

THE AUTHOR OF HER TROUBLE: ABORTION IN NINETEENTH- AND EARLY TWENTIETH- CENTURY JUDICIAL DISCOURSES

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INTRODUCTION

In *Gonzales v. Carhart*, the Supreme Court upheld the Partial Birth Abortion Ban Act, stating:

Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow

. . . .

. . . The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the

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skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.¹

In response, Justice Ginsberg's dissent charged: "This way of thinking reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."² Commentators have used more heated language to describe Justice Kennedy's opinion; the day after the decision, law professor Jack Balkin blogged, "[t]his is the New Paternalism that is now central to the rhetoric of the pro-life movement. Either a woman is crazy when she undergoes an abortion, or she will become crazy later on."³ Balkin's insertion of the modifier "new" is notable. Although the Court's opinion exemplified a relatively new, pro-life-influenced preoccupation with female regret,⁴ the broader current of paternalism in abortion-related jurisprudence was not unprecedented.

The treatment of women in nineteenth- and early twentieth-century abortion cases was, as others have argued, paternalistic.⁵ For example, Reva Siegel has explored "the extreme forms of paternalism and sex-stereotyping expressed in nineteenth-century arguments for criminalizing abortion,"⁶ while Samuel Buell has critiqued the application of the laws and judicial attitudes toward women procuring abortions.⁷ Buell argues that it was incoherent for courts to allow women who actively sought abortions to escape criminal liability, that incoherence "resulted from a paternalistic approach," and that it "reflect[ed] our culture's history of persistent denial of female autonomy."⁸

This Note moves past a paternalism critique to offer a multi-causal explanation for doctrinal incoherence, and it reveals how the judicial mitigation of female consent facilitated the exercise of female agency within

¹ *Gonzales v. Carhart*, 550 U.S. 124, 159–60 (2007) (internal citations omitted).

² *Id.* at 185 (Ginsburg, J., dissenting).

³ Posting of Jack Balkin to Balkinization, <http://balkin.blogspot.com/2007/04/big-news-about-gonzales-v-carhart.html> (Apr. 19, 2007, 22:50 EST).

⁴ See Reva Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 *DUKE L.J.* 1641, 1648–49 (2008).

⁵ See Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 *N.Y.U. L. REV.* 1774, 1778, 1792 (1991) ("Two doctrinal issues in the criminal law—accomplice and conspiratorial liability—exposed the incoherence, resulting from a paternalistic approach toward women, in the courts' attempts to apply abortion statutes and in the statutes themselves."). Buell cites to, and his argument appears to be significantly informed by, Justice Sandra Day O'Connor's scholarship on nineteenth-century views of women. See Sandra Day O'Connor, Madison Lecture on Constitutional Law at New York University School of Law: Portia's Progress (Oct. 29, 1991), in 66 *N.Y.U. L. REV.* 1546 (1991). Both Buell's student note and O'Connor's lecture appeared in the December 1991 issue of the *New York University Law Review*.

⁶ Reva Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 *STAN. L. REV.* 1871, 1896 (2006); see also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 287–318 (1992) [hereinafter Siegel, *Reasoning from the Body*].

⁷ See Buell, *supra* note 5.

⁸ *Id.* at 1778, 1792.

nineteenth- and early-twentieth-century courts. Almost all courts neutralized the woman's actions vis-à-vis the father or physician in procuring an abortion, and they regularly labeled women as victims. While cultural paternalism undoubtedly played a role, I argue that pragmatism, not nineteenth-century gender ideology, was the primary impetus behind this doctrinal maneuvering. With little fear of prosecution, some women proactively aligned themselves with the state's police power to punish "the author[s] of [their] trouble."⁹

After surveying scholarship on the history of the criminalization of abortion in America in Part I, I examine the state of the doctrine and judicial approaches to female consent in Part II. Specifically, I discuss female action in the context of accomplice liability, conspiracy liability, and the admission of dying declarations. Throughout Part II, I demonstrate the importance of judicial pragmatism (in conjunction with, and as opposed to, gender ideology) in the construction of women's status under abortion law, and I conclude with commentary on the intersection of law and masculinity in these cases. In Part III, I consider the ways in which women leveraged their relative immunity and affirmed their position as agents by aligning themselves with the state.

I. BACKGROUND: COMMON LAW AND CRIMINALIZATION

In this Part, I briefly explore abortion under the common law and the influences behind American statutory criminalization in the nineteenth century. This history draws upon the work of James Mohr and Cyril Means,¹⁰ and incorporates aspects of Joseph Dellapenna's recent counter-history.¹¹ I also defend Siegel's nuanced view of legislative purpose in criminalization by presenting judicial interpretations of legislative intent.¹²

Most contemporary authorities state that under nineteenth-century common law, the act of abortion was only illegal after "quickening."¹³ Quickening refers to the moment when the pregnant woman first experiences

⁹ See, e.g., *State v. Stapp*, 151 S.W. 971, 972 (Mo. 1912) (euphemistically referring to the man who impregnated the aborting woman). Courts also describe these male defendants as the authors of "ruin" or "shame." See, e.g., *Clarke v. People*, 27 P. 724, 725 (Colo. 1891); *People v. McDowell*, 30 N.W. 68, 72 (Mich. 1886).

¹⁰ JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900* (1978); Cyril C. Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968).

¹¹ JOSEPH W. DELLAPENNA, *DISPELLING THE MYTHS OF ABORTION HISTORY* (2006).

¹² See Siegel, *Reasoning from the Body*, *supra* note 6, at 293, 294, 318 n.235 (discussing the multiple potential motivations behind criminalization); see *infra* note 31.

¹³ See, e.g., JANET FARRELL BRODIE, *CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA* 254 (1994) ("For two centuries in America, abortion had been treated according to common law tradition in which abortions before 'quickening' . . . were not punishable . . ."); MOHR, *supra* note 10, at 4-6; LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 28 (1992).

perceptible fetal movement, occurring approximately sixteen to eighteen weeks into gestation.¹⁴ Recent scholars have complicated this vision of legality under the common law by recontextualizing some sources and distinguishing between earlier and later common law.¹⁵ However, most nineteenth-century American courts found that abortions before quickening were not punishable at common law.¹⁶ The aborting woman, then, clearly could not be indicted for a pre-quickening abortion, and decisions about whether she could be liable under common law for a post-quickening abortion were mixed.¹⁷

Historian James Mohr has written one of the most influential assessments of nineteenth-century American history surrounding abortion.¹⁸ According to Mohr, in the United States, early legislation regarding abortion consisted of code revisions in the 1820s and 1840s; these laws largely regulated who could perform abortions and punished the practice of unauthorized post-quickening abortions.¹⁹ Yet the statutes still generally permitted abortions before quickening.²⁰ The second wave of criminalization, from the 1860s through the 1880s, effectively abolished the quickening distinction.²¹ For instance, in Massachusetts, an 1869 law did away with the requirement that pregnancy be proved for abortion to be proved.²² Although the sphere of criminal behavior expanded, it appears that no woman in the United States has ever been convicted for the crime of her own abortion.²³ In the early period of intensified prosecutions, beginning around 1840, the defendants—abortionists and former sexual partners—were regularly acquitted.²⁴ Scholars from across the political spectrum agree that there was a considera-

¹⁴ See Buell, *supra* note 5, at 1780 n.25; see also Means, *supra* note 10, at 412.

¹⁵ See DELLAPENNA, *supra* note 11, at 200–28. Dellapenna notes, “[T]he criminality of abortion under the common law was well-established.” *Id.* at 200. He argues that there was a split in nineteenth-century courts over the question of pre-quickening abortion at common law. *Id.* at 422. However, he only cites four cases stating that it was a common law crime before quickening. *Id.* at 422 n.92.

¹⁶ If the quickened fetus survived the abortion attempt and then died after birth, or if the woman died as a result of the procedure, the abortionist’s crime was murder. See Means, *supra* note 10, at 426, 437–38.

¹⁷ See *id.* at 428 (noting that U.S. courts’ dicta about the common law status of women’s immunity post-quickening were divided).

¹⁸ MOHR, *supra* note 10; see also DELLAPENNA, *supra* note 11, at 266.

¹⁹ See MOHR, *supra* note 10, at 43. Mohr explains that some 1820s statutes were “as much poison control measures as anti-abortion measures.” *Id.* at 26.

²⁰ See *id.* at 43.

²¹ See *id.* at 200–02.

²² *Id.* at 219.

²³ DELLAPENNA, *supra* note 11, at 301; see also MOHR, *supra* note 10, at 24 (noting that America’s first anti-abortion statute was “carefully drafted to retain the woman’s own immunity from prosecution”); TRIBE, *supra* note 13, at 122 (discussing “the traditional immunity of women from prosecution for abortion”).

²⁴ See Leslie J. Reagan, “About to Meet Her Maker”: Women, Doctors, Dying Declarations, and the State’s Investigation of Abortion, *Chicago, 1867–1940*, in *WOMEN AND HEALTH IN AMERICA: HISTORICAL READINGS* 269, 272–73 (Judith Walzer Leavitt ed., 2d ed. 1999); see also Note, *A Functional Study of Existing Abortion Laws*, 35 *COLUM. L. REV.* 87, 90–91 (1935) (“[Abortion] statutes seem never to have been satisfactorily en-

ble degree of jury nullification of abortion statutes throughout the nineteenth and twentieth centuries, though popular attitudes toward the practice shifted.²⁵ Mohr hypothesizes that abortion rates were relatively high from the 1840s through the 1870s, and the public perception was that these rates were increasing among married, middle-class, native-born Protestant women.²⁶ Abortion opponents capitalized on these trends to turn public opinion against the practice, leading to, by 1880, a surge in anti-abortion statutes and “a significant, perceptible hardening of American public opinion against what had become a relatively common private practice.”²⁷

Mohr’s work suggests that the statutory criminalization of abortion was prompted in significant part by the political lobbying of physicians striving to consolidate their profession.²⁸ The physicians, through the recently formed American Medical Association (“AMA”), acted to strengthen their professional power and constrict the practice of “irregulars,” such as homeopaths and midwives.²⁹ Though there is little legislative history on the issue, it is clear that physicians informed legislatures of the risks of general immorality, social disorder, potential demographic shifts, and threats to women’s health.³⁰ Law professor Reva Siegel discusses doctors who “defined women’s health as a condition of continuous reproductive activity” and tied this duty to marital obligations.³¹ For example, nineteenth-century antiabortion-

forced [O]fficers in charge of enforcement have deplored the unwillingness of juries to convict.”)

²⁵ See DELLAPENNA, *supra* note 11, at 430. Dellapenna notes that this conclusion requires one to a) “assum[e] that the reported cases are representative,” and b) “know how conviction rates for abortion compared with conviction rates for other crimes by or against women.” *Id.* at 431–38. He goes to great length to defend the argument that jury nullification is not indicative of broad legal or social acceptance of abortion. *Id.*; see also MOHR, *supra* note 10, at 122 (discussing nullification in Massachusetts).

²⁶ See MOHR, *supra* note 10, at 73–81, 86.

²⁷ *Id.* at 85, 167, 171–72, 200.

²⁸ See MOHR, *supra* note 10, at 160–61, 173–75.

²⁹ See *id.* at 160–61; Reagan, *supra* note 24, at 270. Some physicians also held strong personal moral beliefs against abortion. See MOHR, *supra* note 10, at 166. I do not mean to suggest that the profession had a monolithic approach to abortion; ultimately, many “regular” physicians were willing to perform abortions and were prosecuted under abortion laws. See LESLIE J. REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973*, at 48 (1997) [hereinafter REAGAN, *WHEN ABORTION WAS A CRIME*].

³⁰ See *id.* at 287, 297, 317.

³¹ Siegel, *Reasoning from the Body*, *supra* note 6, at 293–94. Siegel cites doctors who “elaborated on a norm of marital sexuality in therapeutic terms.” *Id.* at 294. Discussing Cyril Means’s thesis about a woman-protective rationale behind criminalization, she notes:

In retrospect, it is impossible to assess the force or sense of this concern. It may have reflected a response to sensational newspaper coverage of women maimed or killed by abortionists, or deference to medical authority in the matter. But these arguments may well have been compelling as they played upon the larger sentiments the doctors’ campaign so assiduously cultivated: Abortion was dangerous to women’s health because it interrupted their ‘natural’ physiological function and purpose in life.

Id. at 318 n.235.

tion activist and physician Horatio Robinson Storer wrote that “[e]very married woman . . . should occasionally bear a child; not as a duty to the community merely . . . but as the best means of insuring her own health.”³² Social fears of swelling immigrant populations offered further support for the physicians’ arguments.³³ These fears were manifest in an Ohio Senate’s physician-inspired report on abortion, which discussed declining birth rates among “native” populations, and asked: “Shall we permit our broad and fertile prairies to be settled only by the children of aliens?”³⁴ While the report mentioned physical danger, this danger was coupled with a “moral danger” to women, who, by “avoid[ing] the duties and responsibilities of married life,” endangered the destiny of the race.³⁵ The physicians’ concerns for abortion’s physiological consequences were entwined with their interest in protecting social order, and their arguments sometimes invoked moral rationales. Despite abortion opponents’ appeals to morality and in contrast to their role in contemporary political discourse, America’s clergy was generally reluctant to insert itself into the debate.³⁶

Dellapenna argues that Mohr’s account of the relevance of abortion to the consolidation of power within the medical profession is exaggerated.³⁷ In Dellapenna’s view, the criminalization process was primarily about protecting fetal life and outlawing a relatively uncommon and dangerous practice.³⁸ However, even he acknowledges that nineteenth-century proponents of criminalization were concerned with preserving the racial “purity” of the nation in light of increased immigration of eastern and southern Europeans, along with falling birthrates among middle and upper class western and northern Europeans.³⁹

Writing in the 1960s, law professor Cyril Means’s historical account highlights the woman-protective rationales of nineteenth-century legislatures: “The object of our statutes . . . [was] the preservation of the health and life of the *pregnant woman*”⁴⁰ His methodology focuses on the evolution in New York statutes, and he claims there was only one example of a contemporaneous judicial discussion of legislative purpose.⁴¹ Contrary to Means’s description, a number of state courts did elaborate on legislative purpose, and even more opined on the nature of the crime.⁴² His suggestion that protecting women from health risks was the primary motivation behind

³² HORATIO ROBINSON STORER, *IS IT I? A BOOK FOR EVERY MAN* 115–16 (photo. reprint 1974) (1868).

³³ See MOHR, *supra* note 10, at 167.

³⁴ MOHR, *supra* note 10, at 207–08 (quoting 1867 Ohio Senate J. App. 235).

³⁵ *Id.* (quoting 1867 Ohio Senate J. App. 235).

³⁶ See *id.* at 182–96.

³⁷ See DELLAPENNA, *supra* note 11, at 285, 297–98, 422.

³⁸ See *id.* at 273, 285, 423.

³⁹ *Id.* at 492–93.

⁴⁰ Means, *supra* note 10, at 418, 452.

⁴¹ See *id.* at 452. His example was *State v. Murphy*, 27 N.J.L. 112, 114 (1858).

⁴² See *infra* note 44.

statutory criminalization is incorrect.⁴³ Notwithstanding its role as an important ostensible motivation, judicial accounts of legislative purpose also highlighted the ideas of injury to morality, society, and nature.⁴⁴ In *State v. Mandeville*, the New Jersey Court of Errors and Appeals discussed the purposes behind its abortion statute:

[T]he view expressed . . . to the effect that the design of the statute was to guard the health and life of the pregnant female, while true as far as it goes, ignores the salutary effect of the statute as a preventive of a crime against public morals and the welfare of the state, which is equally within its language and purview. . . . There is nothing . . . that should prevent us . . . from giving to the language of the statute all of the force that such language possesses as a deterrent, not only of personal injury to a class of citizens of the state, but also of public injuries to the entire body politic.⁴⁵

The idea of injury to the body politic resonates with physicians' warnings of demographic shifts; it also reflects the notion that women had a duty, as citizens, to bear children.

The dangerousness of the abortion procedure in the nineteenth century, particularly relative to the dangers of childbirth, is somewhat contested.⁴⁶

⁴³ The Supreme Court in *Roe v. Wade*, 410 U.S. 113, 148–52 (1973) relied heavily on Means's argument ("Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy."). Since then, a number of authors have instead argued that the state was primarily motivated by a desire to protect fetal life. See, e.g., DELLAPENNA, *supra* note 11, at 297; John Keown, *Back to the Future of Abortion Law: Roe's Rejection of America's History and Traditions*, 22 ISSUES L. & MED. 3, 13–14 (2006) (arguing that fetal protection was "the primary if not sole purpose of the legislation or was, at the very least, a purpose of the legislation"). Reva Siegel has emphasized that state motivation was multifaceted. See Siegel, *Reasoning from the Body*, *supra* note 6, at 318 n.235.

⁴⁴ See, e.g., *State v. Tippie*, 105 N.E. 75, 77 (Ohio 1913) ("The reason and policy of the statute is to protect women and unborn babes from dangerous criminal practice, and to discourage secret immorality between the sexes, and a vicious and craven custom amongst married pairs who wish to evade the responsibilities and burdens of rearing offspring."); *State v. Howard*, 32 Vt. 380, 399 (1859) ("Then the evil example of such a practice, and the teaching the mothers, or thus attempting to teach them, the facility with which they may escape the perils of child bearing, and the consequent responsibilities, and the impediments to a life of ease and vicious indulgence, are among the most pernicious consequences of such abominable practices, and are no doubt properly to be regarded as fairly coming within the evils to be considered in fixing the construction of the statute and its probable object and purpose."); cf. *State v. Murphy*, 27 N.J.L. 112, 114 (1858) (noting that "[t]he offence of third persons, under the statute, is mainly against [the woman's] life and health").

⁴⁵ *State v. Mandeville*, 98 A. 398, 400 (N.J. 1916).

⁴⁶ Means emphasizes the discoveries of Louis Pasteur and Joseph Lister, which made surgery safer, and argues that abortions and all surgeries pre-1867 were "inherently dangerous to the life of the patient, since surgeons did not know what caused infection or how to prevent it." Means, *supra* note 10, at 436. Means posits that the health risks to women motivated much abortion legislation. This supports his broader argument that abortion should be legal because the procedure was, by 1968, substantially safer—safer

Regardless, as the procedure grew safer, legislatures expanded penalties and focused more explicitly on fetal life in the statutes criminalizing abortion.⁴⁷ Nineteen states criminalized a woman's involvement in her own abortion, classifying it as a lesser statutory crime.⁴⁸ This should not necessarily be interpreted as a move toward or away from female-protective legislative rationales, though it does indicate increasing political disfavor toward the practice of abortion.

II. WOMEN IN THE COURTS: "VICTIM" EXPLAINED

While the neutralization of female consent in abortion cases is partially explained by paternalistic social conceptions of gender, it also resulted from the realities of enforcement, the difficulties of doctrine, and potential judicial sympathy for the woman or the circumstances giving rise to the practice. Moreover, the general failure to treat women as principles, accomplices, or conspirators continued well into the twentieth century, even as women's movements altered the social landscape.⁴⁹ The continuation of laws that did not reflect the realities of female action buttresses the notion that judges' ideas about gender were not the primary source of doctrine.

In this Part, I first discuss the legal (ir)relevance of the aborting woman's consent, and I foreshadow some of the judiciary's gymnastics around the exercise of consent. Second, I explore accomplice and conspiracy doctrine, and I examine the practical difficulties of abortion prosecution that led judges to minimize recognition of female consent in these doctrinal contexts.

even than childbirth. *See id.* at 511–15. To the contrary, Mohr argues that the dangers had been exaggerated, and women obtained early nineteenth-century abortions with relative ease. MOHR, *supra* note 10, at 30–31.

⁴⁷ *See* MOHR, *supra* note 10, at 200 (“[M]ost of the legislation passed between 1860 and 1880 explicitly accepted the regulars’ assertions that the interruption of gestation at any point in a pregnancy should be a crime”); *see also* James Witherspoon, *Reexamining Roe: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY’S L.J. 29, 40 (1985) (“At the end of 1883, twenty states provided an increased range of punishment for attempts causing the death of the child; fourteen of these expressly provided that the same range of punishment would apply if the attempt caused the death of the mother.”).

⁴⁸ These states are: Arizona, California, Connecticut, Delaware, Idaho, Indiana, Minnesota, Montana, Nevada, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Utah, Washington, Wisconsin, and Wyoming. *See* DELLAPENNA, *supra* note 11, at 298 n.295; Buell, *supra* note 5, at 1785 n.50 (supplying Indiana, which Dellapenna failed to cite). New York changed the crime from a misdemeanor to a felony in 1872. DELLAPENNA, *supra* note 11, at 298.

⁴⁹ One doctrinally analogous area, the crime of transporting prostitutes, reflected the norm that women should be treated as agents where appropriate. In *United States v. Holte*, 236 U.S. 140 (1915), the Court held that a woman transported in violation of the Mann Act, an anti-prostitution statute, could be guilty of conspiracy in the act of transporting herself. Justice Holmes stated: “We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim. The words of the statute punish the transportation of a woman for the purpose of prostitution even if she were the first to suggest the crime.” *Id.* at 145.

Here, the denial of consent is tied to the aborting woman's technical status as victim. Next, I consider the potential role of judicial sympathy in the construction of a victim with compromised agency. At the end of this Part, I complete the picture of the "victim" by exploring the complementary judicial expectations for male behavior.

Abortion is a private act, and criminalization only heightened the secrecy surrounding the procedure. Potential witnesses were almost always limited to parties to the procedure, a situation which made the prosecutorial role especially difficult.⁵⁰ Dellapenna notes that in the nineteenth century, medical examinations alone could rarely provide dispositive proof that an abortion occurred, except in cases where the woman was severely injured.⁵¹ These deficiencies in physical proof meant that where the woman survived the procedure, her testimony was even more critical for the prosecution to obtain a conviction.⁵² The practical necessity of her testimony led to much of the doctrinal maneuvering which positioned women as victims. In approaching the problem, the first issue for courts to address was the status of female consent.

A. Consent

Scholars have incorrectly argued that the judicial minimization of female consent was rooted in paternalistic conceptions of female agency and victimhood. According to Dellapenna, "The attitude that the woman was a victim rather than a criminal . . . continued to be dominant in the twentieth century," and "[c]ourts rationalized their view of women as victims . . . by declaring that a woman 'was not deemed able to assent to an unlawful act against herself.'" ⁵³ Similarly, Buell emphasizes the ways in which the judicial mitigation of consent is in tension with women's actions, and he incorrectly attributes this tension primarily to nineteenth-century views of gender:

One can explain the anomalous treatment of the woman's conduct as reflecting our culture's history of persistent denial of female autonomy and as perpetuating a now-dated perception of a woman who seeks an abortion as a victim, incapable of making moral decisions where her own body is concerned

⁵⁰ See DELLAPENNA, *supra* note 11, at 432; MOHR, *supra* note 10, at 72 (stating that prosecutors were placed in a "wretched position").

⁵¹ DELLAPENNA, *supra* note 11, at 432.

⁵² *Id.* at 433; See MOHR, *supra* note 10, at 72.

⁵³ DELLAPENNA, *supra* note 11, at 299 (quoting *State v. Farnam*, 161 P. 417, 419 (Or. 1916)). Dellapenna's discussion of female victimhood is problematically tied to an argument that "[t]he tradition that women seeking abortions were victims rather than criminals originated in the suicidal dangers that long attended abortion." *Id.* at 298.

. . . [C]riminal-abortion laws exempt women from their ambit because of a deeply rooted paternalism that denies women the status of fully autonomous citizens⁵⁴

Dellapenna points to what was a doctrinal conclusion in some cases,⁵⁵ and Buell accurately explains one source of the tension; however, they are both incomplete descriptions of how courts approached female consent. In most instances, courts did not wholly disregard female consent or female action in procuring an abortion. Instead, they recognized consent and subsequently neutralized it.⁵⁶ Although nineteenth-century gender ideology may have contributed to this inconsistency, other factors included a likely desire to facilitate prosecution of a crime that was difficult to prove, and the reality that many courts considered the practice in the context of a woman's severe injury or death.⁵⁷ In the latter cases, it is unsurprising that the court uses "victim" descriptively. Given the relatively prevalent construction of victims and accomplices as mutually exclusive, courts facing clear victims-in-fact justifiably shied away from highlighting women's active consent in procuring the abortion.

Courts routinely acknowledged the consent or willingness of the woman upon whom the abortion was performed. Some criminal statutes expressly included a category of abortions in which the procedure is performed with the woman's consent, or they noted that her consent is no defense.⁵⁸ In Texas, an 1859 statute read:

⁵⁴ Buell, *supra* note 5, at 1778. Justice O'Connor elaborates on these nineteenth-century views:

Most of the women legal pioneers faced a profession and a society that espoused what has been called 'The Cult of Domesticity,' a view that women were by nature different from men. Women were said to be fitted for motherhood and home-life, compassionate, selfless, gentle, moral, and pure. Their minds were attuned to art and religion, not logic. Men, on the other hand, were fitted by nature for competition and intellectual discovery in the world, battle-hardened, shrewd, authoritative, and tough-minded.

O'Connor, *supra* note 5, at 1547.

⁵⁵ See DELLAPENNA, *supra* note 11, at 299 n.301.

⁵⁶ See *infra* notes 71-74 and accompanying text.

⁵⁷ From Exodus through Saint Thomas Aquinas, the prohibition of abortion was framed in terms of the illegality of a blow to the pregnant woman that induced miscarriage. See Douglas R. Miller, *The Alley Behind First Street, Northeast: Criminal Abortion in the Nation's Capital, 1872-1973*, 11 WM. & MARY J. WOMEN & L. 1, 3-7 (2004). In this formulation, the woman was not an active participant. However, the common law's prohibition on abortion expanded the set of potential scenarios. In the thirteenth century, Henri de Bracton discussed a third party administering poison to a woman, and by the seventeenth century, Edward Coke had referred to self-poisoning, and an Englishwoman had been indicted (though pardoned) for self-abortion. See *id.* at 6-8; Suzanne M. Alford, Note, *Is Self-Abortion a Fundamental Right?*, 52 DUKE L.J. 1011, 1019-20 (2003). Thus, though negation of the woman's consent resonated with the historical treatment of abortion, the framing of women as wholly passive had been put aside by the nineteenth century.

⁵⁸ See WIS. STAT. § 169.58 (1858), quoted in HORATIO STORER, ON CRIMINAL ABORTION IN AMERICA 84 (1860) (criminalizing a woman's conduct in self-abortion or consent

If any person shall designedly administer to a pregnant woman, with her consent, any drug or medicine, or shall use toward her any violence, or any means whatever, externally or internally applied, and shall thereby procure an abortion, he shall be punished by confinement in the Penitentiary, not less than two, nor more than five years; if it be done without her consent, the punishment shall be doubled.⁵⁹

Other statutes did not explicitly address consent, leaving courts to impose their own readings.⁶⁰ In an 1898 Michigan case, *People v. Abbott*, the court considered a challenge from the defendant that the indictment used the language of assault, but “the evidence showed that [the abortion] was done with the consent of Viola Stevens.”⁶¹ The court found that this was not grounds for reversal, “as it was not necessary to allege or prove the assent . . . and as the offense was the same whether she assented or not.”⁶² An 1897 Texas case stated the proposition more plainly: “Our law does not hold the woman, whether she consents or not, a principal. She is guilty of no crime known to the law.”⁶³ Courts similarly acknowledged, but did not doctrinally account for, scenarios in which the woman plainly insisted on the abortion.⁶⁴

Legislatures crafted statutes so that women could not be tried as principals to the felony crime of abortion.⁶⁵ When defendants tried to exploit potential ambiguities, courts imposed common law understandings or their own interpretations, resulting in immunity for the aborting woman.⁶⁶ For example, in a 1904 Connecticut case, the court found: “At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another”⁶⁷ As discussed in Part I, prosecutors pursued abortionists and former sexual partners as violators of these statutes. Because the woman could not be tried as a principal, the courts doctrinally and logically transformed the roles of both abortionists and former sexual partners. Many of the defendants’ actions were of the sort that, in other contexts, would have led to their

to an abortion); 1910 Ky. Acts 189-190 (stating that a woman’s consent to an abortion is no defense).

⁵⁹ OLDHAM AND WHITE’S DIGEST LAWS OF TEXAS (1859) art. 531.

⁶⁰ See, e.g., MICH. COMP. LAWS §§ 244.32–34 (1871).

⁶¹ *People v. Abbott*, 74 N.W. 529, 531 (Mich. 1898).

⁶² *Id.* (reaching this conclusion by finding the indictment sufficiently specific).

⁶³ *Moore v. State*, 40 S.W. 287, 290 (Tex. Crim. App. 1897).

⁶⁴ *Gray v. State*, 178 S.W. 337, 342 (Tex. Crim. App. 1915).

⁶⁵ See MOHR, *supra* note 10, at 24. The pregnant woman was the object of the criminal activity. See *id.* at 21.

⁶⁶ *Commonwealth v. Wood*, 77 Mass. 85, 93 (Mass. 1858) (“[S]he could not have been indicted with him for the offence.”); *Commonwealth v. Boynton*, 116 Mass. 343, 345 (Mass. 1874) (“She could not have been indicted as a participator in the offence”).

⁶⁷ *State v. Carey*, 56 A. 632, 636 (Conn. 1904).

prosecutions as accomplices or accessories.⁶⁸ However, because there can be no accomplice without a principal, some courts were compelled to classify a would-be accomplice as a principal.⁶⁹ To ease this transformation of roles, courts occasionally referred to the aborting women as “innocent agent[s].”⁷⁰

Given that doctrinal state of affairs, it is unsurprising that a woman’s consent did not affect the criminal culpability of other actors. In *Commonwealth v. Parker*, the Supreme Judicial Court of Massachusetts stated:

The use of violence upon a woman, with an intent to procure her miscarriage, without her consent, is an assault highly aggravated by such wicked purpose, and would be indictable at common law. So where, upon a similar attempt by drugs or instruments, the death of the mother ensues, the party making such an attempt, with or without the consent of the woman, is guilty of the murder of the mother, on the ground that it is an act done without lawful purpose, dangerous to life, and that the consent of the woman cannot take away the imputation of malice, any more than in case of a duel, where, in like manner, there is the consent of the parties.⁷¹

Although Dellapenna analogizes the neutralization of female consent in criminal abortion cases to statutory rape,⁷² an example that better indicates courts’ approaches to abortion is the analogy to a duel.⁷³ Courts did not treat women who sought abortions as “too immature to make their own decisions,” nor did they approach them as “immature girls who are not treated as accessories to statutory rape.”⁷⁴ Instead, as the Massachusetts court indicates, abortion is more like a duel, where courts acknowledge consent-in-

⁶⁸ For example, in Texas, the statute criminalized the administration of drugs with the intent to procure an abortion, and it explicitly defined furnishing the means for an abortion while knowing the purpose as leading to accomplice liability. Therefore, if a doctor furnished medicine to a woman with instructions, he would have been an accomplice under a plain reading of the statute. However, the court in *Moore*, 40 S.W. at 290, held that “[the doctor] is the principal, because the woman cannot be.”

⁶⁹ See, e.g., *Moore*, 40 S.W. at 290.

⁷⁰ See, e.g., *Maxe v. United States*, 30 App. D.C. 63, 75 (D.C. Cir. 1907) (“[O]ne may be convicted as a principal, though acting in the commission of the crime through an innocent agent.”); *Seifert v. State*, 67 N.E. 100, 100 (Ind. 1903) (“[A] person who causes such a crime to be committed through an innocent agent is deemed constructively present.”); *Willingham v. State*, 25 S.W. 424, 424 (Tex. Crim. App. 1894) (“If Miss Brown is . . . guilty of no offense (though desiring an abortion, and consenting to what was done to produce the same), [she] was the innocent agent of appellant . . .”).

⁷¹ *Commonwealth v. Parker*, 50 Mass. 263, 265 (Mass. 1845).

⁷² See DELLAPENNA, *supra* note 11, at 302.

⁷³ *Parker*, 50 Mass. at 265.

⁷⁴ See *id.* Dellapenna, in his argument that the purpose of criminalization was to protect fetal life, emphasizes the practical reasons for positioning women as victims; however, he offhandedly remarks that “[t]hese reasons [for not treating women as criminals] might strike a modern observer as overly paternalistic . . .” *Id.* He then draws the parallel to statutory rape, and he seems indifferent as to whether the doctrines are actually manifestations of paternalism. *Id.*

fact, but deny it doctrinal significance to serve a public policy end. Gender-based conceptions of female power and agency mattered, but the somewhat incoherent doctrine resulted largely from the practical inability to charge women for the crime.

Even when courts were willing to minimize the consent of the woman seeking the abortion, the consent of other actors could be dispositive in their culpability. In *Greenwood v. State*, the court noted that Ethel Carpenter had consented to the procedure.⁷⁵ The appellant, invoking the rule that accomplice testimony must be corroborated, challenged Carpenter's testimony on the basis that she was an accomplice and her testimony was uncorroborated.⁷⁶ The court did not reach the question of whether she was an accomplice, because it found that the testimony of her sister, Kate Rose, was sufficient corroboration.⁷⁷ Interestingly, the court held that the sister was not an accomplice on the basis of Rose's lack of consent—which it mentioned three times in reaching its holding.⁷⁸ This supports the notion that the court's approach to consent was not primarily driven by gender ideology; the court gives full recognition to a non-aborting woman's consent or lack thereof, and its decision to do so is arguably outcome-oriented. Similarly, courts held midwives fully accountable for their actions, without regard to their status as women.⁷⁹

B. *Accomplice Liability, Agency, and Necessity of Testimony*

In practice, it was a nearly impossible task to convict an abortionist without the testimony of the woman.⁸⁰ To facilitate her testimony, prosecutors sometimes granted immunity to women to circumvent potential complications of self-incrimination.⁸¹ But immunity options were insufficient tools for the prosecutor if the woman risked being labeled an accomplice. If she was an accomplice, the defendant usually could not be convicted on the

⁷⁵ *Greenwood v. State*, 105 P. 371, 373 (Okla. Crim. App. 1909).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See, e.g., *Hatchard v. State*, 48 N.W. 380, 381–82 (Wis. 1891) (upholding a physician's wife's conviction for abortion because she "had previously offered to perform the operation, and voluntarily assisted her husband in doing so each time" and because there was "strong evidence that Mrs. Hatchard was acting voluntarily . . .").

⁸⁰ See DELLAPENNA, *supra* note 11, at 300.

⁸¹ *Id.* at 300 n.303. The New York legislature granted statutory immunity to women in 1869, though this was revoked in its abortion statutes of 1872. *Id.* at 300.

basis of her uncorroborated testimony.⁸² Courts commonly circumvented this aspect of doctrine by declaring that the woman was not an accomplice.⁸³

While one court attempted to rationalize this move by stating that the woman was an accomplice “in a moral and not in a legal sense,”⁸⁴ courts more often emphasized the distinction by creating a dualism, in which the woman was a victim, as opposed to an accomplice.⁸⁵ Yet the concept of her victimhood never expanded to encompass and negate all female consent. Some courts positioned women as “victims” while simultaneously doctrinally acknowledging their roles as agents. Women in certain states were technically subject to statutory penalties for abortion;⁸⁶ they were capable of being co-conspirators,⁸⁷ and courts regularly held that juries could find them “moral[ly] implicat[ed]” in the act.⁸⁸ These courts often used the moral implication of the woman’s participation in her abortion to weigh the credibility of her testimony.⁸⁹ Conversely, at least one court found that the wo-

⁸² See, e.g., *People v. McGonegal*, 17 N.Y.S. 147, 151 (N.Y. Gen. Term 1891) (“[N]o conviction can be had upon the testimony of an accomplice unless corroborated by such other evidence as tends to connect the defendant therewith”); *State v. Robinson*, 93 N.E. 623, 625 (Ohio 1910) (noting the trial court should “instruct the jury not to convict upon the uncorroborated testimony of an accomplice”); *Greenwood v. State*, 105 P. 371, 373 (Okla. Crim. App. 1909) (“[A] conviction cannot be had on the uncorroborated testimony of an accomplice”); cf. *State v. Shaft*, 81 S.E. 932, 932 (N.C. 1914) (“[T]he testimony of an accomplice is competent in this state, and a person may be convicted upon the unsupported testimony of an accomplice, though the jury should be cautious in so doing.”).

⁸³ See, e.g., *Gullatt v. State*, 80 S.E. 340, 341 (Ga. Ct. App. 1913); *State v. Stafford*, 123 N.W. 167, 168 (Iowa 1909); *Peoples v. Commonwealth*, 9 S.W. 509, 510 (Ky. Ct. App. 1888); *Commonwealth v. Boynton*, 116 Mass. 343, 345 (1874); *State v. Owens*, 22 Minn. 238, 244 (1875); *State v. Hyer*, 39 N.J.L. 598, 601 (1877); *Hammett v. State*, 209 S.W. 661, 661 (Tex. Crim. App. 1919); *State v. McCurtain*, 172 P. 481, 482 (Utah 1918); cf. *State v. McCoy*, 39 N.E. 316, 316 (Ohio 1894) (“Whenever a woman voluntarily participates with another person, who administers medicine to or uses an instrument upon her, for the purpose of producing a criminal miscarriage upon herself, she . . . is thereby subject to indictment and punishment as an aider, abettor, or procurer of the principal offender; and her evidence, when she testifies in the case, should be regarded as that of an accomplice.”).

⁸⁴ *Shaft*, 81 S.E. at 933.

⁸⁵ See, e.g., *Meno v. State*, 83 A. 759, 760 (Md. 1912) (“A woman on whom an abortion has been performed is regarded as a victim rather than an accomplice, and, even if she be deemed an accomplice, she is competent as a witness for the prosecution of the accused”); *Dunn v. People*, 29 N.Y. 523, 527 (1864) (“The law regards her rather as the victim than the perpetrator of the crime.”); *Watson v. State*, 9 Tex. Ct. App. 237, 244 (Tex. Ct. App. 1880) (“The rule that she does not stand legally in the situation of an accomplice, but should rather be regarded as the victim than the perpetrator of the crime, is one which commends itself to our sense of justice and right”); *Smartt v. State*, 80 S.W. 586, 589 (Tenn. 1904) (“She is the victim, and is neither principal nor accomplice”).

⁸⁶ See *supra* note 48 and accompanying text.

⁸⁷ See *infra* note 119 and accompanying text.

⁸⁸ *People v. McGonegal*, 32 N.E. 616, 621 (N.Y. 1892) (implicating a female confidante of the (deceased) aborting woman); see also, e.g., *Smartt v. State*, 80 S.W. 586, 589 (Tenn. 1904) (same).

⁸⁹ See, e.g., *Thompson v. United States*, 30 App. D.C. 352, 362–64 (D.C. Cir. 1908) (affirming the trial court’s statement that the woman “morally implicates herself in the

man's willingness to testify to her own disgrace would strengthen her testimony.⁹⁰ In short, the judicial understanding of the woman as "victim" was not monolithic and was, in part, constructed to emphasize her non-accomplice status.⁹¹

The problems posed by potential accomplice liability for the aborting woman were clear, and some legislatures did not leave the issue to judicial discretion. These political actors were not motivated by mere gendered ideology. In a 1908 American Medical Association debate concerning whether the organization should support the criminalization of the pregnant female's actions, criminalization opponents elaborated on the pragmatic benefits of preventing aborting women from accomplice classification: it would facilitate prosecutions, since her uncorroborated testimony would be sufficient basis for a conviction.⁹²

C. *Dying Declarations*

Many prosecutions for abortion took place in situations in which the woman had died as a result of the procedure.⁹³ As some women were dying from abortion-related injury and infection, police gathered information from them about the abortionist, where the procedure occurred, its cost, and the types of instruments involved.⁹⁴ Leslie Reagan, in her study of dying declarations in Illinois, found that thirty-seven of forty-three abortion cases decided by the Illinois Supreme Court between 1870 and 1940 were of this type.⁹⁵ In my nationwide examination of recorded appellate level decisions between 1860 and 1920, the percentage of cases involving the woman's death was substantially lower. Yet this lower proportion is not aligned with the perception at the time. In 1903, a Colorado attorney sharply observed, "[t]he law only applies to the man who is so unskillful as to kill his patient."⁹⁶ A doctor writing on abortion in 1932 noted that "[t]he abortionist is usually discovered owing to the death or grave illness of the patient . . . for every case which comes into court [,] . . . a large, indeed a very large num-

act"); *Smartt*, 80 S.W. at 589 ("[H]er moral implication is a proper question for the consideration of the jury in weighing her testimony."); *Watson*, 9 Tex. Ct. App. at 245 ("[T]hough not strictly an accomplice, inasmuch as she is in a moral point of view implicated in the transaction, it would be proper for the jury to consider that circumstance in its bearing upon her credibility."); *State v. Bolton*, 102 A. 489, 492 (Vt. 1917) (finding that testimony as to the woman's actions "bore upon [her] credibility").

⁹⁰ See *State v. Stapp*, 151 S.W. 971, 973 (Mo. 1912).

⁹¹ Judicial constructions were critically important, as it seems that only the Kentucky legislature explicitly ensured that the woman could not be classified as an accomplice. See 1910 Ky. Acts 189; cf. CAL. PENAL CODE § 1108 (Deering 1915).

⁹² DELLAPENNA, *supra* note 11, at 300 n.308 (citing Walter Dorsett, *Common Abortion In Its Broadest Sense*, 51 JAMA 958 (1908)).

⁹³ See *Witherspoon*, *supra* note 47, at 54.

⁹⁴ See *Reagan*, *supra* note 24, at 269.

⁹⁵ *Id.* at 273.

⁹⁶ *Id.* at 272-73 (quoting H. H. Hawkins) (internal quotation marks omitted).

ber are never heard of.”⁹⁷ This supports the argument that cases not involving the death of the woman were brought to a prosecutor by a party to the abortion—likely the woman herself.

In this process, the dying declarations of women were often critical pieces of evidence.⁹⁸ However, courts confronted some doctrinal difficulty in admitting this evidence: defendants regularly argued that it constituted hearsay.⁹⁹ Although dying declarations of homicide victims were “a well-recognized exception” to hearsay evidence rules,¹⁰⁰ there was initially some uncertainty as to how they should be treated in abortion cases.¹⁰¹ In a 1900 New Jersey case, *State v. Meyer*, the defendant was charged under an abortion statute in which the resulting death of the victim was not part of the crime.¹⁰² Although there were two separate provisions—one for abortion, and one for abortion resulting in the death of the mother or child—the lower court found that the gradation was merely with respect to penalties.¹⁰³ Because the gradation did not create a separate crime altogether, in which death was an essential element, the dying declaration could not be admitted.¹⁰⁴ The Court of Errors and Appeals reversed, finding that abortion resulting in death was a discrete offense.¹⁰⁵ In this context, the crime was close enough to homicide that the court was comfortable admitting dying declarations without modifying traditional hearsay doctrine. In New York and Massachusetts, dying declarations in abortion cases were made admissible by statute.¹⁰⁶

Some courts reasoned that while the declarations were “strictly hearsay,” they could be admitted in abortion prosecutions where “conspiracy is shown between two or more persons . . . [and] the declarations of one, since deceased, [were] made in furtherance of the conspiracy”¹⁰⁷ This placed courts in the awkward position of labeling a dead woman—whose death, particularly in twentieth-century cases, may have been the result of

⁹⁷ L.A. PARRY, CRIMINAL ABORTION, 87–88 (1932).

⁹⁸ Reagan, *supra* note 24, at 273.

⁹⁹ See, e.g., *State v. Hunter*, 154 N.W. 1083, 1085 (Minn. 1915).

¹⁰⁰ *People v. Becker*, 109 N.E. 127, 133 (N.Y. 1915).

¹⁰¹ See, e.g., *Edwards v. State*, 112 N.W. 611, 613 (Neb. 1907) (noting that dying declarations were not always admitted in Ohio); *State v. Fuller*, 96 P. 456, 457–58 (Or. 1908) (observing that dying declarations were not originally admissible, “on the ground that her death was not an essential ingredient of the offense,” but when the death is an essential part of the crime by statute, the dying declaration could be received into evidence).

¹⁰² *State v. Meyer*, 47 A. 486, 487 (N.J. 1900).

¹⁰³ *State v. Meyer*, 45 A. 779, 780 (N.J. Sup. Ct. 1900).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 487.

¹⁰⁶ N.Y. CODE CRIM. PROC. § 398-a (1915), noted in *People v. Becker*, 109 N.E. 127, 133 (N.Y. 1915); MASS. REV. LAWS ch. 175, § 65 (1902), discussed in *Commonwealth v. Turner*, 112 N.E. 864, 865 (Mass. 1916).

¹⁰⁷ *State v. Hunter*, 154 N.W. 1083, 1085 (Minn. 1915). To “show conspiracy,” the prosecution had to present evidence beyond the dying declaration. *Id.* In some cases, including in *Hunter*, these declarations were admitted as part of the *res gestae*. See, e.g., *id.*

negligence—a party to the criminal act. These courts would simultaneously call attention to the woman's youth, desire to marry, lack of education, and poverty to elicit sympathy for the decedent, and vengeance against a defendant.

Reagan has emphasized the intrusiveness of the process of collecting a dying declaration, and the potential shame attendant upon surviving family members.¹⁰⁸ While these phenomena were real, some families did choose to prosecute the father or the abortionist. Dying women themselves could find power in the act of naming their abortionist. For example, the court in *People v. Hagenow* discussed a number of past incidents in which the female abortionist had been implicated, one of which involved a bitter dying declaration.¹⁰⁹ In this incident, the police, joined by the abortionist, had come to the hospital room of a young woman dying from her procedure. The young woman and the defendant conversed in German:

“The victim answered: ‘Yes; see what you have done!’ Mrs. Hagenow said: ‘Why, you had a flow when you came to me, did you not?’ Marie said: ‘I didn’t have no flow.’ Mrs. Hagenow now said: ‘Yes; you did. Tell these people now you did have a flow.’ Marie said: ‘No; I didn’t have a flow, and I won’t tell the people that I had a flow.’”¹¹⁰

Yet deathbed statements were not always a last empowering act. In a 1912 Wisconsin case, a woman in the process of an abortion sought help from a second physician.¹¹¹ This doctor compelled the aborting woman to issue a statement concerning who had performed the abortion before he would treat her injuries.¹¹² Although the appellant challenged the dying declaration as a statement made under duress that should not be admitted, the appellate court ruled that the trial court properly admitted the declaration.¹¹³

D. Conspiracy

As Buell notes, theoretically, most women obtaining abortions would have been classifiable as co-conspirators, even if they were not technically accomplices.¹¹⁴ While accomplice liability attaches if one aids in an offense

¹⁰⁸ Reagan, *supra* note 24, at 280.

¹⁰⁹ *People v. Hagenow*, 86 N.E. 370, 374–75 (Ill. 1908).

¹¹⁰ *Id.* at 374. In another instance, as a young woman was giving her dying declaration in the presence of Hagenow and the police, “Dr. Hagenow stepped up to the side of the bed, rubbed the girl’s face with her hand, and said: ‘Don’t talk too much, my girl. It won’t do you any good.’” *Id.* at 375.

¹¹¹ *State v. Law*, 136 N.W. 803, 804 (Wis. 1912).

¹¹² *Id.* at 804–05.

¹¹³ *Id.* at 805.

¹¹⁴ Buell, *supra* note 5, at 1793.

with the purpose that it succeed,¹¹⁵ conspiracy is simply an agreement to disobey the law.¹¹⁶ By virtue of the woman's consent to the procedure, courts could have inferred that the woman had entered into such an agreement.¹¹⁷ Buell argues that "courts refuse to view the woman as a conspirator . . . because they read the statute as designed for her protection."¹¹⁸ This oversimplifies the courts' views of the woman's status in three ways. First, Buell himself cites at least seven recorded decisions in which courts were willing to view the woman upon whom the abortion was performed as a co-conspirator for the purposes of admitting evidence.¹¹⁹ Second, while some courts did read the statute as designed exclusively for female protection, most did not, as discussed in Part I. Third, courts strategically worked with conspiracy doctrine, like accomplice doctrine, to facilitate prosecution. This was particularly true in the dying declarations context. Before dying declarations were routinely admitted into evidence in abortion cases, some courts admitted them on the grounds that the decedent woman was a co-conspirator, and the declaration dealt with acts in furtherance of the conspiracy.¹²⁰

An 1890 British case, *Regina v. Whitchurch*, held that a woman (who was, in fact, not pregnant) could conspire to procure an abortion upon herself.¹²¹ When the case was reported in *American Criminal Reports*, it was followed by a note stating: "It is doubtful whether the doctrine of *Reg. v. Whitchurch* would be fully accepted in this country; because it is held by many respected authorities here that the woman upon whom an abortion is

¹¹⁵ See MODEL PENAL CODE § 2.06 (2001). Buell argues that most women obtaining abortions should have been classifiable as accomplices as well. Buell, *supra* note 5, at 1792.

¹¹⁶ See MODEL PENAL CODE § 5.03 (2001).

¹¹⁷ Buell, *supra* note 5, at 1792.

¹¹⁸ *Id.* at 1794.

¹¹⁹ *Id.* at 1794 n.100. Buell cites: *Solander v. People*, 2 Colo. 48, 62–63 (1873); *State v. Gilmore*, 132 N.W. 53, 54 (Iowa 1911); *State v. Crofford*, 110 N.W. 921, 922 (Iowa 1907); *Fields v. State*, 185 N.W. 400, 403 (Neb. 1921); *People v. Davis*, 56 N.Y. 95, 102–03 (1874); *State v. Mattson*, 206 N.W. 778, 778 (N.D. 1925); *Kraut v. State*, 280 N.W. 327, 333 (Wis. 1938). In some of these cases, the court viewed the woman as a co-conspirator in dicta; in others, the court denied that she was a co-conspirator on the facts, but indicated that they would have been willing to consider her as one on different facts.

¹²⁰ See, e.g., *Solander*, 2 Colo. at 63 ("[T]he conspiracy being shown, her acts and declarations in furtherance of the common design are evidence against others engaged with her in the criminal act."); *Crofford*, 110 N.W. at 922 ("Though she may not be guilty of committing an abortion upon herself, it is a crime for another to do so, and, if she conspires with others to perform the act, there is no escape from the conclusion that she is a co-conspirator, and that her declarations in promotion of the common enterprise are admissible in evidence against another conspirator on trial for the commission of the substantive crime."). Conspiracy doctrine was not a panacea for evidentiary problems. In *Gilmore*, 132 N.W. at 54–56, the court reversed a conviction of a physician on the grounds that the lower court admitted improper testimony concerning statements of the co-conspirator decedent. The decedent had only met the physician for the first time on the day of the abortion. *Id.* at 55. Therefore, they had not been co-conspirators the week prior, and third-party testimony as to her statements the week prior was not sufficiently connected to the conspiracy. *Id.* at 55–56; see also DELLAPENNA, *supra* note 11, at 301.

¹²¹ *R v. Whitchurch*, (1890) 24 Q.B.D. 420, reprinted in [1892] 8 Am. Crim. Rep. (Callaghan & Co.) 1.

committed is not an accomplice, which view would seem to militate against the doctrine laid down in the foregoing case.”¹²² The note then cites a number of cases in which “the law looked upon her rather as a victim than a co-offender.”¹²³ Though somewhat incorrect in its prediction about American courts, this note posits an important tension between inconsistent conspiracy and accomplice doctrine, as well as potential conflict in the simultaneous status of “victim” and conspirator.

One of the cases in which the court recognized that a woman could, in theory, be a co-conspirator, *Solander v. People*, addressed whether dying declarations were admissible evidence.¹²⁴ The court stated that a woman generally:

[M]ay be, and usually is, a party to the illegal combination to effect the abortion, and as this is the ground upon which the declarations are admitted, it can make no difference that she is not criminally liable for the act done. In some cases, probably, the woman is an unwilling subject, submitting to, but not actively joining in, the unlawful attempt, and in such cases the community of purpose which alone can make the acts and declarations of one admissible as evidence against his associate in crime, may be wanting. But where it appears that the woman not only submits to the unlawful attempt, but actively promotes it, by seeking the aid of others, and eagerly adopting the means suggested to accomplish the crime, it cannot be claimed that she is not a party to the criminal design.¹²⁵

Though the court hypothetically neutralizes scenarios involving passive consent, the frank speculation about a woman’s active promotion of the crime is unusually nuanced for abortion cases of the period. The court presents a realistic account of *actus reus* that aligns with the doctrine and facilitates the introduction of evidence.

Judicial maneuvering around questions of agency and doctrine is particularly evident in *State v. Crofford*.¹²⁶ Crofford, a physician, was on trial for the murder of Maud Stone by abortion, and the court considered a number of challenges, including one involving the admissibility of a letter written by Ms. Stone as a declaration by a co-conspirator.¹²⁷ Interpreting Iowa’s abortion statute, the court stated:

This language indicates the design of the lawmakers to treat the woman upon whom the act is perpetrated as the victim, and she cannot be guilty of this crime. This is in harmony with the conclu-

¹²² *Attempt to Commit an Impossible Crime*, [1892] 8 Am. Crim. Rep. (Callaghan & Co.) 4.

¹²³ *Id.*

¹²⁴ *Solander*, 2 Colo. at 48.

¹²⁵ *Id.* at 63.

¹²⁶ *State v. Crofford*, 110 N.W. 921 (Iowa 1907).

¹²⁷ *Id.* at 923–25.

sion reached by courts generally that she is not to be regarded as an accessory or accomplice. But it does not follow that she may not engage in an unlawful conspiracy with another to perpetrate the offense upon herself. . . . [I]f she conspires with others to perform the act, there is no escape from the conclusion that she is a co-conspirator, and that her declarations in promotion of the common enterprise are admissible in evidence against another conspirator on trial for the commission of the substantive crime.¹²⁸

Although the court frames the legislative intent as arising from a dualistic paradigm of guilt and victimhood, it complicates this dualism, reflects actual dynamics, and facilitates prosecution by accepting the decedent as a co-conspirator. The court's language choices also betray its more complex understanding of female involvement. It does not proclaim that Stone was a victim; rather, lawmakers "treat" women generically as victims, and this treatment assists courts in declaring that the women are not accomplices.

E. Sympathy?

Judicial sympathy toward women obtaining abortions, individuals performing abortions, and other supporting actors is impossible to measure. Although there is evidence of the prevalence of jury nullification,¹²⁹ the attitudes of judges appear conflicted and highly context-specific. In some instances, genuine sympathy may have mingled with disgust for the practice, or reluctance to upset a jury's conviction. For example, in an 1887 Oregon case, *State v. Clements*, the court found:

There appears to have been no improper motive upon the part of the appellant to produce an abortion upon Lena Dakota, unless it were actuated by sympathy for that unfortunate girl. Her anxiety to cover up her shame would be likely to have had an influence upon any one possessed of a sympathetic nature. She had been imprudent, but was not outside of the pale of charity, and yet could not hope for it in the eyes of mankind; especially in those of her own sex.¹³⁰

Yet the court went on to affirm the jury's conviction of the physician, citing its closeness to the proceedings.¹³¹

¹²⁸ *Id.* at 922 (internal citations omitted).

¹²⁹ See MOHR, *supra* note 10, at 122 (discussing nullification in Massachusetts); Reagan, *supra* note 24, at 272; Note, *supra* note 24, at 90-91; cf. DELLAPENNA, *supra* note 11, at 436 (pointing to one defendant's suicide as evidence she was unwilling to rely on the supposed trend of jury nullification).

¹³⁰ *State v. Clements*, 14 P. 410, 413 (Or. 1887). The implication that women would be more judgmental of an out-of-wedlock pregnancy is an interesting one; however, the court did not elaborate further. See *id.*

¹³¹ *Id.*

Beyond their personal sentiments, judges were aware of the potential sympathy for the woman having the abortion, as well as the stigma associated with pregnancy out of wedlock.¹³² In one 1916 Washington case, the lower court judge referenced the reality of nullification by specifically instructing the jury, “Neither should the fact that [she] may be a young girl or that she may be unmarried have any weight in your deliberations. . . . This question is . . . unaffected by considerations of policy.”¹³³ Likewise, in an 1897 Indiana civil suit, the appellate court stated, “the very fact that she was pregnant with a bastard child, together with all the facts . . . was enough to arouse in the hearts and minds of the jury a well-grounded sympathy for her, and to create with the jury an unconscious prejudice in her favor.”¹³⁴

It is difficult to disentangle judicial portraits of sympathetic “victims” from a desire to facilitate prosecution, particularly of abortionists.¹³⁵ When the defendant was on trial for the resulting death of the woman, retributive motivations likely informed prosecutors’ and courts’ approaches to the victim/agent dichotomy. Decedents were not depicted as victims merely because of judicial ideology about female agency. Rather, faced with stories of grotesque deaths,¹³⁶ prosecutors and courts facilitated punishment for the facts at hand. Some courts allowed and offered strong condemnations of physicians and other defendants.¹³⁷

¹³² See, e.g., *Snell v. State*, 79 S.E. 71, 75 (Ga. Ct. App. 1913) (stating that it was an “act of humanity” for a man unrelated to the abortion to house the injured woman in a spare room); *State v. Hunter*, 154 N.W. 1083, 1083 (Minn. 1915) (noting the “embarrassing situation” and “disgrace” involved).

¹³³ *State v. Russell*, 156 P. 565, 567 (Wash. 1916).

¹³⁴ *Courtney v. Clinton*, 48 N.E. 799, 802 (Ind. App. 1897).

¹³⁵ One highly variable doctrine among the states concerned the burden of proof as to whether the abortion was necessary to preserve the woman’s life. Some courts, evincing strong concern for defendants’ rights generally (and possibly professionals’ rights specifically), forced the state to prove that the abortion was *not* necessary to the woman’s life. See, e.g., *State v. De Groat*, 168 S.W. 702, 705–07 (Mo. 1914) (“If there be degrees and grades in presumptions, it would seem that the presumption of innocence ought to prevail [W]e conclude that . . . the burden is on the state to prove the nonnecessity of the abortion to save the life of the mother or the life of an unborn child.”); *Clements*, 14 P. at 415–16 (placing the burden on the state, and finding that there is a presumption of the doctor’s good faith); *State v. Wells*, 100 P. 681, 683–84 (Utah 1909) (noting that to convict the defendant, “[i]t is not enough that circumstances be proven from which an inference may be deduced that the production of the miscarriage was not necessary to preserve the life of the woman, but they must also be inconsistent with every other reasonable conclusion”). Other courts placed this burden on the defendant. See *Johnson v. People*, 80 P. 133, 136–37 (Colo. 1905) (agreeing with a line of case law and finding it “not necessary [for the state] to negative this exception”); *State v. Lee*, 37 A. 75, 80 (Conn. 1897) (concluding that it is the state’s burden to prove guilt, but that there is a presumption that the abortion was not necessary to preserve the woman’s life).

¹³⁶ See, e.g., *People v. Hagenow*, 86 N.E. 370, 375 (Ill. 1908) (“[The subsequent attending physician] took the sheet down, and saw a mass of intestines upon the bare thighs. Upon further examination, after calling another doctor on the telephone, they found that the intestines were protruding from the vagina through a large rent from the abdominal peritoneal cavity.”).

¹³⁷ See, e.g., *State v. Miller*, 133 P. 878, 883 (Kan. 1913) (noting that prosecutor at trial had asked the jury, with respect to the defendant midwife, “Will you turn her loose

Although Mohr, noting the low number of abortion convictions, describes abortion in the middle of the nineteenth century as relatively socially accepted,¹³⁸ Dellapenna argues that “social tolerance” theories fail to appreciate the practical hurdles to obtaining conviction.¹³⁹ Mohr argues that with the surge in the commercialization and publicization of abortifacients¹⁴⁰ and abortionists’ services in newspapers, there was a likely jump in abortion rates from the 1840s through the 1870s.¹⁴¹ In his account, the legislative response was relatively weak from the 1840s to the 1860s, but the physicians’ campaign, harnessing perceptions that the nation’s native-born white Protestant population was endangered, had a potent effect from 1860 to 1880.¹⁴² This led to both increased criminalization and social antipathy toward the practice.¹⁴³ To the contrary, Dellapenna claims that there was no period of widespread public support for abortion.¹⁴⁴ Regardless of the degree of social condemnation, it is plausible that jurors operated under cognitive dissonance when confronted with a sympathetic defendant. This is even more probable in the middle of the nineteenth century; when abortion rates were higher, jurors were more likely to know individuals who had aborted and to understand their motivations.

This potential social sympathy for the practice, or for women in difficult circumstances, ultimately did not undermine judicial application of the law.¹⁴⁵ Judges never insinuated that sympathy could be a product of criminalization—that criminalization generated a system of unsafe practices

to practice her beastly profession upon the people of the state of Kansas?”); *Wilson v. State*, 252 P. 1106, 1108 (Okla. Crim. App. 1927) (“The medical practitioner who performs abortions, unless under the conditions named in the statute, is a menace to society.”). The court in *Clements* expressed disapproval of the trial court judge’s remark that:

[a]nybody is competent to tell whether a woman is pregnant or not, at certain stages and times, by her looks, — from common observation. There is a great deal of humbug about medical science, and medical experts and medical testimony, and so-called medical scientific opinion. There is no other profession where there is such a difference, or where such testimony is unsettled and unsatisfactory as medical experts’, and there is many a man practicing medicine who ought to be second-class cook in a third-class hotel.

14 P. at 413.

¹³⁸ MOHR, *supra* note 10, at 131 (discussing “clear evidence of the growing realization that abortion had become a major method of family limitation in the United States, more comparable both legally and in the popular mind, if performed before quickening, to a form of birth control than to a form of murder”).

¹³⁹ DELLAPENNA, *supra* note 11, at 431–32.

¹⁴⁰ “[A] drug or other agent that induces abortion.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 5 (1981). Tribe notes that “The line between abortifacient and contraceptive is by no means clear” TRIBE, *supra* note 13, at 122.

¹⁴¹ MOHR, *supra* note 10, at 50, 75. He also points to “the enduring resiliency of the quickening doctrine throughout the period” as supporting the probability of high abortion rates. *Id.* at 73.

¹⁴² See MOHR, *supra* note 10, at 102–09, 122, 145–46, 149, 200.

¹⁴³ See *id.* at 171–72, 200.

¹⁴⁴ See DELLAPENNA, *supra* note 11, at 412–14.

¹⁴⁵ See *id.* at 436 (noting that “courts as well as prosecutors took an increasingly dim view of abortion as its incidence increased”).

cloaked in secrecy, which in turn generated a degree of social understanding. In *Peoples v. Commonwealth*, the court admits to the potential social circumstances surrounding the abortion, but quickly undercuts this line of reasoning.¹⁴⁶ After stating that the woman may be a consenting party, but is a victim, not a co-offender, the court notes: “She, however, acted from a sense of shame; and, however censurable her conduct may have been, it cannot shield the accused, who from a purely sordid motive caused her death, and outraged a law vital to the existence of good society.”¹⁴⁷ Similarly, in *Commonwealth v. Brown*, the court acknowledges potential sympathy but denies it legal relevance:

Acts for the purpose of procuring the miscarriage of a woman pregnant with child, to be unlawful, need not be done in a spirit of wanton cruelty or wicked revenge; but would be unlawful if done from any wicked, base or sordid motive, offensive to good morals or injurious to society. Such acts would be none the less unjustifiable because done by the consent or upon the solicitation of the pregnant woman whose miscarriage was attempted to be procured, or because done to screen such a woman from exposure or disgrace, or for gain or reward.¹⁴⁸

Yet the *Brown* court goes further in explicating the circumstances surrounding the act.¹⁴⁹ The physician may have been motivated by sympathy, or a desire to “screen” the woman, but this motivation cannot mitigate his culpability.

F. Judicial Expectations for Male Behavior

In many ways, the objects of judicial regulation in abortion cases were not gender-specific.¹⁵⁰ As Leslie Reagan notes: “The criminalization of abortion . . . demanded conformity to gender norms, which required men and women to marry, women to bear children, and men to bear the financial responsibility of children.”¹⁵¹ Prosecutors embraced the victim/agent dichot-

¹⁴⁶ *Peoples v. Commonwealth*, 9 S.W. 509, 513 (Ky. App. 1888).

¹⁴⁷ *Id.* While her sense of shame could never be a justification for the abortion, the court evinces concern for the memory of the individual woman at hand. The legislature would never be positioned to pry into the individual circumstances surrounding a woman’s abortion, or to discuss a woman’s “sense of shame” in a senate committee report.

¹⁴⁸ *Commonwealth v. Brown*, 121 Mass. 69, 77 (1876). Interestingly, this is one of the few decisions that explicitly reads a “health” exception (in addition to a preservation of life exception) into the statute. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ I distinguish “broad paternalism” (one that is implicated in the purposes and effects of many modes of law) from the narrower, female-agency-specific paternalism that is the focus of this Note. As stated in Part I, this Note is concerned with critiquing the notion that judicial approaches to women were primarily rooted in a cultural denial of female agency.

¹⁵¹ Reagan, *supra* note 24, at 271.

omy by capitalizing on male deviations from social mores concerning sexual conduct. Among those without strong views about the evils of abortion, the demands on male behavior could be described as inconsistent: while men were expected to financially support children, merely paying for abortifacients or an abortion was criminal.¹⁵² This tension was sometimes explicit. In *State v. Loomis*, the counsel for the defendant-father in the court below had made an argument about the “reasonableness of an attempt by a person who gets a woman into trouble to assist her in getting out.”¹⁵³ The judge had informed the jury that this statement should not be considered, and the appellate court agreed: “The court properly took the view that when the statute denounced a certain course of conduct as criminal, the guilty participation of a defendant in acts which preceded and caused the pregnancy . . . was irrelevant as a defense.”¹⁵⁴ The defense counsel’s statement was keyed to play upon traditional understandings of the male role, yet the court’s instruction and the criminal statute itself frustrated the fulfillment of that role.

An 1898 Illinois case highlights conflicting social expectations of male behavior. There, the court affirmed the defendant Eddie Cook’s sentence to seven years in prison for manslaughter in procuring an abortion upon Minnie Bennett, from which she died.¹⁵⁵ The court acknowledged that she had exerted “efforts of her own to produce an abortion, which had proved a failure”; it also twice stated that Bennett was “resolved” to obtain an abortion.¹⁵⁶ Though the court admitted to her agency, it also took note that Cook had “seduced and debauched” the single, twenty-year-old Bennett, who was “entirely without means.”¹⁵⁷ After her failed attempt, she traveled to another town to have the procedure done, with the help of Cook:

The fact of the operation being established, there can be no doubt of defendant’s guilt. Minnie Bennett was resolved to procure an abortion, and the conduct of both parties shows that she appealed to him as the one responsible for her condition. He arranged in advance with the doctor; took her to Atlanta; called for her after dark, and, after paying her bill, took her to the doctor’s office; held a private conference with the doctor before going home; came back the next day, and, finding her sick and distressed, went to Dr. Gardner’s house, and was seen with him going towards the station¹⁵⁸

¹⁵² See, e.g., *Cook v. People*, 52 N.E. 273, 275 (Ill. 1898) (noting that the defendant arranged for the doctor, traveled with the woman, and paid for the abortion, and finding that these actions confirmed his guilt).

¹⁵³ *State v. Loomis*, 100 A. 160, 161 (N.J. 1917).

¹⁵⁴ *Id.*

¹⁵⁵ *Cook*, 52 N.E. at 273.

¹⁵⁶ *Id.* at 273–75.

¹⁵⁷ *Id.* at 273–74.

¹⁵⁸ *Id.* at 275.

Bennett sought out Cook's assistance, and as the man "responsible" for her condition, he supported and tended to her in what could be perceived as a sympathetic and responsible fashion. In its litany of actions exposing Cook's guilt, the court includes the act of fetching a physician upon finding her ill. While this non-criminal act, in context, seemingly ties the defendant to the locus of criminality, its inclusion within the list of guilty acts betrays somewhat contradictory expectations for male behavior.

Moreover, in describing the crime of abortion, some courts referred to *human* weakness and the importance of preventing general sexual immorality.¹⁵⁹ Though women bore the physical consequences of such "immorality," courts subjected men to fines and jail time. The exercise of female agency and (criminal) male responsibility were, to the courts, not mutually exclusive.¹⁶⁰

III. WOMEN SUBVERT THE STATUS OF "VICTIM"

The majority of women who obtained abortions in the nineteenth and early twentieth centuries probably did not think of themselves as victims of a crime.¹⁶¹ However, some women leveraged their formal status as non-party or informal status as unprosecutable to encourage the prosecution of their former sexual partners. Historians have not explored this phenomenon on its own terms nor addressed it in discussions of abortion-related victimhood. Although Dellapenna alludes to the decision to testify in discussing the difficulties of bringing women on the stand against abortionists, he frames their motivation as "perhaps a new-found willingness to defy those who might have pressured her into having an abortion she had not wanted."¹⁶² This limited view of female agency merely reinforces the idea of a monolithic judicial paternalism. While a "change of heart" about the abortion could have led some of these women to prosecute their former lovers,¹⁶³ it seems

¹⁵⁹ See *supra* notes 44 and 45; see also *State v. Crofford*, 96 N.W. 889, 892 (Iowa 1903) ("These letters, with others written by Miss Stone and offered in evidence by appellant, reveal a most surprising and pitiful story of human weakness and unbridled passion . . .").

¹⁶⁰ In *Jones v State*, 17 A. 89, 89 (Md. 1889), the woman's sexual partner had sent her drugs and instructions for ingestion through the mail, but he was not present when she took the drugs. The court found that he need not be present to be convicted. *Id.* His crime was that he "did knowingly use, and cause to be used, certain means" for the purpose of unlawfully causing the miscarriage and abortion of one Margaret Oursler." *Id.*; cf. *Tonnahill v. State*, 208 S.W. 516, 517 (Tex. Crim. App. 1919) (prosecutrix testifying that appellant gave her drugs and told her not to use them until she heard from him. The case was reversed on many grounds, one being that the jury instruction should have said that he had to tell her to use the drugs).

¹⁶¹ See Buell, *supra* note 5, at 1789-90 (identifying that a primary impediment to enforcement statutes was "the fact that the woman, as the potential complainant, did not consider herself a victim of a crime").

¹⁶² DELLAPENNA, *supra* note 11, at 433.

¹⁶³ *Id.* Dellapenna does not discuss the dynamics specific to the prosecution of a former partner; he only makes a general note on the motive behind women's testimony.

more likely that women—especially those who testified to their proactiveness in obtaining the abortion—struck back against former partners for varied personal reasons. Courts were not blind to this process, and even if they doctrinally positioned women as “victims,” the following cases demonstrate the judiciary’s more nuanced understanding of female behavior. By aligning themselves with the police power of the state, women capitalized on the paternalism and pragmatism of the courts. This section will explore the facts of selected appellate level decisions in which it is likely that women manipulated their relative immunity to achieve their own ends. These cases are representative of dozens wherein: the woman acts as a prosecutrix, the threat of prosecution for a lesser crime is absent, and her partner was not obviously accused by a third party unrelated to the abortion. The following cases highlight fact sets where, given the limited sphere of individuals who knew of the procedure, the woman is especially likely to have been the initiator of the prosecution.

In *Dawson v. State*, Arthur Dawson appealed from a conviction of “manslaughter in the killing of an unborn quick child.”¹⁶⁴ Dawson had repeated intercourse with and impregnated Lizzie Pitts, a married woman whose husband was residing out of state.¹⁶⁵ Upon hearing from Pitts that she was pregnant, Dawson cursed that “she was not going to have the child and disgrace him,” and brought a doctor to the home to perform an abortion.¹⁶⁶ It appears that Pitts then contacted the local prosecuting attorney, who asked the sheriff to visit Pitts’s home.¹⁶⁷ Dawson came to the home while the sheriff and two of his deputies were present, and they hid to eavesdrop on his conversation with Pitts.¹⁶⁸ They testified that the interaction was as follows:

[T]he prosecutrix and the appellant went over the whole ground of the illicit intercourse that had obtained between them and which resulted in the pregnancy of the prosecutrix and in the killing of the unborn quick child by the appellant; that the appellant was endeavoring to have the prosecutrix go away in order that the prosecution against him might be suppressed; that he offered her money to leave and stay away until after the spring and August terms of the court; that the prosecutrix refused to go; that they indulged in criminations and recriminations, she upbraiding him for the manner in which he had treated her, and he censuring her for preferring charges against him; that during the course of the conversation appellant admitted to having procured the doctor to perform the abortion¹⁶⁹

¹⁶⁴ *Dawson v. State*, 180 S.W. 761, 761 (Ark. 1915).

¹⁶⁵ *Id.* at 762.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 762–63.

¹⁶⁹ *Id.* at 763.

Dawson offers a rare example of a court's glimpse into the personal conflict surrounding a woman's decision to press charges. Whether the initial conflict was a consequence of a "change of heart"¹⁷⁰ about the abortion, or whether it had more to do with "the manner in which he had treated her"¹⁷¹ is unclear. However, Pitts was not a passive observer of the state's enforcement of the laws against a physician and her partner; rather, she aligned her interests with the state to injure Dawson. The court was fully aware of her agency as a prosecutrix, and it did not approach her as an incapacitated entity.

A 1919 Missouri case, *State v. Steele*, provides another example of a prosecution likely initiated by the woman after her abortion. Oneida Tipton, a nineteen-year old, became pregnant by her "over 30" year-old neighbor, Carey Steele.¹⁷² The two entered a relationship and were engaged to be married.¹⁷³ After Tipton's menstruation ceased, Steele discussed the possibility of abortion with Tipton's mother, who did not approve.¹⁷⁴ Her mother requested that Steele marry Tipton, but he refused, on the grounds that "he did not want to lose his own mother."¹⁷⁵ When Tipton was two months pregnant, Steele paid for her train and dinner, and he took her to a physician's office for an abortion.¹⁷⁶ He paid twenty-five dollars for the physician, Dr. Hawkins, to perform the procedure.¹⁷⁷ She was in good health before and after the procedure; she even returned to her high school within a week.¹⁷⁸ The state brought suits against both Steele and Hawkins. In *Hawkins*, the court noted that Tipton had considered a suit for damages against Steele, but that he would have been unable to pay any judgment in her favor.¹⁷⁹

Neither decision explicitly discussed the events leading up to the prosecution, nor the role that Tipton played in encouraging prosecution. However, given that she was contemplating a civil suit against Steele, it is likely that she proactively sought out a local prosecutor. The engagement seemed to be broken. As she suffered no lasting physical consequences, it seems unlikely that another party would have reported the abortion. In some cases, a physician who followed up with an injured or ill woman reported the physician who performed the abortion to the authorities.¹⁸⁰ In this scenario,

¹⁷⁰ This is Dellapenna's phrase. DELLAPENNA, *supra* note 11, at 433.

¹⁷¹ *Dawson v. State*, 180 S.W. 761, 763 (Ark. 1915).

¹⁷² *State v. Steele*, 217 S.W. 80, 81 (Mo. 1919); *see also* *State v. Hawkins*, 210 S.W. 4 (Mo. 1919).

¹⁷³ *Steele*, 217 S.W. at 81.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Hawkins*, 210 S.W. at 5; *see also* *Steele*, 217 S.W. at 81.

¹⁷⁸ *Steele*, 217 S.W. at 82.

¹⁷⁹ *Hawkins*, 210 S.W. at 6.

¹⁸⁰ *See, e.g.*, *State v. Bolton*, 102 A. 489, 492 (Vt. 1917) (describing how, after an abortion-related injury, the woman contacted Dr. Downing, and "Dr. Downing, as he testified, notified the sheriff of Littleton . . ."); *State v. Law*, 136 N.W. 803, 805 (Wis. 1912) (describing how the physician attending to the abortion-induced injury "informed

however, the physician who attended to Tipton upon her return apparently planned to testify that the “fetus” she claimed to have passed was merely a blood clot.¹⁸¹

Though some women may have manipulated the system to their benefit, they also faced costs in bringing this type of case. A woman risked both publicity about her abortion and the presentation of evidence relating to her sexual history. For women who sought the abortion in part to avoid public knowledge of sexual activity, the cost of serving in the role of prosecutrix could have been too great to bear.¹⁸² Steele, for example, introduced evidence concerning the sexual history of Tipton, and even the morality of Tipton’s mother. In its statement of the facts, the *Hawkins* court noted: “The reputation of prosecutrix for chastity and morality was shown to be bad,”¹⁸³ and in its opinion, “the prosecutrix is impeached for that her reputation for chastity is shown to be of the worst.”¹⁸⁴

Beyond the costs of exposure in the course of the presentation of evidence relating to sexual history, some judges’ appellate level decisions gratuitously and even voyeuristically focus on these details.¹⁸⁵ While the women involved in these cases were likely not reading appellate level decisions, the codified judgments reinforce a sense of condemnation and invasion. In the facts announced before the opinion in *Steele*, the court unnecessarily took note that “[m]ost of the acts of sexual intercourse occurred at the barn on the rear of the lot where defendant lived.”¹⁸⁶ As discussed in an 1875 Wisconsin case prohibiting the admission of a woman to the bar, male legal professionals were best suited to the rough work of such “unclean issues.”¹⁸⁷

the district attorney”); see also REAGAN, WHEN ABORTION WAS A CRIME, *supra* note 29, at 3 (discussing “the alliance between medicine and the state” and noting that “[p]hysicians learned to protect themselves from legal trouble by reporting to officials women injured or dying as a result of illegal abortions”).

¹⁸¹ *Steele*, 217 S.W. at 82. He was unable to testify due to military service, but the court deemed this irrelevant, as pregnancy was not essential to the crime. *Id.*

¹⁸² See, e.g., *Rodermund v. State*, 168 N.W. 390, 391 (Wis. 1918) (“The evidence of the woman tends to show that . . . there was some conversation as to the necessity of preventing publicity of the fact of her condition and his treatment of her under these circumstances.”).

¹⁸³ *Hawkins*, 210 S.W. at 6.

¹⁸⁴ *Id.* at 8. At the trial court, the judge sustained the state’s objection to a question by the defense counsel that “seriously reflected upon the chastity of the witness.” *Id.* at 7.

¹⁸⁵ See, e.g., *Courtney v. Clinton*, 48 N.E. 799, 799–800 (Ind. App. 1897) (noting that the aborting woman “finally yielded to [defendant’s] desires and embraces” and “[t]hey had sexual intercourse sometimes in her room, in her bed, and sometimes in his room, in his bed”).

¹⁸⁶ *Steele*, 217 S.W. at 81.

¹⁸⁷ *In re Goodell*, 39 Wis. 232, 246 (Wis. 1875). The court found:

It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man’s reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and

Some courts embraced this mandate, so that women who brought abortion cases subjected details of their sexual lives to public, male scrutiny.

Because non-party physicians attending injured women were incentivized to report the abortion to the police to avoid incrimination, the scope of potential informants narrowed for abortions in which the woman was not injured. In *Davis v. State*, this factor, in conjunction with evidence of familial acrimony, points to a potential woman-initiated prosecution.¹⁸⁸ Defendant Lawrence Davis appealed a conviction and sentence of one year's imprisonment and a fine of \$100 for administering abortifacient drugs to May Cooper before the period of quickening.¹⁸⁹ Cooper testified for the state.¹⁹⁰ While Cooper's doctor testified as to her symptoms indicating pregnancy, there is no discussion of a post-abortion examination and it does not appear that he was involved with contacting the prosecutor.¹⁹¹ Moreover, there is no discussion of evidence indicating physical harm to Cooper, making it more likely that the sphere of individuals with knowledge of the incident was limited to Cooper, Davis, their families, and Cooper's physician.

Davis appealed on a number of grounds, one of which was that the court erred in allowing Cooper to testify about abuses she suffered at the hands of Davis's relatives.¹⁹² Although the court's opinion provides little insight into the facts leading up to the prosecution of Davis, it clearly indicates strife between Davis and Cooper. According to Cooper's testimony, both her family and Davis's relatives were implicated in the conflict.¹⁹³ Davis introduced into evidence a letter, allegedly written by Cooper, that spoke of him in "virulent and bitter terms" and discussed his family's abuse of her.¹⁹⁴ Cooper denied writing the letter, which had contradicted some of her testimony.¹⁹⁵ She admitted that his family abused her, and that she had informed her family of the abuse; however, she said she loved Davis, and that the letter was written by one of her relatives.¹⁹⁶ It seems likely that Cooper pursued the prosecution in part because of acrimony between her and Davis, or acrimony between the families. The court affirmed the conviction.¹⁹⁷

slander of sex, impotence, divorce: all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society, with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men.

Id. at 245–46.

¹⁸⁸ *Davis v. State*, 130 S.W. 547 (Ark. 1910).

¹⁸⁹ *Id.* at 547.

¹⁹⁰ *Id.* at 548.

¹⁹¹ *Id.*

¹⁹² *Id.* at 548–49.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 549.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 549.

Cases dealing with the ingestion of abortifacients are more likely to involve only the woman and her partner; thus, a reasonable inference is that these cases involve woman-propelled prosecutions. In *Austin v. State*, defendant S.W. Austin appealed from a conviction of attempted abortion.¹⁹⁸ Austin had promised to marry Jessie Spencer Anderson, but after impregnating her, he refused.¹⁹⁹ He tried to convince two different doctors to perform an abortion, both of whom were unwilling.²⁰⁰ The first doctor provided Austin with a medicine to help bring on Anderson's menses if she were not pregnant, while if she were pregnant, it would do no harm.²⁰¹ After she ingested the medicine, her menses did not return, and Anderson informed Austin that "if he did not do something to relieve her, she would kill herself; that she did not intend to live long enough for her condition to become perceptible to other people."²⁰² Anderson eventually gave birth,²⁰³ so this was not an instance of an injured woman facing state inquiries when seeking treatment. The sphere of individuals who were aware that Anderson had ingested this medicine was limited, and it is highly likely that her animosity toward Austin propelled her to pursue prosecution.

The Supreme Court of Iowa stretched the standards of evidence to accommodate a prosecutrix in the 1909 Iowa case *State v. Stafford*.²⁰⁴ There, the defendant appealed a conviction for "having administered a certain noxious substance to one Flora B. Smith . . . with intent to cause a miscarriage."²⁰⁵ Stafford and Smith, unmarried, had been engaging in intercourse for more than a year.²⁰⁶ In late December she missed her menses.²⁰⁷ The court reported that "[t]he evidence leaves no doubt but that at her request he procured cotton root and wintergreen for her, and did bring her a substance he represented to her was what she desired, and that he advised her how to take it."²⁰⁸ After taking the substance, she became ill on January 20, and she claimed to have passed something resembling a clot in early February.²⁰⁹ Although proof of pregnancy was required under the statute, and two physicians testified that it was too early in the pregnancy to determine this without "microscopic examination," the court found that there was reasonable certainty of pregnancy.²¹⁰

The only individuals with knowledge that Stafford had procured and administered these drugs were Smith and himself. Thus, it seems likely that

¹⁹⁸ *Austin v. State*, 194 S.W. 383, 383 (Tenn. 1917).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *State v. Stafford*, 123 N.W. 167 (Iowa 1909).

²⁰⁵ *Id.* at 167.

²⁰⁶ *Id.* at 168.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 167.

²⁰⁹ *Id.* at 168.

²¹⁰ *Id.*

there was a rift between the two, and she pursued charges. There was evidence of conflict once she initiated the prosecution. Stafford's previous attorney testified that during a meeting with defendant, Smith, and the lawyer, Smith said to Stafford: "You know, Clarence, you are or were responsible for my condition, and you gave me the medicine, and you do not dare or cannot deny it" ²¹¹ In a case such as this, the woman is not seeking retribution for a coerced abortion, as the court found the defendant procured the items upon her request. Rather, because of some other conflict, the woman harnesses the law's contradictions to her satisfaction. In either type of case, the result is not merely a consequence of gender-based judicial paternalism.

Despite the preceding evidence that some women initiated contact with the state and used the courts as a matter of personal retribution, not all women recouped agency in this fashion. In *Fretwell v. State*, the court noted that the woman who had obtained the abortion had not intended to testify. ²¹² However, the prosecutor "agreed to dismiss her adultery case" if she appeared as the prosecution's witness. ²¹³ *Fretwell* challenged her testimony on the basis of this arrangement, and the court responded that:

[t]his [bargain], by itself, would suggest that she agreed to testify against defendant regardless of whether such testimony was true or false. Now, we think it could be explained that the agreement was predicated on her telling the truth as against defendant, and that no suggestion was made that she would falsify in order to get the case against her for adultery dismissed. ²¹⁴

It is not clear from the court's narrative that there was already an adultery case pending; it is possible that the prosecutor threatened to charge her if she did not testify. Conversely, the woman may have proactively sought the prosecution of her former partner for abortion so that she could be relieved of an existing adultery charge. Although my research did not uncover other appellate level elaborations on bargaining and prosecutorial dynamics, it is plausible that prosecutors routinely threatened such charges, and that some women initiated abortion prosecutions to escape liability.

CONCLUSION

The inconsistency between women's actions and judicial approaches in nineteenth- and early twentieth-century abortion cases stems from a number of causes. Though paternalistic social conceptions of gender partially explain the neutralization of female consent, the treatment of women as "vic-

²¹¹ *Id.*

²¹² *Fretwell v. State*, 67 S.W. 1021, 1022 (Tex. Crim. App. 1902).

²¹³ *Id.*

²¹⁴ *Id.*

tims,” and the general absence of women’s liability as principals, accomplices, or conspirators to their own abortions, these phenomena were also generated by the realities of enforcement, the difficulties of doctrine, and potential judicial sympathy. Ultimately, the minimization of female consent facilitated the exercise of female agency. Women’s relative immunity in abortion jurisprudence created an opening for their manipulation of the prosecutorial apparatus to serve personal ends.

This Note presents a history in which paternalistic ideas about a woman’s inability to consent were not the sole engine behind doctrinal contortions. Yet we see nineteenth-century gender ideology continually in the background—perhaps most potently in some of the arguments for statutory criminalization advanced by physicians and elaborated on by courts. Abortion not only threatened the unborn, marriage, the state, and social structure;²¹⁵ it endangered women’s health by interfering with their natural reason for existence,²¹⁶ and it permitted a “vicious indulgence” in the face of women’s natural responsibility.²¹⁷ I introduced this Note with *Carhart* to illustrate a potential contemporary manifestation of gender role-driven reasoning, and to establish that my project of complicating paternalism did not require renouncing its explanatory force. In the history of abortion doctrine, this sex-stereotyping paternalism was bound with other social currents, including early concern for the dangerousness of the procedure; however, the emphasis on women’s roles has been perpetually salient. While some of these other social currents, such as the health risks of abortion, have fallen away, *Carhart* arguably demonstrates that sex-based judicial paternalism is still operative.

²¹⁵ See Siegel, *Reasoning from the Body*, *supra* note 6, at 281.

²¹⁶ See *id.* at 318 n.235.

²¹⁷ See *State v. Howard*, 32 Vt. 380, 399 (1859).