and the law of Anglo-Saxon kings, most extensively those of King Canute.²¹⁵ Most importantly for my purposes is that their author was most likely a continental observer who gathered assorted pieces of several parallel legal regimes, mostly Anglo-Saxon and canon law, to which he added various of his personal observations.²¹⁶ Here appear the Anglo-Saxon *wergeld* tradition and new, canon law provisions which show some concern for harm to the fetus, side by side. These laws make the following provisions for abortion:

Si pregnans occidatur et puer in ea uiuat, uterque plena wera reddatur. (If a pregnant woman is slain, and the child in her is living, each shall be compensated for by the full *wergeld*.)

Si nondum uiuus sit, dimidia wera soluatur parentibus ex parte patris. (If the child is not yet living, half the *wergeld* shall be paid to the relatives, based on the paternal relationship.) . . .

Mulieres que fornicantur et partus suos extinguunt et eas que secum agunt ut utero conceptum excutiant, antiqua diffinitio usque ad exitum uite remouet ab ecclesia. (Women who commit fornication and destroy their embryos, and those who are accessories with them, so that they abort the foetus from the womb, are by an ancient ordinance excommunicated from the church until death.)

Nunc clementius diffinitum: x annis peniteat[n]t. (A milder provision has now been introduced: they shall do penance for ten years.)

Mulier si partum suum ante xl dies sponte perdiderit tribus annis peniteat, si postquam animatus est, quasi homicida vii annis peniteat. (A woman shall do penance for three years if she intentionally brings about the loss of her embryo before forty days; if she does this after it is quick, she shall do penance for seven years as if she were a murderess.)²¹⁷

212. *See id.*

213. LEGES HENRICI PRIMI 1 (L.J. Downer ed., trans., Oxford Univ. Press 1972).

214. BAKER, *supra* note 202, at 14.

215. LEGES HENRICI PRIMI, *supra* note 213, at 4, 28.

216. BAKER, *supra* note 202, at 15.

217. LEGES HENRICI PRIMI, *supra* note 213, at 222-23.

The first two provisions reflect the *wergeld* tradition of the laws of Alfred.²¹⁸ As noted above, this does not mean that the fetus was considered a person.²¹⁹ *Wergeld* was paid and carefully calculated not only for each person according to his or her social status, but also for individual body parts down to toes and fingernails, as well as for chattel.²²⁰ These first two paragraphs, then, are drawn from Anglo-Saxon law.²²¹ The last three have a distinctly different tone and reflect the author's interpolation of his canon law sources.²²² The punishments he enumerates support this reading: suddenly, we are in the realm of penance rather than *wergeld*, the cleansing of the soul rather than the paying of compensation.²²³ Clearly, these provisions are not part of the Anglo-Saxon common law. Two parallel legal regimes regarding fetal destruction, then, appear at this early stage: one requires compensation to the woman or her kin, while the other looks to the cleansing of the sinner's soul.²²⁴

Also significant in the *Leges* is the fact that the second group of provisions applies to "[w]omen who commit fornication."²²⁵ This heading implies that this part is concerned exclusively with women who destroy embryos caused by illicit sex.²²⁶ This set of laws, then, suggests a greater concern with sexual transgression and its consequences, a concern that reflects the intrusion of canon law and its preoccupation with sexual morality.²²⁷ Tellingly, the *Leges* contains no parallel provision for married women.²²⁸ As I will show, this was the first sign of what would become the overriding concern about abortion, a concern that it would allow illicit sex to go undetected and unpunished.²²⁹ From the beginning, concerns about abortion were a part of the broader concern with illicit sex and its consequences: the "fornication" clause

218. See THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 194, at 69; LEGES HENRICI PRIMI, *supra* note 213, at 222-23.

219. See THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 194, at 69; LEGES HENRICI PRIMI, *supra* note 213, at 222-23.

220. LEGES HENRICI PRIMI, *supra* note 213, at 296-97.

221. See *id.* at 222-23.

222. *Id.*

223. See *id.* (comparing "[i]f a pregnant woman is slain, and the child in her is living, each shall be compensated for by the full wergeld" with "[w]omen who commit fornication and destroy their embryos, and those who are accessories with them, so that they abort the foetus from the womb, are by an ancient ordinance excommunicated from the church until death").

224. *Id.*

225. *Id.*

226. See *id.*

227. *Id.*

228. *Id.* My thanks to Art Lefrancois for raising this issue.

229. See HOFFER & HULL, *supra* note 48, at 154-55 (describing the use of abortion to conceal extramarital pregnancy).

seems to ignore the destruction of embryos within marriage, that is, within the boundaries of accepted sexual conduct.²³⁰

As discussed below, this overriding worry drove the courts over the next several centuries.²³¹ For example, to detour briefly from the chronological review of statutes, the infanticide statute of 1624 reflects this same concern with illicit sex and the crimes arising from it.²³² The following Acte created a presumption that an unmarried woman found with a dead infant would be presumed to have murdered it unless another witness testified that it was born alive.²³³ The law reads:

An Acte to p'vent the murthering of Bastard Children:
WHEREAS many lewd Women that have been delivered of Bastard Children, to avoyd their shame and to escape Punishment, doe secretlie bury, or conceale the Death, of their Children, & after if the Child be found dead the said Women do alleadge that the said Childe was borne dead; whereas it falleth out sometymes (although hardlie it is to be proved) that the said Child or Children were murthered by the said Women their lewd Mothers, or by their assent or pcurement: For the p'venting therefore of this great Mischeife, be it enacted by the Authoritie of this p'sent Parliament, That if any Woman after one Moneth next ensuing the end of this Session of Parliament, be delivered of any Issue of her Body Male or Female, which being born alive, should by the Lawes of this Realme be a Bastard, and that she endeavor privatelie either by drowning or by secrett burying thereof . . . soe to conceale the Death thereof, as that it may not come to light, whether it were borne alive or not . . . the Mother soe offending shall suffer Death as in case of murther, except such Mother can make pffe by one Witsnesse at the least, that the Child . . . was borne dead.²³⁴

The statute targets "lewd women" and "bastard children"; like the *Leges*, it ignores the murder of children born within marriage.²³⁵ The case records bear out this reading: the typical offender under this statute was a young, unmarried woman accused of murdering her newborn infant.²³⁶ The statute's aim seems to have been to stem the economic, more than the moral, cost of non-marital sex.²³⁷ This

230. *See id.*

231. *See infra* text accompanying notes 232-37, 343-51, 369-74.

232. *See* Acte to P'vent the Murthering of Bastard Children 1623-24, 21 Jac., c. 27 (Eng.).

233. *Id.*

234. *Id.*

235. *Id.*; HOFFER & HULL, *supra* note 48, at 22.

236. DURSTON, *supra* note 18, at 144; HOFFER & HULL, *supra* note 48, at 95.

237. JACKSON, *supra* note 32, at 30; *see also* SANDRA CLARK, WOMEN AND CRIME IN THE

enduring worry, I suggest, is the common theme in the *Leges* and the 1624 statute.

To continue chronologically: Bracton, at the beginning of the thirteenth century, declared that abortion after animation was homicide: "[i]f . . . some one, . . . has struck a pregnant woman, or has given her poison, whereby he has caused abortion, if the foetus be already formed and animated, and particularly if it be animated, he commits homicide."²³⁸ This is the first appearance of the term "homicide" in legal writing about abortion, and it probably reflects the canon law influence.²³⁹ By the same token, however, it also reiterates the Church doctrine that aborting a fetus pre-animation was not murder.²⁴⁰ Similarly, at the end of the century, Fleta wrote "[a] woman . . . commits homicide if, by a potion or the like, she destroys a quickened child in her womb."²⁴¹

Other treatises seem to contradict this rule, asserting that homicide can only occur if the infant is killed after it is *in rerum natura*, that is, born alive.²⁴² In 1557, William Staunford summarized the English law requirements for homicide by stating that "the thing killed must be in part of the world of physical beings (*in rerum natura*)."²⁴³ Therefore, he continues, "if one kills an infant in its mother's womb, this is not a felony."²⁴⁴ Later, Coke famously said that:

If a woman be quick with childe, and by a 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: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.²⁴⁵

STREET LITERATURE OF EARLY MODERN ENGLAND 44 (2003) (describing the 1624 statute as a measure to "control the rate of illegitimate births, which was perceived by contemporaries to be a considerable problem of social order").

238. HENRICI DE BRACON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 279 (Sir Travers Twiss ed., Longman & Co. 1880) (1569).

239. *See id.*

240. *Id.*

241. SELDEN SOC'Y, FLETA 61 (H.G. Richardson & G.O. Sayles eds., trans., Bernard Quaritch 1955) (1647) [hereinafter FLETA].

242. *See* SIR WILLIAM STAUNFORD, LES PLEES DEL CORON 21 (P.R. Glazenbrook ed., Profl Books Ltd. 1971) (1557).

243. *Id.* The translation is my own.

244. *Id.* The translation is my own.

245. COKE, *supra* note 193, at 50.

Authorities agree that the word "misprision" means something similar to "misdemeanor."²⁴⁶ Blackstone, in 1765, concurred, noting that "[l]ife . . . began in contemplation of law as soon as an infant was able to stir in the mother's womb,"²⁴⁷ and goes on to agree that, even then, abortion is less than homicide,

[F]or if a woman is quick with child, and by a potion or otherwise, killeth in her womb, or if any one beat her whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter.²⁴⁸

Sir Matthew Hale wrote in the seventeenth century:

What the person killed?

It must be a person *in rerum natura*.

If a Woman quick with Child take a potion to kill it, and accordingly it is destroyed without being born alive, a great misprision, but no Felony; but if born alive, and after dies of that potion, it is Murder.

The like if it dies of a stroke given by another in like manner.²⁴⁹

Legal texts appear to agree, at the least, that destruction of the fetus pre-quickening is not homicide, but they differ as to when homicide does attach. Some say after animation; others insist it is only after the infant is born alive.²⁵⁰ Early modern notions of the nature of man and reason may offer a way to reconcile these differences. Dellapenna tries to avoid Coke's "born alive" statement by interpreting the phrase *in rerum natura* to mean "that the law was not able to reach a definite conclusion" about the status of the fetus, which modern science can do today.²⁵¹ In other words, he translates *de rerum* to mean biologically alive, part of the world of living things, a state modern science can detect much earlier in gestation today. This interpretation of the phrase *in rerum natura* is widespread.²⁵² This argument, however, misunderstands Coke's text, its antecedents, and the culture. As Coke himself says elsewhere, defining murder:

246. DICKENS, *supra* note 44, at 21.

247. DELLAPENNA, *supra* note 3, at 238 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *129-30).

248. *Id.* at 238-39.

249. HALE, *supra* note 94, at 53.

250. Compare DELLAPENNA, *supra* note 3, at 238 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *129-30), with HALE, *supra* note 94, at 53.

251. DELLAPENNA, *supra* note 3, at 199-200.

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

Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature *in rerum natura* under the king's peace, with malice fore-thought, either expressed by the party, or implied by law, so as the party wounded, or hurt, &c. die of the wound, or hurt, &c. within a year and a day after the same.²⁵³

To understand the meaning of the phrase, it is necessary to examine it as a whole: "any reasonable creature *in rerum natura* under the king's peace."²⁵⁴ All of these qualities — having a soul, being part of the natural world, being part of the "king's peace" — were necessary attributes of the victim of homicide. Indeed, killing an outlaw — i.e., someone who had been removed from the king's peace — lacked a requisite element and thus was not homicide.²⁵⁵ By the same token, being a "reasonable" creature — that is, having a soul and being capable of reason — was an important part of being a legally cognizable human being.²⁵⁶ Thus, there is reason to think that *in rerum natura* means more than simply alive and reflects more than an evidentiary deficit of the day.²⁵⁷

Sir Matthew Hale's commentary on this matter supports this conclusion. In the section on murder in his *Summary of the Pleas of the Crown*, Hale defines a "person killed" as "a person *in rerum natura*."²⁵⁸ Immediately after this, he illustrates this definition by giving an example of a non-homicidal killing: "[i]f a Woman quick with Child take a potion to kill it, and accordingly it is destroyed without being born alive," it is not murder.²⁵⁹ It becomes murder only when the child is born — that is, exists in the world.²⁶⁰

Early modern philosophy about man and the universe illuminate this phrase's meaning. Reason was central to this age's concept of humanity: it was the capacity for reason that distinguished man from all the other so-called "faculties" of the universe and was the bond that man shared with the divine.²⁶¹ Man was the "nodal point" at the center of creation; according to Augustine, "[h]omo est utriusque naturae vinculum": man is the link connecting the various forms of nature.²⁶²

253. COKE, *supra* note 193, at 47.

254. *Id.*

255. See generally DURSTON, *supra* note 18, at 152-53 (discussing the omission of enemy aliens and thieves from homicide).

256. *Id.*

257. *Id.*

258. HALE, *supra* note 94, at 53.

259. *Id.*

260. *Id.*

261. E.M.W. TILLYARD, *THE ELIZABETHAN WORLD PICTURE* 66 (1944).

262. *Id.*

His reason, and the related idea that man partook of the divine spirit by having a soul, was central to what man was and what separated him from animals.²⁶³ In modern terms, this capacity was a requirement for legal personhood.

The idea, then, that a fetus only became ensouled after a certain point in gestation has important implications for how its "personhood," or humanity, was viewed. The philosophy of the age suggests that a fetus would not have legal personhood before at least quickening, or the forty-day point at which this was thought to occur.²⁶⁴ Contemporaries may have understood an embryo to be alive in some biological sense but not endowed with fully human status. Thus, whether the infant is endowed with reason at animation or at birth, the underlying point is that neither the canon law nor the common law granted it full personhood at the time of conception. Both legal regimes — the one that requires animation for homicide and the one that requires living birth — share this theme: mere conception of the embryo is not enough.

B. The Structure of the Early Common Law Legal System

The fundamental structure of the common law in medieval and early modern England was not amenable to the detection or prosecution of self-induced, early term abortion as a means of birth control in marriage. First, the common law evolved not as a system of abstract rules but as a system of writs, meaning that a legal remedy came into being as a response to an injury done to someone, not from the violation of an abstract moral precept.²⁶⁵ Second, the early common law was largely the province of men,²⁶⁶ while the world of pregnancy and childbearing was the province of women.²⁶⁷ This has a number of implications. It presents another structural feature — this time, a gendered one — of the common law which made it unlikely to recognize certain kinds of abortion, and its relegation of these matters to the private, female sphere has implications for our understanding of the history of privacy in our collective conscience.

First, with respect to writs, adjudicating a case did not involve applying a rule of law to a set of facts so much as judging whether the claim was acceptable within the existing system of writs, and

263. *Id.* at 71.

264. DICKENS, *supra* note 44, at 15; SHAHAR, *supra* note 120, at 124.

265. See NORMAN DOE, FUNDAMENTAL AUTHORITY IN LATE MEDIEVAL ENGLISH LAW 1-2 (1990).

266. DURSTON, *supra* note 18, at 46.

267. Hobby, *supra* note 151, at xvi.

whether the writ presented did indeed offer a remedy for the wrong at issue.²⁶⁸ Legislation of the fourteenth and fifteenth centuries began to develop a substantive set of rules which mandated certain results upon a given set of facts.²⁶⁹ The origins of the common law, however, lie not in statements of objective wrongdoing; they lie instead in the formulation of claims one individual could make against another for personal injury.²⁷⁰ This feature is apparent as early as the laws of Alfred the Great, which itemize personal injuries and their requisite compensation.²⁷¹ Indeed, legal thinkers of the late medieval period, beginning in the fifteenth century, saw the law as the codification of human custom rather than an expression of any divine or natural system existing outside of the human community.²⁷² This kind of thinking is consistent with the origins of the common law in community practice and as a system for addressing personal wrongs.²⁷³

Along these lines, the notion of a "crime" grew out of the category of offenses against a person or his chattel.²⁷⁴ Such offenses, committed with a certain degree of violence, became a breach of the king's peace, which every male from the age of twelve had sworn to uphold.²⁷⁵ Under the Angevin rulers, there was further classification: Glanville uses the terms "civil" and "criminal," but it is misleading to think their meanings mirrored modern usage.²⁷⁶ Like modern criminal laws, Glanville's criminal pleas were crimes that threatened the king's peace and received state-sponsored punishment.²⁷⁷ Crimes were divided into crown pleas and felonies: crown pleas were matters which touched the royal interests closely, such as treason, breach of peace, homicide, arson, robbery, and rape.²⁷⁸ The term felony referred to a serious wrong, inherently involving a breach of the oath to the king, but it could be prosecuted by appeal.²⁷⁹ By definition, crime was something that happened in the public sphere: it injured one of the king's subjects and it disrupted the king's peace.²⁸⁰ Intra-marital, self-induced abortion did not fit this paradigm.

268. DOE, *supra* note 265, at 1-2.

269. *Id.* at 2.

270. *Id.*

271. *E.g.*, THE LAWS OF THE EARLIEST ENGLISH KINGS, *supra* note 194, at 68-71.

272. DOE, *supra* note 265, at 4, 32. Doe finds what he calls a "persistent dialogue between law and morality at work in both theory and practice" in late medieval law. *Id.* at 6. My point is merely that the writ system itself did not involve ideas of abstract morality.

273. DOE, *supra* note 265, at 4, 32.

274. JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW: LAW AND SOCIETY IN ENGLAND FROM THE NORMAN CONQUEST TO MAGNA CARTA 56 (1996).

275. *Id.*

276. *Id.* at 160-62.

277. *Id.* at 160.

278. *Id.* at 161.

279. *Id.* at 162.

280. *Id.* at 165.

By the same token, the process of formal trial came about most often through the actions of the victims or their relatives, not by the actions of the state.²⁸¹ One such process was called appeal and began with an appointed day on which both parties were to appear, with the accuser to make his charge and the defendant to make a formal denial.²⁸² As I will show later, the record contains cases brought by women for assaults that killed fetuses they were carrying.²⁸³ First, it is important to discuss the appeal procedure in some detail. John Baker traces the appeal procedure to the blood feud, calling it “a legal way of seeking revenge and emends.”²⁸⁴ These procedures were not criminal in the sense that a state authority brought the charges, but rather in the sense that they sought to punish serious crime, and, originally at least, to garner compensation for the victims.²⁸⁵ Their most obvious modern analog is the tort.

The prosecution of an appeal began when the victim raised a “hue and cry,” requested help to capture the wrongdoer and seek recourse, then showed his wounds — in the case of assault — to the local coroner or hundred sergeant, who made a record of the wounds and took names of the members of the tithing.²⁸⁶ Eventually, “the coroner enrolled the appeals verbatim” before the county court.²⁸⁷ The initiating procedure was followed by a long process of accusation and denial involving investigation into the accused’s reputation, and for hard cases which could not be settled by other means, battle, oath, or ordeal decided the case.²⁸⁸ Accusations could also be made by a local group — the tithe or hundred — or by a royal official.²⁸⁹

Women could bring appeals in a limited number of cases, limited to the death of a husband or possibly rape.²⁹⁰ Bracton likewise limited women’s appeals to cases “de morte viri sui interfecti inter brachia, et non alio modo,”²⁹¹ and Britton and Fleta agreed.²⁹² The reason for the husband’s homicide exception to the general prohibition of women’s appeals was simple: since husband and wife were one flesh, the death

281. *Id.* at 70.

282. *Id.* at 71.

283. See cases cited *infra* note 301.

284. BAKER, *supra* note 202, at 574.

285. *Id.*

286. HUDSON, *supra* note 274, at 167-68.

287. *Id.* at 168.

288. *Id.* at 72.

289. *Id.* at 71.

290. *Id.* at 235.

291. HENRICI DE BRACTON, DE LEGIBUS ET CONSUEUDINIBUS ANGLIAE 419 (George E. Woodbine ed., Yale Univ. Press 1922) (1569).

292. BRITTON, *supra* note 189, at 95; FLETA, *supra* note 241, at 88.

of a woman's husband was literal injury to her body as well.²⁹³ In practice, however, it appears that justices allowed women to bring appeals in other cases as well: although occasionally a county court was fined for outlawing men appealed by women for killing their relatives,²⁹⁴ county courts were generally not amerced for outlawing men based on appeals by women for the deaths of their sons, brothers, fathers, or daughters.²⁹⁵

The reason for the inflexibility of certain courts may have reflected the same logic underlying Magna Carta's limitations: under coverture, a woman had no separate legal existence and could bring an action for the death of her husband only because his death was injury to her body, which was one with his.²⁹⁶ An unmarried woman might, without coverture, be deemed to have greater scope for appeals, although Magna Carta did not address this. Even if an appeal were quashed on procedural grounds, however, the suit could be taken over and prosecuted by the king.²⁹⁷ Fleta, however, stated that a woman could also bring appeals for rape and the death of a child in her womb.²⁹⁸

Dellapenna relies heavily on cases in which women brought appeals for assaults causing the deaths of fetuses in their wombs.²⁹⁹ Indeed, most of the cases he cites as evidence for the condemnation of abortion fall into this category.³⁰⁰ Misunderstanding the law,

293. See Hobby, *supra* note 151, at xi.

294. Schneebeck, *supra* note 191, at 225.

295. *Id.* at 226.

296. See Hobby, *supra* note 151, at xi.

297. See Schneebeck, *supra* note 191, at 228.

298. See FLETA, *supra* note 241, at 60-61, 88.

299. DELLAPENNA, *supra* note 3, at 134-39.

300. *Id.*; see, e.g., *Rechich's Case*, in SOMERSETSHIRE PLEAS (CIVIL AND CRIMINAL) 321 (Charles E. H. Chadwyck Healey ed., 1887) (describing a 1243 third party assault that caused miscarriage); *Indictment of John Carter*, in CALENDAR OF ASSIZE RECORDS, KENT INDICTMENTS 1649-1659, at 96 (J.S. Cockburn ed., 1989) (describing a 1652 assault by husband resulting in death, no abortion or child mentioned); *Indictment of Richard Poope*, in Calendar of Assize Records, Kent Indictments Elizabeth 1, at 289 (J.S. Cockburn ed., 1979) (describing a 1589 assault by third party); *Indictment of Thomas Adkyns*, in CALENDAR OF ASSIZE RECORDS, ESSEX INDICTMENTS ELIZABETH 1, at 510 (J.S. Cockburn ed., 1978); *Indictment of Roland Meadow & Nicholas Gower*, in CALENDAR OF ASSIZE RECORDS, SUSSEX INDICTMENTS ELIZABETH 1, at 233 (J.S. Cockburn ed., 1975) (describing a third party assault in 1590 on pregnant woman in which assailants stabbed victim and slit open belly to remove unborn child); *Indictment of Walter Beauvyleyn*, in WILTSHIRE GAOL DELIVERY AND TRAILBASTON TRIALS 1275-1306, at 131 (Ralph B. Pugh, ed., 1978) (describing a 1305 third party assault that resulted in miscarriage); *Inquest of the Death of Lucy, Wife of Richard de Barstable*, in CALENDAR OF CORONERS ROLLS OF THE CITY OF LONDON A.D. 1300-1378, at 166 (Reginald R. Sharpe ed., 1963) (describing a 1326 third party assault that resulted in death of mother and birth of an "abortive" child); *Inquest on the Death of Alice, Wife of Adam Cobel*, in CALENDAR OF CORONERS ROLLS OF THE CITY OF LONDON A.D. 1300-1378, at 21 (Reginald R. Sharpe ed., 1963) (describing third party assault in 1301 on pregnant woman that resulted in her death and child's premature birth).

Dellapenna designates these “abortion” cases and claims that their prosecution showed the common law “treated abortion [i.e, the death of the fetus resulting from assault on the woman] as a crime in principle because it involved the killing of an unborn child.”³⁰¹ To the contrary, the law allowed women to bring appeals for three types of injury: death of a husband, rape, and destruction of a fetus in her womb.³⁰² These appeals were allowed because such cases involved graphic injury of a woman.³⁰³ In modern terms, this right to bring an appeal would be called standing.³⁰⁴ Thus, cases of assault involving harmed fetuses were clearly not based on any personhood in the fetus, but rather on harm to the woman’s interest — one might even say, the woman’s personhood. In fact, the analogy with appeals for a husband’s death suggests the opposite — that the law deemed the fetus to be part of the woman, as was the husband.³⁰⁵ The earliest such case is *Agnes’s Appeal* (1200):

Agnes, Saxe’s daughter, appeals John of Paris, for that as she was labouring with child he came into her house, and dragged her out by the feet, and struck her with a stake so that she lost her child. And he defends this as the others have done.³⁰⁶

Although Dellapenna calls this an “abortion case,”³⁰⁷ at the time it clearly was not deemed one within the contemporary understanding of the meaning of abortion. The Latin verb for “lost,” *perdidit*, in the last line makes clear that this case was about injury to the woman rather than the death of the child. The case report fails to make any reference to killing the child; rather it states the mother’s loss as the cause of action by making “her child,” *infantem suum*, the verb’s object.³⁰⁸ From the transitive verb *perdo*, meaning to lose possession of, *perdidit* means that the victim here is the woman who has been deprived of something — in this case, the infant. The past participle, *perdita*, is the name of the lost daughter in Shakespeare’s *Winter’s*

301. DELLAPENNA, *supra* note 3, at 135.

302. *Id.* at 131.

303. *Id.*

304. See BLACK’S LAW DICTIONARY 1442 (8th ed. 2004) (defining “standing” as “[a] party’s right to make a legal claim or seek judicial enforcement of a duty or right”).

305. See *supra* text accompanying notes 290-95.

306. SELDEN SOC’Y, 1 SELECT PLEAS OF THE CROWN, 39 (F.W. Maitland, ed., 1888) [hereinafter SELECT PLEAS OF THE CROWN]. Dellapenna cites this source as well, but offers a slightly different translation from the one appearing in the *Select Pleas of the Crown*, without explanation. See DELLAPENNA, *supra* note 3, at 135.

307. DELLAPENNA, *supra* note 3, at 135.

308. SELECT PLEAS OF THE CROWN, *supra* note 306, at 39 (describing the injury as having “lost her child”).

Tale, who is left out to die then found and raised by shepherds — further evidence that the word means to lose possession of something, not to kill or murder.³⁰⁹ Of course, the above record also offers no support for the idea that pre-quickening destruction of a fetus was criminal: the case obviously deals with a baby at the point of birth ("as she was labouring with child").³¹⁰

Another case Dellapenna cites follows the same pattern:

Amice, who was the wife of Ralph Gundwine, appeals Adam Warner, William Warner and Henry Warner that they came to the house of her the said Amice and broke her house, and took her the said Amice and beat her severely so that, by reason of that beating, she the said Amice lost her child which was in her belly. And that they did this to her wickedly and feloniously against the peace

And the jurors say upon their oath that in truth the aforesaid Adam and others beat the aforesaid Amice; but they say that she immediately went off, and walked about hither and thither, and afterwards when eight days had elapsed she aborted a certain child having the form of a male five inches long; but they believe that this was rather due to the labor and foolish behavior of the selfsame Amice than to the aforesaid beating.³¹¹

Again, the language makes clear that the injury the law recognized was that to the woman for the loss of the child, and not for the destruction of the child itself.³¹² Moreover, the record describes the aborted "child" as having the "form of a male,"³¹³ which shows that it was too early in the gestation process to be considered fully formed as a human child. Furthermore, although many appeals were brought against men who had assaulted women and caused abortions, almost all these accused were acquitted,³¹⁴ suggesting that even the acknowledged injury to the woman was usually found either too hard to prove or not serious enough for conviction.

An understanding of this appeals system suggests, and modern scholars have also argued, that an injury to a fetus performed against

309. William J. Rolfe, *Introduction to WILLIAM SHAKESPEARE, THE WINTER'S TALE* 10, 40 (William J. Rolfe ed., Am. Book Co., 1898) (1623).

310. DELLAPENNA, *supra* note 3, at 135; SELECT PLEAS OF THE CROWN, *supra* note 306, at 39.

311. DELLAPENNA, *supra* note 3, at 137.

312. *See id.*

313. *Id.*

314. *See* Schneebeck, *supra* note 191, at 234 (noting that none of the appeals brought during the reign of Edward I resulted in a conviction).

a woman's will can be recognized as a crime without granting personhood to a few-day-old embryo.³¹⁵ For example, without addressing the question of personhood, Celia Wells and Derek Morgan have argued that a woman's interest in "ensuring the preservation of her foetus" may be as compelling as her interest in determining whether her pregnancy is terminated.³¹⁶ The early history of the common law supports such an argument.

The second structural feature of early common law relevant to this topic is the separation between private and public. While the world of writs, appeals, indictments, and trials was largely a masculine one,³¹⁷ childbirth and pregnancy were almost entirely in the hands of women.³¹⁸ Childbirth was attended by female "gossips" and the female midwife, whose profession, until the seventeenth century, was mostly closed to men.³¹⁹ It was considered immodest for men to touch or see women's "secrets." Nicholas Culpepper, author of a midwifery manual, leaves out of his book any description of an actual birth of a child, as he had admittedly never attended one.³²⁰ This was true throughout the Middle Ages and into the seventeenth century when men first began to make inroads into the profession of midwifery.³²¹ This female, private world was not one on which the common law trained its sights. This is not merely an issue of evidence and proof. Although women could be implicated in crimes — for which their husbands had to pay compensation — they had to enter the masculine, public sphere to do so in a way that would register in the legal system.³²² What occurred in the private world of birth and conception did not.

C. Church Courts

With respect to abortion, Augustine, as noted above, and those who followed him, distinguished between the abortion of a fetus of less than forty days, before God gave it a soul, and one older than forty days.³²³ It is important to distinguish between canonists and

315. See, e.g., DELLAPENNA *supra* note 3, at 139; see also Schneebeck, *supra* note 191, at 233.

316. Celia Wells & Derek Morgan, *Whose Foetus Is It?*, 18 J.L. & Soc'y 431, 431 (1991).

317. DURSTON, *supra* note 18, at 46.

318. Hobby, *supra* note 151, at xvi. Midwife manuals, by contrast, were generally written by men, an important fact to keep in mind when analyzing their contents. See *supra* text accompanying notes 151-57.

319. *Id.* at xi, xiv.

320. See *id.* at xviii.

321. See *id.* at xvi-xix.

322. See DURSTON, *supra* note 18, at 46.

323. DICKENS, *supra* note 44, at 15; SHAHAR, *supra* note 120, at 124.

theologians in this context; the view of theologians was severe toward contraception and abortion, while canonists, expressing approved Church doctrine, espoused more leniency, mandating years of penance for contraception and abortion alike.³²⁴ There are, however, no Church court records of women being convicted for having abortions in the contemporary sense.³²⁵ Moreover, although self-induced abortion may have come under ecclesiastical jurisdiction, the official list of "Causes" for the Church to adjudicate contains no reference to the self-induced abortion.³²⁶ I will examine below the few examples of prosecutions.³²⁷

Destruction of a fetus could fall under ecclesiastical jurisdiction in a number of ways and secular courts also trying such cases did not preclude ecclesiastical jurisdiction.³²⁸ The fact that the destruction of a fetus by a woman herself could fall under ecclesiastical jurisdiction³²⁹ has two implications. While early moderns did not consistently separate the idea of sin from the idea of crime, modern legal systems do, and it is important not to inappropriately transfer religious notions of wrong into legal notions that are relevant today. If the Church — and this is a complicated question which I will address below³³⁰ — condemned abortion, it also banned as sinful throwing snowballs in churchyards.³³¹ The fact that a thing was banned under Church law does not create a basis for banning it under modern notions of crime in common law;³³² even at the time, there was limited support, at least in post-Reformation England, for "secular involvement in moral offenses."³³³ Many texts used to bolster the idea that abortion was a crime in the medieval and early modern period are relevant only to Church courts and doctrines. Thus, although anti-choice writers criticize Blackmun for "ignoring" ecclesiastical law in *Roe*,³³⁴ there is some basis for leaving it out of discussions of the history of the common law approach to abortion.

324. SHAHAR, *supra* note 120, at 124.

325. *Id.*

326. THOMAS OUGHTON, ORDO JUDICIORUM 42-60 (1738).

327. See cases cited *infra* notes 369-74.

328. OUGHTON, *supra* note 326, at 42.

329. DICKENS, *supra* note 44, at 20.

330. See *infra* text accompanying notes 355-74.

331. DURSTON, *supra* note 18, at 174-77. I wish to thank Paula Dalley for this suggestion.

332. R.H. HELMHOLZ, CANON LAW AND THE LAW OF ENGLAND 167 n.44 (1987) [hereinafter CANON LAW AND THE LAW OF ENGLAND] ("It is certainly permissible to argue . . . that American courts are not bound to accept the ecclesiastical law as part of the English Common Law as received in the United States.").

333. DURSTON, *supra* note 18, at 175.

334. Dennis J. Horan & Thomas J. Balch, *Roe v. Wade: No Justification in History, Law, or Logic*, in ABORTION AND THE CONSTITUTION: REVERSING ROE V. WADE THROUGH THE COURTS 57, 64-65 (Dennis J. Horan et al. eds., 1987).

The difference between secular and ecclesiastical punishments is also telling of the separation between the two. The punishments the Church courts imposed were public penance — a humiliating ritual designed to reconcile the offender to God and the community as well as discourage misdeeds — and possible excommunication, but not the corporal punishment the state meted out for non-secular crime such as murder and assault.³³⁵ While it would be anachronistic to assume that spiritual punishments were less effective than corporal ones at this time,³³⁶ a relegation of self-induced abortion to Church courts indicates first, that they were not considered murder, and, second, that they were not regarded as disturbances of the king's peace. Most canonists agreed that Church jurisdiction was based on the purpose of the jurisdiction: if it was to impose punishment, it was left to the secular courts; if the purpose was to correct and impose penance, jurisdiction fell to the Church courts.³³⁷ Conversely, from at least the twelfth century, secular courts increasingly asserted sole jurisdiction over what they considered serious crimes.³³⁸

There is another important distinction between spiritual and secular punishment relevant to this discussion. The Church imposed sanctions in order to restore the sinner's spiritual health and to restore him or her to the community of faith, not simply to punish.³³⁹ In Helmholz's words, these sanctions were "medicinal, not punitive."³⁴⁰ In a broader sense, secular and Church courts had different functions in prosecuting transgression; rather than trying issues of fact, as did secular courts, ecclesiastical courts served as an opportunity for the public clearing of the name of the accused and for mediation of disputes, with restoring peace between the parties serving as the ultimate goal.³⁴¹ Often, it was private parties who invoked the Church courts' jurisdiction over secular crimes, and they seem to have done so when the secular courts offered inadequate remedies, as in the case of attempted crimes, or infanticide.³⁴²

The nature of the crime also determined jurisdiction. State courts had jurisdiction over cases of violence (actions which broke the king's

335. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 2; INGRAM, *supra* note 63, at 3.

336. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 3 (observing that "no sanctions, spiritual or secular, were terribly effective in the Middle Ages" and that "spiritual sanctions seem . . . to have been . . . no more ineffective[] than were the threats of the King's ministers").

337. *Id.* at 124.

338. *Id.* at 125.

339. *Id.* at 106.

340. *Id.* at 107.

341. *Id.* at 138.

342. *Id.* at 143.

peace) and cases involving property, specifically, therefore, forms of murder and theft.³⁴³ The Church jurisdiction relevant to our purposes was over moral and spiritual matters, such as marriage, adultery and other sexual trespasses, and witchcraft.³⁴⁴ If the Church prosecuted cases for self-induced abortions, they would appear under these jurisdictional headings.³⁴⁵ Ecclesiastical jurisdiction over abortion thus indicates that it was not regarded as murder, or as a threat to the peace and order of the community.³⁴⁶ Beginning with Henry II, Angevin rulers had aggressively taken jurisdiction of such matters into state hands; the Assizes of Clarendon of 1166 provided an early example of this impulse.³⁴⁷ This trend represented a determined assertion of the crown over the role of enforcing the king's peace and upholding public order.³⁴⁸

As a final jurisdictional matter, it is important to distinguish between abortion in the public realm, that is, abortion as enabler and sign of illicit sexual activity, and abortion in the private realm, that is, abortion as a private matter within a marriage. Church courts "made virtually no effort to punish . . . sexual irregularities which took place between husband and wife in the marriage-bed."³⁴⁹ Before the Reformation, these matters, if addressed at all, came to light in the context of confession, but after annual confession was abolished as a requirement, the Church made no real effort to bring them into its purview.³⁵⁰ I suggest that this hands-off approach to the nascent private sphere is a structural feature that Church courts shared with the common law courts and that has implications for the regulation of abortion. As the cases below will show, Church court abortion cases that were not third party assault cases generally involved unmarried women and illicit sex.³⁵¹ For reasons I will discuss, they most likely did not involve married women. This lacuna corresponds to a feature of the common law, that is, its apparent willingness to leave private matters between husband and wife outside of its scope.

Dellapenna asserts first that "[t]he ecclesiastical authorities prosecuted [ingestive] abortions fairly routinely as witchcraft."³⁵² The one

343. R.H. HELMHOLZ, *ROMAN CANON LAW IN REFORMATION ENGLAND* 56 (1990) [hereinafter *ROMAN CANON LAW IN REFORMATION ENGLAND*].

344. INGRAM, *supra* note 63, at 2-3; *see id.* at 4.

345. *See* INGRAM, *supra* note 63, at 2-3.

346. *See* CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 125.

347. *Id.*

348. *Id.*

349. INGRAM, *supra* note 63, at 239-40.

350. *Id.* at 240.

351. *See infra* text accompanying notes 369, 371.

352. DELLAPENNA, *supra* note 3, at 152.

Assize case — not a Church court case — he cites fails to support his argument for any kind of abortion prosecution; rather it is a simple assault case, albeit an assault allegedly conducted through witchcraft. In 1580, Jane Turnour, spinster:

[M]aliciously and devilishly bewitched and enchanted a certain Helen Sparrowe, wife of John Sparrowe, . . . being then great with a certain living child, by reason whereof not only was the same Helen then and there on various occasions gravely vexed in her body horribly troubled, to the greatest danger of her life, but also the aforesaid child (of which the same Helen was then and there great) then and there came to death.³⁵³

The language “great with a certain living child” suggests that the fetus was far past quickening, and indeed, the record’s emphasis on the fact that the child was “living” suggests that this status was not a given attribute of a fetus.³⁵⁴ Finally, of course, the most important point here is that this is not a case of self-induced abortion, but a case of assault, in the same category as other assault cases resulting in fetal death.

Of the few relevant prosecutions for fetal destruction in Church courts, most present the same facts, i.e., assault by a third party, that underlay appeals discussed earlier.³⁵⁵ Indeed, it is likely that the injured woman herself brought these cases, as most cases in ecclesiastical courts were brought by parties involved rather than by the authorities.³⁵⁶ Victims of these assaults may have chosen ecclesiastical courts in hopes of being taken more seriously: secular courts often dismissed women’s appeals even if they were technically correct.³⁵⁷ For example, in 1487, John Wren was charged in a Church court “with having wounded his wife during the time she was pregnant so that he killed the child in her belly.”³⁵⁸ In 1471, Thomas Deneham of Minster was prosecuted in the diocese of Canterbury because, knowing his “wife to be pregnant, he imposed such inordinate labors on her that

353. DELLAPENNA, *supra* note 3, at 182. The cite Dellapenna gives for this text is not a part of the regular Assize records, and I have been unable to find it. I take his quote in faith. The Assize record for this case is as follows: “[o]n 8 Jan. 1580 and on other occasions before and since [Joan Turnour, spelled Turnor here] bewitched Ellen wife of John Sparrowe, being great with child, so that she died.” CALENDAR OF ASSIZE RECORDS, ESSEX INDICTMENTS ELIZABETH 1, *supra* note 300, at 212. Obviously, this record presents the case differently: as a case of murder of Helen/Ellen through alleged witchcraft, with the death of the fetus incident to the death of the mother.

354. *Id.*

355. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 159.

356. See HUDSON, *supra* note 274, at 70.

357. See *infra* text accompanying notes 358-59.

358. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 159 (internal quotes omitted).

she aborted."³⁵⁹ The language of these cases also sheds light on the question of quickening. For example, the first case uses the word *puerum* to describe the child that was killed.³⁶⁰ This word, meaning boy,³⁶¹ suggests a relatively advanced stage of fetal development. Despite Helmholz's assertion that these "records show no evidence of dispute about the time of 'quickening' of the fetus,"³⁶² I suggest that the word *puer* itself indicates a fetus developed to the point when its gender could be discerned. Other words were available, such as *proles* and *infantum*, to refer to a neuter, and thus less developed, form.³⁶³ In the Deneham case, the word *gravidam* has similar implications: the Latin literally states that the mother was heavy with child (*inpregnatam et gravidam*).³⁶⁴ Again, this phrasing suggests an advanced pregnancy. The authorities prosecuting and recording the case took the post-quickening state of the infant for granted, I suggest, and did not think it needed mentioning when words like *puer* and *gravidam* make it obvious.

Finally, the Church's enforcement of sexual mores was closely related to the fear of disorder in society at large — and cost to the parish itself.³⁶⁵ Parish officers did their best to prevent the marriages of people deemed likely to become charges on the parish: Ingram reports that the minister of Nether Compton wrote in 1628 that a poor woman "hath no house nor home of her own and very like to bring charge on the parish, and therefore will hardly be suffered to marry in our parish."³⁶⁶ Any concern the Church courts may have expressed over abortion probably reflects this preoccupation with the social and economic impact on the community. The sixteenth century saw increasing Puritan demand for harsher punishment of sexual offenses, a task much more likely to fall to the Church than to secular authorities.³⁶⁷ The few records of such cases are consistent with a concern about sexual morality and abortion as enabling illicit sex, more than with abortion itself.³⁶⁸ For example, George Hemery was charged in

359. *Id.*

360. *Id.* at 159 n.10.

361. OXFORD LATIN DICTIONARY, *supra* note 92, at 1514-15 (defining *puer* as "[a] non-adult male, boy," noting *puerum* as the plural).

362. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 159 n.14.

363. OXFORD LATIN DICTIONARY, *supra* note 92, at 894 (defining *infans* as "[a]n infant, little child (strictly, one not yet able to talk)"); *id.* at 1482 (defining *proles* as "[t]hat which springs from a person (animal, etc.) by birth or descent, offspring, progeny").

364. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 159 n.11.

365. INGRAM, *supra* note 63, at 125-31.

366. *Id.* at 131.

367. *See id.* at 151, 154 (attributing the Puritan demand in part to "theological changes which stressed the depravity of man" and the belief that sexual misconduct was "rife and largely condoned by popular standards").

368. *See* HOFFER & HULL, *supra* note 48, at 154-55 (discussing the use of abortion to

the Consistory court of Rochester in 1493 with giving a woman a medicinal drink "in order to destroy the boy he had procreated."³⁶⁹ The Latin indicates that the boy was "procreated" outside of marriage: rather than referring to the child simply as *puerum* (or *infantem*) *suum*, "his child," which would have been the conventional usage, the recorder went to the trouble of explaining that the child in question was *procreatum per ipsum*, "procreated by him."³⁷⁰ Similarly, in the case of the servant Joan Gibbes, charged in 1469 with having "killed the infant lately in her womb by means of herbs and medicines,"³⁷¹ the record hints that she was unmarried. First, most servants set up their own households when they became married,³⁷² and second, the record fails to give the accused's last name, also indicating unmarried status.³⁷³ Finally, as discussed *supra*, outside authorities were much more likely to have information about the pregnancy — "lately in her womb" — of a servant than of a married woman.³⁷⁴

Helmholz suggests that plaintiffs may have chosen to pursue cases of assaults causing fetal loss in ecclesiastical courts because Church courts were more likely to take these actions seriously.³⁷⁵ The king's courts seem to have regarded them as less heinous than other forms of crime.³⁷⁶ I add to this that the mere fact such cases were brought at all indicates that quickening had occurred, and that the prosecution of these cases in Church courts reflects the same trend I have tried to show in the royal courts — namely, that the underlying concern was with social order, and that cases brought for assault resulting in the death of the fetus are properly seen as assault cases, not abortion cases in the contemporary sense of the terms.

Finally, to conclude this section, I suggest that the relationship between Church teachings, Church courts, and the stuff of daily life is best illustrated by a work of literature.³⁷⁷ While canon law and Church courts may have condemned abortion at some stage of pregnancy, people understood, as they do now, religious precepts to apply

conceal extramarital pregnancy).

369. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 159.

370. Compare *id.* at 159 n.12, with *id.* at 159 n.10 (contrasting with the phrase *uxorem suam*, which means "his wife," in the Wren case).

371. *Id.* at 159.

372. SHAHAR, *supra* note 120, at 225 ("Among peasants . . . marriage . . . symbolized the transition to the new status of householders.").

373. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 159.

374. See *infra* text accompanying note 165.

375. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 167 n.44.

376. *Id.*

377. See GEOFFREY CHAUCER, THE CANTERBURY TALES: NINE TALES AND THE GENERAL PROLOGUE (V.A. Kolve ed., W.W. Norton & Co. 1989) (1388-1400).

to matters of the soul and salvation, while the common law regulated everyday life. Geoffrey Chaucer's *Canterbury Tales*³⁷⁸ illustrates this relationship perfectly. It paints a panorama of contemporary life full of bawdry, fornication, greed, and betrayal,³⁷⁹ and concludes with the somber warnings of the "Parson's Tale," which, most scholars agree, represent Chaucer's sober reflections as he faced his own death.³⁸⁰ The pilgrims' tales, as most of us recall, run the gamut of illicit behavior.³⁸¹ The "Miller's Tale" depicts an adulterous couple who use the story of Noah's Ark to trick the woman's husband into falling asleep so they can spend the night "in bisinesse of mirthe and of solas [pleasure]"³⁸²; the Wife of Bath tells of her five husbands and questions Church teaching that she "sholde wedded be but ones";³⁸³ the Knight tells of pagans who wage war for love;³⁸⁴ and the Cook tells of an apprentice who frequents bars and brothels.³⁸⁵ The final "Parson's Tale" strikes a different note from most of the others (indeed, most editions leave it out).³⁸⁶ Rather than telling a story, the Parson grimly calls on sinners to repent and warns against the seven deadly sins.³⁸⁷ Among other evils humans commit, he mentions abortion:

[I]f a woman have conceyved, and hurt herself and sleeth the child, yet is it homycide.³⁸⁸

The Parson's creed is a fitting finale to the tales of the pilgrims on their way to Canterbury. Just as they represent all walks of life and the panoply of human foibles and errors on the way to salvation, now, near the end of their journey as they approach the holy shrine, he reminds them of the summing up and reckoning at the end of life.³⁸⁹ His message is the necessity of repentance as the end draws near:

378. *Id.*

379. Arthur W. Hoffman, *Chaucer's Prologue to Pilgrimage: The Two Voices*, in GEOFFREY CHAUCER, *supra* note 377, at 459-60.

380. Larry D. Benson, *The Canon and Chronology of Chaucer's Works*, in THE RIVERSIDE CHAUCER xxvi, xxix (Larry D. Benson ed., Houghton Mifflin 3d ed. 1987) (1388-1400); Martin M. Crow & Virginia E. Leland, *Chaucer's Life*, in The Riverside Chaucer, *supra* note 380, at xv, xvi.

381. Jill Mann, *Characterization and Moral Judgment in the General Prologue Portraits*, in GEOFFREY CHAUCER, *supra* note 377, at 471, 474.

382. CHAUCER, *supra* note 377, at 88.

383. *Id.* at 105.

384. *Id.* at 44-45.

385. THE RIVERSIDE CHAUCER, *supra* note 380, at 85.

386. Mann, *supra* note 381, at 472.

387. THE RIVERSIDE CHAUCER, *supra* note 385, at 288-89, 299.

388. *Id.* at 306.

389. *Id.* at 288.

Manye been the weyes espirituels that leden folk to oure Lord
 Jhesu Crist and to the regne of glorie.
 Of whiche weyes ther is a ful noble wey and a ful covenable, which
 may nat fayle to man ne to womman that thurgh synne hath
 mysgoon fro the righte wey of Jerusalem celestial;
 and this wey is cleped Penitence, of which man sholde gladly
 herkennen and enquire with al his herte . . . ³⁹⁰

Chaucer himself expresses repentance at the end of the work in his Retraction — not only for writing the Tales, but for all his other works which may have offended God, including *Troilus and Criseyde*, *The Book of the Duchess*, the *Book of the Ladies*, and, just in case, “many a song and many a leccherous lay” he may have forgotten.³⁹¹

The relationship between the preceding Tales on the one hand, and the “Parson’s Tale” and “Chaucer’s Retraction” on the other, helps us understand the relationship between the moral precepts of the Church and everyday life, and, by extension, the role of the Church courts. It is fitting that as the pilgrims approach their destination, the shrine of Thomas a’Becket at Canterbury, and as Chaucer himself approached the end of his life, both turn from the realities of the everyday to thoughts of “the blisse of hevene”³⁹² and how to achieve it. In this light, it is worth noting that Thomas a’Becket was martyred in the struggle between Henry II and the Church over Church jurisdiction over serious crimes — a struggle that Henry ultimately won.³⁹³

CONCLUSION

An examination of the culture surrounding the act of abortion in early modern England has much to offer. Indeed, I suggest that the law is impossible to understand without an understanding of the social and cultural meaning of the act and the legal texts referring to it, and arguments that ignore this content are doomed to draw an incomplete and misleading picture. Unfortunately, abortion is the kind of topic that attracts this kind of distorted analysis; Dellapenna’s book is a glaring example. An examination of abortion law in its full context reveals that the doctrine does not lend itself to absolutist statements such as the ones Dellapenna makes. It does seem clear, however, that the penalties for abortion in the common law had to do with injuries to the woman carrying the fetus and to the putative father, not with

390. *Id.*

391. *Id.* at 328.

392. See THE RIVERSIDE CHAUCER, *supra* note 380, at 315.

393. CANON LAW AND THE LAW OF ENGLAND, *supra* note 332, at 125.

injury to the fetus as a person.³⁹⁴ Further, beliefs about man's capacity for reason and ensoulment make it unlikely that the pre-quickening fetus was deemed to possess the same human status as the fetus after quickening.³⁹⁵ Medical culture and notions of the body made early miscarriage such a nebulous category that there was little distinction between miscarriage of an embryo and other kinds of dissolution.³⁹⁶ The structure of the common law was not designed to intervene in the sphere in which intra-marital abortions occurred.³⁹⁷ Finally, the records of the time, including literature, pamphlets, manuals, laws, and cases, indicate that the concern underlying most abortion statutes and cases was about social disorder and illicit sex.³⁹⁸ Authorities saw abortion differently depending on who performed it under what circumstances.³⁹⁹ These contextual elements are a necessary part of the legal history of abortion.

394. *See supra* text accompanying notes 95-98, 290-316.

395. *See supra* text accompanying notes 261-64.

396. *See supra* text accompanying notes 33-47, 120-43.

397. *See supra* text accompanying notes 265-98, 317-22.

398. *See supra* text accompanying notes 48-114.

399. *See supra* text accompanying notes 82-98.