IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ACCESS INDEPENDENT HEALTH SERVICES, INC., d/b/a Red River Women's Clinic; KATHRYN L. EGGLESTON on behalf of herself and her patients; ANA TOBIASZ, on behalf of herself and her patients; ERICA HOFLAND, on behalf of herself and her patients; and COLLETTE LESSARD, on behalf of herself and her patients,

Plaintiffs/Appellees,

-vs-

DREW H. WRIGLEY, in his official capacity as Attorney General for the State of North Dakota,

Defendant/Appellant,

and

KIMBERLEE JO HEGVIK, in her official capacity as the State's Attorney for Cass County; JULIE LAWYER, in her official capacity as the State's Attorney for Burleigh County; AMANDA ENGELSTAD, in her official capacity as the State's Attorney for Stark County; and HALEY WAMSTAD, in her official capacity as the State's Attorney for Grand Forks County,

Defendants.

Supreme Ct. No. 20240291

District Ct. No. 08-2022-CV-1608
South Central Judicial District

On Appeal from Judgment dated October 10, 2024
The Honorable Bruce Romanick, District Court Judge
Burleigh County District Court, South Central Judicial District

APPELLANT BRIEF OF DREW H. WRIGLEY

(Oral Argument Requested)

State of North Dakota
Drew H. Wrigley
Attorney General

Daniel L. Gaustad (State Bar 05282)
Joseph E. Quinn (State Bar 06538)
Marcus C. Skonieczny (State Bar 09062)
Special Assistant Attorneys General
24 North 4th Street
Grand Forks, ND 58203
Telephone: (701) 775-0521
Email: dan@grandforkslaw.com
Email: jquinn@grandforkslaw.com
Email: marcus@grandforkslaw.com

Philip Axt (State Bar 09585)
Solicitor General
Courtney R. Titus (State Bar 08810)
Director of Civil Litigation
Office of Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210
Email: pjaxt@nd.gov
Email: ctitus@nd.gov

Counsel for Drew H. Wrigley,
in his official capacity as Attorney General for the State of North Dakota

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES 5

Paragraph

STATEMENT OF ISSUES PRESENTED FOR REVIEW ..... ¶1

INTRODUCTION ..... ¶5

STATEMENT OF THE CASE AND FACTS ..... ¶12

I. North Dakota's Regulation of Abortion from Statehood through *Wrigley*. ..... ¶12

II. The Legislative Assembly Enacts Senate Bill 2150. ..... ¶16

III. Plaintiffs' Amended Complaint and the Instant Appeal. ..... ¶25

LAW AND ARGUMENT ..... ¶29

I. The District Court Erred in Its Constitutional Analysis by Disregarding How the Relevant Provisions Were Understood When Ratified. ..... ¶33

II. The District Court Erred in Declaring that N.D.C.C. ch. 12.1-19.1 Violates Article I, Section 1, of the N.D. Constitution. ..... ¶44

A. North Dakota's history does not support a fundamental right to abortions unless necessary to protect the life or physical health of the mother ..... ¶46

1. Abortion laws in North Dakota and around the nation circa 1889. ..... ¶47

2. Medical literature circa 1889. ..... ¶52

B. The 1984 amendment to Article I, Section 1 did not *sub silentio* create an abortion right. ..... ¶57

C. There is not a fundamental right to "mental health" abortions. ..... ¶66

1. North Dakota's history and traditions do not support the existence of "mental health" abortions. ..... ¶69

2. Conceptualizing abortion as a self-defense right further illustrates why there is not a right to "mental health" abortions. ..... ¶85

3. Abortion is not an accepted standard of care for treating patients with mental health disorders ..... ¶91

D. There is not a fundamental right to abortion simply because the unborn child may have medical conditions or a terminal diagnosis. ..... ¶95

E. The statute's abuse exceptions are not unconstitutional. ..... ¶102

F. The District Court's imposition of a "viability" standard is judicial line-drawing untethered to constitutional text. ..... ¶108

G. The District Court's *sua sponte* assertion that if the State can restrict abortion it can thereby mandate abortion is wrong on many levels. ..... ¶113

H. Tiers of scrutiny analysis. ..... ¶119

III. The District Court Erred in Declaring that N.D.C.C. ch. 12.1-19.1 Violates Article I, Section 25 of the N.D. Constitution. ..... ¶126

A. The District Court's analysis of Article I, Section 25 violated the party presentation principle. ..... ¶128

B. On the merits, Article I, Section 25 did not create any fundamental right to perform abortions. ..... ¶134

IV. The District Court Erred in Declaring that N.D.C.C. ch. 12.1-19.1 is Unconstitutional and Void on the Basis of Vagueness. ..... ¶142

A. The District Court misapplied the test for facial vagueness. ..... ¶146

B. The "reasonable medical judgment" standard is well-understood. ..... ¶155

C. N.D.C.C. § 12.1-19.1-03(1) is not unconstitutionally vague simply because it includes both an objective and a subjective component. ..... ¶162

D. N.D.C.C. § 12.1-19.1-03(2) is not unconstitutionally vague because it permits an abortion when the pregnancy resulted from an assault. ..... ¶175

CONCLUSION ..... ¶187

ORAL ARGUMENT REQUEST ..... ¶188

TABLE OF AUTHORITIES

Cases **Paragraph(s)**

North Dakota Cases

Bland v. Comm'n on Med. Competency, 557 N.W.2d 379 (N.D. 1996) .....¶122

Bolinske v. Sandstrom, 2022 ND 148, 978 N.W.2d 72 .....¶96

Capps v. Weflen, 2014 ND 201, 855 N.W.2d 637 .....¶31

City of Bismarck v. Fettig, 1999 ND 193, 601 N.W.2d 247 .....¶46

City of Jamestown v. Kastet, 2022 ND 40, 970 N.W.2d 187.....¶166

Condon v. St. Alexius Med. Ctr., 2019 ND 113, 926 N.W.2d 136 .....¶30

Denault v. State, 2017 ND 167, 898 N.W.2d 452 .....¶130

Ex parte Corliss, 114 N.W. 962 (N.D. 1907) .....¶35

Gaar, Scott & Co. v. Sorum, 90 N.W. 799 (N.D. 1902) .....¶58

Haney v. N. Dakota Workers Comp. Bureau, 518 N.W.2d 195 (N.D. 1994).....¶106

Hazelton-Moffit Special Sch. Dist. No. 6 v. Ward,
107 N.W.2d 636 (N.D. 1961) ..... ¶¶114, 130

Kelsh v. Jaeger, 2002 ND 53, 641 N.W.2d 100 .....¶34

Lee v. Job Service North Dakota, 440 N.W.2d 518 (N.D. 1989) .....¶103

McCarney v. Meier, 286 N.W.2d 780 (N.D. 1979) .....¶34

MKB Mgmt. Corp. v. Burdick, 2014 ND 197, 855 N.W.2d 31.....¶¶12, 33, 47, 122

Mid-America Steel, Inc. v. Bjone, 414 N.W.2d 591 (N.D. 1987) .....¶69

Nw. Landowners Ass'n v. State, 2022 ND 150, 978 N.W.2d 679 ..... ¶¶184, 185

Overbo, et al. v. Overbo, 2024 ND 233, __N.W.3d__ ..... ¶¶129, 132

Power v. Williams, 205 N.W. 9 (N.D. 1925).....¶56

SCS Carbon Transport LLC v. Malloy, 2024 ND 109, 7 N.W.3d 268 ..... ¶¶10, 29, 34

Simons v. State, 2011 ND 190, 803 N.W.2d 587 ..... ¶¶173, 186

Smith v. Kunert, 115 N.W. 76 (N.D. 1907) ..... ¶51

Sorum v. State, 2020 ND 175, 947 N.W.2d 382 ..... ¶34

State v. Allesi, 216 N.W.2d 805 (N.D. 1974) ..... ¶34

State v. Belyea, 83 N.W. 1 (N.D. 1900) ..... ¶48

State v. Blue, 2018 ND 171, 915 N.W.2d 122 ..... ¶¶129, 130

State v. Hagge, 211 N.W.2d 395 (N.D. 1973) ..... ¶158

State v. Hansen, 2006 ND 139, 717 N.W.2d 541 ..... ¶131

State v. Hanson, 256 N.W.2d 364 (N.D. 1977) ..... ¶158

State v. Heath, 177 N.W.2d 751 (N.D. 1970) ..... ¶61

State v. Holbach, 2009 ND 37, 763 N.W.2d 761 ..... ¶146

State v. Montplaisir, 2015 ND 237, 869 N.W.2d 435 ..... ¶142

State v. Moeller, 138 N.W. 981 (N.D. 1912) ..... ¶48

State v. Norton, 255 N.W. 787 (N.D. 1934) ..... ¶¶41, 42

State v. Tibor, 373 N.W.2d 877 (N.D. 1985) ..... ¶¶147, 148, 149, 153, 186

State v. Tranby, 437 N.W.2d 817, 821 (N.D. 1989) ..... ¶158

State v. Tweed, 491 N.W.2d 412 (N.D. 1992) ..... ¶31

State ex rel. Sanstead v. Freed, 251 N.W.2d 898 (N.D. 1977) ..... ¶44

State ex rel. Strutz v. Stray, 281 N.W. 83 (N.D. 1938) ..... ¶62

T.F. James Co. v. Vakoch, 2001 ND 112, 628 N.W.2d 298 ..... ¶¶138, 140

United States v. Leighton, 13 N.W. 347 (Dakota Terr. 1882) ..... ¶87

Wrigley v. Romanick, 2023 ND 50, 988 N.W.2d 231 ..... *passim*

Federal Cases

Alexander v. S.C. Conf. of the NAACP, 602 U.S. 1 (2024) .....¶5

Box v. Planned Parenthood of Ind. & Ky., Inc., 587 U.S. 490 (2019) .....¶80

Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) .....*passim*

Doe v. Bolton, 410 U.S. 179 (1973).....¶67

F.C.C. v. Beach Comms., Inc., 508 U.S. 307 (1993) .....¶106

Fischer v. United States, 603 U.S. 480 (2024) .....¶138

Glucksberg v. Washington, 521 U.S. 702 (1997) .....¶99

Greenlaw v. United States, 554 U.S. 237 (2008).....¶128

Gonzales v. Carhart, 550 U.S. 124 (2007) .....¶93

Hope Clinic v. Ryan, 195 F.3d 857 (7th Cir. 1999) (en banc) ..... ¶¶153, 171

Jackson Women's Health Org. v. Dobbs, 945 F.3d 265 (5th Cir. 2019) .....¶80

Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999) ..... ¶¶157, 171

Moyle v. United States, 603 U.S. 324 (2024).....¶92

Planned Parenthood v. Rounds, 686 F.3d 889 (8th Cir. 2012) .....¶93

Planned Parenthood of Indiana & Kentucky, Inc. v. Marion Cnty.,
7 F.4th 594 (7th Cir. 2021) .....¶146

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).....¶117

Preterm-Cleveland v. McCloud, 994 F.3d 512 (6th Cir. 2021) (en banc) .....¶80

Roe v. Wade, 410 U.S. 113 (1973)..... ¶¶13, 49

Tennessee v. Lane, 541 U.S. 509 (2004).....¶81

United States v. Burke, 504 U.S. 229 (1992) .....¶128

United States v. Hurwitz, 459 F.3d 463 (4th Cir. 2006) .....¶159

United States v. Powell, 423 U.S. 87 (1975) .....¶180

United States v. Ragen, 314 U.S. 513 (1942) .....¶160

United States v. Rahimi, 602 U.S. 680 (2024) ..... ¶¶36, 81

United States v. Sineneng-Smith, 590 U.S. 371 (2020) .....¶128

Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982).....¶146

Voinovich v. Women's Med. Pro. Corp, 523 U.S. 1036 (1997).....¶170

Wis. Cent. Ltd. v. United States, 585 U.S. 274 (2018).....¶104

Women's Med. Pro. Corp. v. Voinovich, 130 F.3d 187 (6th Cir.1997) .....¶¶168, 169, 170

Other State Cases

Members of Med. Licensing Bd. of Ind. v. Planned Parenthood,
211 N.E.3d 957 (Ind. 2023) .....¶64

Minton v. Commonwealth, 79 Ky. 461 (Ky. 1881).....¶88

O'Neal v. Robinson, 45 Ala. 526 (Ala. 1871).....¶60

People v. Scoggins, 37 Cal. 676 (Cal. 1869) .....¶87

Planned Parenthood Great Nw. v. State, 522 P.3d 1132 (Idaho 2023)..... ¶¶157, 180

Planned Parenthood of Sw. & Cent. Fla. v. State, 384 So. 3d 67 (Fla. 2024).....¶140

Planned Parenthood S. Atl. v. State, 892 S.E.2d 121 (S.C. 2023) .....¶140

State v. Brown, 140 S.W.3d 51 (Mo. 2004).....¶182

State v. Zurawski, 690 S.W.3d 644 (Tex. 2024)..... ¶¶156, 179

North Dakota Constitution and Statutes

N.D. Const. art. I, § 1 ..... *passim*

N.D. Const. art. I, § 4 .....¶61

N.D. Const. art. I, § 9 .....¶61

N.D. Const. art. I, § 25 ..... *passim*

N.D. Const. art. VI, § 4 ..... ¶32

N.D. Const. § 77 (1889) ..... ¶71

N.D.C.C. § 1-01-34 ..... ¶59

N.D.C.C. § 12.1-16-04 ..... ¶99

N.D.C.C. ch. 12.1-19.1 ..... *passim*

N.D.C.C. § 12.1-19.1-01(1) ..... ¶¶17, 143, 163

N.D.C.C. § 12.1-19.1-01(4) ..... ¶19

N.D.C.C. § 12.1-19.1-01(5) ..... ¶¶19, 66

N.D.C.C. § 12.1-19.1-03(1) ..... *passim*

N.D.C.C. § 12.1-19.1-03(2) ..... ¶¶20, 175, 177, 183, 185

N.D.C.C. § 12.1-31-12 (repealed eff. Apr. 24, 2023) ..... ¶14

N.D.C.C. § 14-02.1-02(7) ..... ¶¶98, 116

N.D.C.C. § 50-25.1-03(1) ..... ¶181

N.D. Compiled Laws §§ 9604-05 (1913) ..... ¶12

N.D.C.C. ch. 12-25 (1960) ..... ¶12

N.D.R.C. § 759.3 (1895) ..... ¶71

N.D.R.C. § 1389 (1895) ..... ¶71

N.D.R.C. § 5133 (1895) ..... ¶59

N.D.R.C. § 6814.4 (1895) ..... ¶71

N.D.R.C. § 7051 (1895) ..... ¶99

N.D.R.C. § 7156.3 (1895) ..... ¶71

N.D.R.C. §§ 7177-78 (1895) ..... ¶12

N.D.R.C. §§ 8912-13 (1905) ..... ¶12

N.D.R.C. ch. 12-25 (1943) ¶12

Laws of the Dakota Territory § 6435 (1887) ¶99

Laws of the Dakota Territory §§ 6538-39 (1887) ¶12

Penal Code, Dakota Territory §§ 337-38 (1877) ¶12

Revised Codes of the Territory of Dakota § 604 (2d ed. 1877) ¶59

N.D. Sess. Laws 2023, ch. 122 § 1 ¶16

N.D. Sess. Laws 2023, ch. 122 § 11 ¶14

N.D. Sess. Laws 2017, ch. 458 ¶135

N.D. Sess. Laws 1985, ch. 702, § 1 ¶62

N.D. Sess. Laws 1919, ch. 92 ¶61

Other State Statutes

Idaho Code Ann. § 18-8805(2) ¶17

Secondary Sources and Other Authorities

Albert H. Buck, 1 A Reference Handbook of the Medical Sciences, Abortion, Criminal (1885) ¶53

C. Woodhouse, M.D., *A Lecture on Criminal Abortion*, 4 Medical Investigator 25 (1866) ¶77

Criminal Abortions, 34 Journal-Lancet 81 (1914) ¶¶74, 83

Eric Rakowski, *The Sanctity of Human Life*, 103 Yale L.J. 2049 (1994) ¶117

Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 Harv. L. Rev. 1813 (2007) ¶86

Everett W. Burdett, *The Medical Jurisprudence of Criminal Abortion*, 18 New England Medical Gazette 200 (1883) ¶54

George W. Field, Field's Medico-Legal Guide for Doctors and Lawyers (1887) ¶53

Jerod Tufte, *The North Dakota Constitution: An Original Approach Since 1889*, 95 N.D. L. Rev. 417 (2020) ..... ¶42

Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* (1882) ..... ¶60

Kindaka J. Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault*, 19 Nev. L.J. 227 (2018) ..... ¶89

Robert Desty, A Compendium of American Criminal Law § 31a (1882) ..... ¶88

Stephen G. Gilles, *What Does Dobbs Mean for the Constitutional Right to A Life-or-Health-Preserving Abortion?,* 92 Miss. L.J. 271 (2023) ..... ¶49

Theophilus Parvin, The Science and Art of Obstetrics (1886) ..... ¶54

Thomas M. Cooley, *Treatise on Constitutional Limitations* (5th ed. 1883) ..... ¶35

U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* (1983) ..... ¶79

Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse, 73 A.L.R.4th 782 (Aug. 2024 update) ..... ¶182

Webster's Complete Dictionary of the English Language 806 (1886) ..... ¶60

W.M. H. Parish, *Criminal Abortion*, 17 Am. Lancet 256 (1893) ..... ¶77

STATEMENT OF ISSUES PRESENTED FOR REVIEW

[¶1] Did the District Court methodologically err by expressly disregarding how provisions of our State Constitution would have been interpreted when ratified?

[¶2] Did the District Court err in declaring that N.D.C.C. ch. 12.1-19.1 violates Article I, Section 1 of the N.D. Constitution?

[¶3] Did the District Court err in declaring that N.D.C.C. ch. 12.1-19.1 violates Article I, Section 25 of the N.D. Constitution?

[¶4] Did the District Court err in declaring that N.D.C.C. ch. 12.1-19.1 is facially unconstitutional and void on the basis of vagueness?

INTRODUCTION

[¶5] The U.S. Supreme Court has warned judges to "be wary of plaintiffs who seek to transform … courts into 'weapons of political warfare' that will deliver victories that eluded them 'in the political arena.'" *Alexander v. S.C. Conf. of the NAACP*, 602 U.S. 1, 11 (2024) (citation omitted). The District Court did not heed that warning.

[¶6] If the people of our State want to enshrine a constitutional right to abortion beyond what is necessary to protect the life or health of the mother, they are capable of doing so. Our Constitution has been amended more than 160 times—including just last year. But the people of our State have *not* done so. Instead, through their elected representatives, they have repeatedly confirmed that North Dakota recognizes unborn children to be human beings, and that the State will condone their intentional killing only in limited situations.

[¶7] Almost two years ago, this Court invalidated the State's prior abortion law after holding that "the history and traditions of North Dakota support the conclusion that there is a fundamental right to receive an abortion to preserve the life or the health of the mother." *Wrigley v. Romanick*, 2023 ND 50, ¶33, 988 N.W.2d 231. The Legislative Assembly

responded to this Court's decision and soon thereafter enacted, by supermajorities, a revised statute that expressly permits abortions "to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1).

[¶8] Yet despite the Legislative Assembly's responsiveness to this Court's ruling, the District Court has now declared that *any* legal restriction on performing abortions prior to fetal viability would violate our State Constitution—while simultaneously acknowledging the relevant constitutional provisions would not have been so understood when ratified.

[¶9] To quote the District Court:

> This Court will not spend a significant amount of time addressing the history and laws surrounding abortion … at the time the Constitution was drafted and enacted in 1889. Indeed, this Court can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution … likely would not have recognized the interests at issue in this case.
> ….
> [T]he Court *hopes that we would learn this*: there was a time when we got it wrong … and the sentiments of the past, alone, need not rule the present...

(R603:13-15:¶¶40, 43) (emphasis added).

[¶10] The District Court's refusal to interpret our Constitution in light of how the relevant provisions would have been understood when ratified is a dramatic departure from this Court's express, repeated instruction. As this Court stated, not long ago:

> When interpreting constitutional provisions, we … aim to give effect to the intent and purpose of the people who adopted the constitutional provision. … A constitution must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect.

SCS Carbon Transport LLC v. Malloy, 2024 ND 109, ¶19, 7 N.W.3d 268 (cleaned up).

[¶11] The District Court's judgment should be reversed on multiple grounds. And the State urges the Court to definitively hold, beyond peradventure, that the District Court's approach to constitutional interpretation—refusing to analyze the relevant provisions as

they would have been understood at the time of their ratification—is not a permissible method of constitutional interpretation in North Dakota.

STATEMENT OF THE CASE AND FACTS

I. North Dakota's Regulation of Abortion from Statehood through *Wrigley*.

[¶12] For most of our State's existence, "North Dakota had a long history of prohibiting abortions except to preserve a woman's life." *MKB Mgmt. Corp. v. Burdick*, 2014 ND 197, ¶36, 855 N.W.2d 31 (separate opinion of VandeWalle, C.J.).[1]

[¶13] In 1973, the U.S. Supreme Court issued its *Roe v. Wade* decision, which imposed an abortion regime onto every State, purportedly under the federal Constitution. 410 U.S. 113 (1973). In 2022, the U.S. Supreme Court overruled the *Roe* decision, explaining it had been an improper "exercise of raw judicial power" based on policy considerations "having no bearing on the meaning of the Constitution." *Dobbs v. Jackson Women's Health Org*., 597 U.S. 215, 227-28 (2022). The U.S. Supreme Court recognized that "[a]bortion presents a profound moral question," and it returned that question to each of the States, to be answered by the people and their elected representatives. *Id.* at 302.

[¶14] When *Roe* was overruled, North Dakota's "trigger law" came into effect. Under that trigger law, the State prohibited all abortions but created an affirmative defense where performing an abortion was necessary to protect the life of the mother. *See* N.D.C.C. § 12.1-31-12 (repealed by N.D. Sess. Laws 2023, ch. 122 § 11, eff. Apr. 24, 2023).

[¶15] The District Court preliminarily enjoined the trigger law. (R112). And on appeal

---

[1] Penal Code, Dakota Territory §§ 337-38 (1877); Laws of the Dakota Territory §§ 6538-39 (1887); N.D.R.C. §§ 7177-78 (1895); N.D.R.C. §§ 8912-13 (1905); N.D. Compiled Laws §§ 9604-05 (1913); N.D.R.C. ch. 12-25 (1943); N.D.C.C. ch. 12-25 (1960).

of that preliminary injunction, this Court held "the history and traditions of North Dakota support the conclusion that there is a fundamental right to receive an abortion to preserve the life or the health of the mother." *Wrigley*, 2023 ND 50, ¶33. The Court held the trigger law was not narrowly tailored to protect that fundamental right because it did not expressly permit abortions when "necessary to prevent severe, life altering damage," *id*. at ¶31, and because it categorized life-preserving abortions as an affirmative defense rather than as an exception to the crime, *id*. at ¶30; *see also id*. at ¶44 (Tufte, J., concurring) (noting, under North Dakota law, the State has the burden to prove the absence of a valid self-defense claim beyond a reasonable doubt, rather than the accused having the burden to prove a valid self-defense claim by a preponderance of the evidence).

II. The Legislative Assembly Enacts Senate Bill 2150.

[¶16] The Legislative Assembly responded to this Court's decision by enacting a revised statute, Senate Bill 2150, which repealed and replaced the trigger law. *See* N.D. Sess. Laws 2023, ch. 122 § 1 (codified in relevant part at N.D.C.C. ch. 12.1-19.1). Senate Bill 2150 was passed by supermajorities in both chambers of the Legislative Assembly, and it responds to the *Wrigley* decision in several ways relevant to this appeal.

[¶17] First, "abortion" is defined to have a strict scienter requirement of intent. N.D.C.C. § 12.1-19.1-01(1). Unlike some other states, our law does not have a negligence or even a recklessness standard. *Cf., e.g*., Idaho Code Ann. § 18-8805(2). To be subject to the statute, a person must act "with the intent to terminate" the unborn child. N.D.C.C. § 12.1-19.1-01(1). "Abortion" is expressly defined not to include: removing an already deceased unborn child, treating an ectopic pregnancy, and treating a molar pregnancy. *Id.*

[¶18] Second, rather than being categorized as an affirmative defense, N.D.C.C. ch. 12.1-

19.1 created an exception for any abortion "deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female"—meaning the State has the burden of proof. N.D.C.C. § 12.1-19.1-03(1).

[¶19] "Reasonable medical judgment" is defined as "a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and treatment possibilities with respect to the medical conditions involved." N.D.C.C. § 12.1-19.1-01(4). And "serious health risk" is "a condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it necessitates an abortion to prevent substantial physical impairment of a major bodily function, not including any psychological or emotional condition." N.D.C.C. § 12.1-19.1-01(5).

[¶20] Third, N.D.C.C. ch. 12.1-19.1 created an abuse exception that wasn't present in the trigger law, which permits abortions to "terminate a pregnancy that based on reasonable medical judgment resulted from" certain types of criminal abuse, "if the probable gestational age of the unborn child is six weeks or less." N.D.C.C. § 12.1-19.1-03(2).

[¶21] Several Plaintiffs to this case testified before the Legislative Assembly during Senate Bill 2150's consideration, and the record indicates that their testimony was largely accepted and implemented during the bill's drafting and amendment.

[¶22] Primarily, those Plaintiffs sought to eliminate the requirement that a threat of physical impairment be "substantial *and* irreversible" in the definition of the term "medical emergency" (later re-labeled as "serious health risk"). (R205:2); (R206-208); (R220:3-4). The term "irreversible" was subsequently removed from the statute entirely.

[¶23] After that amendment was made, Plaintiff Tobiasz told the Legislative Assembly the change "will allow for the majority of medical emergencies ... in pregnancy to be cared

for in a timely fashion," specifically listing several conditions, and declared her "support [of Senate Bill] 2150 as amended, adopted and passed by the Senate." (R216). Plaintiff Lessard told her colleagues the amendments were "better than what our ask was," and Plaintiff Tobiasz said removing the word "irreversible" was "sufficient." (R561:1). Discovery also revealed text messages wherein Plaintiff Tobiasz stated those changes "will allow us to do what we need medically," (R562:5), though she personally would prefer no restrictions on when and why unborn children may be killed. *See* (R468:275:18-282:4) (Tobiasz Depo); (R563:8) (asserting there should be an "absolute right to choose [an abortion even] when there are no serious medical issues").

[¶24] Additionally, Plaintiff Lessard has performed at least one abortion after Senate Bill 2150 came into effect, which was intended to prevent the patient's death or substantial physical impairment. (R455:86:2-89:22) (Lessard Depo.). Plaintiff Lessard described the condition the pregnant female was suffering from as one where treatment with an abortion was a "no-brainer," and she determined an abortion could be performed in compliance with State law. (R455:93:20-97:3). Plaintiff Lessard has not been subject to any adverse action under N.D.C.C. ch. 12.1-19.1 for performing that abortion. (R455:86:2-89:22).

III. Plaintiffs' Amended Complaint and the Instant Appeal.

[¶25] N.D.C.C. ch. 12.1-19.1 became effective on April 24, 2023, and Plaintiffs filed their amended complaint on June 12, 2023. Plaintiffs' amended complaint raised only two challenges to the statute: first, they alleged that N.D.C.C. ch. 12.1-19.1 is void for vagueness (R151:31-32:¶¶69-71); and second, they alleged that N.D.C.C. ch. 12.1-19.1 violates the fundamental right to an abortion for preserving the life or health of the mother because it does not permit abortions solely to protect the mother's mental health or where

the child is unlikely to survive long after birth. (R151:32-33:¶¶72-75). Plaintiffs' amended complaint did not assert any other basis for challenging N.D.C.C. ch. 12.1-19.1, nor did it assert that our State Constitution creates a fundamental right to abortions unconnected to preserving the life or health of the mother, pre-viability or otherwise.

[¶26] After conducting discovery, the State moved for summary judgment. *See* (R450); (R451); (R559). Plaintiffs opposed that motion, asserting there were questions of fact that required trial; Plaintiffs did not move for summary judgment themselves. *See* (R551).

[¶27] On September 12, 2024, the District Court issued its Order declaring the entirety of N.D.C.C. ch. 12.1-19.1 unconstitutional. (R603). It declared the statute facially vague because it has both objective and subjective requirements, even though the objective requirement—"reasonable medical judgment"—is an established standard in the medical community. (R603:7-12:¶¶21-35). The District Court further declared Article I, Section 1's reference to "life, liberty, safety, and happiness" provides a right to abortions for any reason whatsoever prior to fetal viability. (R603:23:¶68). And it declared Article I, Section 25's crime victim bill of rights also provides a right to abortions (R603:21, 23:¶¶62, 67), though it offered no explanation for that holding—and such an argument was not made by any party. The District Court recognized that its decision would receive no deference on appeal, and that the issue would need to be resolved by this Court. (R603:3-4:¶¶8-9).

[¶28] Two weeks later, the District Court entered its judgment. (R617). The State moved the District Court for a stay pending appeal, which was denied on October 10, 2024. (R629). The State then moved this Court for a stay pending appeal on October 17, and the Court heard argument on that motion on November 21. As of the time of this filing, the State's motion for a stay pending appeal is still pending decision from this Court.

LAW AND ARGUMENT

[¶29] "Whether the district court properly granted summary judgment is a question of law that [this Court] review[s] de novo." *SCS Carbon*, 2024 ND 109, ¶5 (citation omitted).

[¶30] "Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal. … The justice, wisdom, necessity, utility and expediency of legislation are questions for legislative, and not for judicial[,] determination. This Court exercises the power to declare legislation unconstitutional with great restraint." *Condon v. St. Alexius Med. Ctr.*, 2019 ND 113, ¶7, 926 N.W.2d 136 (citation omitted).

[¶31] "When attacking the constitutionality of a statute, the scales are weighed in favor of the statute. The challenger must overcome a strong presumption of constitutionality." *State v. Tweed*, 491 N.W.2d 412, 418 (N.D. 1992). "Any doubt must be resolved in favor of [] constitutionality," *id.,* and "[t]he presumption … is so strong that a statute will not be declared unconstitutional unless its invalidity is, in the court's judgment, beyond a reasonable doubt," *Capps v. Weflen*, 2014 ND 201, ¶15, 855 N.W.2d 637 (citation omitted).

[¶32] The presumption of constitutionality is especially strong in North Dakota, as we are one of only two States (the other being Nebraska) that requires a supermajority of the State Supreme Court to declare a statute unconstitutional. N.D. Const. art. VI, § 4.

I. The District Court Erred in Its Constitutional Analysis by Disregarding How the Relevant Provisions Were Understood When Ratified.

[¶33] In *Wrigley*, this Court re-iterated that when "construing constitutional provisions, we ascribe to the words the meaning the framers understood the provisions to have when adopted." 2023 ND 50, ¶17 (quoting *MKB Mgmt.,* 2014 ND 197, ¶25). "Our overriding objective is to give effect to the intent and purpose of the people adopting the constitutional provision." *Id.* That intent and purpose is "to be determined, if possible, from the language

itself," and the Court "may consider contemporary legal practices and laws in effect when the people adopted the constitutional provisions." *Id.*

[¶34] The methodology articulated in *Wrigley* was not novel. This Court has long explained "the North Dakota Constitution must be read in the light of history," *State v. Allesi*, 216 N.W.2d 805, 817 (N.D. 1974), and the goal of constitutional interpretation is "to give effect to the intent and purpose of the people who adopted the constitutional provision." *SCS Carbon*, 2024 ND 109, ¶19; *see also, e.g., Sorum v. State*, 2020 ND 175, ¶¶19-20, 947 N.W.2d 382 (similar); *Kelsh v. Jaeger*, 2002 ND 53, ¶7, 641 N.W.2d 100 (similar); *McCarney v. Meier,* 286 N.W.2d 780, 783 (N.D. 1979) ("All rules of construction are subservient to this duty to ascertain and give effect to the intent and purpose of … the people who adopted the Constitution. … Expediency has no application nor does public clamor, majority desire, or apparent need.").

[¶35] That principle goes back to our earliest days as a State. *E.g., Ex parte Corliss*, 114 N.W. 962, 967 (N.D. 1907) ("[I]n construing a Constitution, the same must be construed in the light of contemporaneous history …. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect.") (referencing a decision from "that eminent author and jurist, Judge Cooley"); *see also* Thomas M. Cooley, *Treatise on Constitutional Limitations*, 67-68 (5th ed. 1883) ("What a court is to do … is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time ....").

[¶36] This Court's method of interpretation aligns with the U.S. Supreme Court. *E.g., United States v. Rahimi*, 602 U.S. 680, 717 (2024) (Kavanaugh, J., concurring) (for

interpreting broadly worded constitutional rights "there are really only two potential answers[:] … history or policy," and "[h]istory, not policy, is the proper guide"); *see also id.* at 709 ("[J]udges [are] charged with respecting the people's directions in the Constitution—directions that are 'trapped in amber.'").

[¶37] It was therefore surprising when the District Court announced it did not need to "spend a significant amount of time addressing the history and laws surrounding abortion, women's rights, and women's health in North Dakota at the time the Constitution was drafted and enacted." (R603:13-14:¶40). Instead, it stated: "this Court can comfortably say that the men who drafted, enacted, and adopted the North Dakota Constitution, and the laws at that time, likely would not have recognized the interests at issue in this case …. It quite simply was not the 'tradition' of the time, and therefore was not reflected in the laws or the state constitution." *Id.* The District Court's Order then wandered further, stating it "hopes that we learn" there "was a time when we got it wrong," and that "the sentiments of the past … need not rule the present for all time." (R603:14-15:¶43).

[¶38] Whatever may be said about the District Court's views on constitutional interpretation and the history of our State, it is hard to describe the Order's approach to constitutional law as anything short of jurisprudential defiance.

[¶39] Our State Constitution provides a mechanism for the people to modify it if they believe "the sentiments of the past" "got it wrong." (R603:14-15:¶43). That mechanism is a constitutional amendment. And while our State Constitution has been amended more than 160 times—including just last year—not one of those amendments enshrined a right to perform abortions unless necessary for the life or physical health of the mother.

[¶40] If the people believe our Constitution needs to be amended to create a broader

abortion right, they have the means to do so. That is *not* the role of the judiciary.

[¶41] To justify its refusal to interpret our State Constitution based on how the relevant provisions were understood when adopted, the District Court quoted language from *State v. Norton*, 255 N.W. 787, 792 (N.D. 1934), where this Court stated the Constitution is "a living, breathing, vital instrument, adaptable to the needs of the day." (R603:13 ¶39).

[¶42] It has been noted "how unusual this statement is in comparison to the Court's other statements about constitutional interpretation." Jerod Tufte, *The North Dakota Constitution: An Original Approach Since 1889*, 95 N.D. L. Rev. 417, 436-38 (2020) ("the large majority of the Court's opinions that speak to the issue say the meaning is fixed and not subject to later evolution"). Moreover, the State is not aware of any decision from this Court declaring a statute unconstitutional based on that language from *Norton*—not even *Norton* itself. Thus, to the extent that language was ever more than dicta to begin with, it has been repeatedly abrogated by this Court, and the State asks the Court to expressly hold that *Norton* does not govern constitutional interpretation in North Dakota.

[¶43] In summary, this Court has been clear that "[i]n construing constitutional provisions, we ascribe to the words the meaning the framers understood the provisions to have when adopted." *Wrigley*, 2023 ND 50, ¶17. The District Court's departure from that methodology—express and deliberate—should not be countenanced by this Court.

II. The District Court Erred in Declaring that N.D.C.C. ch. 12.1-19.1 Violates Article I, Section 1, of the N.D. Constitution.

[¶44] If the Court "undertake[s] to ascribe to the words used the meaning which the people understood them to have when the constitutional provision was adopted [in 1889]," *State ex rel. Sanstead v. Freed,* 251 N.W.2d 898, 905 (N.D. 1977), the only reasonable conclusion is that Article 1, Section 1's references to "life, liberty, safety, and happiness"

were not understood to include a right to perform abortions unless necessary to protect the life or physical health of the mother. Nor would the 1984 amendment that replaced the word "men" with "individuals" have been understood as creating an abortion right.

[¶45] The District Court's conclusion otherwise does not attempt to interpret our Constitution in light of how its ratifiers would have understood the language. Instead, its Order represents an act of unconcealed policymaking through judicial fiat, and it contains numerous, serious flaws that should be corrected by this Court.

A. North Dakota's history does not support a fundamental right to abortions unless necessary to protect the life or physical health of the mother.

[¶46] "[W]hile [] legislative construction is not necessarily binding on the courts, [] when it has been followed by a harmonious and constant course of subsequent legislation … for a period of years, … it is entitled to great weight in determining the real intent and purpose of constitutional provisions." *City of Bismarck v. Fettig*, 1999 ND 193, ¶11, 601 N.W.2d 247 (citation omitted). And throughout our history, State law has consistently criminalized abortions unless necessary to protect the life or physical health of the mother.[2]

1. Abortion laws in North Dakota and around the nation circa 1889.

[¶47] "Before the United States Supreme Court decided *Roe* in 1973, North Dakota had a long history of prohibiting abortions except to preserve a woman's life." *MKB Mgmt*., 2014 ND 197, ¶36 (separate opinion of VandeWalle, C.J.). "[P]rovisions prohibiting abortions were continuously in effect before statehood, at statehood, and after statehood,"

[2] While our State statutes historically referred only to protecting the *life* of the mother, a member of the Court noted that the right to protecting *health* comes from the Article 1, Section 1 right to self-defense. *Wrigley*, 2023 ND 50, ¶¶42-43 (Tufte, J., concurring).

and there is "no contrary reference … in the 1889 debates of the North Dakota Constitutional Convention." *Id*. at ¶37. "[T]he drafters of our constitution are presumed to know the existing laws and to have drafted the state constitution accordingly." *Id*.

[¶48] And it is not as if the State's laws against abortion were unknown or unenforced. As this Court explained in 1900, the "crime [of abortion] may be fully consummated … by one animated only by kindly motives. The offense is committed if the designated means are used … with the intent to procure the miscarriage … when … not in fact necessary to save the life of the woman." *State v. Belyea,* 83 N.W. 1, 3 (N.D. 1900) ("The law leaves it for a jury to determine whether or not any miscarriage was necessary to save the life of the pregnant woman."); *see also State v. Moeller*, 138 N.W. 981, 983 (N.D. 1912) (affirming conviction of physician for performing an unlawful abortion).

[¶49] North Dakota's restrictions on abortion upon statehood were consistent with the overwhelming majority of states in the late 1800s. When the 14th Amendment was adopted in 1868, "three quarters of the States had … statutes prohibiting abortion … [except] when necessary to preserve the life of the mother." Stephen G. Gilles, *What Does Dobbs Mean for the Constitutional Right to A Life-or-Health-Preserving Abortion?,* 92 Miss. L.J. 271, 284-85 (2023); *see also Dobbs*, 597 U.S. at 249 & App. A (compiling state abortion laws in 1868 and noting "[t]he trend in the Territories that would become the last 13 States was similar"). That remained true in 1889, and "by the end of the 1950s … all but four States … prohibited abortion 'however and whenever performed, unless done to save or preserve the life of the mother.'" *Dobbs*, 597 U.S. at 249 (quoting *Roe*, 410 U.S. at 139).

[¶50] Attitudes towards abortion among some may have changed since we achieved Statehood, but, with the exception of several decades where the federal judiciary imposed

an abortion regime upon all of the states, North Dakota has consistently criminalized abortions that were not necessary to protect the life or health of the mother.

[¶51] And because abortions not necessary to protect the life or health of the mother were outlawed in this State *before* our Constitution was adopted, *when* it was adopted, and for *nearly a century afterwards* (until *Roe*), the Court should be very skeptical of claims that there was a constitutional right to engage in that conduct the entire time. *E.g., Smith v. Kunert*, 115 N.W. 76, 78 (N.D. 1907) (noting the Court "would feel very reluctant" to declare unconstitutional a statute that had been in effect "[a]t the time the Constitution was adopted, and for some time prior thereto").

2. Medical literature circa 1889.

[¶52] The fact that North Dakota law has consistently prohibited abortions unless necessary for protecting the life or health of the mother is strong evidence that the ratifiers of Article 1, Section 1 did not intend for it to permit abortions that are not necessary for protecting the mother's life or health. Though if contemporary medical journals and secondary sources are also considered, they buttress that conclusion.

[¶53] As a medical treatise explained in 1887, two years before Article 1, Section 1 was ratified, "[i]n this country the statutes making the procuring of an abortion … criminal, make an exception in case the same is necessary to preserve the life of the woman, or the child of which she is pregnant." George W. Field, Field's Medico-Legal Guide for Doctors and Lawyers § 77 (1887) (cleaned up); *see also* Albert H. Buck, 1 A Reference Handbook of the Medical Sciences, *Abortion, Criminal*, 28 (1885) ("If … the physician should be indicted for abortion … it would be necessary for him to show, first, a necessity for the operation, the life of the mother being at stake …"); *see also id*. at 29 ("In the United States,

legislators, realizing that the civil rights of the unborn child are protected … have been inclined to enact laws for the preservation of its personal rights to life.").

[¶54] Those secondary sources are not aberrations; they reflect the medical consensus in the period preceding and around Article 1, Section 1's ratification. As another contemporary journal explained: "[T]here are, morally and legally considered, two kinds of abortion, justifiable and criminal. … There is now but little if any dispute that the justifiable procurement of abortion can have but one aim in view, and that aim *life*. … *Life* is the test; not a mere possibility of danger to life (which possibility exists in every case of pregnancy), but a probability of such danger." Everett W. Burdett, *The Medical Jurisprudence of Criminal Abortion*, 18 New England Medical Gazette 200, 201-02 (1883); *see also* Theophilus Parvin, The Science and Art of Obstetrics 601-02 (1886) (summarizing "the teaching of medical science" as being that "artificial abortion" should not be "resorted to from any other motive than the salvation of the mother's life").

[¶55] Plaintiffs presented the District Court with no evidence to the contrary. The primary basis for Plaintiffs' contention of a sweeping abortion right was a purported expert report from Karissa Haugeberg. *See* (R482). But not even Plaintiffs' "expert" asserted North Dakota has ever recognized a right to abortions unrelated to protecting the life or health of the mother—opining instead that an alleged "medical consensus" supported abortions for "conditions that affected a pregnant person's physical or mental health." (R482:3-4:¶9). As discussed further *infra*, Plaintiffs' expert report is deeply flawed—both in its reliance of articles that post-date 1889 and on articles that use eugenics language. But not even the Plaintiffs to this case tried to claim that North Dakota has *ever* recognized an abortion right unconnected to protecting the life or health of the mother.

[¶56] In short, for nearly a century before *Roe*, abortions were not legally permitted in our State unless necessary to preserve the life or health of the mother. Our laws reflected the legal and medical consensus around the country in the late 1800s. "Such, then, was the situation at and prior to the adoption of the Constitution," and the Court should "assume that th[ese] fact[s] w[ere] well known to the members of the constitutional convention and to the people." *Power v. Williams*, 205 N.W. 9, 12-13 (N.D. 1925).

B. The 1984 amendment to Article I, Section 1 did not *sub silentio* create an abortion right.

[¶57] As part of its Order, the District Court stated: "the inalienable rights guaranteed to North Dakota citizens under Article 1, section 1 … did not even include women until 1984 when the language … was amended from 'men' to 'individuals.'" (R603:14:¶41). That is not correct. And the 1984 amendment did not *sub silentio* enshrine an abortion right.

[¶58] "A change in the law will not be lightly inferred by mere changes in phraseology." *Gaar, Scott & Co. v. Sorum*, 90 N.W. 799, 801 (N.D. 1902). Instead, as this Court has held, "[a] mere change in the words of a revision will not be deemed a change in the law unless it appears that such was the intention. The intent to change the law must be *evident and certain*." *Id.* at 802 (emphasis added). No such intent is evident here.

[¶59] Even before North Dakota's statehood, territorial law provided that "[w]ords used in the masculine comprehend as well the feminine and neuter." Revised Codes of the Territory of Dakota § 604 (2d ed. 1877). That rule of construction carried over into statehood, N.D.R.C. § 5133 (1895), and has remained into the current day. *See* N.D.C.C. § 1-01-34 ("Words of one gender include the other genders.").

[¶60] That rule of construction reflects linguistic conventions at the time of statehood, which defined "man" as "An individual of the human race; a human being; a person." Man,

Webster's Complete Dictionary of the English Language 806 (1886) (primary definition); *see also*, *e.g.*, Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* § 212 (1882) (because "[m]asculine includes [f]eminine[,] [a] woman may be meant by the masculine pronoun 'his,'" as well as "by the word 'man'"); *accord, e.g., O'Neal v. Robinson*, 45 Ala. 526, 534 (Ala. 1871) ("According to our constitution, 'All men are created equal;' and the word 'man' includes persons of both sexes"), *overruled on other grounds by Weil v. Pope*, 53 Ala. 585 (Ala. 1875).

[¶61] The State is not aware of a single decision from this Court holding that, prior to 1984, women were not subject to Article I, Section 1's rights to life, liberty, safety, and happiness. *Contra* (R603:14:¶41). To be sure, some political rights under our Constitution, such as the right to vote, were not granted to women until decades after Statehood—and then by express amendment. *E.g.,* N.D. Sess. Laws 1919, ch. 92. But the State is not aware of any decision suggesting that, prior to 1984, women were not accorded the inalienable rights guaranteed by Article I, Section 1, such as the constitutional right to self-defense.[3]

[3] Notably, if the Court were to now hold that women were not accorded unalienable rights under Article I, Section 1 until 1984, such a holding would suggest women have never had (and currently do not have) rights to free speech or judicial remedy under our State Constitution. *See* N.D. Const., art. I, §§ 4, 9 (referring to those rights as held by "every man"). But this Court has repeatedly decided cases where women asserted such rights, never once suggesting use of the term "man" in that context was gender specific. *E.g., State v. Heath*, 177 N.W.2d 751, 755 (N.D. 1970) (analyzing free speech claims of female defendants, rather than suggesting women do not have free speech rights in this State).

[¶62] Moreover, the clear purpose of the 1984 amendment was to recognize a right to keep and bear arms, analogous to the U.S. Constitution's Second Amendment.

> All ~~men~~ individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; and pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

N.D. Sess. Laws 1985, ch. 702, § 1 (alterations added) (underlined text for additions and stricken-through text for deletions). Indeed, the title of the measure was: "An initiated measure to amend the Constitution of the State of North Dakota, preserving to the people the right to bear arms for lawful purposes." *Id.*; *see also State ex rel. Strutz v. Stray*, 281 N.W. 83, 85 (N.D. 1938) ("the title of [a] measure … may be resorted to in order to determine the intent expressed by the measure itself").

[¶63] The State is not aware of a single document in the legislative record or in contemporary public media indicating that, when adopting that 1984 amendment, the people of this State intended for that amendment to create any substantive rights that had theretofore been denied to women (except for rights relating to the bearing of arms). The ratification of an abortion right would have been a significant and noteworthy occurrence; the lack of any contemporary evidence suggesting that was the intent of the people when ratifying the 1984 amendment is not a silence that should be ignored.

[¶64] Instead, as the Indiana Supreme Court held when rejecting similar arguments that a 1980s linguistic change to that state's constitution *sub silentio* created an abortion right by modifying the phrase "all men are created equal" to "all people are created equal," it seems apparent our Constitution's 1984 replacement of the term "men" with "individuals" was not intended to create any substantive constitutional rights, but "was a purely stylistic

update to the Constitution." *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood*, 211 N.E.3d 957, 981 (Ind. 2023); *see also id.* at 983 ("if Hoosiers in 1984 were amending their Constitution to protect a fundamental right to abortion, it is likely someone would have mentioned it before now").

[¶65] In short, the District Court was incorrect to suggest that Article I, Section 1 did not apply to women prior to 1984. And there is no evidence to support the idea that by changing the term "men" to "individuals," the 1984 amendment was understood or intended by those who ratified it as silently creating an abortion right.

C. There is not a fundamental right to "mental health" abortions.

[¶66] As noted *supra*, the statute defines a "serious health risk" to the mother, for which an abortion may be performed, as a condition that may result in a "substantial physical impairment of a major bodily function, *not including any psychological or emotional condition*." N.D.C.C. § 12.1-19.1-01(5) (emphasis added).

[¶67] The District Court held our State Constitution includes a fundamental right to perform abortions to benefit a woman's "mental health," or where not receiving an abortion would affect her "psychological or emotional conditions." (R603:22-23:¶¶64-66) (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973), *abrogated by Dobbs*, 597 U.S. 215). But other than citing language from the now-abrogated *Bolton* decision, the District Court offered nothing more than conclusory pronouncements for this portion of its Order. *See id*.

[¶68] The District Court's finding of a fundamental right to perform mental health abortions was incorrect for at least three different reasons. First, nothing in the history of our legal code suggests abortions were ever permitted solely on the basis of mental health, despite mental health being reflected in our laws since Statehood. Second, conceptualizing medically necessary abortions as a self-defense right underscores why there is not a right

to mental health abortions. And third, providing an abortion is not a medically accepted standard of care for treating someone suffering from mental health conditions.

1. North Dakota's history and traditions do not support the existence of "mental health" abortions.

[¶69] When interpreting constitutional text, this Court "ascribe[s] to the words the meaning the framers understood the provisions to have when adopted." *Wrigley*, 2023 ND 50, ¶17. And where the framers knew how to speak on a certain topic, but chose not to, that silence is strong evidence of their intent. *E.g., Mid-America Steel, Inc. v. Bjone*, 414 N.W.2d 591, 596 (N.D. 1987) (where "the Legislature knew how to provide for" a certain rule, but "did not do so" in a particular context, it is a "strong indication" that the legislature did not intend to apply the rule to that context).

[¶70] It is therefore highly relevant that our State founders were aware of mental health—and codified the concept into numerous other areas of our early State laws, and even into our original Constitution—but there has never been a mental health exception written into our State laws to authorize or excuse the performance of abortions.

[¶71] For example, our original constitution expressly addressed an elected official becoming incapacitated due to "mental or physical disease." N.D. Const. § 77 (1889). And our earliest State law code provided that "persons of unsound mind" could not be held criminally liable. N.D.R.C. § 6814.4 (1895). Rape was defined to include sexual relations with a woman incapable of giving consent, "through lunacy or any other unsoundness of mind." N.D.R.C. § 7156.3 (1895). Members of the national guard could be discharged "for physical or mental disability." N.D.R.C. § 1389 (1895). And even school children were excused from truancy laws when they could not attend school due to "physical or mental conditions." N.D.R.C. § 759.3 (1895).

[¶72] Thus, it is not as if the founders of our State did not know about the concept of mental health, or that the topic was taboo. *Cf.* (R603:14:¶42). The topic appears repeatedly in our earliest law codes, and even in our original 1889 Constitution. The fact that our State founders knew how to write mental health exceptions into law, yet chose not to when it came to regulating the performance of abortions—and that no subsequent generation did so either, up to the present day—is another silence that cannot be ignored.

[¶73] That statutory silence is by itself dispositive. But if the Court turns to contemporary medical journals, they also don't establish a right to "mental health" abortions.

[¶74] In *Wrigley*, the Court referenced an anonymously authored article from 1914 which suggested abortions could be performed on "the mentally unfit who might become deranged; the woman with a narrow brim … [whose] life might be in danger…; the woman who may bleed to death; the eclamptic; and those suffering from dangerous diseases." *Wrigley*, 2023 ND 50, ¶25 (quoting *Criminal Abortions*, 34 Journal-Lancet 81, 82 (1914)).

[¶75] Plaintiffs seize on the language about the "mentally unfit" to suggest our history and traditions support a right to abortion whenever killing the unborn child might benefit the mother's mental health. *See* (R151:26:¶59) (Am. Compl.) (citing that article to claim "North Dakotans have a fundamental right to obtain an abortion to preserve their mental health"); (R482:12:¶26) (Haugeberg Decl.) (claiming that article supports the conclusion "abortions were appropriate to protect a women's mental or physical health").

[¶76] But the Court should decline to give that 1914 article's reference to performing abortions on "the mentally unfit" the weight that Plaintiffs attribute to it, for at least three different reasons: first, 1914 is decades removed from 1889, which is the more relevant time period; second, that difference of a few decades is important, because during that time

the pseudo-scientific fad of eugenics took hold in medical journals; and third, in any event, nothing in that 1914 article indicates that "mental health" abortions, even if they were performed elsewhere, would have been legal under the laws *of North Dakota*.

[¶77] On the first point, 1914 is decades removed from 1889, and medical journals closer in time to 1889 strongly rebuked the propriety of mental health abortions. In fact, an 1893 article from the American Lancet—not anonymously authored—stated:

> Whenever it is necessary to terminate pregnancy in order to save the life of the mother, such a procedure is justifiable; if not thus necessary, the procedure is criminal. … I have, in a very few instances, felt that the physician was getting very close to criminal ground when he produced an abortion under the plea of justifiability. For instance: A lady pregnant three months wanted an abortion … because she … expressed great fear that insanity would develop if her pregnancy was not terminated. Her physician asked me in consultation. We decided that an abortion was unjustifiable. … [Another practitioner] attempted to justify [the abortion] on medical grounds … His plea was that of justifiability because of apprehended insanity. Such and similar cases seem to me to quite merge into criminality.

W.M. H. Parish, *Criminal Abortion*, 17 Am. Lancet 256, 257 (1893); *accord, e.g.*, C. Woodhouse, M.D., *A Lecture on Criminal Abortion*, 4 Medical Investigator 25, 29 (1866) ("Were law-makers and courts to recognize this excuse and defense for abortion, well nigh … every legal obstacle to fœticide, in all stages of utero-gestation, would go by the board. How easy to say, and show, that the woman's health was not good, that she vomited, was 'nervous,' 'irritable,' 'unhappy,' ever since she became liable to become a mother?").

[¶78] Such articles are not only closer in time to 1889, but also pre-date our State's compilation of a revised law code in 1895, meaning such articles (and not the 1914 article) constituted part of the backdrop against which our original law code was enacted.

[¶79] On the second point, that 1914 article's reference to performing abortions on "the mentally unfit who might become deranged" appears to reflect a strain of the eugenics movement, which peaked as a pseudo-scientific fad among American intellectuals in the

1910s and 1920s, and which used "unfit" as a euphemism for those deemed unworthy of reproduction. *See* U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities* 19–20 (1983) (explaining proponents of the eugenics movement believed "nearly all social problems … [were] due to reproduction by unfit persons").

[¶80] "The use of abortion to achieve eugenic goals is not merely hypothetical." *Box v. Planned Parenthood of Ind. & Ky., Inc*., 587 U.S. 490, 493-512 (2019) (Thomas, J., concurring) (discussing the extensive and troubling overlap between the eugenics and abortion movements in the early 1900s.); *Jackson Women's Health Org. v. Dobbs*, 945 F.3d 265, 284-85 (5th Cir. 2019) (Ho, J., concurring in judgment), *reversed by Dobbs*, 597 U.S. 215 (similar); *Preterm-Cleveland v. McCloud*, 994 F.3d 512, 538-40 (6th Cir. 2021) (en banc) (Griffin, J., concurring), *abrogated by Dobbs*, 597 U.S. 215 (similar).

[¶81] The U.S. Supreme Court has warned that when looking to history to engage in constitutional interpretation, courts must be wary of ideas that were rejected. *See Rahimi*, 602 U.S. at 723 (Kavanaugh, J., concurring) ("courts must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind"). And given that the "the quondam science of eugenics" has long since "lapsed into discredit," *Tennessee v. Lane*, 541 U.S. 509, 535 (2004) (Souter, J., concurring), the Court should be exceptionally wary to read a fundamental right to alleged mental health abortions into our State Constitution based on articles from the early 1900s suggesting abortions should be performed on women deemed "mentally unfit."

[¶82] Third, in any event, a 1914 journal entry suggesting abortions should be performed on the "mentally unfit" says nothing about whether performing an abortion that was not needed to protect the mother from death or serious bodily harm would have been legal in

North Dakota. Even assuming that in the early 1900s there were abortionists around the country willing to kill unborn children carried by physically healthy women they deemed "mentally unfit," that would not establish whether such conduct would have been legal under the laws of North Dakota. And as discussed *supra*, it would not have been.

[¶83] Plaintiffs' "expert" report does not rectify any of those issues. While Plaintiffs' expert claimed there was a sweeping right to mental health abortions, most of the articles cited in her report similarly post-date 1889 by decades. *See* (R482:11-16:¶¶24-32) (Haugeberg Decl.) (primarily citing articles from the 1910s, 1920s, and 1930s). Articles in that report also appear to be aligned with the eugenics movement, as Plaintiffs' expert admitted during deposition. *See* (R:474:289-91) (Haugeberg Depo.) (acknowledging some of the cited articles have "eugenics language"). And regardless, even if the Court were to ignore that the report relies on articles that post-date 1889 by decades and contain "eugenics language," none of the cited articles actually provide, as a matter of North Dakota law, that it would have been legal to perform an abortion in North Dakota when doing so was not necessary to protect the mother from death or serious bodily harm.[4]

[4] When questioned specifically on the 1914 Journal-Lancet article that she claims supports her opinions, Plaintiffs' expert claimed no knowledge of: (a) who the article was referring to as the "mentally unfit;" (b) what conditions would make a woman "deranged;" (c) what treatments were historically appropriate for a "deranged pregnant female;" (d) why an abortion would be imperative for the "mentally unfit who might become deranged;" and (e) if it was ever historically lawful in North Dakota to perform abortions on "mentally unfit" women regardless of their physical health. (R474:291:23-295:13).

[¶84] In short, nothing in our State's legal history and traditions supports the conclusion that there exists a fundamental right to perform mental health abortions unrelated to protecting the mother from death or serious bodily harm.

2. Conceptualizing abortion as a self-defense right further illustrates why there is not a right to "mental health" abortions.

[¶85] In *Wrigley*, a member of the Court noted that "'life or health' need not be understood more broadly than its application to the right of self-defense." 2023 ND 50, ¶42 (Tufte, J., concurring). And while an unborn child is readily distinguishable from an assailant against whom deadly force may generally be used, analogizing medically necessary abortions to the self-defense right is helpful for understanding the limitations of that right, and why it would not include a right to perform mental health abortions.

[¶86] The "right of self-defense [is] protected by N.D. Const. art. I, § 1." *Id*. The relevant language has been part of our State Constitution since 1889, and the Court has "long understood that a woman has an inalienable right to employ deadly force against another person when necessary to protect herself against death or serious bodily injury." *Id.* at ¶43 (Tufte, J., concurring); *see also id.* at ¶45 ("[T]he abortion-as-self-defense right is largely uncontroversial, at least when threats to the mother's life, and not just to her psychological health, are involved ….") (quoting Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 Harv. L. Rev. 1813, 1825 (2007)).

[¶87] At Article I, Section 1's ratification, the right to use lethal force to protect oneself or a third party was only available where there was an imminent threat of "great *bodily* injury." *United States v. Leighton*, 13 N.W. 347, 348-49 (Dakota Terr. 1882) (emphasis added) (quoting *People v. Scoggins*, 37 Cal. 676, 683 (Cal. 1869)) (rejecting argument that "proof of prior threats" was relevant to self-defense claim where, at the time of the killing,

the deceased was not threatening to cause bodily injury).

[¶88] North Dakota was not alone in understanding the self-defense right as limited to the threat of bodily harm. *Accord, e.g., Minton v. Commonwealth*, 79 Ky. 461, 464 (Ky. 1881) ("Whenever a man is in imminent danger of great *bodily harm* …) (emphasis added); Robert Desty, A Compendium of American Criminal Law § 31a (1882) ("Every man has a right to defend himself against … death or serious *bodily* harm ….") (emphasis added).

[¶89] That understanding of the self-defense right has remained true to the present day. To the State's knowledge, no jurisdiction in the United States—at any point in our nation's history—has ever found a constitutional right to use lethal self-defense to protect oneself or another from psychological or emotional injury. Even advocates of expanding the self-defense right to include mental health recognize that "the law is currently without protections for those who use physical force in defense of their emotional and psychological well-being." Kindaka J. Sanders, *Defending the Spirit: The Right to Self-Defense Against Psychological Assault*, 19 Nev. L.J. 227, 252 (2018).

[¶90] In short, conceptualizing medically necessary abortions as a self-defense right further confirms why the idea of a right to mental health abortions is inapt. Abortion as a self-defense right only provides a right to use lethal force when the individual against whom that force will be used (here, the unborn child) is threatening another with death or serious bodily injury. And that is what N.D.C.C. § 12.1-19.1-03(1) provides for. There is not a constitutional right to use lethal force against someone because they may cause someone else to experience anxiety or depression. *Cf.* (R:151:22:¶53). Nor is there a constitutional right to use lethal force against someone because their death will potentially improve someone else's emotional well-being. *Cf.* (R603:22-23:¶66).

3. Abortion is not an accepted standard of care for treating patients with mental health disorders.

[¶91] Finally, another reason why mental health abortions should not be included among medically necessary abortions is the undisputed record evidence that providing an abortion is not the standard of care for treating mental health disorders—one of the few things experts for both sides agreed on in this case. *See, e.g.,* (R556:19:8-10, 52:22-53:2, 57:3-16, 58:3-14,60:3-17, 64:23-72:4) (plaintiffs' mental health expert testifying abortion is not part of the evidence-based standard of care for mental health disorders, and that she has never recommended an abortion as treatment for a mental health disorder).

[¶92] Even the federal government has "emphatically disavowed the notion that an abortion is ever required as stabilizing treatment for mental health conditions." *Moyle v. United States*, 603 U.S. 324, 335 (2024) (Barrett, J., concurring).

[¶93] Moreover, if Plaintiffs are asking this Court to recognize abortion as a method for treating mental health issues—even though experts for both sides of this case agreed it would not be an appropriate treatment—courts have recognized there is "medical and scientific uncertainty" "as to whether abortion itself is a causal factor in the observed correlation" between abortion and subsequent mental health disorders, to include suicidality. *Planned Parenthood v. Rounds*, 686 F.3d 889, 899-904 (8th Cir. 2012) (citation omitted) (discussing conflicting studies); *see also, e.g.*, (R461:14-26:¶¶41-64) (State's medical expert discussing extensive evidence that abortions *negatively* impact women's psychological health). State legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007). Thus, even if it was within the standard of care to treat mental health conditions with abortions (which it is not), medical uncertainty over whether abortions

negatively impact mental health provides yet another independent reason why the claim of a fundamental right to mental health abortions should be rejected.

[¶94] In short, the fact that it is not within the accepted standards of care to treat a patient's mental health disorders by performing an abortion is yet another reason why the right to perform medically necessary abortions would not include a right to perform abortions solely for the alleged benefit of the mother's mental health.

D. There is not a fundamental right to abortion simply because the unborn child may have medical conditions or a terminal diagnosis.

[¶95] Before the District Court, Plaintiffs argued that N.D.C.C. ch. 12.1-19.1 should be struck down because it does not protect an alleged fundamental right to terminate the life of an unborn child whenever the child receives a medical diagnosis indicating he or she is unlikely to survive birth or "likely will not survive more than a few hours or days." (R:151:26-32:¶¶60-68,75). The District Court did not address this argument. But if Plaintiffs re-assert this argument on appeal, it should be rejected.

[¶96] As an initial matter, this Court is "a court of review, not of first view." *Bolinske v. Sandstrom*, 2022 ND 148, ¶23, 978 N.W.2d 72 (quoting *Cutter v. Wilkinson,* 544 U.S. 709, 718 n.7 (2005)). And this Court generally does not adjudicate arguments, like this one, that were not addressed by the District Court below. *Id*. But if the Court nonetheless addresses this argument, it should be rejected for multiple reasons.

[¶97] First, like much of Plaintiffs' argument, it has no historical basis in our State. As discussed *supra*, this Court has held "the history and traditions of North Dakota support the conclusion that there is a fundamental right to receive an abortion to preserve the life or the health of the mother." *Wrigley*, 2023 ND 50, ¶33. But Plaintiffs have not pointed to anything in our history establishing that our State has ever recognized a fundamental

right to preemptively kill unborn children when they receive a terminal diagnosis, at least where the pregnancy does not threaten the mother's life or physical health.

[¶98] Second, the claim "there is no legitimate government interest" in restricting abortions where the unborn child has a potentially fatal diagnosis ignores the fact that North Dakota considers unborn children to be human beings. N.D.C.C. § 14-02.1-02(7). Plaintiffs may disagree with the humanity of unborn children, but that does not diminish the authority of the people, through their elected legislature, to recognize it. And the State does not lose its "legitimate" interest in protecting the lives of people after they receive a terminal diagnosis. Human lives do not lose their inherent worth simply because their expiration date may be known—a fact likely recognized by anyone who has ever had a friend or family member receive a terminal diagnosis, or received one themself.

[¶99] Third, the suggestion there is a fundamental right to affirmatively terminate the lives of unborn children because they have potentially fatal diagnoses has parallels to the argument for a fundamental right to affirmatively facilitate the suicide of someone with a terminal diagnosis.[5] Yet the Supreme Court has rejected the idea any such right is silently lurking in the Constitution, given that "for over 700 years, the Anglo–American common-law tradition has punished or otherwise disapproved of … assisting suicide." *Glucksberg v. Washington*, 521 U.S. 702, 711 (1997); *id*. at 719 (assessing alleged fundamental right "[a]gainst this backdrop of history, tradition, and practice"). North Dakota similarly has historically prohibited the affirmative killing of another human being even if it is believed

[5] A glaring distinction, of course, is the fact that unborn children are not capable of providing consent to their own death.

that individual's death is inevitable. *E.g.*, Laws of the Dakota Territory § 6435 (1887) (aiding suicide punishable by 7 years in prison); N.D.R.C. § 7051 (1895) (same); N.D.C.C. § 12.1-16-04 (assisting in commission of suicide a class C felony).

[¶100] And fourth, conceptualizing medically necessary abortions as a self-defense right also underscores why there would not be a fundamental right to an abortion where the unborn child has received a terminal diagnosis but does not threaten the mother with death or a serious health risk. No jurisdiction in this country has ever recognized a right to use lethal force against someone based on a belief that they are going to die anyway. If killing the unborn child is necessary to protect the mother from the threat of death or a serious health risk, N.D.C.C. ch. 12.1-19.1 permits the performance of an abortion. But absent such a threat, a life is still a life, and the people of this State, through the Legislative Assembly, have the authority to prohibit the extermination of that life.

[¶101] In short, throughout the history of our State, there has never been a fundamental right to preemptively kill an unborn child just because they received a terminal diagnosis, at least where the pregnancy does not threaten the mother with death or a serious health risk. There is no dispute that such situations are heartbreaking and require some of the most profound value judgments that we as a society may be called upon to make. But absent clear constitutional text to the contrary, that is a value judgment that is left to the people. And in this State, the people have decided that an unborn life is a life, and it is worthy of protection even when its expiration date may be known or suspected.

E. The statute's abuse exceptions are not unconstitutional.

[¶102] The District Court appears to have held that N.D.C.C. ch. 12.1-19.1 is unconstitutional because the Legislative Assembly, in the District Court's view, drew

"arbitrary" lines when permitting abortions up to six weeks of gestational age when the pregnancy results from acts of abuse. (R603:21:¶61). The District Court was in error.

[¶103] This Court has never held that there is a fundamental right to terminate the life of an unborn child because the child was created by abuse. And as addressed further *infra*, nothing in our history or traditions suggest that the people of this State ever intended to constitutionalize such a right—including when ratifying Article I, Section 25. The provision of a six-week period for terminating pregnancies that result from criminal abuse is an act of legislative prerogative, not of Constitutional right. *Cf. Lee v. Job Service North Dakota*, 440 N.W.2d 518, 519 (N.D. 1989) (restrictions on unemployment benefits are not subject to heightened scrutiny because they "are a matter of legislative grace").

[¶104] "Abortion presents a profound moral issue on which Americans hold sharply conflicting views" and people "hold a variety of views about the particular restrictions that should be imposed" when it is permitted. *Dobbs,* 597 U.S. at 223, 225. Unlike the courts, State legislatures have "the institutional competence, democratic legitimacy, and (most importantly) constitutional authority to revise statutes in light of new social problems and preferences." *Wis. Cent. Ltd. v. United States*, 585 U.S. 274, 284 (2018). That would seem to be especially the case for balancing the heavy interests that are involved where a child was created by an assault—both for the unborn child and for the mother.

[¶105] In that scenario, the people of this State, through their elected legislature, have chosen to weigh the necessarily implicated interests differently than they are weighed for other pregnancies, permitting an abortion even where the mother's life or health is not at risk, so long as the abortion is performed within six weeks of gestational age.

[¶106] A difficult value judgment of that nature is a core part of the legislative prerogative.

It involves balancing many competing considerations, interests, and viewpoints, and is "not subject to courtroom fact-finding." *F.C.C. v. Beach Comms., Inc.*, 508 U.S. 307, 315 (1993). The Legislative Assembly did not need to explain itself to the District Court when making that value judgment. *Cf. Haney v. N. Dakota Workers Comp. Bureau*, 518 N.W.2d 195, 201 (N.D. 1994) ("[A] court need not know the special reasons, motives, or policies of a State legislature … so long as the policy is one within the power of the legislature to pursue …") (citation omitted). And in any event, six weeks is not an "arbitrary" line; it's when cardiac activity is typically detectable. *See* (R458:178:5-8) (Obritsch Depo.).

[¶107] The District Court's apparent inability to understand why the Legislative Assembly weighed the relevant interests differently for pregnancies that are caused by abuse does not deprive the people of the ability to make that value judgment, nor does it render the entirety of N.D.C.C. ch. 12.1-19.1 unconstitutional.

F. The District Court's imposition of a "viability" standard is judicial line-drawing untethered to constitutional text.

[¶108] In holding that a right to abortion outweighs any interest the State has in protecting the life of the unborn child, the District Court's Order repeatedly draws a line at "viability." (R603:17, 19-23:¶¶49, 53, 55, 57, 62, 65, 68).[6] But unlike the Legislative Assembly, courts must explain their reasoning when they engage in line-drawing. *See Dobbs*, 597 U.S. at 274-78. And nowhere does the District Court offer a principled explanation for why it is only at "viability" when the State's authority to protect the lives of unborn children has

[6] As noted in the State's motion for a stay pending appeal, the District Court's Judgment—as distinct from its Order—does not mention viability, risking confusion about the extent of the constitutional right that the District Court purported to find. *See* (R617:2:¶4a).

legal effect. Instead, the unilateral imposition of such a line reflects precisely the sort of unmoored judicial fiat repudiated by the U.S. Supreme Court.

[¶109] As the U.S. Supreme Court explained in *Dobbs*, the imposition of a "viability" line in *Roe* was an assertion of "raw judicial power" that "makes no sense" as a matter of constitutional law. 597 U.S. at 277. Simply proclaiming, as the District Court did here, that the State's interest in protecting unborn life only becomes compelling at the point of viability, "mistakes a definition for a syllogism." *Id*. at 274 (cleaned up, citation omitted). And "[t]his arbitrary line has not found much support among philosophers and ethicists who have attempted to justify a right to abortion." *Id.* at 275. "If … a State's interest in protecting prenatal life is compelling 'after viability,' … why isn't that interest 'equally compelling before viability?'" *Id.* (citation omitted). The District Court offers no answer.

[¶110] Another "obvious problem … is that viability is heavily dependent on factors that have nothing to do with the characteristics of a fetus." *Id.* at 276. "In the 19th century, a fetus may not have been viable until the 32d or 33d week …. When *Roe* was decided, viability was gauged at roughly 28 weeks. … Today, respondents draw the line at 23 or 24 weeks." *Id.* (cleaned up). "Viability also depends on the quality of the available medical facilities." *Id.* (cleaned up). "[I]f viability is meant to mark a line having universal moral significance, can it be that a fetus that is viable in a big city … has a privileged moral status not enjoyed by an identical fetus in a remote area …?" *Id.* at 277.

[¶111] As such, the District Court's imposition of a "viability" line to demarcate State authority for protecting unborn lives under the State Constitution—a standard that wasn't argued for by the Plaintiffs here—appears to be an "unrestrained imposition of [the District Court's] own extraconstitutional value preferences." *Id*. at 279 (citation omitted).

[¶112] Balancing the State's interest in protecting unborn lives with a woman's interests in carrying a pregnancy is a matter of philosophical debate concerning the very nature of life itself. Absent clear constitutional direction to the contrary, answering that question is left to the people through their elected legislature. And the District Court's unilateral imposition of a "viability" standard, unmoored from any basis in constitutional theory or our State's history and traditions, exemplifies some of the serious problems with inferring an unwritten and ahistorical right into the North Dakota Constitution.

G. The District Court's *sua sponte* assertion that if the State can restrict abortion it can thereby mandate abortion is wrong on many levels.

[¶113] The District Court also made the unsupported and illogical claim that if the State can restrict abortions that are not necessary for preserving a women's life or physical health, it will also have "near-unlimited power to tell women when they *must* have an abortion." (R603:18:¶50) (emphasis original). There seems little basis for that *sua sponte* assertion, and the State will not dwell on it long other than to make two points.

[¶114] First, as a matter of procedure, such an argument was not made by the parties, and this Court has repeatedly held that when it comes to annulling statutes, courts must not "conjure up theories to overturn and overthrow." *Hazelton-Moffit Special Sch. Dist. No. 6 v. Ward*, 107 N.W.2d 636, 646 (N.D. 1961); *see also infra* Section III.A. The District Court's *sua sponte* assertion of this claim was thus procedurally improper.

[¶115] But more fundamentally, the idea that the State's authority to restrict abortions includes an authority to *compel* abortions is profoundly wrong, and it conveys a deep-seated misunderstanding of the interests at issue. The State's authority to restrict abortions does not include an authority to compel abortions for the same reason that its authority to restrict infanticide does not include an authority to compel it.

[¶116] The District Court's statement to the contrary entirely disregards that the State's compelling interest in restricting abortions is protecting the rights of the unborn life. *See* N.D.C.C. § 14-02.1-02(7) ("'Human being' … include[es] the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."). The State has never claimed, and is certainly not claiming here, any source of lawful authority that would permit it to compel a mother to abort a child that she wishes to carry. Any insinuation or speculation by the District Court otherwise is categorically wrong. It is also devoid of any support in the history and traditions of our State and nation.

[¶117] Justice Scalia addressed the "utter bankruptcy" of that suggestion in his *Casey* concurrence, explaining:

> There is, of course, no comparable tradition barring recognition of a "liberty interest" in carrying one's child to term free from state efforts to kill it. … [I]t does not follow that the Constitution does not protect childbirth simply because it does not protect abortion. The … contention … that the only way to protect childbirth is to protect abortion shows the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, n.1 (1992) (Scalia, J., concurring in part); *see also, e.g.,* Eric Rakowski, *The Sanctity of Human Life*, 103 Yale L.J. 2049, 2091 n.10 (1994) (addressing many problems with that claim).

[¶118] In short, the District Court's *sua sponte* suggestion that N.D.C.C. ch. 12.1-19.1 must be declared unconstitutional lest the State be deemed to have authority to compel women to have abortions should be rejected and repudiated, both because the argument was never made by the parties and also because it is entirely baseless.

H. Tiers of scrutiny analysis.

[¶119] If a statute limits fundamental rights, it will be upheld only if it survives strict scrutiny, which means that "it furthers a compelling government interest and is narrowly

tailored to serve that interest." *Wrigley*, 2023 ND 50, ¶28. Conversely, if a statute does not limit the exercise of a fundamental right, it will be upheld so long as the Legislative Assembly had any rational basis for its enactment. *Id.* at ¶14.

[¶120] Rational basis is the appropriate level of scrutiny here. In *Wrigley*, the Court recognized a fundamental abortion right "to preserve a pregnant woman's life or health." 2023 ND 50, ¶28. But N.D.C.C. ch. 12.1-19.1 does not limit that fundamental right, having been drafted specifically to permit abortions that are necessary for "prevent[ing] the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1). The claim that our Constitution contains fundamental rights to perform abortions that are unnecessary for protecting the mother's life or physical health should be rejected. Thus, N.D.C.C. ch. 12.1-19.1 is subject to rational basis review, which it passes easily. *See Dobbs*, 597 U.S. at 300-01 (state's interest in protecting unborn life provides a rational basis).

[¶121] But even if N.D.C.C. ch. 12.1-19.1 is subject to strict scrutiny to the extent that it conditions the performance of a medically necessary abortion on the physician forming a "reasonable medical judgment" that an abortion is needed to prevent the death or serious health risk of the mother, the statute would still pass muster.

[¶122] "The State has a compelling interest in protecting women's health and protecting unborn human life." *Wrigley*, 2023 ND 50, ¶29. And the practice of medicine is "subject to strict regulation under the state's police power." *Bland v. Comm'n on Med. Competency*, 557 N.W.2d 379, 381 (N.D. 1996) (citation omitted); *see also MKB Mgmt.*, 2014 ND 197, ¶21 (separate opinion of VandeWalle, C.J.) ("a state may use its regulatory power … in furtherance of legitimate interests in regulating the medical profession in order to promote respect for human life, including life of the unborn").

[¶123] As addressed further *infra*, the "reasonable medical judgment" standard is the medical malpractice standard. And it would seem apparent that N.D.C.C. ch. 12.1-19.1 both advances a compelling government interest and is narrowly tailored to the extent it simply requires healthcare providers not to engage in medical malpractice when deeming an abortion to be necessary for preserving the life or health of the mother.

[¶124] Moreover, N.D.C.C. ch. 12.1-19.1 is narrowly tailored because it reflects the well-founded principle of double effect. As explained by a medical expert for the State, the principle of double effect permits a physician to knowingly cause negative medical effects when reasonably done to achieve proportional medical benefits. (R459:4-8:¶¶18-29). A limb can be amputated to save a life; chemotherapy can be used to target cancer cells notwithstanding all of its known harms; the life of an unborn child can be ended when necessary to protect the life or health of the mother. And when there is a collision between the compelling interests of protecting the lives of either the mother or her unborn child, N.D.C.C. ch. 12.1-19.1 is narrowly tailored to provide that the life of the mother may be given priority, consistent with the principle of double effect.

* * * *

[¶125] For as long as we have been a State, North Dakota has prohibited abortions unless necessary for preserving the mother's life or physical health. People were prosecuted under those laws. And despite being amended more than 160 times, not a single amendment to our State Constitution reflects any clear intent to enshrine a right to abortions when not necessary to preserve the life or physical health of the mother. Abortion presents profoundly difficult questions. But absent clear constitutional text otherwise, answering that question for our State is a power that belongs to the people, not to the judiciary.

III. The District Court Erred in Declaring that N.D.C.C. ch. 12.1-19.1 Violates Article I, Section 25 of the N.D. Constitution.

[¶126] As mentioned *supra*, the District Court decreed that N.D.C.C. ch. 12.1-19.1 violates Article I, Section 25's crime victim bill of rights, but offered almost no explanation for that holding. (R603:21, 23:¶¶62, 67). Such an argument was never briefed or argued by the parties, and it appears nowhere in Plaintiffs' amended complaint.

[¶127] Consequently, the Court should reverse that part of District Court's judgment for at least two different reasons, one procedural and one substantive. Procedurally, the District Court's *sua sponte* invocation of a new constitutional theory to strike down a statute violated the party presentation principle. And substantively, there is no evidence to support the conclusion that when the people of this State intended to *sub silentio* create an abortion right when they ratified Article I, Section 25 in 2016.

A. The District Court's analysis of Article I, Section 25 violated the party presentation principle.

[¶128] "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance … distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring); *accord, e.g., United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020) ("Courts … do not, or should not, sally forth each day looking for wrongs to right … [and] normally decide only questions presented by the parties.") (cleaned up).

[¶129] As this Court has explained, the party presentation principle is a "corollary to the

separation of powers," because "[t]he judicial branch is a passive instrument of government." *Overbo, et al. v. Overbo*, 2024 ND 233, ¶8, __N.W.3d__. And while the principle is "supple, not ironclad," *id*. (citation omitted), it carries particular weight when it comes to declaring a statute unconstitutional. "Courts must … approach constitutional questions with great deliberation and the greatest possible caution, and even reluctance, and should never declare a statute void unless its invalidity is, in their judgment, beyond a reasonable doubt." *State v. Blue*, 2018 ND 171, ¶23, 915 N.W.2d 122.

[¶130] This Court has repeatedly enforced the party presentation principle to reverse trial court decisions *sua sponte* declaring a statute unconstitutional, stating: "[r]ather than ruling on an issue not raised or briefed by the parties, the district court should have presumed the constitutionality of a statute until it is clearly shown otherwise." *Blue*, 2018 ND 171, ¶19; *see also, e.g., Denault v. State*, 2017 ND 167, ¶17, 898 N.W.2d 452 (reversing invalidation of statute where district court addressed its constitutionality "sua sponte and without the benefit of briefing from the State"); *Hazelton-Moffit Special Sch. Dist*., 107 N.W.2d at 646 ("The court should not of its own volition go outside of the record and search for reasons for annulling a statute, nor should they conjure up theories to overturn and overthrow.").

[¶131] As this Court explained in *State v. Hansen*:

> Our jurisprudence for deciding constitutional issues requires an orderly process for the development of constitutional claims, which … was not followed in this case. Rather, the district court raised the issue without briefing …. Defense counsel did raise the issue but only after embracing the court's invitation …. Unfortunately the procedure employed by the district court not only leaves the impression that the issue was going to be decided whether or not raised by the parties but that the decision was predetermined. This procedure is not conducive to reasoned decision making.

2006 ND 139, ¶¶11-12, 717 N.W.2d 541

[¶132] The District Court here similarly failed to follow the procedures for invalidating

the statute under Article I, Section 25. No party briefed that argument, and the topic never even came up during the summary judgment hearing. *See generally* (R666) (Jul. 23, 2024 Hearing Tr.). This portion of the District Court's judgment was thus not the product of neutrally adjudicating the issues presented by the parties, and it "disrupts the separation of powers between the branches of government." *Overbo*, 2024 ND 233, ¶10.

[¶133] The District Court's departure from the party presentation principle therefore provides the first reason why this portion of its judgment should be reversed.

B. On the merits, Article I, Section 25 did not create any fundamental right to perform abortions.

[¶134] If the merits of the District Court's Article I, Section 25 holding are reached by this Court, the District Court's holding—rendered without the benefit of briefing, and issued with little explanation—was in error for at least two different reasons. First, nothing in the history surrounding Article I, Section 25's ratification suggests it was intended to *sub silentio* create an abortion right. And second, when read in context, the rights created in Article I, Section 25 relate to a victim's interaction with the criminal justice process, they are not free-floating founts of substantive rights in other contexts.

[¶135] First, the history is again not there. When "construing constitutional provisions, [this Court] ascribe[s] to the words the meaning the framers understood the provisions to have when adopted." *Wrigley*, 2023 ND 50, ¶17. Article I, Section 25 was ratified by the people of this State in 2016. *See* N.D. Sess. Laws 2017, ch. 458 (approved Nov. 8, 2016). Codifying an abortion right into our Constitution in 2016 would have been a significant event. It would have been noteworthy. But the State is not aware of a single statement in the legislative record or in contemporary public media suggesting that when the people of this State ratified Article I, Section 25 they *sub silentio* intended to enshrine an abortion

right. That silence is deafening, especially given that 2016 was not very long ago.

[¶136] Second, even setting aside the complete lack of any evidence that the people who ratified Article I, Section 25 had any intent to thereby constitutionally enshrine an abortion right, it seems clear the rights enumerated for crime victims in that Section relate to the crime victims' interactions with the criminal justice system.

[¶137] Article I, Section 25 lists 19 rights held by crime victims. And while the first two appear fairly broad (i.e., rights to be treated with fairness and to be free from intimidation), N.D. Const. art. I, § 25(a)-(b), the rest have a clear tie-in to the crime victims' interactions with the criminal justice system, the prosecutor, and the accused. For example, it includes: the right to have their safety considered when making bail decisions (*id.* § 25(d)); the right to be notified of and present at proceedings (*id.* § 25(g)); the right to be notified if the accused is released (*id.* § 25(h)); the right to receive records (*id.* § 25(l)); the right to testify at sentencing (*id.* § 25(k)); and the right to confer with the prosecutor (*id.* § 25(j)).

[¶138] "[T]he meaning of an unclear word or phrase should be determined by the words immediately surrounding it." *T.F. James Co. v. Vakoch*, 2001 ND 112, ¶9, 628 N.W.2d 298 (quoting Black's Law Dict. 1084 (7th ed. 1999)); *accord Fischer v. United States*, 603 U.S. 480, 487 (2024) ("a word is 'given more precise content by the neighboring words with which it is associated'") (citation omitted). Consequently, to the extent there is any ambiguity about how broadly any of the rights listed under Article I, Section 25 should be construed, it is clear that when they are considered in context, they should each be understood as relating to the crime victim's interactions with the criminal justice system.

[¶139] While the District Court's Order is not clear on which right(s) in Article I, Section 25 it believes confer a right to abortion, it appears to have gestured toward that Section's

reference to a right to "privacy." *See* (R603:21:¶62). But if that's the case, the District Court's reading ignores the context indicating that the Section is referring to the victim's interactions with the criminal justice system. Quoted in full, it states:

> The right to privacy, which includes the right to refuse an interview, deposition, or other discovery request made by the defendant, the defendant's attorney, or any person acting on behalf of the defendant, and to set reasonable conditions on the conduct of any such interaction to which the victim consents. Nothing in this section shall abrogate a defendant's sixth amendment rights under the Constitution of the United States nor diminish the state's disclosure obligations to a defendant.

N.D. Const. art. I, § 25(f).

[¶140] Ambiguous terms are given meaning by the words surrounding them, *T.F. James Co*., 2001 ND 112, ¶9, and it is apparent that Section was intended to create a right against abuses of the discovery process. That is a far more plausible interpretation than stripping the word "privacy" from all surrounding context and concluding that wherever the word can be found in a constitution it must *ipso facto* create a right to abortions. *Cf.* (R603:21:¶62). That's especially the case where, as here, there is no evidence the people ratifying the amendment had any intent to create an abortion right. *Accord, e.g., Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67, 78 (Fla. 2024) (rejecting argument that a constitutional reference to "privacy" enshrines an abortion right in the absence of any evidence "the public would have understood the principle embodied in the operative text to encompass abortion, even though the clause itself says nothing about it"); *Planned Parenthood S. Atl. v. State*, 892 S.E.2d 121, 132 (S.C. 2023) (similar).

* * * *

[¶141] In summary, the District Court's judgment that N.D.C.C. ch. 12.1-19.1 violates Article I, Section 25 of the N.D. Constitution should be reversed either because it was improperly rendered, or because, on the merits, it is a non-meritorious holding.

IV. The District Court Erred in Declaring that N.D.C.C. ch. 12.1-19.1 is Unconstitutional and Void on the Basis of Vagueness.

[¶142] "A statute is not unconstitutionally vague 'if the challenged language, when measured by common understanding and practice, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for fair administration of the law.'" *State v. Montplaisir*, 2015 ND 237, ¶20, 869 N.W.2d 435 (citation omitted); *id*. at ¶¶27-28 (phrases "'serious bodily injury' and 'substantial bodily injury' in a criminal statute are not unconstitutionally vague" because they are "understandable to a reasonable person").

[¶143] As discussed *supra*, N.D.C.C. ch. 12.1-19.1 has a strict scienter requirement: to be subject to the statute, a person must act "with the intent to terminate" the unborn child. N.D.C.C. § 12.1-19.1-01(1). And even then, the statute does not apply to an abortion "deemed necessary based on reasonable medical judgment which was intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1).

[¶144] The District Court acknowledged that the "reasonable medical judgment" standard "is not new … and is a common term in medical malpractice actions." (R603:9:¶26). Nonetheless, it declared the statute "confusing and vague," (R603:10:¶30), invalidated it on its face, and declared the entirety of the statute null and void. (R603:12:¶35).

[¶145] The District Court's vagueness analysis is fundamentally at odds with this Court's precedent regarding facial challenges. As with its fundamental right determinations, the District Court's vagueness determination appears to have been driven more by outcome than by legal precedent, and it should be reversed by this Court for multiple reasons.

A. The District Court misapplied the test for facial vagueness.

[¶146] As initial matter, the District Court was wrong to strike the statute down facially. Outside of the First Amendment, vagueness challenges are generally only appropriate on

an as-applied basis, because to facially strike down a statute for any other type of claim there must not be a single instance where the statute can provide an understandable core of conduct. *State v. Holbach*, 2009 ND 37, ¶¶25-26, 763 N.W.2d 761 ("Because [plaintiff] does not argue the statute implicates First Amendment concerns, he must demonstrate the statute is vague as applied to his conduct."); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 495 n.7 (1982) ("to sustain such a challenge, the complainant must prove [the statute] is vague not in the sense that it … [provides] an imprecise … standard, but rather in the sense that no standard of conduct is specified at all") (cleaned up, citation omitted); *Planned Parenthood of Indiana & Kentucky, Inc. v. Marion Cnty*., 7 F.4th 594, 605 (7th Cir. 2021) (to survive "a pre-enforcement, facial challenge[,]" "Defendants must only demonstrate that the Statute has a discernable core").

[¶147] The Court's leading case on facial vagueness is *State v. Tibor*, 373 N.W.2d 877, 881 (N.D. 1985). In *Tibor*, the defendant alleged (and the district court held) a statute prohibiting sexual contact with a minor was unconstitutionally vague because the statutory term "sexual contact" could hypothetically be interpreted to apply to conduct like changing a baby's diapers or performing a medical exam on a minor. 373 N.W.2d. at 879 n.2.[7] Those hypotheticals were of course not what the defendant was being charged with.

[¶148] This Court in *Tibor* rejected the facial challenge (reversing the district court's judgment) because the defendant could not demonstrate the statute "to be impermissibly vague in *all* of its applications." 373 N.W.2d. at 881 (emphasis added). As the Court

[7] The statute at issue in *Tibor* defined "sexual contact" as "any touching of the sexual or other intimate parts of the person." 373 N.W.2d. at 879 n.2.

noted, to defeat the defendant's facial challenge, it was sufficient to note that, wherever the outer bounds of the statute may be drawn, anyone "exercising common sense" would know that the statute "clearly prohibits fondling the intimate parts" of a minor. *Id.* at n.4. There was consequently at least *one* application of the law that was understandable, and that was all that was needed to survive a facial challenge. *Id*. at 881 (to be facially vague, "the law must be such that no standard of conduct is specified at all").

[¶149] Moreover, *Tibor* explained that the defendant could not dream up hypotheticals to strike down the law as unconstitutionally vague—such as whether the statute would criminalize a parent bathing her child—because the defendant was not being prosecuted "for such hypothetically unconstitutionally vague applications." *Id.*

[¶150] *Tibor* thus illustrates why the District Court erred when it struck down N.D.C.C. ch. 12.1-19.1, facially and in full, based on concerns that physicians might reasonably disagree about whether an abortion would be "necessary" under given hypotheticals.

[¶151] In order to survive a facial vagueness challenge, there needs to be only one application of the statute with an understandable core of prohibited conduct and an understandable core of permissible conduct. And here, there are many.

[¶152] As Plaintiffs and their experts acknowledged during depositions, there are numerous scenarios where performing an abortion would be necessary to protect the mother's life or physical health, and thus be permissible under the statute—such as where the patient is suffering from hemorrhaging, severe preeclampsia, or preterm premature rupture of membranes. *See* (R451:25:¶44) (State SJ Brief) (compiling deposition testimony from Plaintiffs and their experts on the point). And there are also clearly scenarios where performing an abortion would not be permissible under the statute—such as where a patient

has no medical complications at all.

[¶153] Indeed, a Plaintiff to this case has established at least one scenario where the statute provides understandable cores of conduct. Plaintiff Lessard acknowledged during her deposition that she performed a medically necessary abortion after N.D.C.C. ch. 12.1-19.1 came into effect, concluding, under the facts of that case, that the necessity of performing an abortion to protect the mother's health was a "no brainer." *See* (R455:86:2-89:22, 93:20-97:13) (Lessard Depo.). Plaintiffs themselves have thus established at least one application of the statute where the permissible cores of conduct are understandable—and that is all that is needed to defeat a facial challenge. *Tibor*, 373 N.W.2d. at 881.[8]

[¶154] The District Court's failure to apply the appropriate standard for a facial vagueness challenge is thus the first reason its vagueness determination should be reversed.

B. The "reasonable medical judgment" standard is well-understood.

[¶155] Before the District Court, most of the argument—and most of the dueling expert opinions—addressed whether the "reasonable medical judgment" standard was

[8] Plaintiff Lessard claimed in a declaration that she delayed necessary care for this patient. (R186:6-7:¶¶14-15). But discovery revealed contemporary messages where she said the need for an abortion was a "no brainer." If Plaintiff Lessard actually did delay care after concluding the need for an abortion was a "no brainer," the solution is not striking down the law, it is professional education. *Cf. Hope Clinic v. Ryan*, 195 F.3d 857, 866 (7th Cir. 1999) (en banc), *vacated on other grounds*, 530 U.S. 1271 (2000) ("that some people close their eyes (or minds) and thus do not learn of the law's contents or appreciate its application to their conduct [] does not prevent a state from enforcing its rules").

understandable by those in the medical community. And the District Court appears to have determined, correctly, that of course it is an understandable standard. *See* (R603:9:¶26) (noting that "it is a common term in medical malpractice actions").

[¶156] As the Supreme Court of Texas has explained, "[r]easonable medical judgment … does not mean that every doctor would reach the same conclusion." *State v. Zurawski*, 690 S.W.3d 644, 663 (Tex. 2024) (quoting *In re State*, 682 S.W.3d 890, 894 (Tex. 2023)). Rather, "the burden is the State's to prove that *no* reasonable physician would have concluded that the mother had a life-threatening physical condition that placed her at risk of death or of substantial impairment of a major bodily function unless the abortion was performed." *Id.* (emphasis original) (citation omitted). In other words, it is the medical malpractice standard. *Id.* at 663 n.44; *see also* (R469:120:10-121:14) (Tobiasz Depo.) (acknowledging N.D.C.C. ch. 12.1-19.1 reflects the malpractice standard).

[¶157] And as the Supreme Court of Idaho has explained, "[t]here is nothing unusual about holding physicians to a clear standard of objective 'reasonableness' when exercising medical judgment." *Planned Parenthood Great Nw. v. State*, 522 P.3d 1132, 1207-08 (Idaho 2023); *see also, e.g., Karlin v. Foust*, 188 F.3d 446, 464 (7th Cir. 1999) ("'reasonable medical judgment' standard clearly is … [a] comprehensible standard that provides physicians with more than 'fair warning' as to what conduct is expected of them … because this is the same standard by which all of their medical decisions are judged").

[¶158] While this Court doesn't appear to have directly addressed the "reasonable medical judgment" standard, it has repeatedly held that criminal statutes are not vague simply because they hold people to objective standards of reasonableness—"a much-used legal test." *State v. Tranby*, 437 N.W.2d 817, 821-22 (N.D. 1989) (rejecting vagueness challenge

to negligent homicide statute that criminalized causing the death of another by an "unreasonable disregard of … relevant facts or risks"); *see also, e.g.*, *State v. Hanson*, 256 N.W.2d 364, 367 (N.D. 1977) (rejecting vagueness challenge to reckless endangerment statute criminalizing "deviation from acceptable standards of conduct"); *State v. Hagge*, 211 N.W.2d 395, 398 (N.D. 1973) (vehicular manslaughter statute requiring drivers to be "careful and prudent" provides "an ascertainable standard of guilt").

[¶159] Likewise, there is nothing improper about imposing criminal liability on physicians when their conduct is objectively not reasonable, and courts have repeatedly rejected arguments to the contrary. *E.g., United States v. Hurwitz*, 459 F.3d 463, 478 (4th Cir. 2006) ("allowing criminal liability to turn on whether the defendant-doctor complied with his own idiosyncratic view of proper medical practices is inconsistent with" U.S. Supreme Court precedent) (citing *United States v. Moore,* 423 U.S. 122, 124 (1975) (holding "that registered physicians can be prosecuted under [an implicated federal statute] when their activities fall outside the usual course of professional practice")).

[¶160] As the U.S. Supreme Court noted long ago, "[t]he mere fact that a … statute … [may] require a jury … to determine a question of reasonableness is not sufficient to make it" unconstitutionally vague. *United States v. Ragen*, 314 U.S. 513, 523 (1942).

[¶161] The District Court was thus correct to conclude the "reasonable medical judgment" standard does not make the statute unconstitutionally vague. (R603:9:¶26).

C. N.D.C.C. § 12.1-19.1-03(1) is not unconstitutionally vague simply because it includes both an objective and a subjective component.

[¶162] After correctly noting the "reasonable medical judgment" standard was understandable in the medical community, (R603:9:¶26), the District Court declared the entire statute void for vagueness because the medical necessity exception contains both an

objective component—"reasonable medical judgment"—and a subjective component—"intended to prevent death or serious risk." (R603:9:¶¶25-26). According to the District Court, a physician would not "know against which standard his conduct will be tested." (R603:10:¶¶30). That is simply not a reasonable reading of the statute.

[¶163] As discussed *supra*, no one is subject to the statute unless they act "with the intent to terminate" the unborn child. N.D.C.C. § 12.1-19.1-01(1). And even then, the statute does not apply when terminating the unborn child's life was "deemed necessary based on reasonable medical judgment" *and* "intended to prevent the death or a serious health risk to the pregnant female." N.D.C.C. § 12.1-19.1-03(1). Both of those requirements must be met for the exception to apply; nothing about that is confusing to a reasonable reader.

[¶164] Instead, the District Court's real objection to N.D.C.C. § 12.1-19.1-03(1) appears to go back to the fact there is any objective standard at all. To quote the District Court, "a … physician may provide an abortion with the subjective intent to prevent death or a serious health risk, yet still be held criminally liable if, after the fact, other physicians deem that the abortion was not necessary …." (R603:10:¶26). But that is not an objection to having both components—that is an objection to having any reasonableness standard at all. And for all the reasons discussed *supra*, holding physicians to an objective standard of professional reasonableness does not render a statute unconstitutionally vague.

[¶165] Moreover, to the extent the District Court's Order could be read as suggesting that it is *per se* impermissible for a criminal statute to contain both subjective and objective components, such a conclusion would be categorically wrong.

[¶166] Self-defense law refutes any suggestion it is *per se* improper for criminal liability to turn on both objective and subjective components. Notably, self-defense is the only

other area of criminal law addressing when it is permissible to end one life in order to protect another. And self-defense has both objective and subjective components, as the difference between manslaughter and self-defense turns on both: (1) whether the person who committed the killing subjectively intended to defend themselves or another, and (2) whether that person had an objectively reasonable basis to conclude lethal force was necessary to protect against the threat. *E.g., City of Jamestown v. Kastet*, 2022 ND 40, ¶22, 970 N.W.2d 187 ("The jury … must decide whether [defendant] had a reasonable belief that the use of force was necessary to protect himself from imminent harm.").

[¶167] Plaintiffs would likely prefer not to have their actions judged against any standard, let alone an objective standard of reasonableness. *See* (R468:275:18-282:4) (Tobiasz Depo.); (R563:8) (advocating for "absolute right to choose [an abortion even] when there are no serious medical issues"). But when it comes to ending the life of another person, an objective standard of "reasonableness" is deeply embedded into our legal tradition.

[¶168] Before the District Court, Plaintiffs relied primarily—if not exclusively—on the Sixth Circuit's now-abrogated *Voinovich* decision to suggest there is a *per se* rule against statutes having both objective and subjective components. *Women's Med. Pro. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir.1997), *abrogated by Dobbs*, 597 U.S. 215. But there are several reasons why the Court should reject Plaintiffs' reading of *Voinovich*.

[¶169] First, the majority in *Voinovich* concluded, based on how an Ohio statute was worded, that "[a] physician … does not know "against which standard his conduct will be tested and his liability determined." 130 F.3d at 206. As discussed *supra*, North Dakota's statute is clear that for the medically necessary exception to apply the physician performing the abortion must satisfy *both* the subjective and objective components. That by itself is a

sufficient basis for setting *Voinovich* to the side.

[¶170] Second, the decision in *Voinovich* included an extensive dissent. *See* 130 F.3d at 216 (Boggs, J., dissenting) ("I do not believe there is anything vague, or even novel, about a statute prescribing a standard including components of good faith and reasonableness."). Moreover, three justices of the U.S. Supreme Court would have granted certiorari to correct its vagueness analysis, observing "[t]he panel majority appears to have been concerned not so much with vagueness, but rather with the statute's lack of a scienter requirement relating to physician determinations about the medical necessity of an abortion. … Yet … we have never held … a scienter requirement is mandated by the Constitution." *Voinovich v. Women's Med. Pro. Corp*, 523 U.S. 1036, 1348 (1997) (Thomas, J. dissenting).

[¶171] And third, the majority decision in *Voinovich* hasn't been interpreted by other courts to provide the *per se* rule that Plaintiffs suggest it did. Instead, just two years later, the Seventh Circuit examined *Voinovich* and expressly rejected the notion—pushed by Plaintiffs here—"that a properly worded mixed standard is *per se* void for vagueness in the abortion context." *Karlin*, 188 F.3d at 463. Instead, the Seventh Circuit explained the better reading of U.S. Supreme Court precedent is that a statute with both components "is void for vagueness only if it leaves physicians uncertain as to the relevant legal standard under which their medical determinations will be judged." *Id*.; *see also Hope Clinic*, 195 F.3d at 866 (reiterating the Seventh Circuit's criticisms of *Voinovich*).

[¶172] For any or all of those reasons, the Court should reject Plaintiffs' invitation to announce a *per se* rule that statutes become void for vagueness whenever they have both subjective and objective components.

[¶173] A final point. The test for vagueness is not whether lawyers can find a way to make

a statute unclear. Instead, vagueness is assessed "from the standpoint of a reasonable person who might be subject to its terms." *Simons v. State*, 2011 ND 190, ¶30, 803 N.W.2d 587. It is therefore highly relevant that discovery revealed, in their unguarded text messages, that even Plaintiffs to this very case noted the statute "will allow us to do what we need medically." (R562:5); *see also* (R468:245:22-251:12) (Tobiasz Depo.).

[¶174] The District Court thus erred when it struck down the entire statute because N.D.C.C. § 12.1-19.1-03(1) contains both an objective and a subjective component. Each component is understandable on its own terms, and the statute is clear that both requirements must be satisfied for the exception to apply.

D. N.D.C.C. § 12.1-19.1-03(2) is not unconstitutionally vague because it permits an abortion when the pregnancy resulted from an assault.

[¶175] As noted *supra*, N.D.C.C. ch. 12.1-19.1 created an abuse exception that permits abortions to "terminate a pregnancy that based on reasonable medical judgment resulted from" certain forms of sexual abuse, "if the probable gestational age of the unborn child is six weeks or less." N.D.C.C. § 12.1-19.1-03(2).

[¶176] The District Court also cited this provision to strike down the statute in its entirety, stating that since physicians "are not law enforcement officers, investigators, judges, or jurors," they "have no way of reliably determining … if an individual's pregnancy was the result of a criminal act … such a determination is a legal judgment, not a medical one." (R603:11:¶33). The District Court's conclusion is legally flawed for several reasons.

[¶177] First, and most fundamentally, nothing in N.D.C.C. § 12.1-19.1-03(2) requires healthcare providers to prove to a legal certainty that crime occurred before performing an abortion under that provision. The suggestion otherwise is simply wrong.

[¶178] Instead, it only requires healthcare providers to form a "reasonable medical

judgment" that an assault occurred. One can easily anticipate scenarios where a patient presents with indications, including their own statements, that would support a physician's reasonable conclusion that the pregnancy was caused by a crime.

[¶179] Physicians routinely prescribe treatments by considering both a patient's statements and the results of their own medical assessment—and they are held to the reasonable medical judgment standard when doing so. For example, while there may be a range of scenarios where physicians could reasonably disagree about the propriety of prescribing opioids to a patient complaining of pain, there becomes a point where no reasonable physician would believe the patient should be prescribed opioids, and doing so would be medical malpractice. The same standard applies when evaluating if there is a reasonable basis to conclude a pregnancy resulted from abuse. Again, the "reasonable medical judgment" standard is not whether reasonable minds might disagree; the standard is that no reasonable physician could reach that conclusion. *Zurawski*, 690 S.W.3d at 663.

[¶180] Plaintiffs may be able to come up with hypotheticals where it is unclear whether, under some set of facts, there would be a reasonable basis to conclude a pregnancy was the result of a crime. But under any fair reading of the statute, there are clear cores of conduct that would be either prohibited or permitted. "While doubts as to the applicability of the language in marginal fact situations may be conceived," the statute provides notice of a "reasonably ascertainable standard of conduct." *United States v. Powell*, 423 U.S. 87, 93, 92 (1975); *see also, e.g.*, *Planned Parenthood Great Nw.*, 522 P.3d at 1209 ("'rape' and 'incest' exceptions are sufficiently explicit because there is a set of 'core circumstances' to which they unquestionably apply"); (R458:173:23-177:13) (State's medical expert testifying the "sacred relationship of physician-patient" allows the physician to render a

reasonable medical judgment that a pregnancy resulted from abuse).

[¶181] Second, the idea the statute must be struck down because "[p]hysicians have no way of reliably determining" whether a pregnancy was caused by abuse, (R603:11:¶¶33), entirely fails to grapple with the fact that healthcare providers and many other professionals are already legally required to report suspected abuse under threat of criminal prosecution, especially with regard to minors. *E.g.*, N.D.C.C. § 50-25.1-03(1) (reporting obligations when certain professions have "reasonable cause to suspect" abuse).

[¶182] And those reporting requirements, with criminal penalties, have repeatedly survived void-for-vagueness challenges. *See Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R.4th 782 § 2[a] (Aug. 2024 update) ("Statutory provisions permitting a conviction for a failure to report when there was … 'reasonable cause to suspect' child abuse … have survived claims that they were unconstitutionally vague"); *accord State v. Brown*, 140 S.W.3d 51, 54 (Mo. 2004) (Missouri's mandatory child-abuse reporting statute is "not unconstitutionally vague.… [T]he phrase 'reasonable cause to suspect' … is readily understandable by ordinary persons. … Indeed, every other state appellate court interpreting … similar language in reporting statutes has reached the same conclusion.") (compiling cases).

[¶183] And third, even if the District Court was correct that the abuse exceptions in N.D.C.C. § 12.1-19.1-03(2) are facially vague, the remedy would not be striking down the entire statute. The remedy would be invalidating the abuse exceptions.

[¶184] "It is a fundamental principle that a statute may be constitutional in one part and unconstitutional in another part and that if the valid part is severable from the rest, the portion which is constitutional may stand." *Nw. Landowners Ass'n v. State*, 2022 ND 150,

¶37, 978 N.W.2d 679 (citation omitted). "Where … a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are … so connected together in meaning, that it cannot be presumed the legislature would have passed the one without the other." *Id*. at ¶38 (citation omitted).

[¶185] This Court has never held there is a fundamental right to kill unborn children that are created by an assault, and, as discussed *supra*, nothing in our history or traditions suggest that the people of this State have ever intended to constitutionalize such a right—including when ratifying Article I, Section 25. "[T]he remaining provisions" of N.D.C.C. ch. 12.1-19.1 "can operate independently" if the abuse exceptions in N.D.C.C. § 12.1-19.1-03(2) were to be declared unconstitutionally vague. *See Nw. Landowners*, 2022 ND 150, ¶40. So even if the District Court were correct that N.D.C.C. § 12.1-19.1-03(2) was void for vagueness (and it wasn't, for all the reasons discussed *supra*), the remedy would not be voiding the entire statute, it would be voiding that exception.

* * * *

[¶186] In summary, the District Court's vagueness determination is fundamentally flawed. Outside of the First Amendment context, facial vagueness challenges can only succeed where the statute does not provide *any* ascertainable core of conduct. *Tibor*, 373 N.W.2d. at 881. And, as the very Plaintiffs to this case have demonstrated, N.D.C.C. ch. 12.1-19.1 provides cores of conduct that are understandable "from the standpoint of a reasonable person who might be subject to its terms." *Simons*, 2011 ND 190, ¶30.

CONCLUSION

[¶187] The State respectfully urges the Court to reverse the District Court's judgment that N.D.C.C. ch. 12.1-19.1 is unconstitutional under the North Dakota Constitution.

ORAL ARGUMENT REQUEST

[¶188] As the Court has recognized, the questions presented by this appeal are of "vital concern regarding a matter of important public interest." *Wrigley,* 2023 ND 50, ¶11. The State submits that oral argument will aid the Court in resolution of this case by ensuring counsel are available to address any questions the Court may have regarding the extensive legal arguments, record evidence, and historical materials cited by the parties.

Dated: January 06, 2025.

State of North Dakota
Drew H. Wrigley
Attorney General

/s/ Philip Axt
Philip Axt (State Bar 09585)
Solicitor General
Courtney R. Titus (State Bar 08810)
Director of Civil Litigation
Office of Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505
Telephone: (701) 328-2210
Email: pjaxt@nd.gov
Email: ctitus@nd.gov

Daniel L. Gaustad (State Bar 05282)
Joseph E. Quinn (State Bar 06538)
Marcus C. Skonieczny (State Bar 09062)
Special Assistant Attorneys General
24 North 4th Street
Grand Forks, ND 58203
Telephone: (701) 775-0521
Email: dan@grandforkslaw.com
Email: jquinn@grandforkslaw.com
Email: marcus@grandforkslaw.com

Counsel for Drew H. Wrigley,
in his official capacity as Attorney General for the State of North Dakota

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ACCESS INDEPENDENT HEALTH SERVICES, INC., d/b/a Red River Women's Clinic; KATHRYN L. EGGLESTON on behalf of herself and her patients; ANA TOBIASZ, on behalf of herself and her patients; ERICA HOFLAND, on behalf of herself and her patients; and COLLETTE LESSARD, on behalf of herself and her patients, Plaintiffs/Appellees, -vs- DREW H. WRIGLEY, in his official capacity as Attorney General for the State of North Dakota, Defendant/Appellant, and KIMBERLEE JO HEGVIK, in her official capacity as the State's Attorney for Cass County; JULIE LAWYER, in her official capacity as the State's Attorney for Burleigh County; AMANDA ENGELSTAD, in her official capacity as the State's Attorney for Stark County; and HALEY WAMSTAD, in her official capacity as the State's Attorney for Grand Forks County, Defendants.	**Supreme Ct. No. 20240291** **District Ct. No. 08-2022-CV-1608** South Central Judicial District

CERTIFICATE OF COMPLIANCE

[¶1] In compliance with Rule 32(d) of the North Dakota Rules of Appellate Procedure and the Court's Order granting Appellant's Motion for Increased Page Limitations, the undersigned hereby certifies that the following document:

APPELLANT BRIEF OF DREW H. WRIGLEY

contains 67 pages and was prepared with a plain, roman style typeface in a 12-point font.

Dated: January 06, 2025.

/s/ *Philip Axt*
Philip Axt
Solicitor General of North Dakota

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ACCESS INDEPENDENT HEALTH SERVICES, INC., d/b/a Red River Women's Clinic; KATHRYN L. EGGLESTON on behalf of herself and her patients; ANA TOBIASZ, on behalf of herself and her patients; ERICA HOFLAND, on behalf of herself and her patients; and COLLETTE LESSARD, on behalf of herself and her patients,

Plaintiffs/Appellees,

-vs-

DREW H. WRIGLEY, in his official capacity as Attorney General for the State of North Dakota,

Defendant/Appellant,

and

KIMBERLEE JO HEGVIK, in her official capacity as the State's Attorney for Cass County; JULIE LAWYER, in her official capacity as the State's Attorney for Burleigh County; AMANDA ENGELSTAD, in her official capacity as the State's Attorney for Stark County; and HALEY WAMSTAD, in her official capacity as the State's Attorney for Grand Forks County,

Defendants.

Supreme Ct. No. 20240291

District Ct. No. 08-2022-CV-1608
South Central Judicial District

ADDENDUM TO THE APPELLANT BRIEF OF DREW H. WRIGLEY

Addendum Entry 1:

Albert H. Buck, 1 A Reference Handbook of the Medical Sciences, *Abortion, Criminal*, 28-30 (1885).

Available at:

https://digirepo.nlm.nih.gov/ext/dw/31830700RX1/PDF/31830700RX1.pdf

(last accessed Dec. 30, 2024).

A 98

REFERENCE HANDBOOK

OF THE

MEDICAL SCIENCES

EMBRACING THE ENTIRE RANGE OF

SCIENTIFIC AND PRACTICAL MEDICINE

AND

ALLIED SCIENCE

BY VARIOUS WRITERS

ILLUSTRATED BY CHROMOLITHOGRAPHS AND FINE WOOD ENGRAVINGS

EDITED BY ALBERT H. BUCK, M.D.
NEW YORK CITY

VOLUME I

NEW YORK
WILLIAM WOOD & COMPANY
56 & 58 LAFAYETTE PLACE
1885

impracticable to enumerate all such circumstances; suffice it to say, that no man of tact will commit an indiscretion in this regard. If the woman dies, the physician is bound to express his opinion as to the cause of death, in the form of a certificate; but, in the opinion of the writer, he is not called upon to act as an informer further than that; if the case comes to trial, he should testify without reserve.

In case of a legal investigation, the following questions may arise: 1. Has an abortion taken place? 2. Was it artificial? 3. If artificial, was it justifiable, criminal, or accidental?

An absolute affirmative answer to the first question can rest only upon proof that an ovum, or some part of an ovum, has been expelled from the woman's genital canal, or has been found therein after her death. When an embryo is found, the case is simple; otherwise, the opinion must rest on the finding of placental or chorionic tissue, for neither the membranes (apart from the villi of the chorion) nor the liquor amnii can be positively identified as products of conception. The appearance of the uterus is not proof, for the enlargement of the organ due to pregnancy, as well as the characters of its inner surface usually found after recent delivery, may be counterfeited by morbid conditions, and, to some extent, even by ordinary menstruation. It must not be forgotten, however, that death may have been due to an attempt at abortion, although there was no pregnancy; hence injuries to the maternal structures should be looked for carefully, quite irrespective of the evidences of abortion. But it is not solely in explanation of the cause of death that this question may come up; a woman may pretend to have suffered an abortion when in fact such is not the case. The same rules of evidence hold good here; however, the whole or a portion of an ovum must be proved to have proceeded from her genital tract.

As to the second and third questions, it cannot always be ascertained with certainty whether the abortion was due to artificial interference, for, even when the fact of such interference is obvious, the abortion may have proceeded from other causes nevertheless. But here the law solves the difficulty, proof of intent being held sufficient for conviction, although the means employed may have been manifestly inadequate; it is not even necessary that pregnancy should have existed, or, if it did exist, that the attempt at abortion should have proved successful. Practically, then, the question is: Were means employed with the intention of producing abortion? These means include the administration of any one of a long list of drugs, mostly drastic purgatives and so-called emmenagogues, among which ergot and oil of tansy are those most commonly employed in this country. These drugs seldom accomplish the purpose for which they were given, and, when they do, it is commonly impracticable to prove the fact of their having been used by evidence discovered on medical examination; it is chiefly, therefore, with reference to the question of mechanical interference that such examination is of value. Most professed abortionists seek to accomplish their purpose by puncture of the fœtal envelopes, and the traces of their work are generally at the same time the evidences of their unskilfulness, in the shape of injuries to either the mother or the fœtus; the discovery of such injuries raises the presumption of criminality, to be dispelled or weakened only by evidence that the injuries might have been inflicted unwittingly, as in the unskilful use of instruments for legitimate purposes. Here, to disprove a criminal intent, it must be shown that a legally qualified practitioner did use instruments for the investigation or treatment of a uterine disease, real or supposed; under such circumstances he may be innocent, and the woman guilty, for she may have feigned uterine disease or concealed the existence of indications of pregnancy: on all these points circumstantial evidence will have to be relied on mainly. It may be added that those authors are unjust who hold that mechanical injury to the uterus indicates the intervention of a third person, for nothing is more certain than that women sometimes produce abortion upon themselves by the use of instruments, or that they occasionally inflict mortal injury upon themselves in this way. Another statement by authors may well be questioned, namely, that the woman is necessarily accessory to the act. It is quite conceivable that a guilty paramour should deceive his victim into submitting to surgical manipulation, wholly apart from any intention of hers to procure an abortion. The fact of an intentional abortion having been proved, the act should not be held to have been justifiable unless it appears clearly to have been undertaken with the manifest purpose of saving the woman's life; the best proofs of such a motive lie in the mother's physical condition and in the fact of a consultation having deliberately decided upon the operation, the physicians concerned being persons of known skill and probity. *Frank P. Foster.*

ABORTION, Criminal.—Abortion is defined as the expulsion of the fœtus at a period of utero-gestation so early that it has not acquired the power of sustaining life. Abortion may be divided into three classes, viz.:—

I. Natural Abortion.—(*a*) Miscarriage, *i.e.*, the expulsion of the ovum or non-viable fœtus. (*b*) Premature labor, *i.e.*, the expulsion of the child after it is viable.

II. Artificial Abortion, *i.e.*, the inducing of premature labor for the purpose of saving the life of the mother and, if possible, of the child.

III. Criminal Abortion, or Fœticide.

Of Artificial Abortion.—In cases where it seems necessary to the physician to have recourse to artificial abortion in order to save the life of the mother, it is advisable, when practicable, to consult previously with another medical man as to the necessity of the operation. If, owing to the death of the child in a case of artificial abortion, the physician should be indicted for abortion or manslaughter, as has often happened, it would be necessary for him to show, first, a necessity for the operation, the life of the mother being at stake and the operation less to be feared than a natural delivery; and, second, that his action was *bonâ fide*. Therefore the physician, before assuming the responsibility of causing an artificial abortion, should take steps to make such evidence readily available in case of an emergency. While the laws do not formally recognize the right of the physician to induce premature labor, yet the judges have always held that medical practitioners are morally justified in inducing premature labor, provided the object be to save the life of the mother, of the child, or of both. By statute, in most States, it is provided that the prosecution need not prove that such a necessity did *not* exist, thus throwing the burden of proof upon the defendant. It is, therefore, highly important that the physician should be prepared for this exigency before assuming the responsibility. A learned writer upon the subject says:[1] "We strongly urge upon medical men (1) not to induce premature labor or abortion without the most mature consideration; (2) not to undertake it until after consultation with a second practitioner; (3) in any case to have the full consent, in writing if possible, of the parent or guardian."

Of Criminal Abortion or Fœticide.—In earlier days the question as to the extent to which the criminality of fœticide was affected by the degree to which gestation had proceeded was one of considerable importance. By the common law a distinction was made between the destruction of an unborn "quick" child, and that of one not yet arrived at the period of quickening. The stage of pregnancy at which the child should be considered "quick" was vigorously debated by different writers and schools without arriving at any general agreement. Among the Stoics it was considered that the soul was not united to the body before the act of respiration, and while the ideas of the Stoics were popular the destruction of a child *en ventre de sa mère* was not regarded as a criminal act. Periods ranging from three days to ninety have been assigned by different writers as the time at which quickening occurs. In England the common law considered life not to commence before the infant is able to stir in its mother's womb, and, until recently, the English law punished with death the procuring of abortion after quickening, while the same crime anterior to

quickening was regarded merely as a felony. Throughout all the European nations, save England, and in some of the States of the American Union, the same pernicious distinction is to-day incorporated in the statutes. However, the tendency of modern legislation is to do away with this distinction. In England, this has already been done by a statute which makes an attempt to abort criminal, even though the woman be shown not to have been pregnant at the time. In the United States, legislators, realizing that the civil rights of the unborn child are protected, that it can have a guardian appointed, and can receive property by bequest or deed, have been inclined to enact laws for the preservation of its personal rights to life. In Massachusetts, the Supreme Court having held that at common law it was no offence to produce abortion, unless there was viability, the Legislature immediately cured the supposed deficiency by statute. The Massachusetts statute presents the law as it is substantially in all the States in which the viability of the child is not regarded as essential to the criminality of the offence. The statute reads as follows:

"[10] Whoever with intent to procure miscarriage of a woman unlawfully administers to her, or causes to be taken by her, any poison, drug, medicine, or other noxious thing, or unlawfully uses any instrument or other means whatever, with the like intent, or with like intent aids or assists therein, shall, if the woman dies in consequence thereof, be imprisoned in the State prison not exceeding twenty nor less than five years, and, if the woman does not die in consequence thereof, shall be punished by imprisonment in the State prison or jail, not exceeding seven years nor less than one year, and by fine not exceeding two thousand dollars.

"[11] Whoever knowingly advertises, prints, publishes, distributes, or circulates, or knowingly causes to be printed, advertised, published, distributed, or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement, or reference containing words or language, giving or conveying any notice, hint, or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop, or office where any poison, drug, mixture, medicine, or noxious thing, or any instrument or means whatever, or any advice, direction, information, or knowledge may be obtained for the purpose of causing or procuring the miscarriage of a woman pregnant with child, shall be punished by imprisonment in the State prison or jail not exceeding three years, or by fine not exceeding one thousand dollars."

This is the law as prescribed in the majority of the States of the Union, but in some, notably New York, the old common law distinction between the killing or attempting to kill an unborn quick child and one not quick is still retained; but the courts have not agreed as to the exact stage of pregnancy at which the child should be considered quick. Great latitude is permitted the judge in presenting to the jury the law on the subject. In this connection a celebrated legal writer[2] says: "The weight of medical authority is that quickening is a mere circumstance in the physiological history of the fœtus, which indicates neither the commencement of a new stage of existence nor an advance from one stage to another; that it is uncertain in its periods, sometimes coming at three months, sometimes at five, sometimes not at all; and that it is dependent so entirely upon foreign influences as even to make it a very incorrect index, and one on which no practitioner can depend, of the progress of pregnancy."

Of Medical Testimony in Cases of Suspected Abortion.—It is as a medical expert giving testimony before the courts that the reputable practitioner will most frequently be brought into contact with cases of fœticide. The questions as to whether an abortion has actually been procured, as to the means of inducing it, whether a child found dead was brought to its death by violence, and if so whether the injuries were inflicted before or after birth; all these questions and others of equal importance must mainly depend for their solution upon the testimony of the medical expert. To differentiate between the crimes of infanticide and abortion the services of the medical expert are essential. If a child die after birth, in consequence of injuries received before birth, it is infanticide; but the fact of actual birth must be proved. The fact that the child died in consequence of want of viability resulting from premature delivery is no defence to an action for infanticide if this delivery was caused by the defendant's misconduct in bringing about a miscarriage for the purpose of destroying the child: the test, then, of viability is of the greatest importance to the courts in cases of this nature. To illustrate: In the case of a man indicted for infanticide the evidence showed the child's throat to have been cut, the wound dividing the right jugular vein, and further that the lungs floated in water, showing that they must have been inflated by the act of inspiration; it was shown, however, by the testimony of medical experts that this test merely established the fact that the child had breathed, not that it had been born alive. Numerous instances were cited of children having sustained similar lacerations in the act of delivery. In presenting the case to the jury, Baron Parkes charged them that if they had any doubts as to whether the child was born alive, it would be hardly necessary to go into the evidence in behalf of the prisoner. The jury, without further debate, returned a verdict of acquittal.

Of the Examination by Medical Experts in Cases of Suspected Abortion.[3]—The physician who is required to testify in cases of suspected abortion should endeavor to ascertain whether the abortion has actually been committed, by what means, and at what period. To attain this end, it is well to follow a methodical plan in making the examination. In elaborating this plan it will be well to divide the examination into three classes: 1, The examination of the female during life or after death; 2, the examination of substances expelled from the womb; 3, the examination of instruments or of drugs in the possession of the accused.

1. *Of the Examination of the Woman During Life.*—In making this examination it should be remembered that the duration of the signs of delivery varies greatly in different subjects. They may disappear very rapidly, cases being on record where all signs had vanished in twenty-four hours; or they may be very persistent, having been known to continue for a month. Much depends on the state of health of the mother, and the period of gestation reached. If abortion has occurred at an early period of gestation, the indications are of a very evanescent character, and may, in some cases, be entirely absent. Some of the signs may be simulated by menstruation.

Signs of Abortion in the Living.—A relaxed condition of the vulva and passages, patulousness of the os uteri, the presence of a lochial secretion in the earlier stages, and a white mucous secretion at a later period, together with an acid odor characteristic of puerperal women. The breasts are distended, have a hard knotty feeling, and yield a flow of milk on pressure. The loss of blood produces a general anæmic appearance, and the eyes are noticeably sunken. A peculiar excitement of the pulse, with dryness of the skin, is invariably present. The os uteri is generally perceptibly lacerated. The examining physician should note any signs of violence to the uterus or vagina, also any excessive inflammation of the genital organs. All marks on the body of the woman which may indicate general violence inflicted for the purpose of inducing abortion should be most carefully recorded.

If abortion occurs at an early period of utero-gestation, the indications thereof may be very slight, or even altogether absent. After the third month the insertion of the placenta may be detected by a rough place on the inner uterine wall. In making a post-mortem examination, care is necessary in removing and laying open the uterus, as, if a wound appear, it may be suggested that it was made during the autopsy. Punctures, lacerations, and incisions in the uterus and contiguous organs must be especially looked for; all signs of irritant poisoning in the stomach and intestines, or any inflammation of the bladder or kidneys resulting from the administration of abortive drugs, should be carefully noted. Note, further, any general

marks of violence, especially on the abdomen, also the general appearance of the viscera, *i.e.*, whether they show loss of blood during life such as commonly results from abortion.

2. *Examination of Substances Expelled from the Womb.*—If a fœtus be found, a careful examination must be made to determine its age, whether it was born alive, and, if so, what killed it. It should be carefully examined for punctures or wounds, and should any such be found, try to form an opinion whether the injuries were inflicted during life or after death.

3. *Examination of Instruments or Drugs in the Possession of the Accused.*—In making this examination, note whether the injuries found upon the body of the woman could have been inflicted by the instruments found in the possession of the accused, and whether such instruments show indications of having been recently used. If drugs are found, state whether the symptoms manifested by the woman were identical with those caused by the use of the drug in question.

The results of such examinations as the foregoing are of the utmost importance to the courts of law in the administration of justice. The case of the people against the suspected abortionist must in every case rest upon the testimony of the medical expert. The crime is a secret one; often the law of the State prevents the admission of the woman's testimony. In the graver cases the death of the victim precludes the possibility of her lending assistance to the course of justice. For these reasons many nations have seen fit to commission regular boards of physicians as medical experts, who examine into such cases, and whose testimony alone is received by the courts as that of medical experts. Such is the case in Germany and some other European States. In the United States any physician may testify as an expert, and almost every physician during the course of his practice finds himself called upon for such testimony. Such being the case, it would be well if a formal plan of examination be laid down to aid the medical expert in preparing his testimony. Such a plan has been formulated by Mr. Tidy for the use of the physician called on for testimony in cases of abortion. It is as follows:

Medico-legal Examination in Cases of Abortion.—1. *Examination of the Woman if Living.*—(*a*) Temperament. (*b*) As to the woman's predisposition to abort and the period at which abortion had commonly occurred. (*c*) General state of health. (Note existence of leucorrhœa, excessive menstruation, syphilis, asthma, malignant disease, uterine diseases, etc.) (*d*) Whether woman be well or ill formed. (Note pelvic malformations, effect of tight lacing, etc.) (*e*) Any signs of recent delivery or expulsion of uterine contents. (*f*) Whether any cause can be assigned to account for the abortion, *e.g.*, violent coughing, blood-letting, violent exercise, undue excitement, septic poisoning, violence, administering of medicine, etc. (*g*) All injuries of the genital organs. (Consider whether they could have been self-inflicted.)

2. *Examination of Body of Woman if Dead.*—In making this examination the physician should note: (1) the necessity for care not to mistake the effects of menstruation for those of abortion; (2) to avoid injuring the parts by the knife or otherwise during the autopsy; and (3) to consider the possibility of the injuries having been self-inflicted.

(*a*) Note the existence of any marks of violence on the abdomen or other parts. (*b*) The condition of the genital organs, noting all inflammations, rents, tears, perforations, etc. (If the uterus be injured it should be preserved.) Note also: (1) The condition of the passages (relaxed or otherwise). (2) The condition of the os uteri. (3) Vaginal secretions, and, if present, their character. (4) The general appearance of the breasts, presence of milk, etc. (*c*) Whether there be any signs of irritant poisoning in the stomach, or of inflammation of the bladder, kidneys, rectum, etc. (The contents of the stomach, if necessary, to be preserved.) (*d*) Whether the viscera generally indicate loss of blood during life.

3. *Examination of the Product of Conception.*—(*a*) Nature of the supposed product of conception. (*b*) Consider whether it is merely an evidence of a diseased condition of the membranes, or of the placenta, *e.g.*, structural degeneration. (*c*) If a fœtus be found, determine: (1) whether it was born alive; (2) its probable age, and (3) the cause of death. (*d*) Determine, if there be wounds or other injuries, whether they were inflicted during life or after death.

4. *Examination of all Drugs, Instruments, etc.*—Determine whether said drugs or instruments could be used to produce abortion, and if evidence of such use exists on the person of the woman or the fœtus expelled.

Willis J. Abbot.

[1] Tidy's Legal Medicine, vol. ii., page 160.
[2] Wharton on Criminal Law.
[3] This subject is ably discussed in Tidy's "Legal Medicine," vol. ii. The ensuing discussion of the subject is largely drawn from Mr. Tidy's work.

ABSCESS. [Latin, *abscessus*, from verb *abscedo*, I depart; *abscedo* and *abscessus*, used by Celsus in the sense of the gathering of the corrupted fluids (of the body) into an abscess. Greek, ἀπόστημα. French, *abcès*. German, *Eiterbeule*; though the Germans more commonly use the word *Abscess*.] By the term abscess is meant a collection of pus within the body; this may occur in one of the preformed spaces, or in a new-formed cavity in solid parts. Certain adjective prefixes are used to denote duration, situation, and character of abscesses; thus, as regards duration, they may be acute or chronic; as regards situation, retropharyngeal, perinephritic, perityphlitic, ischiorectal, psoas, etc.; as regards character, the various terms used will be mentioned later. A collection of pus in the pleural cavity has received the special name of empyema, but in the other serous cavities one speaks simply of a purulent pericarditis, peritonitis, ependymitis, or arthritis; a single exception to this is the so-called pelvic abscess, by which is meant a collection of pus in the pelvis, due to a circumscribed peritonitis, the remainder of the peritoneal cavity being shut off by adhesions. Although pus forms the greater part of the contents of an abscess, there may be other constituents present, as blood, shreds of tissue of the part in which the abscess has arisen, foreign bodies, parasites, cheesy material. One speaks of abscesses as primary and as secondary, or metastatic; but, inasmuch as the latter are due to emboli, the term embolic abscess has now wholly superseded the older term metastatic abscess.

An abscess represents the results of a purulent inflammation; occurring in a preformed cavity its walls are, primarily at least, those of the cavity; if in a solid organ, there is in its earliest stage an infiltration of the tissues with round-cells, later a liquefaction of the pre-existing tissues, thus giving rise to the formation of a cavity containing pus. At this stage the wall has a smooth lining, consisting of a vascularized connective-tissue layer, to which the name of pyogenic membrane has long been applied, the supposition being that it was this lining which secreted the pus. That all the pus comes from this source can readily be shown to be erroneous from the fact that, in the earlier stages, abundant pus is present before this membrane has formed. Often there is not this tendency to remain circumscribed; on the contrary there is an extension of the pus, the so-called "burrowing," in the direction where the least resistance is offered, soft parts, like muscles, readily yielding, whereas fibrous tissues, like fasciæ, afford a stronger barrier. In the lymph-sheaths of tendons the progress of the pus is very rapid. Abscesses situated near the exterior of the body tend to approach nearer the surface, and are then said to "point;" the skin over the abscess becoming thinned, may finally rupture spontaneously, and thus permit a discharge of the contents. Abscesses in organs having a serous covering often extend peripherally, perforate the capsule, and discharge the pus into the serous cavity, setting up a purulent inflammation of the same. If, however, at the point of rupture two serous surfaces lie in contact, an adhesive inflammation between the two may occur previous to perforation, and thus prevent the escape of the pus into the cavity in which the organ lies. It is in this way that abscesses of the liver occasionally discharge into the bronchi, adhesions occurring between the capsule of the

Addendum Entry 2:

C. Woodhouse, M.D., *A Lecture on Criminal Abortion*, 4 Medical Investigator 25, 25-29 (1866)

Available at:

https://books.google.com/books?id=WKW6YxcbukAC&newbks=1&newbks_redir=0&dq=abortion%20necessary%20insane%20OR%20mental%20OR%20lunacy&pg=RA3-PA25#v=onepage&q&f=false

(last accessed Dec. 30, 2024).

THE

MEDICAL INVESTIGATOR.

VOL. IV.

(NEW SERIES.)

C. S. HALSEY.

CHICAGO: 147 CLARK ST.
BUFFALO: 238 MAIN ST.

1866–7.

Medical Jurisprudence.

A LECTURE ON CRIMINAL ABORTION.

BY C. WOODHOUSE, M. D.,

DELIVERED AT HAHNEMANN MEDICAL COLLEGE, NOV. 15TH, 1866.

GENTLEMEN: The daily and weekly newspapers of the country subserve so many useful and necessary purposes, that but few families claiming or desiring any great degree of intelligence can afford to do without them.

The student in the great school of human nature can study nothing with so much profit as these agencies of civilization and progress. Shut a youth up in the London Museum, the Astor Library, or the famous one at Berlin, for a dozen years, let him ponder over the vast tomes of science, philosophy and history, which are corded up in those institutions, and deny him during these years the newspaper, and he will graduate from his cloister, it may be, a ripe scholar, but most certainly a learned ignoramus. He will know nothing of the existing forces which move the world to thought and action.

Some educators have suggested that it would be a good plan to introduce newspapers into the common schools and academies of our land, to enable the pupils to get daily, or at least weekly views and reviews of practical every-day life. It is thought that in this way, the schoolmaster, commenting on their various articles, advertisements even, and commercial items, could not only teach "the young idea how to shoot," but by explaining its varied contents, passing from "grave to gay," from the "sublime to the ridiculous," in rapid succession, he would every day paint, as it were, a truthful picture of life—not in London, Paris, New York or Chicago merely, but of the world! He would thus possibly enable the pupil on the school bench to shoot "folly as it flies," and most certainly to catch "the living manners as they rise!"

Well, gentlemen, there is truth in this claim. The newspaper is a world in words, and if you would learn the world, read the words. By no means must its advertisements be neglected. Let me read you a few, naturally selected in view of our subject, on the present occasion. I take them from the daily papers of this city, and I ought to say, the *Chicago Republican* is not one of them, to its great honor.

"To the ladies.—Dr. —— is Professor of the Discases of Females, and can be consulted on all private and delicate derangements, with the assurance of relief. No lady should be without a box of Dr. ——'s celebrated Female Pills—a safe and effectual remedy for irregularities and obstructions, no matter from what cause. N. B.—The directions when these pills should not be taken accompany each box. Price $1 and two stamps. Send two stamps for 'Private letters to Married Ladies.'"

"Young men, take particular notice! You who, by indulging in certain solitary practices (or from any other cause) have contracted that mind-harrowing and body-destroying disease, Seminal Weakness, can be restored to health by applying either in person or by letter to Dr. ——. Send two stamps for 'Private Letter' on this subject."

Another:

"The doctor never makes a second charge for one disease. His terms are reasonable, and he has been long enough in Chicago to have established the character of the best practitioner in this branch of medicine. Female pills guaranteed to effect what they are needed for, and information given on any delicate subject by sending two stamps. Send $1 for box of his celebrated Female Pills. Sure cure. Send two stamps for Private Letter on Seminal Weakness. Send two stamps for Private Letter to Married Ladies."

Another:

"It does not interfere with diet or occupation. It operates without sickness or exposure, and is certain in its effect. It not only prevents from having children, but it will restore the monthly periods, and improve the health.

P. S.—Just Issued, 'The Monitor; or Handbook on Secret Diseases: how to avoid them, etc.' Also, important information to females, and other information worth knowing."

I need not comment at length on the obvious objects of these advertisements. And I think were the schoolmaster to cause these disgusting notices to be read in his school, and were he to comment on them to a class of boys and girls, he would shortly receive notice to retire from his business. And yet the necessity of having the newspaper, carries them to half the families and firesides of the country.

Criminal abortion is become an evil of great and increasing proportions in our midst. It is carried on as a specialty and unblushingly made a regular business. The advertisement, the circular, the private assurance of the unscrupulous doctor, promise to make crime safe, secret and easy. Its evils, with the increase of knowledge, are multiplying daily. The "rural districts" even, are up to metropolitan standards. In one of the quietest little nooks in an agricultural settlement, away from the busy haunts of men, I was lately called to see a lady, whom I found in great bodily pain, and her life in peril from an apparently accomplished abortion. With great frankness she confessed she was the victim of a woman, who followed this business, and understood it well, as she thought. But she could not disclose her name as she solemnly promised she would not. This female abortionist assured her that "she had always good luck," "her patients never had any trouble," and "none of them were laid up a day or ever died from the operation." With these assurances—the fee paid in advance—she permitted, at two different times, a month intervening between them, the infernal machine—in this case a flexible india rubber tube, containing a concealed movable wire—to be forced into the womb, and thus the damnable crime of fœticide was accomplished. I said she suffered great *bodily* pain, her *mental* anguish—for she often thought she must die—was greater still. She had no sympathy from her husband, who strongly condemned her. She lay weeks upon her back, and twice in the night I was summoned to her bed-side, to find her almost lifeless from the copious "floodings" that would occasionally come on in spite of every remedy and means that could be used to prevent them. She barely lived. But less fortunate are many others. The grave—the premature grave—over which friends mourn their loved and lost, holds many a secret of the vile abortionist and his erring victim. Let it be understood always, that abortion imperils the mother's life.

The *instruments* and *agencies* in use to procure abortion are various. They are often such as are used to induce premature labor. Churchill, pp. 306-9, gives, I think, eight modes for this purpose. The desire of the honest accoucheur, however, in inducing premature labor is to save the life of both mother and child, if possible so to do. The criminal abortionist, when he uses these modes, desires to kill the fœtus. The modes most usual among the occasional or unprofessional abortionists, are the employment of medicinal substances, such as *Arsenic, Sulphate of Copper, Colycynth, Croton Oil, Savin, Cantharides, Black Hellebore, Tanzy*, and massive doses of *Ergot*. I was once called to a woman, who said she bought and took two ounces of Spurred Rye, and it did the murderous job for a fœtus about seven months old, and came pretty nearly doing the same for herself. Sometimes old ladies—no, I will use a less respectful appelation, old crones—will advise young wives in "family

way" to dance, jump over fences, mop every floor in the house three times a day, wash windows on a ladder, whitewash walls and ceiling, and anything to "strain the strings," to get rid of the pains, travail and trouble of maternity. I once heard a doctor boast of the number of cases of abortion he had enabled women to produce on themselves, by a persevering use of cold water thrown by a syringe into the vagina, and against the os. Generally, I should judge, however, the professional abortionist, resorts to some instrument, which he passes through the neck of the womb, into the workshop of the Almighty, and where his fingers are forming a human being, and wickedly and brutally interferes with the wonderful processes instituted by Infinite Wisdom to perpetuate our race! A sin foul as the defiance of heaven can make it.

We are, of course, not to conclude hastily, when called to a case of the kind, and we find that the woman has aborted, or is in danger of doing so, that there has been any intentionally improper interference, either on the part of the woman or any body else. There are many women—educated and moral women—women of piety and truth—who would as soon think of committing any other great sin, as to procure abortion on themselves. But women will abort, sometimes, from slight causes even, in spite of themselves, and the most judicious efforts of their medical advisers to prevent it. And sometimes women will not abort though all the usual means, and even unusual means, are resorted to to effect it. Dean, p. 145, gives us a remarkable case taken from Guy, who gives it as related by Dr. Wagner of Berlin. The young woman, in this case, had resorted to *Savin* and other drugs to produce miscarriage, being seven months pregnant. Failing in these means, so often successful, "She next had a strong leather strap (the thong of a skate) tightly bound around her body. Her paramour then knelt upon her, and compressed the abdomen with all his strength. He trampled next on her person, while she lay on her back. As all these failed to produce the desired effect, he took a sharp pointed pair of scissors, and proceeded to perforate the uterus through the vagina. Much pain and hæmorrhage ensued, but did not last long. The woman's health continued unimpaired, and about the regular time she produced a living child without having upon it any marks of external injury." If we credit this statement, and I know not how to do otherwise, it seems to me that the claims that iron-clads are a recent invention, must fall to the ground, and this girl must have been the first Monitor.

Where a woman denies any improper act on her part, you should, as a matter of common charity and justice, remember how many *causes* of abortion there are, without wrongful act or intent on the part of any one, and not permit a hasty opinion to do injustice, even in your thoughts, to your patient. But it must be confessed that some will deny, even when they have been guilty.

The predisposing causes to abortion are given in great detail in the books. Let me briefly say that it may proceed from a diseased condition of the fœtus, or of its membranes, which will cause the woman to cast off the dead or dying fœtus, as a tree casts off or drops its blighted fruit. A habit here is as, bad as a habit anywhere else, hard to break up. A small accident or fright may bring it about. Abortion is said to be most likely to occur in women of full and plethoric habits and of irritable and nervous temperaments. (So say some authorities. My own observation, limited indeed, is, that spare women, with a scanty allowance of blood, are most likely to meet with this accident.) Those women affected with syphilis, ulceration of the cervix, and organic diseases of the uterus, are very liable to this calamity. Strong moral or mental emotions of joy or grief, may produce it. Miscarriages come from these causes. As to hard work, with women accustomed to labor, so far as I have ever noticed, they do not seem any more liable to abortion than women who kill time riding in coaches or lolling on sofas from day to day; nor does labor increase the perils or pains of childbirth, unless it is excessive. The Hebrew women in captivity suffered less in childbirth than the pampered mothers of Egypt in freedom.

Women who are most likely to procure abortion are such as have an unusual dread of the pains of childbirth, and who both hate children and hate to have them, single and married women of easy virtue, young wives, too young to begin to have children, and old wives, too old to have the care of babies, and those who think they have done their share in multiplying and replenishing the earth. Further, women fond of society, gaiety, and fashionable life can't spare the time to have babies; women who have not health and strength enough, and women who think they are too poor, or have more already than they can support. A very numerous class consists of the unmarried—often young girls—who have been made the victims of unprincipled men, and have fallen. The laws punishing seduction are very lax in most States and countries, where there are any at all. Some States make its punishment very light, and some make it take the rank of crime. That is a very contemptible law which only makes the seducer of a young girl pay but a few dollars in money for loss of time and maintenance of his child. But this is not the worst of the case. By a strange standard of morals, the seducer hardly loses in reputation, even among the women, while the unfortunate girl, less guilty than her seducer, is despised by her own sex, cut off from their sympathies, and becomes too often entirely ruined.

If there is a case which would warrant the production of abortion, it is that of a poor girl, with the certain prospect of becoming a mother, and no prospect of becoming a wife. But the conscientious man has but one course to pursue, should this office be pressed upon him, and that is, *to do no murder*. Much may be done to correct this evil by establishing correct and unbending standards of respectability in community, and by laws making seduction a higher crime than stealing a horse or counterfeiting a bank note. In establishing this standard of respectability, had I an audience of women before me, I would urge them to do their own part, as more than all others, in duty bound to protect their own sex and rights.

The Jurisprudence of Abortion I now propose to notice.

In our remarks on this branch of our subject, it is a matter of regret that the laws of our country in relation to it, are far from being all that the interests of society demand. But it is the duty of the medical man, and especially the medical author, to do what he can to correct these mistakes, and supply their deficiencies. It is in this conviction that we consider, in this place, this momentous subject.

In medicine, we understand by abortion the expulsion of the fœtus before the sixth month of gestation. If this expulsion takes place between the sixth and ninth month, this, in medical parlance, is termed miscarriage, or premature labor. The popular word for both is miscarriage. And the law does not make the distinction made by medical men. In many instances the law, unfortunately, recognizes the popular falsehood, that a woman may be at a certain point of time, "not quick with child," and in the next instant "quick with child," and this event is supposed always to take place several months after conception. It is needless to say, that no sound physiologist can give the least sanction to this error; an error fruitful in sin and crime, however venerable for age. Lawmakers, as well as people, need enlightenment on this matter. Those who believe that at a certain period, say the fourth month after conception, the fœtus for the first moment begins to live, will agree that it is no moral wrong to remove it before that time, and justify themselves for this crime on this false ground. But a little

reflection must satisfy the reason, that the fœtus from the beginning must exist in one of two states, *life* or *death*. If dead from the beginning of gestation, that death is a *finality*. The mother has no power to give life to a dead fœtus within her. If the fœtus is alive at the fourth or fifth month, or in any period of utero-gestation, it must have been alive from the beginning. Unless the word "quickening," in connection with this subject, can be so used as to guard against error, it had better not be used at all. It is to be hoped that, at all events, the absurd distinction of "quick and not quick with child," will soon be banished from the legal codes of all civilized lands. And inasmuch as the laws, in many States, do not (to use the language of Storer), "recognize the true nature of the crime of abortion, draw unwarrantable distinctions, allow many criminals to escape, neglect to establish a standard of justification, and in many respects are at variance with equity and justice," every true physician should aim to perfect, as far as his influence may go, codes for courts, and ideas for the people, until the Divine command, "Thou shalt not kill," shall be understood to apply alike to the taking away of all human life, fœtal or otherwise.

We will now give a brief view of some of the laws of different countries and States, on abortion:

ENGLAND.—In this country the absurd distinction of "quick and not quick" is not done away with. Within the reign of the present Queen the following law has been enacted: "Whosoever, with the intent to procure the miscarriage of any woman, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, shall be guilty of felony, and being convicted thereof, shall be liable at the discretion of the court, to be transported beyond the seas for the term of his or her natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." It will be seen at a glance, that this law makes no exception in respect to medical men, who may adopt, for any purpose or with any motive, this practice. It would doubtless be essential for them to show, in case of prosecution for this offence, that their motives were as good as those of the surgeon's in amputating a badly diseased limb, to save himself from the penalties of the law. The English law is clearly against the practice, by any body.

SCOTLAND.—Mr. Allison, a late writer on Scottish law, states it thus: "If a person gives a potion to a woman to procure abortion, and she die in consequence, this will be murder in the person giving it, if the potion was of that powerful kind which evidently puts the woman's life at hazard." Further, "Administering drugs to procure abortion is an offence at common law, and that equally whether the desired effect be produced or not." In 1806 and 1823, persons who used *instruments* for this purpose, were sentenced to transportation for this offence. However it may be in actual practice, the Scotch law, as given by Allison, makes no exception in behalf of medical men. Like the law of England, it shows some advance in a right direction, by discarding the phrase, "quick and not quick," etc.

FRANCE.—The Code of Napoleon declares that every person who by means of ointments, beverages, medicines, acts of violence, or by other means, shall procure the untimely delivery of a pregnant woman, although with her consent, shall be sentenced to confinement." The mother procuring abortion on herself is similarily punished, under the same code. And it also provides that "Physicians, surgeons, apothecaries, and other officers of health, who shall prescribe or administer such means of abortion, shall, if miscarriage ensue, be sentenced to hard labor for a limited time."

AUSTRIA.—The criminal code of this country, established in 1787, by Joseph II., decrees that a woman with child, using means to procure abortion, is to be imprisoned not less than fifteen years, nor more than thirty, and condemned to the public works. If married, the punishment is still greater. Even advising abortion is severely punished, and where the accomplice is the father of the infant, the punishment is increased.

GERMANY.—Beck gives the following summary of the laws of Germany: If produced within thirty weeks from the time of conception, the woman or her aiders are imprisoned from two to six years. The punishment when committed in the last month of pregnancy, is imprisonment from eight to ten years.

ITALY.—The laws punish the women who make the attempt only, to confinement from six months to a year; if she is successful in the attempt, she is confined from one to five years. If the father of the fœtus is a party to the crime, his punishment is still greater. The party attempting abortion against the will of the mother is punished with four to ten years' severe imprisonment; and if the life of the mother is endangered, or her health impaired, the imprisonment is five to ten years.

STATE OF NEW YORK.—The laws of this State, on abortion, are now embraced in three sections, one of which provides that for the willful commission of this crime, by medicine or instrument, the offender shall be imprisoned in the county jail not less than three months, nor over one year. This section omits the distinction of "quick and not quick." Another section provides for punishing the offence, committed on a woman *quick with child*, with intent to destroy the child, unless necessary to save the life of the mother. Otherwise than for this purpose, if either child or mother die in consequence, the offence is manslaughter in the second degree, and the punishment is State prison, for not over seven nor less than four years. A further section provides that the willful killing of an unborn quick child, by an injury to its mother, which would be murder if it resulted in her death, is manslaughter in the first degree, and the penalty is State prison for not less than seven years. This great State has for its motto "Excelsior," and doubtless may for many good reasons still use it; but it needs to follow in the wake of England and Scotland, and younger sister States, in discarding from its laws on abortion the pernicious and absurd phrase, "quick and not quick," etc.

STATE OF CONNECTICUT.—Here this absurd distinction of "quick and not quick," still remains, but the crime may be punished by State prison for life.

STATE OF OHIO.—In the laws of this State, the same absurd distinction is kept up as in New York and Connecticut, but there is a provision justifying the physician in saving the life of the mother, even at the expense of that of the fœtus.

STATE OF MASSACHUSETTS.—In 1845, this State adopted a law, discarding the distinction of "quick," etc., and providing that abortion, by whatsoever means produced, if the woman die, shall be punished by imprisonment for not less than five years, nor more than twenty. If the woman do not die, the offence is a misdemeanor, and the punishment not over seven years, nor less than one, and by a fine of not over $2,000.

STATE OF MISSOURI.—The penalty for this crime here is imprisonment not over seven years, and a fine not over $3,000.

STATE OF VIRGINIA.—The offence is here punished by confinement in the penitentiary not less than one nor over four years.

In all these named States, provisions are made for exempting from punishment any physician, or other person, where the act is done in good faith, with intent to preserve the life of either mother or child. (See *Beck. Med. Jurisprudence*, Vol. I., page 584).

STATE OF ILLINOIS.—In the laws of this State, the absurd distinction alluded to is not retained. The punish-

ment is confinement in the penitentiary not over three years, and a fine not over $1,000.

STATE OF IOWA.—From the year 1851 to 1858 there were in this State, strange to say, no laws punishing the procurement of abortion. Prior to the year 1851, the "willful killing of an unborn quick child, by drugs or violence," was punished as manslaughter. But for this omission of duty and once legal recognition of the false distinction of "quick and not quick," etc., Iowa has nobly atoned by giving a very good law (a model for some other States) on this subject. It reads as follows: "That every person who shall willfully administer to any pregnant woman, any medicine, drug, substance or thing whatever, with the intent thereby to procure the miscarriage of any such woman, unless the same shall be necessary to preserve the life of such woman, shall, upon conviction thereof, be punished by imprisonment in the county jail for a term not exceeding one year, and be fined in the sum not exceeding one thousand dollars."

STATE OF CALIFORNIA.—The law against abortion in California, says *The Medical and Surgical Reporter*, is exceedingly stringent. It declares that the person on whom an abortion is practised shall be held as guilty as the abortionist. The object of this feature of the law is to relieve the physician of vexatious lawsuits, to which he is sometimes subject by the attempt of certain wicked females to fasten upon him criminal abortion, when he has not even been applied to at all in the matter. A case of this kind is said to have occurred in San Francisco, and illustrates the necessity of the law in that State, even though the cases which may occur under it are few. Procuring an abortion is justly regarded as a crime of great magnitude, and the laws of all the States, so far as we are informed, inflict upon the perpetrator a heavy penalty; and the law is right. Its penalties are none too severe; indeed hardly enough so, to prevent its occasional if not frequent violation.

These citations of some of the laws on abortion, are sufficient to show how this crime is viewed in different States and countries, and also to call attention to such improvements in them as the facts in physiology and the authority of the divine law shall suggest and require. The laws should in no case create or perpetuate the distinction of "quick and not quick with child," as it is repudiated by right reason and sound physiology. The fact should also be pressed upon the attention of lawmakers that a pregnant woman may, herself, be mistaken as to whether quickening has taken place or not, and that she may bear a living child without having been ever conscious of quickening having ever taken place in her case at all. The laws should leave no loop-holes for the escape of the offender, who knows the nature and enormity of the crime he or she commits. One State, for instance, could be cited, where the laws are perhaps sufficiently severe against the crime of abortion, when produced by *drugs*, but, singularly enough, says nothing against its production by *instruments*. The moralist has a duty to do in the premises, and all books on abortion should be deemed exceedingly faulty, which do not bear testimony against this evil, and help to aid its suppression.

Before I leave this point of fœtal life from the beginning of Utero-Gestation, I wish to give you the opinions of others—opinions worthy of careful consideration. Prof. Dean, p. 129, says, Physiology "asks what is the state of the fœtus prior to the period of quickening? Is it alive or dead? If alive, then it does not become *first* endowed with life at that period. If dead, where are the evidences of it—putrefaction and decomposition, which are always the inevitable consequences of the extinction of the vital principle?" On page 130, he winds up his argument thus: "It may be affirmed, upon sound physiological principles, that the embryo possesses vitality from the moment of conception."

Prof. A. E. Small, (after having shown the existence of fœtal life, before quickening has taken place), in his admirable lecture on Criminal Abortion, published in the *Medical Investigator*, and reprinted in Hale's work on Abortion, says, "this fact once established, we are struck with a full sense of human degradation; mothers imbruing their hands in their infant's blood; fathers equally guilty; nurses who lend themselves to the infamy; members of the medical profession, made wicked by their wholesale murders, out Heroding Herod;" (Herod slew all the children that were in Bethlehem and its courts from two years old and under)—"eclipsing in criminality the pirate upon the seas, the midnight robber, or highwayman."

You will notice, gentlemen, that the laws which I have cited from various sources, representing we may say the sentiment of the most enlightened lawgivers and jurists in the world, on the subject of abortion, as a crime and its appropriate punishment, that while in some of these laws no emergency is allowed to justify abortion, in some other cases, as in the laws of Iowa, and I may add Mississippi, Minnesota, Maine, New Hampshire, Michigan, Indiana, and some others, abortion may be justified where the object is to save the *life of the mother*, and in some other States where the object is to save the *life of either child or mother*. You will also notice another important fact, and to this fact I call your very special attention, i. e., not one of these laws proposes to justify the abortionist or doctor in producing abortion, either before or after fœtal viability, to preserve the health of the mother. Nor does any other State, in our land, to my knowledge, make this provision. Sometimes, it is true, that the health of the mother during pregnancy may become very poor indeed, but not to save her health, can abortion be justified either in law or morals at any period of utero-gestation. Where the case is clear, unmistakeable, that the woman must inevitably die in consequence of poor health, unless she is delivered before her child can, in the due course of nature, be born, or that her child never can be born and the mother survive, the case is vastly different from the mere question of *health*. Tens of thousands of women suffer in health almost daily while bearing children. They have their morning sickness, vomiting, their mental anxieties, their bodily sufferings, and yet these tens of thousands, sustained often, and as they should be always, by sympathizing friends, by the consciousness that the office of reproducing the divine image in the human form is their sacred privilege, as well as their heaven-appointed duty, obligatory as divine, bear up and suffer on until God grants them a safe deliverance.

And here, gentlemen, let me caution you to be well guarded against all false reasoning, as to the comparative value of the impregnated ovum with ovulation, and especially, the comparative value of the impregnated ovum with the viable fœtus. The effect of all this false reasoning, we may fear, is to lead to the belief that it is no more sinful for a person to cause the abortion of a fœtus before viability than to permit the ovum to be cast away unimpregnated, or that a woman is no more bound, morally or legally, to carry an impregnated ovum to the point of viability, than she is to see to it that the ovum of her body is impregnated; or, if she can justifiably omit the latter, abortion before viability is a matter involving really no sin. In plainer English, she is no more bound to bear a baby from its embryonic state to the point of viability or the full term of utero-gestation, than she is to get aid, from the necessary quarter, in the inception of one, when the requisite conditions on her part are present.

Now the mere circumstance of ovulation only shows a susceptibility to impregnation, but no commencement of human life. The impregnated ovum is the commencement of life—life in the womb; and infancy, at birth, is

not the commencement, but the continuance of life out of the womb, that same life that began with the beginning in that mysterious workshop of which I have spoken, and which has never been interrupted, and which continues on "until the golden bowl shall be broken at the fountain and the wheel at the cistern, and the dust shall return to the earth as it was and the spirit to the God who gave it." I know not how in view of these facts to measure the relative value of the viable fœtus and the impregnated ovum. May the impregnated ovum die, or suffer from early blight? So may a viable fœtus die, and the difference is, that one lives only a little longer than the other. We might as well try to determine the relative value of an infant drawing its first breath and a full grown man.

Now, gentlemen, for all this flimsy speculation, which I have endeavored to expose, there is neither, as I think, physiology, morals, nor law to support it. The old law of the Romans taught this truth—"A child conceived is to be considered a child born." By a Supreme Court decision, involving the right to legacy under the grandfather's will, the law is thus established. Let me give you the case taken from Massachusetts Reports, 15, page 255, by Pickering: The grandfather died June 19, 1809. Charles L. Hancock, the grand-son and claiming legatee, was born March 6, 1810, so that the grand-son was not born till over eight and a half months after the grandfather's death. The will devised property to such of his grand-children "*as should be living at his decease.*" The court held that Charles L. should inherit, declaring that "in general, a child is to be considered *in being* from the time of its conception, where it will be for the benefit of such child to be so considered." In England, Lord Macclesfield, in the Burdett case, decided in the same way. Physiological investigations sanction this law of courts. With the vital union of the male and female generative properties, human, individual, life begins. The book of Job is thought, by many, to be the oldest book in the Bible, and that book recognizes the sex as well as the fact of a human being at this joining of the ovule of the female and spermatozoa of the male. Hear his words—"Let the day perish wherein I was born, and the night, in which it was said—There is a *man-child* conceived."

There may be, occasionally, in a very large practice, cases where abortion is necessary to preserve the life of the mother, or premature labor that of the child. Against the practice under these very rare circumstances—supposing of course they are well ascertained—we say not a word. The law in some States, as we have seen, makes this a ground of justification; and in other States and countries, where no standard of justification exists in the statute, the physician can plead the necessity of his act to save the life of the mother or offspring. On a trial for this offence, it would be very much to the advantage of the physician to have a *clean record.* If it was made to appear that no good ground of justification existed in the case, that he was in the habit of having a great many of these desperate cases, and that he proceeded to induce abortion on his own responsibility, without counsel, when it was possible to obtain it, I would not be willing to ensure his acquittal by a just judge and honest jury. It is to be hoped that the legislation of the country will throw more and more proper restraints around this practice. Never, I feel certain, will the law permit an impregnated ovum to be destroyed on the mere plea that it was necessary to preserve the health of the mother. Were law-makers and courts to recognize this excuse and defense for abortion, well nigh every barrier to this sin would be broken down, and not only this, but well nigh every legal obstacle to fœticide, in all stages of utero-gestation, would go by the board. How easy to say, and show, that the woman's health was not good, that she vomited, was "nervous," "irritable," "unhappy," ever since she became liable to become a mother? How easy to presume that abortion, under these conditions, was important to the recovery of the patient?

Much denunciation has been poured out on the heads of the Madames Restelle and Beaumont. But, gentlemen, the laws of God and man, know no difference between them and those doctors who for a fee, a tempting fee, disgrace themselves, and, as far as they can, a noble profession, and justify themselves because they are doctors. Such doctors, if they will do this infernal work, should receive no countenance from their professional brethren, and no support from any accredited medical authors. Let them be driven to such books as the "Secret Friend," and "Medical Lighthouse," for their authority. Books to be placed in the hands of the profession, and to guide the medical student, should be so carefully written, that no slip of the pen even, could be so construed as to sanction, except for reasons as weighty as life itself, this practice. If the medical profession, the law-makers, the courts, the pulpit, and the better classes of society, will do their whole duty in reference to this subject, the respectable portion of the newspaper press will be compelled to close their columns against the indecent advertisements which now disgrace them, and continually suggest to the minds of interested readers the ease with which this sin may be committed and concealed. How a man can repeat daily the prayer, "Lead us not into temptation, but deliver us from evil," and yet pocket the profits of these foul and vicious publications, is more than I can well comprehend. Do not say, sin and crime must keep pace with knowledge. Has heaven so decreed? The very thought is impious. Man is free. Duty is plain. The highest authority has declared—"He that knoweth his master's will and doeth it not shall be beaten with many stripes." With knowledge comes responsibility. "To whom much is given, much is required," and what is required can be done; and what is forbidden, can be left undone.

Gentlemen, acting from a sense of duty, of duty that is more imperious than any wish to please or fear to offend, I have now to close this lecture with the earnest wish that you may ponder the remarks I have made well and candidly. All those of you who shall in your professional life hereafter be governed by the counsel I have endeavored to imply in this paper, will, at least, be clear and clean of one most murderous sin. Should any of you (which we can hardly think possible), take the other course, and should inward condemnation, the scorn of the pure, and the justice of man and God overtake you, you will not be able to lay your guilt to this Chair, the solemn duties of which, on the subject of Criminal Abortion, I have endeavored to meet.

SCIENTIFIC TREATMENT (SO CALLED.)

She died of Cholera. Every attention possible with the best medical aid, was cheerfully bestowed, but all to no purpose.—*Nashville Despatch.*

The medical aid (?) was a teaspoonful of salt-water every four minutes—a grain of calomel every hour—and enema of luke-warm salt-water. S.

Practice.

METORRHAGIA.

BY DR. JOHN DAVIES, CHICAGO.

In the early part of the month of September last I was called to see Mrs. J—; æt. 25; fair complexion; nervous temperament; married seven years, but had no living child, having aborted three times. Found her suffering from intense pain in the uterus of a bearing down character, accompanied with occasional hæmorrhage. She

Addendum Entry 3:

Criminal Abortions, 34 Journal-Lancet 81, 82-83 (1914)

Available at:

https://archive.org/details/journallancet3419nort/page/82/mode/2up

(last accessed Dec. 30, 2024).

THE JOURNAL-LANCET

The Journal of the Minnesota State Medical Association
and Official Organ of the
North Dakota and South Dakota State Medical Associations

PUBLISHED TWICE A MONTH

A SEMIMONTHLY MEDICAL JOURNAL

W. A. JONES, M. D., EDITOR

VOLUME XXXIV

MINNEAPOLIS
W. L. KLEIN, PUBLISHER
1914

lieve nothing that you hear and only half that you see."

For the present, radium will not be given out freely by boards of health, and until it can be purchased as cheaply as neosalvarsan it might be well to accept good old-time advice, and wait until the present excitement subsides.

CRIMINAL ABORTIONS

The record of abortions performed in Minneapolis is only an index of what is done elsewhere. *The Minneapolis Journal* has investigated the subject, and in the issue of January 22d records twelve known deaths in the past two years. It also gives the information that approximately 250 criminal operations have been performed in two years which were not reported to the authorities. It does not attempt to give the number of abortions produced by women themselves without the aid of a doctor. All physicians who have practised general medicine know that a large number of abortions are self-inflicted by various means. Lead-pencils, darning-needles, button-hooks, expanding pessaries, and catheters are commonly employed by those in trouble, especially by married women who do not wish to be encumbered by a pregnancy. Many of the "self-inflicted" usually get along without a doctor, but a few are obliged to receive treatment to remove remnants left in the uterus. The public hears nothing of this class, but it is pretty generally acquainted with the professional abortionist.

It seems rather strange that a physician, irregular or regular, will take the desperate chances incurred in performing an abortion. There are not infrequently cases in which an abortion is imperative: the mentally unfit who might become deranged; the woman with a narrow brim or outlet because of which her life might be in danger and a Cesarian section is the only relief; the woman who may bleed to death; the eclamptic; and those suffering from dangerous diseases. This class, fortunately, is small in number; and an abortion is performed only after a deliberate and careful consultation in which the dangers of the abortion are weighed from every side.

The majority of abortions are among those who decline pregnancy and who become pregnant through lack of moral sense. This list includes unmarried, as well as married, women.

The principal prompting to a physician for performing an abortion is the fee he may demand, and the price ranges from a few dollars to several hundred dollars. The usual fee is not uncommonly five dollars, a ridiculous fee for so dangerous an experiment. A common reason is the sympathy of the doctor for the pregnant girl or woman who may lose her reputation if her condition becomes known.

The professional abortionist who does the work for gain, regardless of the moral law, will, in the end, get his just dues. The practice has grown to such proportions that it is almost impossible to prevent it, unless county medical societies assist county attorneys in the work of prevention or elimination.

Within the past two years the Hennepin County Medical Society has expelled or suspended two of its members engaged in this work, and it has investigated many complaints, but it has been unable to get sufficiently convincing evidence for conviction. The average abortionist does his work alone with the patient; and his word is as good as hers, except in a few instances where the circumstantial evidence is very strong. The county attorney naturally hesitates in a prosecution unless he has evidence that is conclusive.

Juries are naturally sympathetic; and if the doctor can give a plausible reason for the unfortunate outcome of a case there will be no conviction. The man who performs an abortion is rarely called for the after-treatment. If he is a professional abortionist, his work is finished in the office; and not infrequently he does not record the name of the patient. Under such circumstances his conviction is exceedingly unlikely.

It occasionally happens that the physician who is called in such emergency cases is blamed for the whole affair, and he is thus placed in an embarrassing position. If he be wise, he has witnesses present before he attempts relief.

A physician in the country one time openly boasted that he could not be convicted of abortions, as he had performed the service for the judge, the county attorney, the sheriff, and many of the jurors! If such conditions prevail there is nothing to be done.

An amendment to the law is necessary before the abortionist can be stamped out. Even then the practise will continue secretly; but many lives will be saved and many people kept out of invalidism if public sentiment is aroused, and honest and conscientious doctors absolutely decline to perform abortions unless from humanitarian reasons.

CENSURE FOR UNPROFESSIONAL CONDUCT—WHAT DOES IT MEAN?

No doubt all medical societies provide penalties for offenses committed by their members; and it is probable that "censure" stands at one extreme and "expulsion" at the other of every list of such penalties, even though the list contain but two penalties. In the absence of a special definition in the by-laws, the word censure has no specific meaning.

This point was raised in the recent annual meeting of the Hennepin County Medical Society, reported in another column. The Society had voted only once prior to this meeting to "censure" a member; and, very naturally, some members wished to know the significance of its act in a vote of censure. In the absence of a specific meaning given the word in the by-laws of the Society, Dr. Donaldson gave it an unmistakable meaning in the form of a concrete example

Now, THE JOURNAL-LANCET has no desire to add to the string of any penalty inflicted by a medical society; but we should be recreant to our plain duty if we failed to publish the transactions of any society coming to us officially.

In the absence of a specific meaning to the word censure, and in view of the fact that our societies have been slow to enforce their discipline while such offenses as it has under consideration are becoming increasingly prevalent, we commend this example to them.

ARE YOU ON THE LIST?

We publish in this issue the roster of the Minnesota State Medical Association; and, as usual, the names of not a few well-known men in the state do not appear on it; and why? Negligence, pure and simple! Their medical-defense insurance lapses, their names are not on the roster, and THE JOURNAL-LANCET cannot be sent to them, except through our courtesy, which has its limitations; and all because of negligence.

They are good fellows and good doctors, ready to help all good causes with their time and their purses; but they cannot pay their society dues *on time*.

REPORTS OF SOCIETIES

HENNEPIN COUNTY SOCIETY

The annual meeting of the Society was held on Jan. 5th, with President Haggard in the chair, and 42 members present.

Dr. Green reported a case of bone-fitting and illustrated the same with x-ray plates.

The Treasurer's annual report showed receipts of $3,000 and expenditures of $2,850.

The report of the Executive Committee called attention to the fact that newspaper notices of physicians, referring to operations, new discoveries, etc., had become too frequent of late, and urged the members to avoid such notoriety; and a resolution was passed that offenders in this line should be disciplined.

The Milk Commission reported through Dr. Haggard that two dairies are furnishing certified and inspected milk to Minneapolis under agreement with the Society, members of the Commission inspecting the dairies and keeping tab on the milk supplied. Paid inspection of the milk, the cows, and the dairies, is to be provided. The Commission is endeavoring to have only certified or inspected milk used in the hospitals of the city.

The Board of Censors reported that they had investigated charges against Dr. N. H. Scheldrup for advertising, and, finding the charges sustained, recommended that he be censured.

As only one other member had ever been censured, the report caused a lengthy discussion as to whether the charges in such a case should be given to the Society, together with the evidence, and also as to the effect of such censure. Upon the latter point, Dr. Donaldson spoke as follows:

> An answer to this matter occurs in a case reported in the last JOURNAL-LANCET. A vote of censure is reported. That paper goes to every physician in the Northwest. If any member of this Society thinks he would like to have that paper report his own name, he thinks differently than the majority do. It does not seem to me that a physician would have that appear against his name if he could possibly avoid it. If any man has this vote of censure it occurs to me that that is one thing that will help to set him right, if anything will set him right, and if he does not care I do not know what sort of prediction to make. It seems to me that the Board of Censors is right in giving the smallest punishment possible to call their attention if they have been careless or have not been thinking about the matter, to remind them of it in the easiest possible way we can, because I have in mind that as this is the first time we have done this, there will be a little more thinking and a little more care in regard to such matters.

The resolution was passed.

Drs. Frank J. Lawler, Thos. Ziskin, J. A. Sanford (Farmington), Hugh S. Wilson, and Daniel B. Mark were elected to membership.

Notice of the weekly clinics to be given in the City Hospital was made by Dr. Cross in the

Addendum Entry 4:

Everett W. Burdett, *The Medical Jurisprudence of Criminal Abortion*, 18 New England Medical Gazette 200, 200-205 (1883).

Available at:

https://archive.org/details/newenglandmedica18bost/page/200/mode/2up

(last accessed Dec. 30, 2024).

THE

NEW ENGLAND

MEDICAL GAZETTE.

A Monthly Journal

OF

HOMŒOPATHIC MEDICINE.

"Die milde Macht ist gross."

VOLUME XVIII.

BOSTON:
OTIS CLAPP & SON, 3 BEACON STREET.
1883.

by allopaths to be separate from but hidden within the organism. Of course, Dr. Deschere meant to express this; but, with his familiarity with the text, he had not the reader in mind.

The comma above referred to, though it is in the right place, will not necessarily prevent the reader, especially if he never saw the "Organon" before, from connecting the parts of the phrase. While omission of the comma would be wrong, its presence may technically but not unconditionally guard the meaning of the paragraph.

Dr. Deschere's translation contains another obvious error in the sentence, ". . . is a nothing, a nonentity, *which* could only originate in the minds of materialists." (Italics are mine.) This "which" is made to apply to nonentity, while, according to the obvious meaning of the original, it should apply to "disease . . . as a material thing."

I have no doubt that my sentence can be improved; but I regret that the alteration suggested by Dr. Deschere would not mend matters. Accordingly, I append a version of the sentence in plain English form, correct in meaning, as well as in grammatical construction: —

"Hence, it is an absurdity on the part of allopathists to consider disease (not subject to the manual skill of the surgeon), as a material thing, however subtile, hidden within, but distinct from the whole living organism and its life-giving vital force. Such an idea could only have originated in the minds of materialists, and has for thousands of years given to medical science all those deplorable directions, making of it an unwholesome instead of a healing art."

THE MEDICAL JURISPRUDENCE OF CRIMINAL ABORTION.

A PAPER READ BEFORE THE BOSTON HOMŒOPATHIC MEDICAL SOCIETY BY EVERETT W. BURDETT, ESQ., OF THE SUFFOLK BAR.

THE procurement of abortion, or the premature expulsion of the fœtus at such a time and in such a manner as to destroy fœtal life and defeat the natural end of conception — or, as it has been more briefly defined, the practice of destroying the fœtus *in utero*—may be said to be almost as old as the human race, and almost as universal as the globe. The Jews constituted, perhaps, a solitary exception to the rule among ancient nations; and the practice was denounced by the early Christians. It found a congenial home in Europe during the dark ages of that country's history. It prevails to-day even in the uttermost parts of the earth, and in the islands of the sea. The Mohammedan and the

Christian, the denizen of Europe and the Dark Continent, the East Indian and the Oriental, all offend against the laws of maternal and embryotic life. So universal seems to have been and to be this practice, that, as has been said, "we may well doubt whether more have ever perished in those countries by plague, by famine, and the sword."

This practice — I speak now without reference to cases of special justification, but of the practice generally — has not been, and I suppose is not now, without its defenders. Among the ancients, such sages as Aristotle and Plato gave it their approval. And to-day, while probably no respectable authority can be found to justify the general practice, the conclusion seems warranted that the non-professional public looks upon it with complaisance.

The medical profession, largely responsible for and capable in a degree of exercising control over public sentiment touching this matter, has the satisfaction of being able to assert that Hippocrates, "the father of medicine," pledged his disciples upon their oaths not to practise abortion. And to-day, all codes of medical ethics characterize the practice as a crime, and regard it as ample reason for the dissolution of all fraternal and professional relations with the offender.

Although there are several indications in the earliest of the English law books that abortion was, even in the morning of English jurisprudence, deemed a crime, the opinion is held by excellent authority that abortion, as such, was an offence unknown to the common law. And by the common law, it is doubtless unnecessary for me to say in this presence, I mean the unwritten law, which has been the result of growth and not of legislation, — that system of jurisprudence which has evolved itself out of history and the experiences and necessities of mankind, and has not, like Aphrodite from the waves, been called into instant existence by a "*fiat lux*" mandate. Unlike murder, theft, or adultery, abortion has not been recognized as *malum in se;* it is *malum prohibitum*.

And there is, according to all codes, such a thing as justifiable abortion. The very title of this paper, and of all writings upon this subject, indicates that there are, morally and legally considered, two kinds of abortion, — justifiable and criminal.

To comprehend a rule or a definition fully, one must know its exceptions. To know what criminal abortion is, one must first know when the procurement of abortions is justifiable.

JUSTIFIABLE ABORTION.

There is now but little if any dispute that the justifiable procurement of abortion can have but one aim in view, and that aim *life*. Neither convenience nor sympathy, neither the mother's

request nor the father's acquiescence, neither the assuaging of pain nor the avoidance of risk, justifies the operation.

Where pregnancy will assuredly impair the health, and possibly endanger the life of the patient, cannot the physician choose? It has been asked, "Are the cases always so plain that a man can decide, and may he not balance a choice of evils?" This question is now universally answered with an unbending negative. *Life* is the test; not a mere possibility of danger to life (which possibility exists in every case of pregnancy), but a probability of such danger. This alone is pleadable in excuse of an operation. Some even insist that this probability must be of a high order, and amount almost to a certainty. At any rate, the test appears to be rather increasing than decreasing in severity.

The proposition is generally put so as to allow the life of either the mother or the child to constitute the criterion. But in the records of the Massachusetts Medical Society may be found a resolution of the Fellows stamping with their "disapprobation and abhorrence all attempts to procure or promote abortion, except in cases where it may be necessary for the preservation of the mother's life." Whether this is now the test and standard of that ancient and honorable association, I cannot say; but I think not.

If the true test be the preservation of the life of either the mother or her issue, the question might arise, and under some circumstances become material, whether any discrimination in favor of either life can properly be made. The case of the death of the fœtus for the mother's preservation is the usual circumstance; the case of the death of the mother for the well-being of her issue may, I suppose, some time present itself. While, I imagine, a physician would seldom find himself really embarrassed by the decision of such a complication, — his lack of embarrassment working to the serious peril and disadvantage of the fœtal candidate for mundane existence, — different views have been expressed by those who were entitled to speak with some authority. Some say, "Who shall judge as to the relative value of these lives? Of the one we know something; of the other it may be said that it possibly contains the germ of one of the world's best and greatest." One author says, "Where one only can by any possibility be preserved, the female may use her right of self-preservation and choose whether her own life or that of her child shall fall a sacrifice." Another author says, "I protest against the notion that we choose which of the two lives we shall save, — a notion as false in theory as it is in practice. No man dare make such a choice, for we have neither the necessary knowledge, nor the right, nor the authority to decide which is the more important life and best worth preserving." Of course "it is the due appre-

ciation of these relative responsibilities (*i. e.*, to mother and child) in difficult cases that distinguishes the wise and experienced *accoucheur*. He preserves a just counterpoise between them so long as it is possible to fulfil both, and recognizes the proper moment when one ceases."

In cases of necessary and, therefore, justifiable abortion, the physician finds himself peculiarly embarrassed. As to the necessity of it, he is the judge; as to the execution of it, he takes the responsibility. Under such circumstances, he runs the further risk of being compelled, at a subsequent time, to *prove* in a court of criminal jurisdiction that the operation was necessary, or in a civil tribunal that it was skilfully and wisely executed. Physicians probably do not have as lively an appreciation as do lawyers of the important distinction between facts and testimony. Facts, whatever they may be, may as well never have existed as not to be capable of proof; while testimony not infrequently is even more serviceable than the facts. This distinction needs to be carefully remembered by the physician who has anything to do with an abortion case. If he finds in a given case that abortion is necessary, he can do himself no injury by obtaining the concurrent judgment of a brother doctor; and if the question of *bona fides* or of skill subsequently arises, the testimony of two good doctors will be just twice as satisfactory as would be that of one, particularly if that one be defendant in the case.

A novel duty, which, I suppose, devolves upon physicians in cases of attendance upon Catholic parents, who believe in the necessity of the baptism of the unborn child whose life must yield to the mother's safety, is the baptism of the presenting part before the life of the fœtus is destroyed. Whether or not this custom is by physicians more honored in the breach than in the observance, I cannot say; but I find it stated as a duty owed by all physicians who respect the religious convictions of their patients. Under such circumstances he may, if need be, officiate both as priest and doctor, as the church concedes the right of baptism to a layman *in extremis*. That a legal right of action could not be based upon his neglect or refusal to perform this peculiar duty, or to wait till a priest could be procured for that purpose, is not at all certain. In view of a recent effort in our courts, popularly known as "the image case," to hold a clergyman responsible for mental and physical damage by reason of meddling with the plaintiff's *penates*, one can conceive of a claim for damages to parental feelings by reason of a disregard of the religious conviction above referred to. Such disregard might tend to wound the feelings to such a degree as to affect the health of the parties, for "deeply wounded sensibility and wretchedness of mind can hardly fail to affect the health." Such is the belief of our Supreme

Court, and under such circumstances an action might well be maintained against an *accoucheur* who wilfully and grossly disregarded the feelings and convictions of his patient. But if he but act discreetly, and under a stress of circumstances, and without undue haste or malice, I should not feel inclined to discourage the defence of such an action.

The question has arisen in the case of justifiable abortion, how far the physician is hampered in his action by the expressed desire or command of the mother or her husband. As to whether it is for the mother to say, when *in extremis*, whether her own life or that of her child shall pay the forfeit, has already been referred to. As we have seen, upon that point opinions differ; and I do not know that a court of law has ever found it necessary to determine. But it has been a matter of legal inquiry whether the father has *property* in the fœtus after the mother's death, and can lawfully forbid the attempt to deliver and save the life of the then unborn child. An opinion has been given that he has such property in the fœtus as to entitle him to sue in trespass for the *accoucheur's* act in attempting a delivery against his protest. This view is technical, and its soundness may well be doubted. There are higher laws than those of property. If I rescue my neighbor's child against his protest by jumping into and contaminating the waters of my neighbor's reservoir or cistern, he would find it difficult to collect substantial damages. The question might even arise as to my accountability to the law in case I had neglected my evident moral duty in the premises. If goodman Brown had rescued Betty Hague, famous in song as the mismated wife of Johnny Sands, against John's protest, and at the cost of a trespass on John's land, I should prefer to be retained by Brown, defendant, rather than by Sands, plaintiff.

Then again, abortion may be the result of accident, in which case it is clear that, so far as criminal liability is concerned, the practitioner is as safe as in cases of justifiable abortion, the reason being that an accident, *ex vi termini*, excludes the possibility of evil design or intent, without which there can be no crime. But this statement is susceptible of one limitation. The law sometimes imputes intent; that is to say, presumes it conclusively. If I discharge a weapon into a crowded street, though I have no evil design upon any of the passers, an intention to do damage is conclusively imputed to me in case of damage. Every man is presumed to contemplate the natural and probable consequences of his acts, and he cannot be heard to say that he intended no harm when harm was the inevitable consequence of what he did. Hence we have in law the doctrine of criminal carelessness.

So, if a physician procure an accidental abortion, which would not have taken place but for his carelessness or his lack of ordi-

nary skill, he ought not to be heard to excuse himself on the plea of accident. Such, strictly, was not an accident: a human act or omission, which ought not to have taken place, intervened to cause a damage which, in the ordinary course of nature, would not have happened.

A physician's civil liability under such circumstances is well determined. Like other professional men, a doctor impliedly contracts with his patient to bring to the exercise of his duties a fair degree of education and skill, and to do his work with such care and in such manner as the circumstances of the case fairly demand. If, therefore, he exhibit a deplorable lack of information, or is plainly lacking in ordinary skill, or is grossly negligent or careless in his methods and treatment, he is justly held to respond in damages for the breach of his implied contract to which I have referred. And in view of the fact that doctors have not yet succeeded, with all their skill, in materially changing human nature as it is exhibited in and by successive generations, and the fact that with human nature as it is, men will now and then not only fail to appreciate the most valuable services, but will condemn them as unworthy and without value, it behooves doctors to guard against the results of such misapprehensions on the part of patients as far as possible. I have already suggested the wisdom of sharing the responsibilities of necessary procurements of abortion with another physician. To secure in advance the same protection in cases of accidental abortions is of course impossible. Here one's habits, education, skill, and reputation must stand in the place of witnesses. And if they be what they ought to be, they will stand him in good stead. Whether an early examination, after the event, by another physician would enable that other to judge and to testify as to the probable circumstances and facts of the delivery, doctors will know better than I. But if so, I again insist upon the sometimes almost vital distinction between facts and evidence, and urge physicians who desire to stand upon the facts to procure as much competent evidence of them as he can.

But I may be reminded that, by the title of this paper, I impliedly agreed to speak of criminal abortion, whereas I have thus far spoken chiefly of justifiable and accidental abortion. But, if so, let me again suggest that a rule is proved and a definition illustrated by its exceptions. How are we to know what constitutes criminal abortion, unless we also ascertain when and what abortions are innocent and justifiable?

CRIMINAL ABORTION.

As I have said, the unlawful procurement of abortion is with us a statute crime. Exactly upon what theory the prohibition

Addendum Entry 5:

George W. Field, Field's Medico-Legal Guide for Doctors and Lawyers § 77 (1887)

Available at:

https://archive.org/details/fieldsmedicolega00fiel/page/154/mode/2up

(last accessed Dec. 30, 2024).

E. A. Tucker, M. D.
Sloane Mat. Hosp.
Nov. 29/93.

FIELD'S

MEDICO-LEGAL GUIDE

FOR

DOCTORS AND LAWYERS,

EMBRACING THE FOLLOWING SUBJECTS:

MEDICAL WITNESSES; MEDICAL EXPERT TESTIMONY; INSANITY AND ITS LEGAL RELATIONS; PRIVILEGED COMMUNICATIONS; ABORTION; CIVIL LIABILITY OF MEDICAL MEN FOR MALPRACTICE; CRIMINAL LIABILITY FOR MALPRACTICE; LIABILITY FOR PRACTICING IN VIOLATION OF STATUTES; DAMAGES; COMPENSATION; MEDICAL ETHICS.

BY

GEORGE W. FIELD, LL. B.

BANKS & BROTHERS:

ALBANY,
473 and 475 Broadway.

NEW YORK,
144 Nassau Street.

1887.

The causes of abortion are often complicated; in other words, they may be partly maternal and partly fœtal. And it is often difficult to discover the primary cause; and it may be further observed that abortion has a great tendency to become a habit: Dr. Barnes' Obstetric Operations (1st ed.), 385; Tidy's Leg. Med. (Am. ed.) 97.

§ 76. Natural and innocent causes of abortion.

Abortion may be naturally and innocently caused, or artificially and criminally produced. Natural and innocent abortion or miscarriage may arise from a nervous and irritable temperament, disease, malformation of the pelvis, immoderate venereal indulgence, a habit of miscarriage, plethora, great debility, or from disease in the ovum or in the membranes.

§ 77. Artificial and innocent abortion; premature labor.

The laws of England, it seems, do not recognize the induction of premature labor by the medical practitioner; but English judges have always held that medical men are morally justified in inducing premature labor, provided the object

be to save the life of the mother or child, or both: Tidy's Leg. Med. (1st Am. ed.) 98; Verrier's Man. of Obstet. (1st Am. from 4th French ed.) 319.

In this country the statutes making the procuring of an abortion or miscarriage criminal, make an exception in case "the same is necessary to preserve the life of the woman, or the child of which she is pregnant:" See *post*, § 80; N. Y. Penal Code, § 294.

The cases in which it has been recommended to induce premature labor are as follows:

1. In cases of extreme narrowness of the pelvic rim; and in certain cases of deformity, where neither version nor forceps can succeed at full term in bringing into the world a living child. This may often be accomplished with perfect safety to the mother, by inducing premature labor at the seventh month.

2. In some cases of obstinate vomiting, where all expedients have proved fruitless and a fatal result is anticipated.

3. In case of pregnancy complicated with insanity and disease of the uterus or other organs, such as cancer, fibrous tumors, etc.

4. In case of placenta prævia, or where there is severe hemorrhage.

5. In case of rupture of the uterus.

6. In case of narrowing of the soft passages, cicatrices of the vagina, etc.

§ 78. Chief methods employed to produce abortion.

It may be observed that the methods employed to induce a miscarriage or to produce an abortion may be the same, whether it be lawful or unlawful, whether it be necessary to save the life of the mother or child, or both, or whether the purpose be otherwise and criminal.

Dr. Barnes, in his Obstetric Operations, says: The chief methods of inducing premature labor are:

1. Puncturing the amniotic sac or membranes.

2. The administration of ergot of rye, or other cebolic.

3. Separating the membranes from the lower portion of the uterus.

4. Passing a flexible catheter between the membranes and the uterus (*i. e.*, within the womb), and retaining it there for some hours.

5. Mechanical dilatation of the cervix by instruments, or by sponges, or by laminaria tents, or

Addendum Entry 6:

Joel Prentiss Bishop, *Commentaries on the Written Laws and Their Interpretation* § 212 (1882).

Available at:

https://books.google.co.uk/books?redir_esc=y&id=sA4sAQAAMAAJ&q=masculine+includes+feminine#v=snippet&q=masculine%20includes%20feminine&f=false

(last accessed Dec. 30, 2024).

FOR CIVIL PRACTICE.

COMMENTARIES

ON

THE WRITTEN LAWS

AND THEIR

INTERPRETATION.

BY

JOEL PRENTISS BISHOP.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1882.

violated by having one half, or any smaller part, of such apparatus,[1] or the apparatus to make one side only of a counterfeit coin.[2]

§ 212. Thirdly. *It is not a violation of the rule of strict construction to give the words of a statute a reasonable meaning, according to the intent of the makers, disregarding captious objections, and even the demands of an exact grammatical propriety.*[3] Thus, —

"Person" — (State — Corporation). — In this class of statutes as in others, the State,[4] United States,[5] or a corporation[6] may be included in the word "person." But such is not necessarily the construction;[7] as, for example, not in every statute has the word "person" been held to extend to a corporation.[8] The rule would seem to be, that *prima facie* it does,[9] because a corporation is an artificial person created by the law;[10] but considerations of the subject, object, and connected words of the particular statute may lead to the contrary result.[11] So, —

[1] The State *v.* Griffin, 18 Vt. 198.

[2] Commonwealth *v.* Kent, 6 Met. 221. **A Part, in Larceny.** — See, under Stat. 14 Geo. 2, c. 6, as to killing a sheep with intent to steal a part of the carcass, Rex *v.* Williams, 1 Moody, 107; Rex *v.* Clay, Russ. & Ry. 387.

[3] For illustrations of this doctrine, see the cases cited to this and the next four sections; also Commonwealth *v.* Martin, 17 Mass. 359; Commonwealth *v.* Keniston, 5 Pick. 420; The State *v.* Mairs, Coxe, 453; Rex *v.* Atkinson, Russ. & Ry. 104; Rex *v.* Harris, 7 Car. & P. 446; Rex *v.* Shadbolt, 5 Car. & P. 504; Commonwealth *v.* Loring, 8 Pick. 370.

[4] Stewart *v.* The State, 4 Blackf. 171; Martin *v.* The State, 24 Texas, 61.

[5] The State *v.* Herold, 9 Kan. 194.

[6] Germania *v.* The State, 7 Md. 1; Planters and Merchants' Bank *v.* Andrews, 8 Port. 404; People *v.* Utica Insurance Co., 15 Johns. 358, 381; Fisher *v.* Horicon Iron and Man. Co., 10 Wis. 351; Miller *v.* Commonwealth, 27 Grat. 110; People *v.* May, 27 Barb. 238; Beaston *v.* Farmers' Bank, 12 Pet. 102, 134; Society, &c. *v.* New Haven, 8 Wheat. 464; Olcott *v.* Tioga Railroad, 20 N. Y. 210; Bartree *v.* Houston, &c. Railroad, 36 Texas, 648; Norris *v.* The State, 25 Ohio State, 217; Newcastle Corporation, 12 Cl. & F. 402; Memphis *v.* Laski, 9 Heisk. 511. See The State *v.* Ohio and Mississippi Railroad, 23 Ind. 362. Of this there seems to have been formerly some doubt. See Rex *v.* Harrison, 1 Leach, 4th ed. 180, 2 East P. C. 926, 988; Rex *v.* Jones, 1 Leach, 4th ed. 366, 2 East P. C. 991.

[7] The State *v.* Bancroft, 22 Kan. 170; In re Fox, 52 N. Y. 530; United States *v.* Fox, 94 U. S. 315.

[8] The State *v.* Cincinnati Fertilizer Co. 24 Ohio State, 611, a case which in some of the other States would probably be held the other way.

[9] Miller *v.* Commonwealth, 27 Grat. 110; In re Oregon Bulletin Publishing, &c. Co. 13 Bankr. Reg. 199; Douglass *v.* Pacific Mail Steamship Co. 4 Cal. 304; Northwestern Fertilizing Co. *v.* Hyde Park, 3 Bis. 480.

[10] Crim. Law, I. § 417; Louisville, &c. Railroad *v.* Commonwealth, 1 Bush, 250; Douglass *v.* Pacific Mail Steamship Co., 4 Cal. 304.

[11] Pharmaceutical Society *v.* London, &c. Supply Assoc. 5 Ap. Cas. 857, in which the H. of L. held the word "person" in 31 & 32 Vict., c. 121, not to in-

Continued — (Negro — Indian — Judge). — A negro,[1] Indian,[2] or judge holding court,[3] may be comprehended under this word "person." Again, —

Masculine includes Feminine — ("His" — "Man" — "Woman"). — A woman may be meant by the masculine pronoun "his."[4] And, in a statute not penal,[5] probably also in a penal one, she may be by the word "man."

"Sheep." — The word "sheep" may include a ewe[6] or a lamb.[7] And —

"Cattle" — may comprehend horses,[8] geldings,[9] asses,[10] pigs,[11] and sheep.[12] Moreover, —

§ 213. **Singular and Plural.** — The singular number may be comprehended in the plural. For example, —

"Bank-notes," "Bills obligatory" — (Larceny). — A statute making it felony to purloin from the post-office "bank-*notes*" is broken by taking a single bank-note.[13] And one punishing the larceny of "*bills* obligatory" is infringed when a single bill obligatory is stolen.[14] So, —

"Tippling-houses" — (Lord's Day). — Under a statute declaring it an offence "to keep open tippling-*houses* on the Sabbath day," a person may incur the guilt by so keeping open one tippling-house.[15] But, —

"House," "Dwelling-house." — Between "house" and "dwelling-house" there is a distinction which, though nice, is palpable in the law.[16] Therefore when the legislature had taken away clergy from the felony of burning a *dwelling*-house, one con-

clude a corporation, sustaining the Court of Appeal in 5 Q. B. D. 310, and overruling the Queen's Bench division in 4 Q. B. D. 313; Saint Leonards, Shoreditch, *v.* Franklin, 3 C. P. D. 377; Commonwealth *v.* Phœnix Bank, 11 Met. 129, 149.

[1] The State *v.* Peter, 8 Jones, N. C. 19; Hammond *v.* The State, 14 Md. 135.

[2] United States *v.* Shaw-mux, 2 Saw. 364.

[3] Bass *v.* Irvin, 49 Ga. 436.

[4] Rex *v.* Smith, Russ. & Ry. 267.

[5] Smith *v.* Allen, 31 Ark. 268.

[6] Reg. *v.* Barran, Jebb, 245; Reg. *v.* Bannam, 1 Crawf. & Dix C. C. 147.

[7] Reg. *v.* Spicer, 1 Car. & K. 699; The State *v.* Tootle, 2 Harring. Del. 541.

[8] Rex *v.* Moyle, 2 East P. C. 1076.

[9] Rex *v.* Mott, 2 East P. C. 1075, 1 Leach, 4th ed. 73, note.

[10] Rex *v.* Whitney, 1 Moody, 3.

[11] Rex *v.* Chapple, Russ. & Ry. 77; Decatur Bank *v.* St. Louis Bank, 21 Wal. 294.

[12] United States *v.* Mattock, 2 Saw. 148. See post, § 245–248.

[13] Rex *v.* Hassel, 1 Leach, 4th ed. 1, 2 East P. C. 598.

[14] Commonwealth *v.* Messinger, 1 Binn. 273.

[15] Hall *v.* The State, 3 Kelly, 18. So, in another sort of case, under a grant to "orphans" a single orphan will take. Averit *v.* Alleam, 23 Ga. 382.

[16] Post, §§ 277, 289.

Addendum Entry 7:

Robert Desty, A Compendium of American Criminal Law §31a (1882)

Available at:

https://books.google.com/books?id=ypgsAQAAMAAJ&pg=PA39&source=gbs_toc_r&cad=2#v=onepage&q&f=false

(last accessed Dec. 30, 2024).

A COMPENDIUM

OF

AMERICAN

CRIMINAL LAW.

BY

ROBERT DESTY,

Author of "Federal Procedure," "Federal Citations," "The Federal Constitution," "Shipping and Admiralty," "Commerce and Navigation," etc.

SAN FRANCISCO:
SUMNER WHITNEY & CO.
1882.

3 Reg. v. Van Butchell, 3 Car. & P. 629. But see Reg. v. Whitehead, 3 Car. & K. 202.

4 Com. v. Thompson, 6 Mass. 134; Rice v. State, 8 Mo. 561. But see McCandless v. McWha, 10 Harris, 261; Reg. v. Senior, 1 Moody C. C. 346; Rex v. Williamson, 3 Car. & P. 635; Webb's Case, 2 Lewin, 196; Rex v. Simpson, 4 Car. & P. 407; Reg. v. Whitehead, 3 Car. & K. 202; Rex v. Spilling, 2 Moody & R. 107; Reg. v. Crook, 1 Fost. & F. 521; Rex v. Long, 4 Car. & P. 440.

5 Dickens v. State, 30 Ga. 383.

6 Hull v. State, 34 Ga. 208.

Sec. 31. *An act which would otherwise be a crime may be excused, if it was done only to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted on the actor, or upon others whom he was bound to protect, inevitable or irreparable evil, and if no more was done than was reasonably necessary for the purpose, and the evil inflicted was not disproportionate to the evil intended to be avoided.*

§ 31 a. Right of self-defense.—The right of self-defense is founded on the law of nature, and is not superseded by the laws of society.[1] It is a right which every one brings into society, and retains in society, except so far as the laws of society have curtailed it.[2] Every man has a right to defend himself against an attack, threatening him with death or serious bodily harm;[3] and his innocence will be presumed until his guilt is established beyond a reasonable doubt.[4] The right is based on necessity;[5] and arises where one manifestly intends and endeavors by violence or surprise to commit a known felony on the person, habitation, or property of another.[6] It is a defense against a present unlawful attack;[7] as where an assault is made with a deadly weapon;[8] or where one is assaulted in his habitation,[9] or where a forcible felony is attempted.[10] It extends to the defense of the habitation when an assault is actually made,[11] and to the protection of property before taken, but not to its recovery after it is taken;[12] unless it can be retaken without undue violence;[13] so a party may defend his use to a well.[14] Its rules extend to the relations of parent and child, husband

and wife, master and servant, and brother and sister;[15] so a son may forcibly repel an attack on his parent, but if the parent be the assailant, he cannot lawfully aid him.[16] The law of self-defense does not require one, whose life has been threatened, to seek the protection of the law;[17] nor is he obliged first to call on the authorities.[18] The omission to seek protection from the authorities does not deprive him of the protection of the law, or of his right of self-defense.[19]

1 Isaac v. State, 25 Tex. 174; U. S. v. Outerbridge, 5 Sawy. 620; Long v. State, 52 Miss. 23. See Gray v. Combs, 7 J. J. Mar. 478; U. S. v. Holmes, 1 Wall. Jr. 1.

2 Gray v. Combs, 7 J. J. Mar. 478; Horr. & T. 867.

3 Silvus v. State, 22 Ohio St. 90; Drake v. State, 5 Tex. Ct. App. 661.

4 Silvus v. State, 22 Ohio St. 90; Weaver v. State, 24 Ohio St. 584; Drake v. State, 5 Tex. Ct. App. 661.

5 People v. Pool, 27 Cal. 572.

6 Com. v. Riley, Thach. C. C. 471; State v. Thompson, 9 Iowa, 188; U. S. v. Wilberger, 3 Wash. C. C. 515; State v. Stoffer, 15 Ohio St. 47; Patten v. People, 18 Mich. 314; Com. v. Selfridge, Horr. & T. 1; State v. Kennedy, 20 Iowa, 569; Com. v. Riley & Stewart, Thach. C. C. 471; Bohannon v. Com. 8 Bush, 481; Carroll v. State, 23 Ala. 28; Pond v. People, 8 Mich. 150; Collins v. State, 32 Iowa, 36; Young v. Com. 6 Bush, 312; Drake v. State, 5 Tex. Ct. App. 661; Keener v. State, 18 Ga. 194; Stewart v. State, 1 Ohio St. 66; Hinchcliffe's Case, 1 Lewin, 161.

7 Filkens v. State, 69 N. Y. 101.

8 State v. Thompson, 9 Iowa, 188; State v. Kennedy, 7 Nev. 374.

9 Pond v. People, 8 Mich. 150.

10 Pond v. People, 8 Mich. 150; Carroll v. State, 23 Ala. 28.

11 Rex v. Scully, 1 Car. & P. 319.

12 See 1 Whart. C. L. 8th ed. § 102.

13 State v. Elliot, 11 N. H. 540.

14 Roach v. People, 77 Ill. 25.

15 Armistead v. State, 18 Ga. 704; Oliver v. State, 17 Ala. 587; Pond v. People, 8 Mich. 150; Cheek v. State, 35 Ind. 492; Waybright v. State, 56 Ind. 122; Staten v. State, 30 Miss. 619; Sharp v. State, 19 Ohio, 387; Connaughty v. State, 1 Wis. 165.

16 Waddell v. State, 1 Tex. Ct. App. 729.

17 Evers v. People, 3 Hun, 716.

18 Evers v. People, 3 Hun, 716; State v. Doty, 5 Oreg. 491; Manhattan Manuf. Co. v. Van Keuren, 22 N. J. Eq. 251; Brightman v. Bristol, 65 Me. 426.

19 Evers v. People, 3 Hun, 716.

§ 31 b. The danger.—The right of self-defense is not limited to the actual danger threatened.[1] The danger of death or great bodily harm must either be real, or be hon-

Addendum Entry 8:

Theophilus Parvin, The Science and Art of Obstetrics 601-03 (1886).

Available at:

https://archive.org/details/101597651.nlm.nih.gov/page/600/mode/2up

(last accessed Dec. 30, 2024).

THE

SCIENCE AND ART

OF

OBSTETRICS.

BY

THEOPHILUS PARVIN, M.D., LL.D.,

PROFESSOR OF OBSTETRICS AND DISEASES OF WOMEN AND CHILDREN IN JEFFERSON MEDICAL COLLEGE, PHILADELPHIA, AND ONE OF THE OBSTETRICIANS TO THE PHILADELPHIA HOSPITAL.

ILLUSTRATED WITH TWO HUNDRED AND FOURTEEN WOOD-CUTS AND A COLORED PLATE.

PHILADELPHIA:
LEA BROTHERS & CO.
1886.

PART V.

OBSTETRIC OPERATIONS.

CHAPTER I.

THE INDUCTION OF ABORTION AND OF PREMATURE LABOR—CEPHALIC, PELVIC, AND PODALIC VERSION.

The Induction of Abortion.—The induction both of abortion and of premature labor for therapeutic purposes belongs chiefly if not exclusively to modern obstetrics. In the one instance the operation is done for saving the mother's life, and in the other to save that of the infant also.

Historical Notice.—Artificial abortion was frequent in ancient times, without regard to saving the mother's life. In the Republic of Plato its production is authorized in certain circumstances.[1] Aristotle not only did not condemn the practice, but even "desired that it should be enforced by law, when population had exceeded certain assigned limits." Lecky[2] remarks that the general opinion among the ancients seems to have been that the fœtus was but a part of the mother, and that she had the same right to destroy it as to cauterize a tumor upon her body. It seems to have resulted among the Romans not simply from licentiousness and poverty, "but even from so slight a motive as vanity, which made mothers shrink from the disfigurement of child-birth." The practice was avowed and universal. Ploss[3] refers to the prevalence of abortion both in civilized and savage nations, this prevalence being especially great among orientals, because of the slight value attached to the life of the fœtus. The maternal instinct, which acts as a check to the crime, is counterbalanced among the Mahommedans by the severe punishment inflicted upon a woman who has an illegitimate child.

Christianity was the most influential factor in revolutionizing Roman sentiment, and to-day is the most powerful protection of the unborn babe. Lecky, after stating that the average Roman in the later days of Paganism thought artificial abortion only a venial crime, scarcely deserving censure, says, "The language of the Christians from the very beginning was very different. With unwavering consistency and with the strongest emphasis they denounced the practice, not simply as inhuman, but as definitely murder. In the penitential discipline of the Church abortion was placed in the same category as infanticide, and the stern sentences to which the guilty person was subject, imprinted on the minds of Christians, more deeply than any mere exhortations, a sense of the enormity of the

[1] Jowett's translation, vol. iii. p. 343. [2] History of Morals in Europe. [3] Op. cit.

crime." Fortunate is that people or that community where this sentiment prevails, reinforcing civil law, and strengthening the teaching of medical science in regard to artificial abortion, when resorted to from any other motive than the salvation of the mother's life.

Kleinwächter states that it appears from the writings of Aspasia, fragments of which have been received through Ætius, who lived in the fifth century, that the ancient Greeks resorted to abortion in narrow pelves. With the extension of Christianity, however, even this form of abortion disappeared, and was only preserved among the Arabs, as we learn from Rhazes and Avicenna. Further reference to this operation is not made. It reappeared in the middle of the seventeenth century, when it was recommended by the famous German midwife, Justin Siegmundin, for placenta prævia; but it seems most probable, notwithstanding Kleinwächter's statement, that she adopted this practice from French obstetricians. It was employed first in England by W. Cooper in 1717, in order to avoid the great mortality of the Cæsarean operation. It was recommended for the same reason by Scheel in Copenhagen, in 1799. It was warmly advocated by Mende in Germany, 1802, and by Fodéré in France, 1835, and subsequently by Dubois and Cazeaux.

Indications for Artificial Abortion.—These indications may depend upon some general disease of the mother, or upon some local disease or deformity, or upon disease of the ovum.

1. Whenever the mother is suffering from disease arising from the pregnancy or originating before it, or accidentally occurring during it, which imperils her life, and there is a reasonable probability that she will recover if abortion occur, its induction is indicated. Among these diseases may be mentioned the uncontrollable vomiting of pregnancy, and, in some cases, chorea, hydræmia, and the nephritis of pregnancy: in regard to the last, see pages 247 and 249. Breisky includes pernicious anæmia among the diseases that indicate abortion; but Kleinwächter denies this, asserting that a fatal termination is hastened by it.

2. In case of such obstruction of the birth canal, either from pelvic deformity or from neoplasms, that a living child cannot be born through the natural passage even if premature labor be induced, and especially if the obstruction be so great that delivery is impossible after embryotomy, the indication for abortion is by most regarded as clear. This much all must admit: that a plain statement of the facts should be made to the pregnant woman, and then let her take her choice between such operation and the removal of the fœtus at the expiration of pregnancy by the Cæsarean section. There is no doubt as to what that decision will be in nine cases out of ten; and certainly, even if embryotomy be possible at the end of gestation, an early abortion will be less dangerous. Charpentier makes no doubtful statement as to the duty of the practitioner under these conditions.

In accordance with our masters, we admit not only that one can, but that one must perform abortion in all cases where there is considerable narrowing of the pelvis—that is to say, below 6 centimetres, 2.3 inches—so that the child cannot be born spontaneously with the forceps, but still embryotomy is so difficult that the life of the mother is endangered.

3. Certain uterine displacements render abortion necessary. These are retroversion or retroflexion with incarceration, and at least most cases of irreducible procidentia.

4. Diseases of the ovum may render it necessary. The embryo or fœtus may be dead, and the consequences of missed abortion may be present; detachment of the ovum may have occurred, and hemorrhage require that the pregnancy should be ended, or the same indication be presented by cystic degeneration of the chorion.

Prognosis and Means.—The prognosis will depend upon the condition of the patient and the cause rendering the operation necessary; it is generally favorable. Various means, too well known by professional abortionists, will interrupt the pregnancy. Medicines have been given internally, electricity used, and intra-uterine injections or puncture of the membranes employed; the safest way will be dilatation of the cervical canal with tupelo or sea-tangle tents, or partial detachment of the membranes. Of course whatever method is used great care must be taken to avoid septic infection, and after the abortion the same rest and precautions must be taken as after labor.

Induction of Premature Labor.—The object of this operation is usually to secure the birth of a living child, but it may be employed in certain dangerous conditions of the mother. In the first case the cause most frequently requiring the operation is pelvic narrowing, and as upon the degree of that narrowing, and the supposed size of the fœtus, the time when labor is to be brought on will be determined, it is important that these should, as far as possible, be ascertained. In regard to the degree of narrowing in reference to the time when labor should be induced, the following rules are given by Charpentier:—

1. In the case of a multipara, if the antero-posterior diameter of the inlet is 9 centimetres, 3.5 inches, labor should be brought on between eight months and one week and two weeks; but in the case of a primipara, her child being smaller, the practitioner may wait until the end of gestation, or at least not induce labor until eight or ten days before.

2. When this diameter is only 3.5 centimetres or 3.3 inches, labor should be brought on at 8 months or not later than 8.5 months.

3. If the measurement be 8 centimetres, 3.1 inches, induce labor at 8 months or 8.5.

4. If the measurement is 7.5 centimetres, 2.9 inches, labor should be brought on between 7.5 months and 8.

5. When this diameter is 7 centimetres, 2.7 inches, the labor should be at 7 months and 2 or 3 weeks.

6. If the measurement be 6 or 6.5 centimetres, 2.5 or 2.3 inches, the induction of labor should be at 7 months or not later than 7.5. These rules may be compared with the following table, given by Kormann, of the time for the induction of abortion:—

If the true conjugate—that is, the minimum or useful antero-posterior diameter of the inlet—be 2.75 to 3 centimetres				the 20th week.
If this diameter be	4.0	"		the 22d "
" "	4.75	"		the 24th "
" "	5.5	"		the 26th "
" "	6.0 to 6.5	"		the 28th to 29th "

Addendum Entry 9:

Thomas M. Cooley, *A Treatise on Constitutional Limitations*, 67-68 (5th ed. 1883).

Available at:

https://books.google.com/books?id=SsfVDTkdPY4C&q=430#v=onepage&q&f=true

(last accessed Dec. 30, 2024).

A

TREATISE

ON THE

CONSTITUTIONAL LIMITATIONS

WHICH REST UPON

THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION.

BY

THOMAS M. COOLEY, LL.D.,

ONE OF THE JUSTICES OF THE SUPREME COURT OF MICHIGAN, AND LATE PROFESSOR OF LAW IN THE UNIVERSITY OF MICHIGAN.

FIFTH EDITION,

WITH CONSIDERABLE ADDITIONS, GIVING THE RESULTS OF THE RECENT CASES.

THE LAWBOOK EXCHANGE, LTD.
Union, New Jersey
1998

Construction to be Uniform.

A cardinal rule in dealing with written instruments is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform. A constitution is not to be made to mean one thing at one time, and another at some subsequent time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable. A principal share of the benefit expected from written constitutions would be lost if the rules they established were so flexible as to bend to circumstances or be modified by public opinion. It is with special reference to the varying moods of public opinion, and with a view to putting the fundamentals of government beyond their control, that these instruments are framed; and there can be no such steady and imperceptible change in their rules as inheres in the principles of the common law. Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement. Public sentiment and action effect such changes, and the courts recognize them; but a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty; and if its course could become a precedent, these instruments would be of * little avail. The violence of public passion is [* 55] quite as likely to be in the direction of oppression as in any other; and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the legislature will be influenced, by temporary excitements and passions among the people, to adopt oppressive enactments. What a court is to do, therefore, is *to declare the law as written*, leaving it to the people themselves to make such changes as new circumstances may require.[1] The meaning of the constitution is fixed when it is

[1] People v. Morrell, 21 Wend. 563; Taylor, 42 N. Y. 238; Slack v. Jacobs, 8 Newell v. People, 7 N. Y. 9; Hyatt v. W. Va. 612, 650.

adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.[1]

The Intent to Govern.

The object of construction, as applied to a written constitution, is *to give effect to the intent of the people in adopting it.* In the case of all written laws, it is the intent of the law-giver that is to be enforced. But this intent is to be found in the instrument itself. It is to be presumed that language has been employed with sufficient precision to convey it, and unless examination demonstrates that the presumption does not hold good in the particular case, nothing will remain except to enforce it. "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."[2] Possible or even probable meanings, when one

[1] *Campbell*, J., in People v. Blodgett, 13 Mich. 127, 138; Scott v. Sandford, 19 How. 393.

[2] United States v. Fisher, 2 Cranch, 358; Bosley v. Mattingley, 14 B. Monr. 89; Sturgis v. Crowninshield, 4 Wheat. 122; Schooner Paulina's Cargo v. United States, 7 Cranch, 52; Ogden v. Strong, 2 Paine, C. C. 584; United States v. Ragsdale, 1 Hemp. 497; Southwark Bank v. Commonwealth, 20 Penn. St. 446; Ingalls v. Cole, 47 Me. 530; McCluskey v. Cromwell, 11 N. Y. 593; Furman v. New York, 5 Sandf. 16; Newell v. People, 7 N. Y. 9; People v. N. Y. Central R. R. Co., 24 N. Y. 485; Bidwell v. Whittaker, 1 Mich. 469; Alexander v. Worthington, 6 Md. 471; Cantwell v. Owens, 14 Md. 215; Case v. Wildridge, 4 Ind. 51; Spencer v. State, 5 Ind. 41; Pitman v. Flint, 10 Pick. 504; Heirs of Ludlow v. Johnson, 3 Ohio, 553; District Township v. Dubuque, 7 Iowa, 262; Pattison v. Yuba, 13 Cal. 175; Ezekiel v. Dixon, 2 Geo. 146; *In re* Murphy, 23 N. J. 180; Attorney-General v. Detroit and Erie P. R. Co., 2 Mich. 138; Smith v. Thursby, 28 Md. 244; State v. Blasdel, 4 Nev. 241; State v. Doron, 6 Nev. 209; Hyatt v. Taylor, 42 N. Y. 258; Johnson v. Hudson R. R. Co., 49 N. Y. 455; Beardstown v. Virginia, 76 Ill. 34; St. Louis, &c. R. R. Co. v. Clark, 53 Mo. 214; Mundt v. Sheboygan, &c. R. R. Co., 31 Wis. 41; Slack v. Jacob, 8 W. Va. 612; Hawbecker v. Hawbecker, 43 Md. 516. The remarks of Mr. Justice *Bronson* in People v. Purdy, 2 Hill, 35, are very forcible in showing the impolicy and danger of looking beyond the instrument itself to ascertain its meaning, when the terms employed are positive and free from all ambiguity. "It is said that the Constitution does not extend to *public* corporations, and therefore a majority vote was sufficient. I do not so read the Constitution. The language of the clause is: 'The assent of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill creating, continuing, altering, or renewing any body politic or corporate.' These words are as broad in their signification as any which could have been selected for the occasion from our vocabulary, and there is not a syllable in the whole instrument tending in the slightest degree to limit or qualify the universality of the language. If the clause can be so construed that it shall not extend alike to *all* corporations, whether public or private, it may then, I think, be set down as an established fact that the English language is too poor for

Addendum Entry 10:

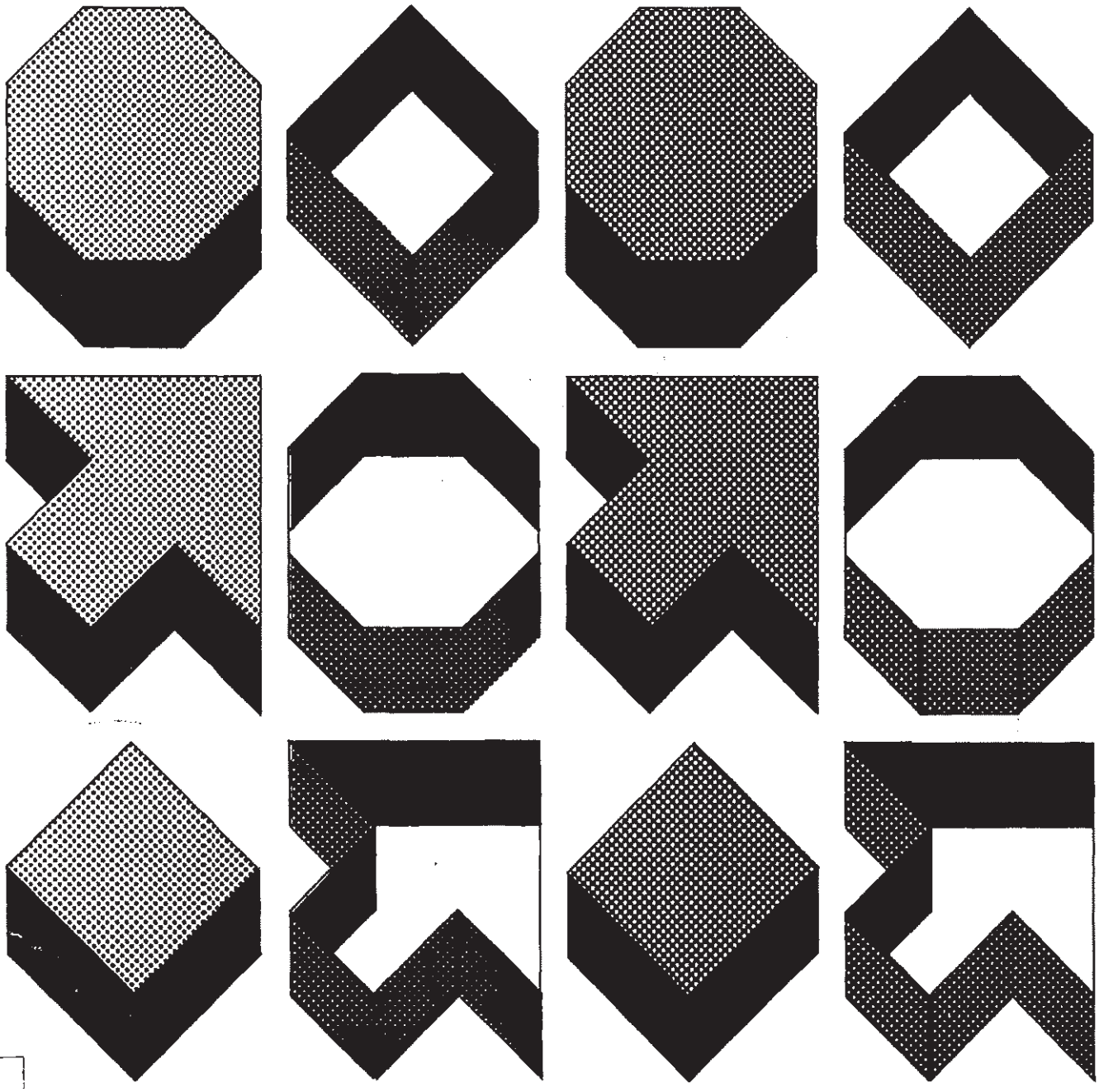
U.S. Comm'n on Civil Rights, *Accommodating the Spectrum of Individual Abilities,* 19-20 (1983)

Available at:

https://www2.law.umaryland.edu/marshall/usccr/documents/cr11081.pdf

(last accessed Dec. 30, 2024).

Accommodating the Spectrum of Individual Abilities



United States Commission on Civil Rights Clearinghouse Publication 81 September 1983

Based partly on State legislative reports criticizing prior approaches as inefficient, in the early 1820s public programs shifted to more organized, institutional care for indigent and handicapped people.[14] Although some facilities provided care for people with particular types of handicaps,[15] the typical approach that emerged was to confine handicapped people in almshouses or poorhouses, along with juvenile delinquents, prostitutes, elderly people, and poor people.[16] Most of these facilities were merely custodial, and many were unsanitary and overcrowded.[17]

Concern over the inadequacies of the local almshouse system prompted reformers like Dorothea Dix to push for State supervision of institutional facilities and for more specialized care.[18] As a result, in the 1850s, State facilities for various groups of handicapped people proliferated amid high hopes that training and education would allow people to leave the institutions and live in their own communities.[19] Although these programs apparently achieved some success, they were largely replaced between 1870 and 1890 by facilities operating on a new model focused on protecting handicapped people from society. This philosophy emphasized "benevolent shelter" and resulted in large institutions housing great numbers of disabled people far from population centers. These programs generally provided no training that might enable handicapped residents to return to their communities. Some residents were taught skills such as farming, but only to help defray institutional costs.[20]

Ironically, the protective isolation model, premised upon a belief that handicapped persons needed to be protected from the hardships incident to normal society, was replaced in the late 1800s and early 1900s by a growing sentiment that society needed protection from handicapped people.[21] The Social Darwinism of the late 19th century spawned a eugenics movement, which peaked in the United States in the 1920s. This movement was based on the notion that mental and physical disabilities were the underlying source of nearly all social problems and were occurring with ever-

[14] Ibid., p. 19.

[15] In 1773 the Eastern State Hospital at Williamsburg, Virginia, was founded especially to treat mental illness. The Massachusetts Asylum for the Blind (later the Perkins Institute) opened in 1832. The first American Asylum for the Deaf was started in Hartford, Connecticut, in 1817. The first private school in America for educating severely mentally retarded children was created in 1848. Ibid., pp. 20–28.

[16] Ten Broek and Matson, "The Disabled and The Law of Welfare," p. 811; "Disabled Americans: A History," p. 20. Some States already had almshouses, but a dramatic increase in their numbers occurred in the 1820s and 1830s. "Disabled Americans: A History," pp. 5, 19–20.

[17] Bowe statement, *Consultation*, p. 9; "Disabled Americans: A History," p. 20.

[18] "Disabled Americans: A History," p. 20. Dix also labored unsuccessfully for a Federal act establishing land grants for asylums to provide care for handicapped people, at a time when the Federal Government was providing many thousands of acres of Federal land to States for various public purposes. When Congress finally passed such a measure in 1854, President Franklin Pierce vetoed it on constitutional grounds as an attempt to make "the Federal Government the great almoner of public charity throughout the United States." Ibid., pp. 21–22; Burton, "Federal Government Assistance for Disabled Persons," p. B–4.

[19] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 89–92.

[20] Ibid., pp. 94–100.

[21] Ibid., pp. 100–105.

increasing frequency due to reproduction by unfit persons.[22] Some observers saw the spreading of handicapping conditions through heredity as the single most serious problem facing America.[23] Handicapped individuals were frequently referred to as "mere animals," "sub-human creatures," and "waste products" who were draining the economy and producing only "pauperism, degeneracy, and crime."[24]

To isolate handicapped people,[25] some professionals advocated institutionalization for even minor disabling conditions. The costs of maintaining the institutions, however, soon became burdensome for many communities. Reducing per capita costs allowed institutions to admit more people on a given budget.[26] These economies of scale fostered large, understaffed institutions often providing minimal custodial services to residents.[27]

By the end of the 1920s, scientists had discredited many of the underpinnings of eugenics, and the belief that handicapped people were a social menace waned. Experts challenged the eugenicists' overemphasis on heredity as the cause of disabilities and refuted theories that the human race was deteriorating genetically.[28] This undercut the primary rationale for segregating handicapped people from the rest of society, but the large State residential institutions had established a momentum of their own.[29] Institutionalization had become American society's automatic response to the question of how to deal with the handicapped population:

> [W]hether young or old; whether borderline or profoundly retarded; whether physically handicapped or physically sound; whether deaf or

[22] *See* Robert L. Burgdorf, Jr., and Marcia Pearce Burgdorf, "The Wicked Witch Is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons," *Temp L. Q.*, vol. 50, no. 4 (November 1977), pp. 997–1000 and authorities cited therein (hereafter cited as "Wicked Witch: Sterilization of Handicapped Persons").

[23] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 102–05; "Wicked Witch: Sterilization of Handicapped Persons," p. 998. An article calling for a sterilization statute in Kentucky, for example, issued the following warning:

> Since time immemorial, the criminal and defective have been the "cancer of society." Strong, intelligent, useful families are becoming smaller and smaller; while irresponsible, diseased, defective families are becoming larger. The result can only be race degeneration. To prevent this race suicide we must prevent the socially inadequate persons from propagating their kind, i.e., the feebleminded, epileptic, insane, criminal, diseased, and others.

Note, "A Sterilization Statute for Kentucky," *Ky. L.J.*, vol. 23 (1934), p. 168.

[24] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 102, 106–07.

[25] Eugenicists advocated several strategies for dealing with the propogation of handicapped people. These included prohibitions on marriage and sexual intercourse, compulsory sterilization, segregation from the community and from the opposite sex, and euthanasia. "Wicked Witch: Sterilization of Handicapped Persons," pp. 998–99. Some of these measures were difficult to enact or enforce or were struck down by the courts as unconstitutional. Ibid., pp. 1000–01.

[26] Wolfensberger, "The Origin and Nature of Our Institutional Models," p. 118.

[27] Some institutions actually competed to see which could reduce costs the most, with little concern for the welfare of residents or the quality of their environment. Ibid., p. 122. "Farm colonies" exploiting the labor of mentally retarded residents became common. Ibid., pp. 119–22.

[28] "Wicked Witch: Sterilization of Handicapped Persons," pp. 1007–08, and the authorities cited therein.

[29] Wolfensberger, "The Origin and Nature of Our Institutional Models," pp. 129–31.

Addendum Entry 11:

Webster's Complete Dictionary of the English Language 806 (1886).

Available at:

https://archive.org/details/websterscomplete00webs/page/806/mode/2up

(last accessed Dec. 30, 2024).

AUTHORIZED AND UNABRIDGED EDITION.

WEBSTER'S
COMPLETE DICTIONARY
OF
THE ENGLISH LANGUAGE.

WITH VARIOUS LITERARY APPENDICES AND NUMEROUS ADDITIONAL ILLUSTRATIONS.

THOROUGHLY REVISED AND IMPROVED,

BY CHAUNCEY A. GOODRICH, D.D., L.L.D.,
LATE PROFESSOR OF RHETORIC AND ORATORY, AND ALSO PROFESSOR OF THE PASTORAL CHARGE IN YALE COLLEGE;

AND

NOAH PORTER, D.D.,
PROFESSOR OF MORAL PHILOSOPHY AND METAPHYSICS IN YALE COLLEGE.

ASSISTED BY

DR. C. A. F. MAHN, OF BERLIN,
AND OTHERS.

NEW EDITION OF 1880,
With a Supplement of New Words, and an Additional Appendix of Biographical Names.

LONDON: GEORGE BELL & SONS;
LONGMAN & CO.; SIMPKIN, MARSHALL & CO.; WHITTAKER & CO.; HAMILTON, ADAMS & CO.; KENT & CO.
EDINBURGH: JOHN MENZIES. GLASGOW: PORTEOUS BROTHERS.
DUBLIN: M'GLASHAN & GILL. CALCUTTA: THACKER, SPINK & CO.
MELBOURNE: GEORGE ROBERTSON. BOMBAY: THACKER, VINING & CO. CAPE TOWN: J. C. JUTA.
PARIS: FOTHERINGHAM.

1886.

Măn, *n.*; *pl.* MEN. [A-S. *mann*, *man*, *monn*, *mon*, O. Sax., D., O. H. Ger., & Sw. *man*, N. H. Ger. *mann*, Icel. *madhr*, for *mannr*, Dan. *mand*, Goth. *manna*, *man*, from an hypothetical Goth. *minan*, imp. *man*, Skr. *man*, to think.]

1. An individual of the human race; a human being; a person. "In matters of equity between *man* and *man*." *Watts.*

A *man*, in an instant, may discover the assertion to be impossible. *More.*

2. Especially, an adult male person; a grown-up male, as distinguished from a woman or a boy.

When I became a *man*, I put away childish things. 1 *Cor.* xiii. 11.

3. The human race; mankind; the totality of men; sometimes, the male part of the race, as distinguished from the female. "Vindicate the ways of God to *man*." *Pope.*

And God said, Let us make *man* in our image, after our likeness, and let them have dominion. *Gen.* i. 26.

Man that is born of a woman is of few days, and full of trouble. *Job* xiv. 1.

The proper study of mankind is *man*. *Pope.*

Woman has, in general, much stronger propensity than *man* to the discharge of parental duties. *Cowper.*

In the system of nature, *man* is ranked as a distinct genus. *Encyc. Brit.*

4. One possessing in a high degree the distinctive qualities of manhood; one of manly strength or virtue. "This was a *man*." *Shak.*

I dare do all that may become a *man*;
Who dares do more is none. *Shak.*

5. A servant of the male sex; a male attendant; a vassal; a subject; — strictly, always with a possessive pronoun.

Like master, like *man*. *Old Proverb.*

The vassal or tenant, kneeling, ungirt, uncovered, and holding up his hands between those of his lord, professed that he did become his *man* from that day forth, of life, limb, and earthly honor. *Blackstone.*

6. A married man; a husband.

Every wife ought to answer for her *man*. *Addison.*

7. Sir; — used as a familiar term of address, often with impatience, and in a disparaging sense.

We speak no treason, *man*. *Shak.*

8. A piece with which a game, as chess or draughts, is played.

☞ *Man* is often used in composition, signifying male, belonging or pertaining to, or becoming, a man or men, and so on, the compounds thus formed being usually of very obvious signification; as, *man-child*, *man-eater*, *man-eating*, *man-hater*, *man-hating*, *man-hunter*, *man-hunting*, *man-killer*, *man-killing*, *man-knowledge* or *man-lore* (anthropology), *man-love* (philanthropy), *man-lover*, *man-loving*, *man-midwife*, *man-midwifery*, *man-mountain* (giant), *man-pleaser*, *man-servant*, *man-shaped*, *man-slayer*, *man-stealer*, *man-stealing*, *man-thief*, *man-woman* (hermaphrodite), *man-worship*, and the like.

Man of straw, a puppet; one who has no character or influence, or who is led about at the will of another; also, a candidate; a nominee. — *Man-of-war*, a first class ship of war. — *To be one's own man*, to have command of one's self; not to be out of one's own control.

Addendum Entry 12:

W.M. H. Parish, *Criminal Abortion*, 17 Am. Lancet 256, 256-260 (1893).

Available at:

https://books.google.com/books?id=7DFYAAAAMAAJ&newbks=1&newbks_redir=0&dq=lancet%20%22Criminal%20Abortions%22&pg=PA256#v=onepage&q&f=false

(last accessed Dec. 30, 2024).

—THE—

AMERICAN LANCET.

A MONTHLY

EXPONENT OF RATIONAL MEDICINE.

EDITED BY

LEARTUS CONNOR, A.M., M.D.

NEW SERIES, VOL. XVII—JANUARY TO DECEMBER, 1893.

DETROIT:

GEORGE S. DAVIS, MEDICAL PUBLISHER.

1893.

and fractured her hip, and sent for the first surgeon in Philadelphia at that time. She was put on the extension treatment, and in a couple of weeks bed-sores developed, and the apparatus had to be abandoned.

I do not want anyone to understand that I condemn all appliances, but what I wish to impress upon your minds is that I abolish them as the fundamental principle in such cases as I have described, where in many there is incontinence of urine, and the patients are so old that they cannot endure prolonged confinement. In many cases, if apparatus is persisted in, the patient is left more damaged by treatment than by the original accident.

*CRIMINAL ABORTION.**

BY WM. H. PARISH, M.D.

IN submitting a paper upon the subject of criminal abortion, I must refer to some extent to the law relating to it, and I shall do so with no little hesitation in the presence of the learned legal gentlemen with us.

I am very forcibly reminded of something I read during my college days, in one of those dead languages which we learn so slowly and forget so quickly—namely, that he who is ignorant of the science of warfare should not discuss military matters in the presence of Hannibal. So I, ignorant of law, might well be silent in reference to matters of law in the presence of that legal Hannibal, our very able District Attorney. But I hope he will correct me when in error, and I am sure that he and the other legal gentlemen present, and our Coroner, Mr. Ashbridge, will present in a most interesting and instructive manner the correct relations, under the law, of the physician to cases of criminal abortion, when the after-treatment comes under their charge.

The practice of destroying the fœtus *in utero* is not of modern introduction, but is recorded in history from the earlier nations, with the sole exception of the Jews. Aristotle and Plato defend it (*Travels of Anacharsis*, v, p. 270; *ibid.*, iv, p. 342). It is mentioned by Juvenal, Ovid, Seneca, and Cicero, and denounced by the earlier Christians. It was common in Europe through the Middle Ages, and still prevails among the Mohammedans, Chinese, Japanese, Hindoos; and it has been so extensively resorted to in most of the nations of Africa and Polynesia that it is doubtful if more have died in these countries by plague, famine, and the sword.

In approaching the consideration of criminal abortion, the first query which very naturally presents itself is: "What constitutes criminal abortion?" In attempting to reply to this question, we must not confound the different interpretations given to the term abortion. In medical language the word indicates delivery prior to the viability of the child, or it is restricted by some to delivery prior to the formation of the placenta; in other words, it is limited to delivery during the first six months or the first three months of pregnancy. In law this term is not thus limited, but is applied to delivery at any time prior to intra-uterine maturity.

The expulsion of the ovum, fœtus, or child by criminal violence, at any period of utero-gestation, is regarded as a miscarriage or abortion in law. Criminal abortion, then, is criminal delivery prior to maturity. What constitutes criminal abortion as distinguished from non-criminal abortion? Wherein rests its criminality under human or divine law?

"Abortion" has been legally defined thus: "Any person who does any act calculated to prevent a child from being born alive is guilty of abortion. The intention constitutes the crime, not the means employed. The drugs may even be harmless." He, then, who resorts to any procedure, however harmless in itself, with the intention of producing an abortion, is guilty.

If the pregnant woman, with or without the advice of another, administers to herself a drug or resorts to some mechanical procedure with the intention of producing an abortion, she is herself guilty and liable to punishment under the law, even though the drug or the procedure be itself harmless.

If she voluntarily submits to the use by another of mechanical means which she knows are intended to produce on her an abortion, she is guilty along with him who uses the instrument or other means.

In order that an attempt to produce an abortion may constitute a felony, it is not necessary that the woman be pregnant—even though she be not pregnant, the intention constitutes the crime.

I will not argue before this Society the great moral criminality of what is known under the law as criminal abortion. The medical profession looks upon this crime as one of the most heinous, and as closely allied to infanticide. He who is believed to be guilty of such a crime could never be received into membership in this or any other medical society; or if a member should so far forget his high calling as to be guilty of this crime, his expulsion would quickly follow upon the presentation of adequate evidence of his guilt.

The physician who resorts to criminal abortion does so in the most secret manner, for he knows not only that he is punishable under the law, but he also knows that professional ostracism will make him forever an outcast from the medical profession.

Undoubtedly many criminal abortions are produced by legalized practitioners of medicine, but in this State the law legalizing the practice of medicine is a very lax one, and in some States there is no law determining who shall practice medicine. I do not believe that criminal abortion is frequently performed, even ever so secretly, by men or women of recognized professional standing;

*Read before the Philadelphia County Medical Society, March 22, 1893.

but that it is at times produced by some such members is certainly the case, as the records of the criminal docket show. The habitual abortionist, if a legalized practitioner, is nearly always one around whom suspicion, at least, has rested, and this suspicion has been sufficient to debar him from that affiliation with the worthy members of the medical profession which constitutes to a large degree the stamp of professional respectability. The medical profession draws a wide distinction between a legalized practitioner of medicine and a worthy, reputable physician. Unfortunately, this distinction is not sharply drawn by some lay minds.

Graduates of the best medical schools have proved false to their noble avocation, and have brought dishonor upon themselves and, to a certain degree, discredit upon the profession of medicine. But this experience is not limited to our profession—a like experience occurs in the sister professions of theology and of law, and, in fact, we may say in all avocations of life.

There are those, however, who produce, or attempt to produce, criminal abortion who are not legalized practitioners of medicine—are not practitioners of medicine at all. Often such persons are exceedingly ignorant; they know nothing of the anatomy concerned; they possess no manual skill in the manœuvres undertaken; they have only the most vague knowledge of the injuries which may be inflicted; they know nothing, or almost nothing, of the effects of the drugs administered; they only believe that certain procedures and certain drugs have the reputation of producing abortion; yet he who attempts to produce an abortion always knows that what he is doing is criminal.

Criminal abortion, however, is not infrequently produced or attempted by the pregnant woman herself. I think that such women are not always cognizant of the fact that they are liable to the law for such an act. Each one knows that if she commits the crime on another she is amenable to punishment; but for a self-produced abortion she seems not to know that she is punishable.

A few words in reference to the justifiable production of abortion or of premature labor by members of the medical profession. That the production of delivery before the viability of the child, *i. e.*, before the end of the sixth month, is at times justifiable, is recognized in the courts and by the medical profession. But the conditions which justify such a radical procedure are not numerous.

Whenever it is necessary to terminate pregnancy in order to save the life of the mother, such a procedure is justifiable; if not thus necessary, the procedure is criminal. I grant that there is room for difference of opinion in the medical profession as to what conditions justify the production of abortion. The resort to an abortion may be reprehensible though not criminal; for instance, when it is performed by a practitioner of medicine under the mistaken, though honest, opinion that an abortion is necessary to save the life of the mother. It is quite generally accepted that there are cases of disorders of the kidneys or of the heart, of degenerations of the ovum—as myxoma of the chorion, and polyhydramnios—and very rarely instances of uncontrollable vomiting, in which the production of early or late abortion is demanded and justifiable because it is necessary to save the life of the mother, and also because the death of the mother always involves the death of the embryo and usually that of the child approaching maturity. The authoritative works on "Medical Jurisprudence" class among the conditions justifying abortion, extreme pelvic deformity. Although this statement was a proper one at one time, it is not so at present, in my opinion.

The very favorable results of the Cæsarean section, and of its modification, the Porro operation, and of symphysiotomy so recently introduced into this country—the results, I say, of these operations are now so very favorable, both to the mother and to the child, that it is time to eliminate even extreme pelvic deformity from the list of conditions justifying early abortion. The law leaves it quite entirely to the medical profession to determine what constitutes justifiable abortion, either early or late. The responsibility in this direction thus placed upon us is a very weighty one, and the privilege conferred with it should be exercised with the utmost discretion. I have, in a very few instances, felt that the physician was getting very close to criminal ground when he produced an abortion under the plea of justifiability. For instance: A lady pregnant three months wanted an abortion produced, and so did her husband, because she, having had one very painful labor, had great dread of another labor in advanced pregnancy. They both expressed great fear that insanity would develop if her pregnancy was not terminated. Her physician asked me in consultation. We decided that an abortion was unjustifiable. She returned to her former home in a distant city, and there the abortion was produced by a regular practitioner. I saw a letter from this physician in which he attempted to justify on medical grounds, not only this abortion, but also two previous ones on the same lady. His plea was that of justifiability because of apprehended insanity. Such and similar cases seem to me to quite merge into criminality. Professional opinion in reference to what constitutes justifiable abortion should be so firmly crystallized that criminal abortion could not be performed under a false plea of justifiability.

As to the frequency of the occurrence of criminal abortion, it is impossible to give any statement of even approximate accuracy, as secrecy is so closely associated with its performance.

I suppose every physician of some reputation as an obstetrician or gynæcologist has applications from those desiring that an abortion should be produced. Probably a half-dozen such applicants call upon me during each year. Doubtless the same women visit other physicians

on like errands. Also, nearly every physician is called in to take charge of the after-treatment of cases of criminal abortion. He will suspect some of them to be criminal, but in most instances he is unable to assert that the abortion is or is not a criminal one. Many cases of early criminal abortion do not come under reputable professional care at any period of their course. Even all the fatal cases are not recognized as criminal. For these reasons it is impossible to do more than to form an opinion that criminal abortion is performed with considerable frequency. All statistical statements as to its frequency are merely expressions of opinion.

It is well recognized that criminal abortion brings to the patient enhanced dangers—dangers greater than those pertaining to accidental or justifiably produced abortion. The increased dangers are due to the character of the manœuvres and to the drugs resorted to. The mechanical measures are often carried out in a bungling, unskilled manner, and without regard to the liability of conveying a septic poison. Often drugs are used which, when given in too large quantities, endanger the life of the patient whether or not an abortion is produced. The woman, desirous of securing secrecy, often does not call in a physician sufficiently early to enable him to prevent a fatal result.

The methods of producing, or of attempting to produce, criminal abortion, are numerous and widely diverse in character. Of the drugs resorted to in this country, probably the ones most frequently used, and also the ones most likely to effect the result aimed at, are the preparations of ergot and of cotton-root. These drugs act by stimulating directly the contraction of the uterus. I have known a patient to treasure up a bottle of ergot left over from her labor, and to successfully partake of its contents at the incipiency of her next pregnancy. But even these drugs usually fail to effect an abortion at any period of pregnancy. Among other drugs frequently administered are aloes and savine. The entire list of medicines occasionally resorted to would be a long one —among them may be mentioned elaterium, croton oil, colocynth, gamboge, cantharides, arsensic, strychnine, corrosive sublimate and other forms of mercury; pennyroyal, tansy, black hellebore, and not a few others, some of which are active poisons, others dangerous in large quantities, and some harmless. None of them produce abortion except occasionally, and then only through their injurious effects upon other organs or upon the general system. Some of them will produce the death of the patient without producing an abortion.

Tardieu, in his classical treatise, gives numerous cases of abortion produced, or attempted, by mechanical means. The professional abortionist usually dilates the cervix with a metallic dilator, introduces a slender instrument into the uterus, and punctures the membrane—or he may use the latter instrument without previous dilation of the cervix. Very usually, after the membranes have been punctured, he dismisses the patient, and an abortion comes on in generally from three to ten days.

The more modern method of the criminal abortionist of advanced ideas is to dilate the uterus with graduated dilators, under ether, and at once to empty the uterus with all antiseptic precaution, usually receiving the woman into his private hospital for this operation. A lady applied to one of the medical men who advertised in the New York papers. He admitted her into his hospital in New York City, and practiced the immediate removal of the ovum. She returned to Philadelphia at the expiration of a week's absence.

But sometimes the operator is ignorant and unskilled, and a great variety of instruments have been carried into the uterus: wooden skewer, crochet-needle, hair-pin, knitting-needle, a weaver's spindle, whalebone, wire, umbrella-ribs, pen-holders, catheters, bougie, sounds, tents, and dilators. Tardieu speaks of the frequent use in France of what is there termed a hedgehog, which I believe is a slender instrument having near the end a number of bristles—which lie close to the handle when introduced into the uterus, but expand after introduction, and which, when rotated very effectually, break up the ovum—but which has proved disastrous also to the mother. Electricity is also effectually resorted to, one pole being usually introduced into the uterus.

Injections of corrosive or other irritant substances into the vagina are occasionally resorted to by the patient or by an ignorant abortionist. I have known a patient to produce an exfoliation of almost all of the epithelial lining of the vagina, by means of a strong solution of alum, without producing an abortion. Injections of different fluids, even water, into the uterus, are resorted to, and if the membranes are largely detached or ruptured, abortion inevitably follows. In a few instances the most violent measures, such as the introduction of the hand into the uterus and attempts to drag out the entire uterus, have produced most disastrous effects.

What lesions do we find following attempts at criminal abortion? Naturally, from the variety of the means resorted to, these are various, and may be numerous in an individual case. In one authentic case the patient herself carried into the uterus an umbrella-rib, which perforated its wall, entered and passed upward and through the abdomen, through the diaphragm and into the lungs. She did not desist in her efforts until coughing of blood and troubled breathing alarmed her. She concealed her manœuvres, and the umbrella-rib was found *in situ* in a post-mortem examination. During pregnancy the physiological softening of the uterine tissue permits the easy passage of a somewhat sharp instrument through it into the peritoneal cavity, and generally with resultant fatal peritonitis. When mechanical means are resorted to, if perforation of the uterus does not occur there is usually, though not invariably, laceration—it may be a

slight one—of the neck of the uterus or of the vagina. Rupture of the vagina or of the uterus has occurred from the introduction of the hand. Abscesses at various points in the uterus or in close proximity to it may follow. Blood-poisoning with local inflammations constitutes the pathological condition following many cases of criminal abortion. When drugs have been administered, gastric and intestinal inflammation may result, and evidences of such be seen after death.

It is not usually difficult to determine that an abortion is in progress; but it is by no means an easy matter to determine with certainty, from the examination of the patient during life, whether or not the abortion is criminal in character. Even fatal perforations of the uterus are not usually recognizable during life. The statements of the patient may give this information, but she may, and usually does, deny that any attempt has been made to produce an abortion. Her statements, if accepted, would usually be misleading. Hence cases which recover—and the very great majority do recover—can usually be only diagnosticated as *probably* criminal abortions.

In the lesions found post-mortem, there is no characteristic evidence that the abortion has been a criminal one, excepting the wounds, which are usually, though not always, present in such cases as have resulted from the use of mechanical means. Even then the history of the case must be looked into, for the abortion may have been innocently produced by a reputable physician who had failed to recognize the existence of pregnancy. Lacerations of the vulva, perineum, or vagina may result from violent sexual intercourse, and excessive or violent sexual intercourse is not an infrequent cause of abortion in the young.

The after-treatment of criminal abortion must be according to the peculiarities of the case. If the abortion is incomplete, the indications are absolute to immediately empty the uterus and to render it aseptic. Here the expectant treatment is fraught with great danger. Such cases usually call for the utmost skill of the expert to effect the recovery of the woman.

Most frequently the underlying cause of a fatal result is septic infection or blood-poisoning. The traumatism produced is in itself usually slight and insignificant, but septic poison develops in the retained fragments of the products of conception, or is carried into the genitals by the abortionist. Blood-poisoning and the associated inflammatory lesions result.

Abdominal section, with ablation of the uterus and its appendages, or of the appendages alone, may be necessitated.

When a patient suffering from a criminal abortion is sent to a hospital, it should be to one having a maternity or a gynæcological ward; otherwise the best treatment may not be secured.

In the management of cases of criminal abortion, the physician is often placed in a most trying position. If, perchance, he has been informed by the patient, or if in his examinations he has discovered, that measures or drugs have been resorted to with the view of producing an abortion, what becomes his duty under the law? Here we would like to have an expression of the views of the Coroner, the District Attorney, and the other lawyers present.

Is it incumbent upon the physician to notify the officers of the law that an abortion has been produced, or attempted, illegally? If he does not thus furnish this information, to what extent, if any, does he render himself a *particeps criminis* under the law? Should the information thus gained in the practice of his profession be held sacred in deference to the good name of his patient, who is usually, though not always, more sinned against than sinning, or in deference often to the fair fame and happiness of the other members of the family?

I believe that very often the physician does all that is in his power to conceal both the fact that an illegitimate pregnancy has occurred, and also that an abortion, even though criminal, has resulted. Is the physician then acting with justice to himself, and with a proper appreciation of his duties under the circumstances? Is it incumbent upon him to become an informer?

I know that in this State the information gained in the practice of his profession, and necessary to the proper treatment of his patient—I know that such information is not privileged, but may be extorted from him in our courts. Yet must he voluntarily convey this information to the officers of the law? Or shall he draw a distinction between the fatal and the non-fatal cases? Shall he report only the fatal cases to an officer of the law, withholding his certificate of death in such instances and letting the coroner investigate the circumstances? Certainly, if the case is about to terminate fatally, the proper information should be given in order that an ante-mortem statement may be secured; and undoubtedly also no physician should give a death certificate in any case in which the death has resulted from what he strongly suspects or believes or knows to have been a criminal abortion.

These rules are in accord with justice to the physician whose reputation is at stake, and are also in accord with law and the welfare of the community. But if the patient is recovering, is it required by law, or is it in accord with the general welfare of the community, that information bearing upon the character of the abortion should be formally brought by the physician before the officers of the law? I will answer the question in the negative, and will ask the gentlemen present to tell us in the discussion whether or not I am correct. In my opinion the physician should not become an informer.

I will further say that he should not elicit or extort from the patient any information bearing upon her criminality, other than that which is necessary for his guid-

ance in the performance of his professional duties. He must not perform the functions of a detective.

In all serious cases of abortion, especially if criminal, the physician should secure another physician in consultation for the protection of his own reputation, as well as for the welfare of the patient. Let the physician remember, also, that he can examine the patient's genitals only with her consent. If he by an exercise of force secures such examination, he renders himself liable to punishment by legal process.

The consideration of the measures which may tend to diminish the number of criminal abortions becomes very important in every large city, for it is believed that where the population has become concentrated, there this crime occurs with greatest frequency. Those conditions or habits of life which diminish the number of marriages increase the number of illegitimate pregnancies and the number of criminal abortions. But many such abortions occur in the married, and largely in proportion to the tendencies on the part of the married to indulge in expensive habits of life beyond their financial abilities.

The disgrace and shame attendant upon illegitimate pregnancy or maternity is the impelling motive on the part of the great majority of the unmarried. A recognition of the difficulties and of the disgrace attendant upon the care of an illegitimate child, on the part of its unmarried mother, impels some to procure criminal abortion.

With all, however, there is an underlying immorality, usually on the part of both sexes, which leads up to the commission of an act as unnatural as it is criminal. The preservation of the purity of morals, then, of the youth of both sexes, constitutes the only efficient safeguard against the occurrence, in any community, of criminal abortion—other measures are adjuncts only.

The American Association of Gynæcologists and Obstetricians held its three days' meeting at the Russell House in Detroit during the first of June. A good attendance was present and excellent work accomplished. Unfortunately its near approach to the meeting of the American Medical Association interfered with visitors from the local profession. Next year it will meet in Toronto under the presidency of Dr. Geo. H Rohe.

President McGuire closed his address to the American Medical Association thus: "Let us strive to show the world that our whole object is scientific work, and our high purpose good to humanity." To this we say Amen, and so says every earnest member of the profession. But this end cannot be attained so long as the present Nominating Committee is permitted to exist in the American Medical Association with its taint of political methods utterly at war with all science or high purpose of good to any person but wire-pullers.

Correspondence.

LONDON LETTER.

The Vegetarians and Long-Distance Walking—Petroleum in Diphtheria—The Sanitary Registration Bill—The Detection of Poison One Hundred Years Ago—A New Danger—Leprosy in England—An Operation for Strabismus—Opening of St. Bartholomew's the Great—Influenza in the Navy.

The vegetarians are exulting over the achievements of the long-distance pedestrians who in the walk from Berlin to Vienna came in first and second, having supported nature during this arduous journey mainly on bread, apples, and cold water. After the contest they were entertained at a banquet consisting of salad, vegetables, and fruit.

Paris medical men continue to give their opinions on the treatment of diphtheria by petroleum as carried out by Dr. Flahaut, a provincial physician. All unite in testimony as to the fact that such a treatment is by no means original. Professor Dumontpellier, of the Hotel Dieu, says that the experiments of Dr. Flahaut are highly interesting, but he is uncertain as to the effect of the oil on the sound parts of the respiratory organs. According to the reports to hand of the cases cured, there would be no injurious results to the healthy parts of the air-vessels. He is also mindful of the fact that petroleum was tried in Paris hospitals on patients suffering from diphtheria, and if Dr. Flahaut be so successful as is rumored, he cannot account for the metropolitan practitioners returning to the phenic acid treatment. Dr. Cartaz, an authority on throat diseases, says that to his knowledge no specific treatment of diphtheria has been yet discovered beyond the cauterization by phenic acid, with antiseptic washing and tonics. Dr. Archambault, who in the Children's Hospital painted the false membranes with the oil, the patients also receiving small internal doses of petroleum, considered it to be an excellent topical or external medicament, but it was dangerous to manipulate owing to its toxic quality, and moreover it was by no means a sovereign remedy for the disease. Doctor Bergeron, who has written standard treatises on diphtheria, is inclined to suspend his judgment until further particulars be given about Doctor Flahaut's experiments. Both diphtheria and croup have, he says, been treated by inhalations, but no permanent substantial success was secured.

With the view of supporting the Sanitary Registration bill now before Parliament, a conference has been called. The object of the promoters of the bill is not to attempt to carry any particular measure, but to attempt to solve a question which is thought to be of paramount interest to the community at large. At the opening proceedings of the conference the chairman referred to improved methods of sanitation in connection with new

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ACCESS INDEPENDENT HEALTH SERVICES, INC., d/b/a Red River Women's Clinic; KATHRYN L. EGGLESTON on behalf of herself and her patients; ANA TOBIASZ, on behalf of herself and her patients; ERICA HOFLAND, on behalf of herself and her patients; and COLLETTE LESSARD, on behalf of herself and her patients, Plaintiffs/Appellees, -vs- DREW H. WRIGLEY, in his official capacity as Attorney General for the State of North Dakota, Defendant/Appellant, and KIMBERLEE JO HEGVIK, in her official capacity as the State's Attorney for Cass County; JULIE LAWYER, in her official capacity as the State's Attorney for Burleigh County; AMANDA ENGELSTAD, in her official capacity as the State's Attorney for Stark County; and HALEY WAMSTAD, in her official capacity as the State's Attorney for Grand Forks County, Defendants.	**Supreme Ct. No. 20240291** **District Ct. No. 08-2022-CV-1608** South Central Judicial District

DECLARATION OF SERVICE

[¶1] I declare that a true and correct copy of the following documents:

1. Appellant Brief of Drew H. Wrigley (Oral Argument Requested); and
2. Addendum to the Appellant Brief of Drew H. Wrigley.

were filed electronically with the Clerk of the Supreme Court through the North Dakota Supreme Court E-Filing Portal and were served upon counsel of record noted on Exhibit A attached hereto by the means designated below:

☒ North Dakota Supreme Court E-Filing Portal
☐ U.S. Mail
☒ Email
☐ FedEx

[¶2] I declare, under penalty of perjury under the law of North Dakota, that the foregoing is true and correct.

Dated: January 6, 2025.

/s/ Tiffani Broden

BY: Tiffani Broden
24 North 4th Street
Grand Forks, ND 58203
701-775-0521
Email: tiffani@grandforkslaw.com

Exhibit A

To the Plaintiffs/Appellees:

Meetra Mehdizadeh at mmehdizadeh@reprorights.org;
Astrid Ackerman at aackerman@reprorights.org;
Caroline Sacerdote at csacerdote@reprorights.org;
Jiaman Wang at awang@reprorights.org;
Marc Hearron at mhearron@reprorights.org;
Z. Beatrix Lu at blu@reprorights.org;
Christina A. Sambor at christina.sambor@genderjustice.us;
Jess Braverman at jess.braverman@genderjustice.us;
Caroline Elvig at caroline.elvig@weil.com;
Robert Niles-Weed at Robert.Niles-Weed@weil.com;
Melissa Rutman at Melissa.Rutman@weil.com;
Krystel Delauney at krystel.delauney@weil.com;
Naz Akyol at Naz.Akyol@weil.com;
Luna Barrington at Luna.Barrington@weil.com;
Liz Grefrath at Liz.Grefrath@weil.com;
Lauren Kelly at Lauren.Kelly@weil.com;

To the Other Defendants

Scott Porsborg at sporsborg@smithporsborg.com.