VICTIM OR ACCOMPLICE? : CRIME, MEDICAL MALPRACTICE, AND THE CONSTRUCTION OF THE ABORTING WOMAN IN AMERICAN CASE LAW, 1860s-1970

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The state legislators who, in the 1860s and 1870s, passed laws that for the first time criminalized abortion at all stages of pregnancy envisioned the aborting woman as an active agent, one who searched out abortion services in order to avoid the reproductive duties of marriage. "Fashionable" and "well-to-do" married women, mid-nineteenth-century anti-abortion commentators charged, filled the offices of abortionists. These "selfish" women had been known to declare "that they have neither the time nor the inclination to nurse babies."[1] This image of the aborting woman, which provoked fears of feminism and fears that non-white and Catholic groups would soon outpopulate white Protestants, inspired lawmakers to criminalize abortion. Anyone who aided a woman's efforts to end a pregnancy, whether by providing information, drugs and instruments, or inducing an abortion, and in some states the woman as well, could be prosecuted under the nation's new criminal abortion laws.[2]

The woman who aborted was the villain in this mid-nineteenth-century anti-abortion story. Yet when the new criminal laws were put into practice, the representation of the aborting woman dramatically changed. Despite the consensus that produced the criminal abortion laws, the

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[1] James C. Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800-1900 94, 107, 108, ch. 4 (1978).

[2] On the criminalization of abortion, see Mohr, *supra* note 1. *See also* Linda Gordon, Woman's Body, Woman's Right: Birth Control in America, 51-60 (rev. ed. 1990); Carroll Smith-Rosenberg, Disorderly Conduct: Visions of Gender in Victorian America 217-44 (1985); Janet Farrell Brodie, Abortion and Contraception in Nineteenth-Century America, ch. 8 (1994); Leslie J. Reagan, When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973 8-14 (1997). The criminal abortion statutes remained virtually unchanged, except for raising the penalties, until the reform movement of the 1960s. Mohr, *supra* note 1, at 200-25.

character of the aborting woman was a subject of legal debate throughout the century of illegal abortion. The judiciary was repeatedly asked whether the woman who had an abortion was an "accomplice" in the crime of illegal abortion or a "victim" of the criminal abortionist. The designation of the aborting woman as victim or accomplice in the courtroom could significantly affect trial outcomes. One definition cast the woman as passive object of violence, the other, as active agent in crime. The debate, carried out in courtrooms and recorded in appellate opinions, offers an opportunity to investigate judicial thinking not only about sexuality and gender, but also about the dual responsibility of the state to protect the health and safety of its citizens and to punish those who violated the law. Finally, analysis of jury actions affords a glimpse of the views of ordinary citizens regarding women, abortion, and the duties of physicians.[3]

Judges settled the legal problem in contradictory ways. State interests, legal principles, and gender norms all jostled for priority in the judiciary's decision-making. Rulings on the question of whether the woman was a victim or an accomplice in abortion depended first on whether the issue arose in criminal or civil law. In the criminal law, jurists easily found their way to a practical response that facilitated the state's goal of prosecuting abortionists.[4] By the beginning of the twentieth century, the courts ruled firmly and consistently that the aborting woman was a victim in criminal cases. In the civil law, however, where women or their relatives brought suits against abortionists for malpractice or wrongful death, the state's interest was murky and no single solution could be found. As a result, judicial attitudes toward women and men, crime and negligence, sex and reproduction came to the fore and produced contradictory interpretations of the law. The opposing rulings in these civil cases exposed significant disagreement within the judiciary over the primacy of the state's commitment to punishment versus protection of the citizenry.

Although the state courts never reached a consensus in the civil law about how to regard the woman who aborted, the judiciary concurred on the importance of the production of children within marriage. As Nancy Cott has recently argued, marriage was not simply a romantic or private

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[3] Over 200 state judicial opinions were identified through reports in the medico-legal section of the Journal of the American Medical Association. *See* Annotation, Right of Action for Injury to or Death of Woman who Consented to Abortion, 21 A.L.R. Fed. 369-73 (1952); Francis Wharton, A Treatise on Criminal Law 1010-11 (11th ed. 1912).

[4] *See* Mohr, *supra* note 1. Mohr found that although state laws provided for the prosecution of women who had abortions, late-nineteenth-century state prosecutors went after the abortionists. Juries were reluctant, however, to convict people accused of performing abortions. As a result, prosecutors increasingly focused on prosecuting abortionists whose practice had resulted in the death or severe injury of a woman patient. This emphasis did not change until around 1940. *Id. See also* Leslie J. Reagan, "About to Meet Her Maker": Women, Doctors, Dying Declarations, and the State's Investigation of Abortion, Chicago, 1867-1940, 77 J. Am. Hist. 1240 (1991).

relationship, but one highly regulated by the state.[5] The state granted marriage contracts; it expected husbands and wives to produce families. Furthermore, the refusal to do so, through the use of abortion and contraception, was newly prohibited by law in mid-nineteenth-century America. In the civil law, as the appellate record shows, an unmarried woman who aborted was likely to be forgiven her transgressions and allowed to bring suit in civil court; in contrast, a married woman was likely to be reprimanded for her abortion and her suit prohibited. Reproduction, these civil cases indicate, was more than a female or familial duty; it was a married woman's duty to the state.

Once abortion reached the courtroom, prosecutors constructed an image of the aborting woman that contrasted sharply with the prevailing nineteenth-century representation of abortion that underpinned the criminal abortion laws.[6] Prosecutors bringing an accused criminal abortionist to trial did not present the woman who had an abortion as an immoral woman bent on avoiding motherhood, but instead represented her as a victim and told the crime of abortion in the form of a rape narrative. Although the details of each case were different, the goal of convicting criminal abortionists produced a plot line that was the same in all cases: the woman who had the abortion was a "victim" and the abortion operation was an "assault" on her body. The assailant, however, was not the man with whom she had had sexual intercourse, but the practitioner who terminated her pregnancy. The fictional story of assault by abortionists denied that women brought themselves to their practitioners and actively sought and arranged their abortions.[7]

Defense attorneys for accused abortionists, in contrast, constructed women who had abortions as accomplices. Depicting the woman as a partner in the crime of abortion matched the attitude toward women that had propelled passage of the criminal abortion laws in the first place. Making the woman a co-criminal, whose words should not be believed, was also a strategic tactic. Judges routinely warned juries to be cautious about accepting the testimony of accomplices and state statutes required that the testimony of accomplices be corroborated.[8] Relying on the general rule in

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[5] Nancy F. Cott, Giving Character to Our Whole Civil Polity: Marriage and the Public Order in the Late Nineteenth Century, *in* U.S. Women's History as U.S. History: New Feminist Essays 107-21 (1995).

[6] This description of the legal debate in this and the following paragraph is based on my reading of over 200 appellate opinions, as described above.

[7] On the social history of abortion, see Reagan, *supra* note 2.

[8] H.C. Underhill, A Treatise on the Law of Evidence 337-38 (1894). On the history of these customs and rules, and hundreds of citations illustrating the endless discussion of accomplices and the degree of corroboration required, see John Henry Wigmore, A Treatise on the Anglo-American System of Evidence in Trials at Common Law 312-34 (3d ed. 1940).

criminal law that treated the testimony of accomplices as untrustworthy, defendants in criminal abortion cases argued on appeal that their convictions should be reversed since they had been convicted on the testimony of an accomplice. If judges accepted the defense's argument and treated women who had abortions as accomplices, it would have been nearly impossible for prosecutors to win criminal abortion cases since, in many cases, the state could not bring additional witnesses because no one else had heard the negotiations or observed the operation. If the woman who had an abortion was deemed "victim," prosecutors had an advantage; a defendant accused of criminal abortion could be convicted on the testimony of the aborted woman alone.

The problem of evident female complicity in the crime of abortion was quickly resolved in the state's interest. The nation's higher courts decided, repeatedly, that the woman was a victim and that her testimony need not be corroborated. One of the earliest cases was an 1864 New York case, in which a man convicted of advising a woman to take "Dr. Johnson's French Female Pills" to induce a miscarriage complained that he had been convicted on the testimony of the very woman whom he had assisted.[9] Because she was an accomplice, he argued on appeal, the criminal law required that her testimony be corroborated. The highest court of New York concluded to the contrary. The court declared, "She did not stand legally in the situation of an accomplice; for although she, no doubt, participated in the moral offense imputed to the defendant, . . . the law regards her rather as a victim than the perpetrator of the crime."[10] In an 1889 decision, the New York court elaborated; though the criminal abortion statute envisioned "two persons . . . co-operating in the commission of the crime," the woman was regarded as "the subject, upon whose body the crime is committed."[11] Regardless of a woman's actual behavior, her demand for an illegal abortion, and her collaboration in inducing an abortion, the judges decided to call her a victim.

A legislative backlash arose against the judicial interpretation of women as victims of abortion and the power granted their words. At the peak of the nation-wide campaign against abortion, when the representation of the selfish married woman who aborted her pregnancy in favor of frivolity over family was in circulation, two states tried to reverse the trend.

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[9] Dunn v. People, 29 N.Y. 523 (1864).

[10] *Id.* at 527. It should be noted that the courts' treatment of women as victims in abortion cases cannot be explained as the natural result of the fact that the woman had died following an illegal abortion, since as in this case and a number of others, the woman survived her abortion efforts. Michael Grossberg remarked on mid-nineteenth-century jurists' special treatment of women as victims of abortion, in Governing the Hearth: Law and the Family in Nineteenth-Century America 164, 182-83 (1985).

[11] People v. Vedder, 98 N.Y. 630, 631-32 (1889).

California, in 1861, and Minnesota, in 1875, amended their laws to *require* that the testimony of a woman be corroborated in abortion cases. Physicians and surgeons, the California Legislature declared, could not be "arrested, indicted, or put on trial, or convicted by the testimony of such woman alone."[12] "No conviction shall be had," the Minnesota Legislature clarified in 1875, "upon the uncorroborated evidence of such a woman," because "such a woman" could not be trusted.[13]

The conditions imposed by the California and Minnesota state legislatures drew on a basic assumption about women in rape cases: a woman who claimed she was a victim was apt to be lying.[14] It would be dangerous, the legislators believed, to allow men, and particularly professional men such as physicians, to be convicted on the word of a woman alone. The California and Minnesota statutes expose an underlying fear that women were likely to use the power of being listened to and believed in the courtroom to falsely accuse, convict, and imprison men. In an 1870 opinion, the California Supreme Court remarked with approval that the state Legislature had "foresee[n] that physicians and surgeons might be exposed to great peril" if the testimony of a female patient alone could convict them of criminal abortion and had "wisely" required corroboration.[15] The California court expressed concern for professional men who could be harmed because of the nature of their private practice. Women patients, perhaps all patients, were potential threats to their doctors.

Although criminal abortion cases mimicked rape cases in the way that they cast the woman as victim, the treatment of women typical in rape

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[12] Act of April 16, 1850, Sec. 45, amendment approved May 29, 1861, Hittell's Dig. Art. 1447, *cited in* People v. Josselyn, 39 Cal. 393, 395 (1870).

[13] General Laws of the State of Minnesota 81, ch. 49 (1875).

[14] Anna Clark, Women's Silence, Men's Violence: Sexual Assault in England, 1770-1845 67-69 (1987). For cases that explicitly connected rape and abortion, see Goldnamer et al. v. O'Brien, 33 S.W. 831, 831 (Ky. 1896); Cahill v. State, 178 P.2d 657, 657, 660, 664 (Okla. 1947).

[15] People v. Josselyn, 39 Cal. at 399. The opinion stated:

> In view of the confidential relations which exist between physicians and surgeons and their patients, and the secrecy which necessarily exists in the treatment of certain diseases to which females are subject, and foreseeing that physicians and surgeons might be exposed to great peril if criminal practices imputed to them could be sustained on the uncorroborated statement of the patient alone, the Legislature has wisely provided that they shall not be 'arrested, indicted, put on trial, or convicted' of an attempt to produce abortion 'by the testimony of such woman alone.'

Id.

cases was atypical in criminal abortion cases.[16] When defense attorneys in criminal abortion cases tried to denigrate the women by asking questions regarding their sexual histories, the norm in rape cases, judges forbade the introduction of evidence designed to malign the sexual morality of women who had abortions.[17] The testimony of a woman was treated as trustworthy in one set of criminal cases and suspect in the other.

The legislative effort to force the courts to treat women who had abortions as accomplices and require corroboration of their testimony turned out to be nothing more than a skirmish. When Minnesota's Supreme Court reviewed an abortion case in 1875, the same year that the legislature made it clear that women should be treated as accomplices, the court interpreted the statute in a flexible fashion. The court decided to assume that evidence corroborating her testimony had indeed been provided since, the judges explained, it was not apparent in the incomplete record "that there was no such corroborative evidence."[18] Despite the new statute, the court upheld the conviction of Jay Owens for providing the "noxious" medicines used to induce a miscarriage.[19]

Why did nineteenth-century jurists, who might be expected to share the attitudes toward women held by other men of their class, treat the aborting woman differently? The judiciary faced a quandary of ideology versus the practicality of enforcing the criminal abortion laws. In the end, the higher courts facilitated the successful prosecution of criminal abortionists, an outcome that meshed with the intention of mid-nineteenth-century criminal abortion legislation. As the New York judges remarked in an 1889 opinion, the question of whether the woman who had an abortion was a victim or an accomplice, was "too well settled by authority, and too salutary in practice to now be questioned."[20] She was a victim. This counterintuitive interpretation of women's role in abortion was "salutary": it made winning convictions in abortion cases possible. The benefits of

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[16] When women complained of rape, their own narratives were rejected and legal tradition allowed them to be transformed from victims into vamps who sought sex. *See* Clark, *supra* note 14; Mary E. Odem, Delinquent Daughters: Protecting and Policing Adolescent Female Sexuality in the United States, 1885-1920 65-70 (1995); Charles P. Nemeth, Character Evidence in Rape Trials in Nineteenth-Century New York: Chastity and the Admissibility of Specific Acts, 6 Women's Rts. L. Rep. 214-25 (Spring 1980); Karen Dubinsky, Improper Advances: Rape and Heterosexual Conflict in Ontario, 1880-1929 22-32 (1993).

[17] People v. T. Wah Hing 114 P. 416 (Cal. Ct. App. 1911); Meno v. State, 83 A. 759, 760-61 (Md. 1912).

[18] State v. Owens, 22 Minn. 238, 244 (1875).

[19] *Id.* at 239.

[20] People v. Vedder, 98 N.Y. at 632.

such a rule to the state's case legitimated the rule. The Minnesota Supreme Court expressed the same view in 1894. "As a first impression," the court admitted, "it may seem to be an unsound rule that one who solicits the commission of an offense, and willingly submits to its being committed upon her own person, should not be deemed an accomplice . . . . But in cases of this kind the public welfare demands the application of this rule."[21] By the end of the nineteenth century, appellate courts in virtually every state adopted the convenience of treating women who had abortions as victims in criminal cases and affirmed these rulings throughout the twentieth century.[22]

Yet the question of whether women were victims or accomplices in abortion continued to arise when women themselves or their families brought suits against practitioners who botched an abortion and/or individuals who arranged them. That some women sued their own abortionists for malpractice challenges some common-place assumptions about women and abortion in the years before Roe v. Wade.[23] This set of cases suggests, first, that women were neither as embarrassed nor as silenced about their sexual and reproductive behaviors as many assume, and, second, they did not fear the law. In these civil cases, women and their family members deliberately entered the legal arena, made illegal abortions public, and expected the legal system to aid them at a time of injury or death. Even in states where women could be prosecuted for having abortions, women brought cases against their illegal abortionists.[24] Women and their relatives expected not only competent care when they engaged an abortionist, but, if their abortion provider proved to be unskilled, they assumed they had recourse in the courts. Their victories in court show they were right. Juries granted awards ranging from $200 to $8,000.[25] The

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[21] State v. Pearce, 57 N.W. 652, 653 (1894).

[22] For cases that affirmed that women would not be treated as accomplices, see Wharton, *supra* note 3, at 1010-11; Wigmore, *supra* note 8, at 338-39.

[23] 410 U.S. 113 (1973).

[24] New York, New Hampshire, Wisconsin, Minnesota, Indiana, Arizona, and Idaho state statutes included punishments for women who had abortions. Mohr, *supra* note 1, at 133-34, 140, 218, 222-23, 227, 229. A 1934 survey found that punishment for women ranged from fines of $100 to $1,000, and incarceration for thirty days up to ten years. Some states had specific language regarding the women who had abortions, many others relied on common law precedents to determine possible punishments, and in a few there was no punishment at all for the woman. *See* Thomas E. Harris, Statutes Relating to Abortion, *in* Frederick J. Taussig, Abortion, Spontaneous and Induced: Medical and Social Aspects App. A, at 453-75 (1936). For examples of women who consented to abortions in states where they could conceivably be prosecuted themselves, and yet brought suits against their abortionists, see Miller v. Bayer, 68 N.W. 869 (Wis. 1896); Gunder v. Tibbits, 55 N.E. 762 (Ind. 1899); Nash v. Meyer, 31 P.2d 273 (Idaho 1934).

[25] Juries found for the plaintiff and gave money awards in twelve cases; the rest of

average award in these abortion suits ($3,250) was comparable to awards granted in other medical malpractice cases.[26] At least twenty-three damage suits were appealed to higher courts[27] and hundreds more may have been brought and settled without ever reaching trial.[28]

The majority of these suits was against doctors. Of twenty cases in which the abortionist was sued, thirteen were identified as physicians; one was a chiropractor; the occupations of the rest are unknown.[29] The civil suits for injuries and deaths related to abortion were part of a general expansion in suits for malpractice.[30] Since physicians played an important

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the appellate cases either never went to jury or were directed verdicts for the defendant. The amount of money awarded was reported in nine cases.

[26] A study of over 400 malpractice cases appealed between the Civil War and World War I found a similar range of awards; most jury awards for malpractice were between $1,000 and $5,000. Charles J. Weigel, II, Medical Malpractice in America's Middle Years, 32 Tx Rep. on Biology & Medicine 194-95 (Spring 1974).

[27] For a list of the civil suits, see Appendix. I provide numerical breakdowns of the suits for the interested reader, but they are not from a random sample and should not be treated as representative of all abortion-related civil suits or the practice of abortion. Civil suits often included more than one defendant. Of the twenty-three cases, the abortionist was sued in twenty cases, the woman's male lover in eight cases, the parents of the man in two cases, the woman's rapist in one, and one other. In thirteen of the twenty-three cases the woman lived. Of these, ten were brought by women themselves (married and single), two by fathers on behalf of minor daughters, and one by a husband. Ten cases sought damages for the wrongful death of a woman due to an illegal abortion; these were brought by family members or administrators on behalf of husbands and children. Appeals were brought by both plaintiffs and defendants. In twelve cases, the physician-abortionist or other defendant appealed a jury decision awarding damages; in nine cases, the plaintiffs appealed a directed judgment for the defendants; and in two cases lower courts asked for clarification on how to handle this type of case.

[28] There is no way to know how many other cases were brought at lower levels or how they fared. One conventional estimate is that for every malpractice case that reached an appellate court, one hundred other suits were initiated, which may have been won, but never moved up through the courts. Andrew A. Sandor, The History of Professional Liability Suits in the United States, 163 J. A.M.A. 459, 464 (1957). Lawrence Friedman points out that only a small percentage of civil cases ever went to trial, but the pervasive (though exaggerated) belief that juries would grant large awards put pressure on defendants to settle out of court. *See* Lawrence M. Friedman, Some Notes on the Civil Jury in Historical Perspective, 48 DePaul L. Rev. 201 (1998).

[29] In six cases the abortionist's occupation is unknown. Sixty-five percent of the abortionists sued were doctors; if the doctors and chiropractor are added together, seventy percent were health care professionals.

[30] The large number of abortion-related civil suits in the 1920s and 1930s fits with the general history of medical malpractice. A study of appellate cases concerning medical malpractice between 1900 and 1955 shows a peak during the mid-1920s through the mid-1930s. Sandor, *supra* note 28, at 460 (see graph). On the history of medical malpractice, see Chester R. Burns, Malpractice Suits in American Medicine Before the Civil War, 43 Bull. Hist. Med. 41 (1969); Weigel, *supra* note 26, at 191-205; James C. Mohr, Doctors and the

role in providing abortions throughout the era of illegal abortion in the United States, despite the law and the American Medical Association's prohibitions of it, their appearance in this type of suit makes sense. Rather than using the number of cases as some sort of rough measure of actual skill among competing practitioners, the willingness of Americans to sue doctors for badly performed *illegal* abortions should be read as an indication of Americans' high expectations of doctors. Twentieth-century Americans believed in the skills of the medical profession; when doctors proved to be unskilled, careless, or neglectful, they felt betrayed and justified in going to the law to exact punishment.[31]

Women or their families brought complaints against abortion providers to court in search of reimbursement for the costs of emergency medical care or funeral services, and for damages. In doing so, they attempted to legalize the customary practices of the extra-legal world. Nineteenth- and twentieth-century abortionists typically refunded fees when abortion procedures failed and reimbursed the costs of hospitalization. In the case of fatal outcomes, abortionists covered funeral expenses and more.[32] These practices served as insurance for the abortionists: taking financial responsibility for bad outcomes might convince women and their relatives to abandon or avoid investigations and prosecution. Yet they also grew out of patient expectations. In 1935, for example, one Chicago man, on the advice of his mother, returned to the office of the physician-abortionist who had operated on his lover, where he explained to the doctor that she was in the hospital, and told him, he reported, that "I wanted some of that money back to pay for the hospital bill."[33] They argued, but the

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Law: Medical Jurisprudence in Nineteenth-Century America, ch. 8 (1993); Kenneth Allen De Ville, Medical Malpractice in Nineteenth-Century America: Origins and Legacy (1990); Neal C. Hogan, Medical Malpractice in the Twentieth Century (forthcoming dissertation, Harvard University).

[31] On the growing respect of the public toward the medical profession (and the expanding claims of the profession) in the late nineteenth and twentieth centuries, see Ronald L. Numbers, The Fall and Rise of the American Medical Profession, *in* Sickness and Health in America: Readings in the History of Medicine and Public Health, 225-36 (Judith Walzer Leavitt & Ronald L. Numbers eds., 3d rev. ed. 1997); John C. Burnham, American Medicine's Golden Age: What Happened to it?, *in* Sickness and Health in America, *id.* at 284-94.

[32] For a physician-abortionist who refunded fees and paid for hospital care if needed, see Ed Keemer, Confessions of a Pro-Life Abortionist 144 (1980). For a midwife-abortionist who gave the husband of her deceased client money to cover funeral costs and the cost of providing care for his infant child, *see* Inquest on Margaret B. Winter, November 13, 1916, case 274-11-1916, Medical Records Department, Cook County Medical Examiner's Office, Chicago, Illinois. For a physician who offered to pay funeral costs, see People v. Schaffner, 46 N.E.2d 989, 992 (Ill. 1943).

[33] Testimony of Stephen Zakes in Inquest on Mary Nowakowski, April 4, 1935, case 80-5-1935, Medical Records Department, Cook County Medical Examiner's Office.

doctor finally agreed to the man's demands and told him, "I will pay for everything."[34] The families that brought suits to cover emergency-related expenses no doubt tried informal routes first; the practitioners who ended up in court had failed to live up to pre-existing community standards.

But could someone sue for harm resulting from an illegal abortion? Would the courts allow such cases to be brought when the woman who had an illegal abortion had, by definition, broken the law herself and participated in a crime? Throughout the century of illegal abortion, the courts divided into two camps on the question. Some courts concluded that, as in criminal cases, the woman who had an illegal abortion was a victim and, thus, damages could be sought; others treated her as an accomplice who had consented to the crime of abortion and rejected these suits.[35] The judiciary's opposing rulings regarding the legitimacy of these civil suits is not easily explained.

There is no moment when the courts as a whole ruled one way, and then changed their interpretation and ruled another. Instead of change over time, there is continuity: the judiciary consistently disagreed over the appropriate response to this type of case. In nearly every decade from the late nineteenth century up to 1970, judges reached opposing conclusions about the validity of civil suits for injuries resulting from illegal abortion. Whether the aborted woman survived the procedure or died does not clarify contradictory outcomes. Even when the woman was deceased and would seem to be a clear victim, the courts disagreed.[36] Regional differences do not explain differing legal rulings either; every region of the country was split, though the Midwest was somewhat more willing to permit civil suits for abortion and the South less so.[37]

A number of courts adhered to the principle that prohibited a

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[34] *Id.*

[35] The states split almost equally on whether or not suits for damages arising from an illegal abortion were permitted. Of the twenty-three damage cases involving abortion, appellate courts permitted suits in fourteen cases and declared that suits could not be brought in nine cases. Appellate courts ruled on civil suits following illegal abortions in nineteen jurisdictions: in ten states the courts determined that the woman or her family could sue for damages; in eight states and the District of Columbia higher courts prohibited such suits.

[36] Of the twenty-three appellate cases, the woman survived her abortion in thirteen cases; the courts permitted suits in seven cases and rejected suits in six cases. In the ten cases when the woman had died as a result of her abortion, seven were permitted, three were not.

[37] State courts in all regions addressed the question of whether civil suits could be brought in illegal abortion cases. Only two cases were from western states; the rest were evenly divided among the East, South, and Midwest. In the Midwest, five states permitted suits and one did not; in the East, two states permitted suits, two did not; in the South, two states permitted suits, five jurisdictions did not; in the West, one state permitted suits, one did not.

participant in criminal activity from using the legal system to seek damages for any resulting harm. In reviewing an 1896 case, the Kentucky Supreme Court declared that, "the party consenting to the injury can not profit by his wrongful act. . . . [I]f the plaintiff voluntarily went to Louisville" to have an abortion performed, then the woman could not sue.[38] When Dr. M. Hunter of Washington, D.C. lost a malpractice suit brought by a patient for whom he performed an abortion in 1920, he appealed, arguing that his patient had no legal right to seek damages for the results of an "illegal contract."[39] The Appeals Court of the District of Columbia concurred. Although the woman who had an abortion was not considered "criminally liable" or an accomplice, the court observed that this was not necessarily true in civil law.[40] The aborted woman's role as a "victim" in criminal abortion cases, the court ruled, did not mean she could escape "the legal consequences" of her "illegal or immoral acts."[41] "It has long been the law," the court declared, "that, where an action is founded upon an unlawful contract, the court will not interfere."[42]

This strict reading of tort law in abortion cases conformed to nineteenth-century judicial thinking, which made it difficult for individuals to sue and win damage awards. The doctrine of contributory negligence kept many claims from ever going to a jury at all. The general rule was, Lawrence Friedman explains, "if the plaintiff was negligent himself, ever so slightly, he could not recover from the defendant."[43] In keeping with this standard, about half of the appellate courts faced with a case of this type noted the participation of the woman in the crime of abortion, and rejected the suit.

Nonetheless, many courts reached the opposite conclusion and decided that it was not in the public interest to allow practitioners who botched abortions and caused fatalities or injuries to avoid civil suits. These courts made an exception to the usual rule forbidding the participants in an illegal act from using the legal system to recover damages in cases when "the public peace or the life of a participant in the wrongful act is

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[38] Goldnamer et al. v. O'Brien, 33 S.W. at 832. *See also* Laroque v. Conheim, 42 Misc. 613 (N.Y. Sup. Ct. 1904); Szadiwicz v. Cantor, 154 N.E. 251 (Mass. 1927).

[39] Hunter v. Wheate, 289 F. 604, 605 (D.C. Cir. 1923).

[40] *Id.*

[41] *Id.* at 606.

[42] *Id.*

[43] Lawrence M. Friedman, A History of American Law 470 (2d ed. 1985). *See also* Christopher L. Tomlins, Law, Labor, and Ideology in the Early American Republic 302-04, 341-84 (1993); G. Edward White, Tort Law in America: An Intellectual History (1980).

involved."[44] Maine, for example, allowed the awarding of damages for negligence in illegal abortion cases. In a 1917 case, the state's Supreme Court upheld a jury award of $881.58 in damages for the costs of one woman's hospitalization, nursing, and the "anxiety and distress" it caused her husband.[45] This woman had become infected as a result of the abortion operation and, after four weeks of futile care by her abortionist, was hospitalized. There, she endured ten operations in seven weeks; six months later she had only partially recovered from the ordeal. The damages, the court concluded, could not be considered "excessive."[46]

Judges who permitted such suits relied upon an interpretation of the law put forward in an 1879 treatise by the eminent Michigan jurist, Thomas M. Cooley. In his explication of tort law, Cooley contended that the state "is wronged" by a "breach of the peace . . . and forbids it on public grounds."[47] In cases where physical injury resulted, showing consent on the part of the injured could not be used as a defense for no one may consent to a battery or their own killing. "If men fight, the State will punish them. If one is injured, the law will not listen to an excuse based on a breach of the law."[48] Thus a man injured in a duel, which was illegal, might sue the other for damages.[49] Cooley did not specifically address abortion, but judges in several states relied upon the general principles outlined by Cooley to permit civil suits for damages caused by illegal abortions.[50] The fact that a woman had consented to an illegal operation, they concluded, did not exempt the operator from a civil suit for wrongful death or malpractice.

Where suits were allowed, a physician's agreement to perform an abortion was treated as a contract between physician and patient and the physician was expected, in this procedure as in all others, to practice with

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[44] Milliken v. Heddesheimer, 144 N.E. 264 (Ohio 1924); *see also* Martin v. Hardesty, 163 N.E. 610 (Ind. App. 1928).

[45] Lembo v. Donnell, 101 A. 469, 470 (Me. 1917).

[46] *Id.*

[47] Thomas M. Cooley, A Treatise on the Law of Torts or the Wrongs which Arise Independent of Contract 163 (1879). In the original, the first phrase quoted follows the second. On Cooley, see Friedman, *supra* note 43, at 372, 628-29.

[48] Cooley, *supra* note 47.

[49] Cooley, *supra* note 47, at 162-63. In states that dismissed this reasoning, the woman's consent to abortion ensured that civil suits for damages after an abortion would be thrown out automatically. A number of courts that rejected civil suits in abortion cases cited Francis H. Bohlen, Consent as Affecting Civil Liability for Breaches of the Peace, 24 Colum. L. Rev. 819 (1924).

[50] For references to Cooley, see Milliken v. Heddesheimer, 144 N.E. at 266-67; Martin v. Hardesty, 163 N.E. at 611; Joy v. Brown, 252 P.2d 889, 891 (Kan. 1953).

skill and to care for his patient. In the late 1920s, for example, an Indiana jury awarded $5,000 to the widower and three young children of Mrs. Arretta Hardesty in a suit brought against Dr. John T. Martin.[51] Dr. Martin had performed an illegal abortion and "by reason of his negligence and lack of skill, in failing to wash his hands and sterilize the instruments used, his treatment resulted in the death of the patient."[52] The Indiana Appellate Court ruled that suing was permitted and upheld the award.[53] Even in an illegal operation, ordinary citizens, as represented by the jury, and eminent judges considered it reasonable to expect that a physician who undertook an operation would have the skills necessary to do so and would conform to the medical standards of the day. By the 1920s, Americans expected doctors to follow the rules of aseptic procedure or face financial penalties.

Some states managed to adopt the legal principle that prohibited civil suits arising out of illegal activities, yet nonetheless permit suits in illegal abortion cases. Negligence in performing the abortion was not actionable, the Washington Supreme Court announced in 1931, but the doctor's actions *after* the abortion could be scrutinized and subject to malpractice claims.[54] "A physician and surgeon has no more right," the opinion announced, "to abandon his patient under such circumstances than . . . under ordinary circumstances."[55] The civil suit went forward. Abandoning injured or dead patients was, of course, exactly what some abortionists who feared arrest did. This neat distinction gave courts a way to abide by the rule to refuse to aid criminals while simultaneously aiding the relatives of women who were killed by incompetent and careless abortionists. In 1948, Minnesota adopted the same reasoning for handling cases of wrongful death by abortion.[56]

The disagreement about how to handle cases charging negligent performance of an abortion or wrongful death caused by an abortion was not resolved in the postwar period. As more than one judge realized, "the authorities . . . are about evenly divided on the question" of whether civil suits and recovery of damages for illegal abortion should be barred or permitted.[57] After exhaustive review of the existing case law, in 1953 the

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[51] Martin v. Hardesty, 163 N.E. at 610.

[52] *Id.*

[53] *Id.*

[54] Androws v. Coulter, 1 P.2d 320 (Wash. 1931).

[55] *Id.* at 321. Abandoning a patient violated basic expectations of physicians and physicians who did so were held liable. Weigel, *supra* note 26, at 200.

[56] True v. Older, 34 N.W.2d 700 (Minn. 1948). Whereas, Androws v. Coulter, 1 P.2d 273, was unanimous, the Minnesota case included a dissenting opinion.

[57] Wolcott v. Gaines, 169 S.E.2d 165, 166 (Ga. 1970).

Kansas Supreme Court concluded that a woman could bring a suit against her abortionist for negligence or the next of kin could sue in the event of a woman's death.[58] Indeed, the Kansas court felt "no hesitancy" about declaring that if the deceased Joy M. Joy had lived, she could have brought a suit for negligence herself.[59] Certainly, her relatives, on behalf of her six-year-old daughter, could sue for wrongful death.[60] Yet, a year later the Illinois State Supreme Court reached the opposite conclusion.[61] In 1970, the Georgia Supreme Court reviewed case law on the question and concluded, as had the Kansas court, that civil suits following illegal abortions were allowed.[62] The Kansas and Georgia decisions permitting women or their relatives to sue for damages in illegal abortion cases fit with the period's general trend toward making it easier for people to bring malpractice suits and coincided as well with the emerging movements for abortion law reform.[63]

Underlying the opposing responses to malpractice and wrongful death suits for abortion are implicit theories about the methods for deterring crime. On the one hand, judges who refused to allow women or their surrogates to sue incompetent abortionists may have hoped to send a message to women who might have abortions: the abortion market was unregulated, they could be seriously injured or even killed if they chose to have an illegal abortion, and the state would show no leniency toward them. Suits to cover the costs of medical care, funerals, or lost services would not be permitted. Women who had abortions were on their own, and if they were hurt it was just punishment for their illegal and immoral behavior. If women realized the dangers, perhaps they would stop demanding abortion.

On the other hand, the strategy of permitting suits put pressure on the supply side of illegal abortion and prioritized high standards of medical care. When judges permitted these types of suits to be argued in court and go to jury, they warned all physicians and others who performed abortions that they could be held liable for their practices. The threat of criminal and

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[58] Joy v. Brown, 252 P.2d 889 (Kan. 1953).

[59] *Id.* at 893.

[60] *Id.*

[61] Castronovo v. Murawsky, 120 N.E.2d 871 (Ill. App. Ct. 1954).

[62] Wolcott v. Gaines. 169 S.E.2d 165.

[63] On trends in malpractice cases, see Hogan, *supra* note 30. On the movements for abortion law reform, see David J. Garrow, Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade (1994); Rosalind Pollack Petchesky, Abortion and Woman's Choice: The State, Sexuality, and Reproductive Freedom ch. 3 (rev. ed. 1990); Gordon, *supra* note 2, at 397-409; Kristin Luker, Abortion and the Politics of Motherhood chs. 3 & 4 (1984).

civil suits might convince more marginal practitioners to refuse to perform abortions. If abortionists were ordered to pay hundreds or thousands of dollars in damages for their negligence, perhaps more of them would seek additional training, take care to sterilize their instruments, use penicillin and antibiotics, and attend to their patients when something went wrong with the procedure. (In fact, many abortionists did all of these things.)[64] Relying on court cases alone though, whether civil or criminal, to insure good medical practice is an imperfect method of regulating medical competence, especially for an illegal procedure. Not everyone would have the ability to bring suit and suits could only be brought after the damage had been done—perhaps only after a fatality.

The conflicting answers to the question of whether suits could be brought against negligent abortionists drew on different philosophies of the relationship between the state and its citizens and different attitudes towards women and their sexual behavior. The group of judges that favored allowing suits, it may be argued, placed high value upon the protection of the lives and bodies of citizens. Judges who identified with the Cooley analysis of tort law made protection of the citizenry paramount and refused to protect criminals by granting them a simple defense in abortion cases. They were apparently less concerned with punishing women for their illicit sexual behavior and abortion practices. The group that prohibited suits believed that allowing damages in cases where someone had participated in and consented to an illegal operation would weaken the criminal law. These jurists took a tough attitude toward actual victims of abortion—women killed or injured as a result.

Yet opposing legal theories do not fully explain the division within the judiciary about whether or not suits could be brought for injuries caused by illegal abortions. In these cases, jurists articulated their views about gender as well as legal principles. When the rulings on civil suits for abortion are compared according to the marital status of the women who had abortions, the results are startling. The courts tended to reject civil suits that involved married women who had abortions and to permit suits that involved unmarried women. The marital status of the woman is known in twenty civil cases. When the woman was married, nearly two-thirds of the courts decided that no civil suit could be brought.[65] When the woman was unmarried, however, the reverse was true. In over three-quarters of the cases concerning single women, the courts upheld the right of women or their families to sue for damages following an illegal abortion.[66]

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[64] Reagan, *supra* note 2, ch. 5.

[65] Five of eight cases.

[66] Ten of thirteen cases. Although more married women than unmarried had abortions, of the women who were the subject of these civil suits, thirteen were unmarried, eight were married, and two were of unknown marital status. The greater number of unmarried women in these civil suits may indicate that unmarried women went to worse

In the civil law, higher courts echoed the anti-abortion campaign's hostile attitude toward married women by rejecting most suits involving married women. The courts pointed to the immorality of married women who evaded the duties of motherhood by having abortions. For example, when Mrs. Pearl L. Wheate, mother of a twelve year old, sued Dr. Hunter for malpractice following her abortion in 1920, the jury concluded that the doctor was negligent and awarded Mrs. Wheate damages.[67] Dr. Hunter appealed. The Washington, D.C. Appeals Court overturned the case. Mixed in with the commentary on contracts and legal tradition was another discourse on female sexual and reproductive behavior. Mrs. Wheate, the jurists explained, had "engaged, not only in an unlawful act, but also in one which was immoral."[68] The Tennessee Supreme Court used similar language to describe a married woman who sued her doctor for damages resulting from her third abortion by him.[69] Mrs. Agnes L. Martin, the Tennessee court observed, was "a matured married woman, who well knew the serious consequences likely to result from such an operation, and that it was both illegal and immoral. . . . [S]he is entitled to no relief."[70] A Virginia jury in the 1940s saw fit to award damages of $8,000 for the death of Mrs. Kerneda C. Bennett following an abortion.[71] On appeal, however, the Virginia Supreme Court agreed that the suit could not be brought because the deceased, "was guilty of moral turpitude and participated in the violation of a general anti-abortion statute."[72] The Virginia court's

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abortionists or that parents and seduced daughters felt more need to seek vengeance (of abortionists and unmarried men) through the courts.

The finding that the courts continued to treat unmarried women with sympathy is in marked contrast to the courts' increasing doubt about single women who claimed to be victimized by men in seduction and breach-of-promise suits at the turn of the century. On the history of breach-of-promise and seduction suits, see Grossberg, *supra* note 10, ch. 2; Jane E. Larson, Women Understand so Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction, 93 Colum. L. Rev. 374, 393-96 (1993). Constance Backhouse finds that the Canadian judiciary also disliked seduction suits, though juries regularly awarded damages. Constance Backhouse, The Tort of Seduction: Fathers and Daughters in Nineteenth Century Canada, 10 Dalhousie L.J. 45 (1986).

[67] Hunter v. Wheate, 289 F. 604.

[68] *Id.* at 609. Indeed, Mrs. Wheate appeared to the court to be "neither reluctant nor unwilling to have the operation." *Id.* at 607.

[69] Martin v. Morris, 42 S.W.2d 207 (Tenn. 1931).

[70] *Id.* at 207.

[71] Miller v. Bennett, 56 S.E.2d 217, 218 (Va. 1949).

[72] *Id.* at 221. The Virginia Supreme Court, which reviewed the case law and saw that it was contradictory, buttressed its decision by remarking that "the better reasoned cases" prevented damages in this type of case. *Id.* at 220. On Coffman's conviction in an associated criminal case, see Coffman v. Commonwealth, 50 S.E.2d 431 (Va. 1948).

conclusion, as in the Tennessee and D.C. decisions, was not based on law alone, but on the character of the deceased woman in whose name the suit was brought. In rejecting these suits, the courts confirmed that it was a married woman's duty to bear children; an abortion could not be pardoned.

In contrast to their response to suits involving "immoral" married women, appellate rulings showed sympathy for suits brought by or on behalf of unmarried women who had been hurt by illegal abortions. The more lenient response to single women reflected widespread feeling that unmarried women who became pregnant deserved understanding. Unlike married women who had no excuse for avoiding motherhood, unmarried women and their illegitimate children would be stigmatized for life. From the late nineteenth century to the late twentieth century, American society tended to regard single women who became pregnant and had abortions as victims of irresponsible men who failed in their duty to marry their pregnant lovers. Turn-of-the-century newspapers portrayed unmarried women who had abortions as victims of male villains who had seduced and abandoned them. Although this portrait is a Victorian one, it continued well into the twentieth century. Even in the 1960s physicians and reformers expressed sympathy for the difficulties faced by pregnant single women.[73]

Several turn-of-the-century civil suits for damages following an abortion highlighted the sexual vulnerability of unmarried women. These suits reveal that the association between male sexual abuse and abortion was real for some unmarried women and their families. In six cases, women intertwined their complaints of injuries due to abortion with rape and seduction charges.[74] In these cases, women presented themselves as victims of the men who impregnated them and as victims of abortion. A rare suit revealed a man using violence to force a woman to undergo an unwanted abortion,[75] but most of the suits brought by unmarried women against men indicate more subtle forms of coercion. The men urged and arranged an abortion after having first encouraged (or sometimes forced) young women into sexual relationships. Male pressure combined with fear of social denunciation for single motherhood made women feel they had no option but to go along with an abortion. The women sued the men who put

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[73] For an excellent analysis of the Victorian construction of female sexual danger, see Judith R. Walkowitz, City of Dreadful Delight: Narratives of Sexual Danger in Late-Victorian London (1992); on single women, seduction, and abortion, see Reagan, *supra* note 2, chs. 2 & 8; on sympathy toward unmarried, pregnant women in the early nineteenth century, see Mohr, *supra* note 1, at 86-89.

[74] Goldnamer v. O'Brien, 33 S.W. 831; Miller v. Bayer, 68 N.W. 869; Courtney v. Clinton, 48 N.E. 799 (Ind. App. 1897); Gunder v. Tibbits, 55 N.E. 762; Larocque v. Conheim, 42 Misc. 613; Herman v. Turner, 232 P. 864 (Kan. 1925).

[75] True v. Older, 34 N.W.2d 700. The court stated that one man "by means of threats of bodily harm and refusal to marry her . . . compel[led]" his lover to go with him to an abortionist. *Id.* at 702.

them in this difficult position. This set of cases is further evidence of the disarray and confusion about changing heterosexual courting norms at the turn of the century.[76]

That unmarried women and their relatives brought these cases demonstrates their confidence that the community would feel as outraged by male deception and sexual misbehavior as they did. These turn-of-the-century civil suits coincided with reform movements that sought to punish men for their sexual exploitation of young women by passing laws against "white slavery" and statutory rape.[77] The pursuit of these civil cases following illegal abortion suggests a popular effort to make it more risky for the male lovers of young women to enjoy sexual pleasures and then use abortion to avoid the responsibilities of marriage and fatherhood. Appellate courts evidently concurred with popular sentiment; in most of the cases brought against men who impregnated an unmarried woman and then urged the abortion, the courts permitted the suit.[78] An unlucky man who was responsible for an unmarried woman's pregnancy and abortion could find himself arrested, jailed, and prosecuted by state authorities for violating the criminal law on abortion, and then sued in civil court by his sweetheart or her relatives.[79]

The suits of single women underscore the vulnerability of women who worked as domestic servants and lived in the homes of their employers.[80] In her suit, Dora Troxell pictured herself as an orphaned seventeen year old who worked as a servant in the home of her seducer, an

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[76] Many of the women in unwed mothers' homes in this period had believed their lovers' promises of marriage. Joan Jacobs Brumberg, 'Ruined' Girls: Changing Community Responses to Illegitimacy in Upstate New York, 1890-1920, 18 J. Soc. Hist. 251-52 (1984). Regina G. Kunzel analyzes the changing narratives of unmarried mothers and their experiences in maternity homes in Fallen Women, Problem Girls: Unmarried Mothers and the Professionalization of Social Work, 1890-1945 (1993). On dating patterns, see Kathy Peiss, Cheap Amusements: Working Women and Leisure in Turn-of-the-Century New York (1986).

[77] *See* Ruth Rosen, The Lost Sisterhood: Prostitution in America, 1900-1918 (1982); Odem, *supra* note 16

[78] Six of eight cases. Juvenile court probation officers and judges were also sympathetic to suits brought against men responsible for the out-of-wedlock pregnancies of young women. Odem, *supra* note 16, at 51-52, 141, 154.

[79] On the criminal prosecution of the male lover, see Reagan, *supra* note 4, at 1260-62.

[80] In three of six abortion/seduction cases, the woman had worked as a domestic and been seduced by either her employer or the family's son. The woman was identified as a servant in Gunder v. Tibbits, 55 N.E. 762, Courtney v. Clinton, 48 N.E. 799, and Herman v. Turner, 232 P. 864. On the general problem of sexual assault of domestic servants, see David M. Katzman, Seven Days a Week: Women and Domestic Service in Industrializing America 216-18 (1981); Odem, *supra* note 16, at 26, 58-59.

Indiana merchant named Gunder, whom she described as "a man of mature age, married, of wealth and high social position."[81] Gunder seduced her in March 1892 and "continued to debauch her" until 1895.[82] Twice the young woman got pregnant and twice he took her to his physician, Thomas C. Kimball, who told her that she would die unless she had an abortion. She submitted to two abortions. She later took the men to court for seduction, for the injuries and medical bills following the abortions, for loss of reputation, and for her inability to work and earn a living. The jury awarded damages of $5,000. The Indiana Supreme Court showed no mercy to the defendants. Gunder was responsible for his "continuous course of fraud and deceit."[83] Dr. Kimball had used his medical skills to perform two abortions not to preserve his patient's life, but to protect a man's reputation. The award, the court concluded, was fair. To emphasize that point, the opinion ended by quoting a California decision that upheld an award of $25,000 in a seduction case.[84]

At least one woman tried to use an abortion suit to secure child support.[85] Her attempt matched what other unmarried and pregnant young women did in turn-of-the-century United States and Canada: they and their parents turned to seduction and statutory rape suits in the hope of forcing men to marry or to provide financial support for illegitimate children.[86] The Indiana woman sued for damages for an attempted abortion that had failed to end her pregnancy and instead caused her to bear "a bastard child."[87] She had been a domestic servant in the Courtney family and, after agreeing to marry the son James, she "yielded to his desires" in the summer of 1894. When she discovered herself pregnant, her lover refused to marry, and his family arranged for an abortion. After first trying medicines, the abortionist operated on her three times unsuccessfully. Her suit complained of having "suffered great bodily pain and humiliation" and of lasting injury to her

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[81] Gunder v. Tibbits, 55 N.E. at 763.

[82] *Id.*

[83] *Id.* at 766.

[84] *Id.* at 768. Furthermore, the Court determined that it did not matter "whether abortion, or seduction, or breach of promise is the name of the action . . . it is simpler to say that the action is for the damages resulting from the various consequences of one continuous wrong." *Id.* The remark not only points to the importance of social considerations, but underlines my argument that the law was not fixed but always in the process of creation.

[85] Courtney v. Clinton, 48 N.E. 799.

[86] Odem, *supra* note 16, at 51-52, 57-58; Dubinsky, *supra* note 16, at 21, 74-76.

[87] Courtney v. Clinton, 48 N.E. at 799.

health.[88] The jury awarded her $3,500. Her ex-lover appealed.

The jury apparently sympathized with the jilted woman and her need for funds as a single mother, but the Appellate Court of Indiana could not overlook her sexual impurity. An unmarried woman could not be sure of a sympathetic audience in the court. Although judges upheld suits and awards when convinced of male sexual exploitation, in this case, they reacted differently. In their review, the court considered the woman's conduct and challenged her claim of being a victim; they saw her as an immoral and greedy woman. The Appellate Court noted that the new mother had already sued Courtney for bastardy and accepted $300. Furthermore, she had consented to taking medicines and to the operations. The court questioned the injuries claimed, for the woman had taken long walks, attended church, and appeared at parties. All in all, the judges observed, there was reason for "much doubt" about her testimony concerning the abortion and "much evidence [of her] . . . lascivious and lecherous conduct with . . . James Courtney."[89] The appellate court saw her as a sexual actor. The court concluded that the jury's award was excessive and granted a new trial. Yet it did not reverse earlier rulings that permitted women who had abortions to sue.

The legal definition of the aborting woman as "victim" or "accomplice" could not be determined simply by assessing whether she had been physically harmed or whether she had cooperated and consented to the crime. The judiciary's reading of whether an individual woman was a victim or an accomplice in an abortion case depended on the type of case in which the question arose, the interests of the state, legal principles, and gender ideology. By the end of the nineteenth century, in criminal law, women as a class were designated victims of abortion, regardless of their individual injuries or behavior. Classifying the woman as victim was useful for enforcing the criminal abortion laws. In civil law, where the courts responded to popular pressure and had no clear guide to the state's interests, the contradictions of gender, public policy, and legal values were most apparent.

That citizens brought suits against incompetent abortionists and won awards from juries suggests a popular commitment to punishing practitioners who injured their patients, regardless of the legality of the procedure. Appellate courts, however, split on the question of whether women or their family members could sue for damages following an illegal abortion. Embedded within the judicial opinions on abortion in civil law is

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[88] *Id.*

[89] *Id.* at 801. A woman's sexual character similarly influenced the outcome of seduction and statutory rape cases. Odem finds that when judges saw a woman as "promiscuous," they rejected her statutory rape complaint. Odem, *supra* note 16, at 57; *see also* Dubinsky, *supra* note 16, at 77-79.

evidence of conflict within the judiciary over legal philosophy and, at the same time, evidence of the significance of sex and gender norms in judicial decision-making. In civil cases, from the nineteenth century to the late twentieth, each woman was subjected to individual scrutiny and to the legal standards and prejudices of different courts with varying outcomes. Courts assessed the woman's marital status and sexual behavior as they deliberated the question of whether she should be regarded as victim or accomplice. When judges decided that civil suits were prohibited, they pointed to both legal doctrine that refused to aid those who participated in crime and to the sexual impropriety of the women involved. An unmarried woman was likely to be seen as a victim and allowed to bring suit; a married woman was likely to be seen as an accomplice and find her efforts at gaining redress for injuries blocked. Yet, the courts were not uniformly hostile toward women who had illegal abortions; as many higher courts permitted suits for injuries due to illegal abortion as prohibited them. No matter how authoritative the voice of a judicial opinion, however, the construction of women in abortion cases was unstable, contradictory, and contested.

APPENDIX

Civil Suits Following an Illegal Abortion

Goldnamer v. O'Brien, 33 S.W. 831 (Ky. 1896)
Miller v. Bayer, 68 N.W. 869 (Wis. 1896)
Courtney v. Clinton, 48 N.E. 799 (Ind. App. 1897)
Gunder v. Tibbits, 55 N.E. 762 (Ind. 1899)
Larocque v. Conheim, 42 Misc. 613 (N.Y. Sup. Ct. 1904)
Lembo v. Donnell,101 A. 469 (Me. 1917)
Hancock v. Hallowed, 82 So. 522 (Ala. 1919)
Hunter v. Wheate, 289 F. 604 (D.C. Cir. 1923)
Milliken v. Heddesheimer, 144 N.E. 264 (Ohio 1924)
Herman v. Turner, 232 P. 864 (Kan. 1925)
Stejskal v. Darrow, 215 N.W. 83 (N.D. 1927)
Szadiwicz v. Cantor, 154 N.E. 251 (Mass. 1927)
Martin v. Hardesty, 163 N.E. 610 (Ind. App. 1928)
Androws v. Coulter, 1 P.2d 320 (Wash. 1931)
Martin v. Morris, 42 S.W.2d 207 (Tenn. 1931)
Pleak v. Cottingham, 178 N.E. 309 (Ind. App. 1931)
Nash v. Meyer, 31 P.2d 273 (Idaho 1934)
Bowlan v. Lunsford, 54 P.2d 666 (Okla. 1936)
True v. Older, 34 N.W.2d. 700 (Minn. 1949)
Miller v. Bennett, 56 S.E.2d 217 (Va. 1949)
Joy v. Brown, 252 P.2d 889 (Kan. 1953)
Castronovo v. Murawsky, 120 N.E.2d 871 (Ill. App. Ct. 1954)
Wolcott v. Gaines, 169 S.E. 2d 165 (Ga. 1970)