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NEW YORK MEDICO-LEGAL SOCIETY.

# REPORT

OF THE

# COMMITTEE ON CRIMINAL ABORTION.

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# PREFACE.

A FEW words are deemed necessary to explain the origin of the following report.

Soon after the startling disclosures in connection with the "professional" abortionists, Wolff and Lookup, the New-York Academy of Medicine met on the 18th of May, 1871, and unanimously passed the following resolutions:

"*Whereas*, The pervading crime of abortion as a regularly advertised business has, in this city and county, been hitherto opposed by the medical profession without the uniform and efficient coöperation of the State officers and the courts, which has been desired and reasonably expected:

"*Resolved*, That the profession hail the advent of any administration which will secure it such long-desired support as shall enable it to successfully contend against this wide-spread crime, practised, in too many instances, by malefactors possessing, or pretending to possess, medical diplomas.

"*Resolved*, That Judge Gunning S. Bedford, by his manner of conducting the trials of those notorious abortionists and enemies of mankind, Wolff and Thomas Lookup; by the high moral tone of his addresses to, and by his clear and specific instructions given to the juries; and finally, by his prompt and just sentences, eminently honored the name he bears, has done infinite service to society, has merited the commendation and shall have the most cordial approval of the New-York Academy of Medicine, as he doubtless will of every member of the profession who properly estimates his duty and morality."

The sentiments thus expressed were loudly echoed in various parts of the country. Among other influential medical associations, the Medical Society of the County of Berks, Pa., passed a series of resolutions similar to the above, and dispatched a letter to Judge Bedford highly commendatory of his "earnest and decided efforts to arrest the unnatural crime of abortion . . . now assuming such fearful proportions in our land."

Society had scarcely recovered from the shock inflicted upon it by the two criminals above-named, when it was again thrown into a state of alarm by the discovery of the fearful "trunk mystery!" In the midst of the excitement occasioned by this shocking outrage, the New-York Academy of Medicine met again on the 21st of September, 1871, and adopted a set of resolutions giving expression to its warm appreciation of Judge Bedford's charge, then recently delivered to the grand-jury, on the occasion of opening the Court of General Sessions, September 6th, and pledging "all its influence and its efforts in support of any legislative or other measures which our law-officers may propose as offering a reasonable promise of mitigating, if not removing, the pestilence of criminal abortion which is upon our country."

The charge of Judge Bedford, referred to in the preamble to these resolutions, was remarkable for its outspoken declaration of a pressing need for more stringent legislation on the subject of criminal abortion. Therein he apprises the community that the "authorities have resolved to strive with all their power to exterminate the traffickers in human life," and expresses a hope that the next Legislature will so amend the part of the statute relating to the *denomination* of the crime, as to make it "murder in the first degree."

The press took up the subject, and, in several able editorials, advocated the passage of a statutory enactment more stringent than the one now in force.

Encouraged by so general and unanimous an expression of opinion, the New-York Medico-Legal Society espoused a cause so congenial to its well-known aims, and seized the opportunity for which it had been waiting, to appoint a committee of legal and medical gentlemen, with power to consider the practical value of the existing statutes on criminal abortion, and to report thereon to the Society, together with whatever suggestions of amendment it might deem expedient. The result of the deliberations of this committee is presented in the following report, which was read and unanimously adopted at the Society's last meeting, held on the 14th inst., at the College of Physicians and Surgeons, in this city.

J. J. O'D.

New York, *December* 22, 1871

# REPORT ON CRIMINAL ABORTION.

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Report of the committee appointed by the New York Medico-Legal Society, "to take into consideration the subject of the practical value of the existing statutes in this State relating to the prevention of criminal abortion, to report thereon to the Society, and to present such suggestions for further legislation on the subject as the committee may deem expedient."

The committee, appointed in pursuance of the above resolution, beg leave to submit the following report:

Two important influences, law and public opinion, deserve to be considered in relation to the practice of criminal abortion:

I. The history of public opinion on the subjecte onveys a forcible illustration of the evil results of erroneous teaching. Had popular views regarding the *fœtus* been the opposite of what they were and even still are, it is not too much to say that millions of lives, some, maybe, of priceless worth to society, would have been spared.

In ancient days, they who claimed to instruct the multitude in the theory and practice of morals not only looked leniently on fœticide, but, under certain circumstances, openly recommended it. Plato advocates it in a contingency mentioned in the "Republic" (lib. v.). Aristotle ("Polit.," lib. vii., c. 17) declared that no child should be allowed to be born alive whose mother was more than forty, or father over fifty years old. Lysias ("Pleadings," quoted by Harpocration) maintained that forced abortion was not homicide, because a child *in utero* was not indued with a separate existence.

Such being the teachings of some of the great leaders of public opinion in ancient times, first, with respect to the question of the separate life of the *fœtus in utero*, secondly, on the inference that abortion, far from being a crime, was allowable and in some cases commendable, it is not in the least surprising that it should have become a practice so prevalent in afterdays as to merit the denunciations of Ovid ("Amor.," lib. ii.), of Seneca ("Consol. ad Helv.," 16), and of Juvenal (*Satire* vi., 594).

The ancient laws indeed, more circumspect than a misguided public opinion, are said to have punished artificial abor tion with great rigor (*Cicero pro Cluentio. Strobœus Serm.* 73). But among the ancient peoples it was largely practised notwithstanding, under the unfortunate belief that the *fœtus*, not being alive *in utero* with a life of its own, had no special claims to humanity and no rights which they were, morally at least, bound to respect. The Romans carried this view to so outrageous an extreme as to hold that the *fœtus* was a mere excrescence of the mother, a simple appendage from which she could free herself as innocently as she might be rid of a troublesome disorder. Consequently, induced abortion became so common in Rome that the greedy quacks who flocked to her from all quarters could barely supply the demand for their services and nostrums. More particularly did the evil prevail, as in our own day and city, among the well-to-do—the so-called respectable classes. To this fact Juvenal bears ample testimony (*Satire* vi., 591–596). After paying a compliment to the exemplary patience with which the inferior class of matrons bore the pains of labor and the fatigues of nursing, he pours out the phials of his irony on the high-born and pampered dames of his day. "You'll scarce hear tell," he writes, "of a lying-in among ladies of quality; such is the power of art, such the force of medicines prepared by the midwife to cause barrenness and abortion."

> "Sed jacet aurato vix ulla, puerpera lecto.
> Tantum artes hujus, tantum medicamina possunt,
> Quæ steriles facit, atque homines in ventre necandos
> Conducit."

At length Christianity came, to measure swords with the

growing evil. For a time the contest was warm. A society corrupted by ill-gotten wealth and sensual gratification would not surrender such convenient doctrine without a determined resistance. The battle waxed fierce, but the already-assured triumph of the purifying faith was postponed by a compromise (how originated or by whom proposed does not appear) no less disastrous than the pagan theory it supplanted. By this compromise it was agreed to consider the *fœtus* as endued with life only from the date of the maternal sensation called "*quickening.*" Abortions forced after "*quickening*" were branded as serious crimes, but all so caused before this period were suffered to pass unnoticed. Henceforth "*quick*" became a word of evil omen. It is true the canon law subsequently disregarded this compromise, declared the *fœtus* alive from conception, and condemned its destruction at any period of *utero-gestation* as a great and wicked crime. The Christian Church, to its eternal honor be it said, has ever advocated and enforced the principle of the inviolability of fœtal life.[1] But the mischief could not be undone. A doctrine, only a degree less heartless than its pagan predecessor, took a firm hold on society. How effectually it influences the opinion and practice of our own time, how completely it has permeated all, but more particularly the higher ranks of contemporary society, needs not to be insisted upon here.

Among those who are competent to pronounce on this question of "*quickening*," there is, however, but one opinion, and to it your committee ask the undivided attention of the community: *The fœtus is alive from conception, and all intentional killing of it is murder.* The world is free to discuss the transcendental problem concerning the stage of development at which the *fœtus* becomes endowed with a soul. Some may believe, with Plato, that this event is deferred till birth. Others may hold, with Aristotle, that it occurs at the fortieth

[1] "Omnes, qui abortûs seu fœtus immaturi, tam animati quam inanimati, formati vel informis, ejectionem procuraverint, pœnas propositus et inflictas tam divino quam humano jure, ac tam per canonicas sanctiones et apostolicas constitutiones quam civilia jura adversus veros homicidas incurrere, hâc nostrâ perpetuo valiturâ constitutione statuimus et ordinamus." —(*Reiffenstuell, Jus Canonicum Universum*, tome iii. Paris, 1854. Quoted from Storer's "Criminal Abortion," p. 38, note.)

day for boys and the eightieth for girls! Only, let such opinions have their due place and weight. Whatever may be their value as evidences of intellectual activity, they have no bearing whatever on the great practical question of child-murder. If there were never such an existence as a soul, if men perished utterly when they died, laws against murder would still hold good, because laws against murder were enacted not for the soul's sake, but to preserve the peace and even the existence of society. Opinions such as these now indicated are harmless enough if jealously confined to the field of abstract speculation. It is only when suffered to influence conduct toward the *fœtus* that they become delusive and pernicious errors. Too great, unfortunately, has been their power in this respect; hence the necessity of combating them and of exhibiting them to the public in their true light, as evils which have long waged war against the dearest interests of society. All such speculations cannot be too strictly excluded from the sphere of practical morals; and furthermore, the public should be taught that the significance attached to "*quickening*" is unfounded, that the current deductions therefrom, already indicated, are utterly erroneous and immoral, and warned that the community, whose regard for fœtal life is influenced by either, is courting a terrible retribution. Herein is ample work for the two great educators of a nation, its pulpit and its press.

Equally groundless is the opinion, inherited from pagandom, that the *fœtus*, because dependent for existence on its connections with the mother, has not a separate life, and consequently may be wilfully destroyed without incurring the guilt of murder. A moment's consideration will suffice to show the absurdity of this view. All human beings (confining ourselves for the sake of apt illustration to this genus) depend for life on the medium of their existence. Change this medium completely, and they must suddenly die. Now, what ought to be thought of a proposal to excuse murder on the ground that human adults are not indued with independent existences? Yet, monstrous though it would seem, it is the very apology offered, and among some accepted, for fœticide.

II. The point of chief interest, in a legal view of the sub-

ject under consideration, centres in the history of the word "*quick*."

*Wharton* informs us that, at common law, the destruction of an infant unborn, *if it had quickened*, was murder. (1 Russell on Crimes, 671; 3 Coke's Inst., 50; 1 Hawkins P. C., ch. 13, § 16; 1 Hale P. C. H., 34; 1 East P. C., 90; 3 Chitty Crim. Law, 798.)

The procuring an abortion on a woman, *after* "*quickening*," was a common-law misdemeanor, although neither mother nor child perished. If it were procured upon the woman *before* "*quickening*," the offender could be convicted at common law of assault and battery upon the woman, although, if such abortion were procured with the consent of the woman *before the child had quickened*, it was not an indictable offence at common law, for the reason that *the child was not then supposed to be indued with life*. (Commonwealth *vs.* Bangs, 9 Mass. R., 387.)

The statutory laws of New York laid equal stress on the term "*quick*," making it the basis of a distinction between the degrees of guilt of criminal abortion. Thus, the Revised Statutes first enacted, which took effect in 1830, provide that "the wilful killing of an unborn *quick child* by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree." (2 Rev. Stat., 1st ed., p. 661, § 8.)

This section is still in force, never having been repealed.

Section 9 provides that "every person who shall administer to any woman, pregnant with a *quick child*, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall be deemed guilty of manslaughter in the second degree."

This last section was subsequently repealed by laws of 1845, ch. 260.

Without entering into details respecting the amendments to the statutes on this subject, it will be sufficient to say generally that, from 1845 to the present day, section one of the

statute against criminal abortion, defining the character and degree of the crime, has retained the obnoxious term *quick*.

In 1869 the Legislature (2 Laws of 1869, chap. 631, p. 1,502) repealed section two of the act of 1845, and section one of the act of 1846, and enacted as follows:

SECTION 1. "Any person who shall administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance, or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life, shall, in case the death of such child or of such woman be thereby produced, be guilty of manslaughter in the second degree."

This section omitted the word "*quick*," thereby relieving the prosecution from the necessity of proving a fact almost impossible. It further altered the *intent* to the production of the miscarriage of the woman, instead of to the destruction of the child. Its defects will be subsequently pointed out.

SEC. 2. "Whoever shall unlawfully supply or procure any medicine, drug, substance, or thing whatever, knowing that the same is intended to be unlawfully used or employed, with intent to procure the miscarriage of any woman, whether she be or be not pregnant, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail not less than three months, nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment."

SEC. 3. "Every person offending against either of the provisions of this act shall be a competent witness against any other person so offending, and may be compelled to appear and give evidence before any magistrate or grand-jury, or in any court, in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the persons so testifying."

To sum up the whole matter, the law in the State of New York at the present time, upon this subject of criminal abortion, stands as follows:

1. "The wilful killing of an unborn *quick* child by any injury to the mother of such child, which would be murder if

it resulted in the death of such mother, shall be deemed manslaughter in the first degree. (2 Rev. Stat., 1st ed., p. 661, § 8.)

"Every woman who shall solicit of any person any medicine, or drug, or substance, or thing whatever, and shall take the same, or shall submit to any operation or other means whatever, with intent thereby to procure a miscarriage, shall be guilty of a misdemeanor, and shall upon conviction be punished by imprisonment in the county jail not less than three months, nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment." (1 Laws of 1845, chap. 260, § 3, p. 285.)

3. "Any person who shall administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance, or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life, shall, in case the death of such child or of such woman be thereby produced, be guilty of manslaughter in the second degree." (2 Laws of 1869, chap. 631, § 1, p. 1,502.)

4. "Whoever shall unlawfully supply or procure any medicine, drug, substance, or thing whatever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not pregnant, shall be deemed guilty of a misdemeanor, and shall, upon conviction, be punished by imprisonment in the county jail not less than three months, nor more than one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment." (2 Laws of 1869, chap. 631, § 2, p. 1,502.)

5. "Every person offending against either of the provisions of this act shall be a competent witness against any other person so offending, and may be compelled to appear and give evidence before any magistrate or grand-jury, or in any court, in the same manner as other persons; but the testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the persons so testifying." (2 Laws of 1869, chap. 631, § 3, p. 1,503.)

The defects observable in the existing law, more particularly in the first section of the act of 1869, above quoted, may now be pointed out:

1. That section does not justify the procurement of a miscarriage, *except* when necessary to save the life *of the mother*. Cases may, however, occur where, in the judgment of an experienced medical man, premature labor should be induced, and be absolutely necessary to save the life *of the child*. Hence, the statute ought properly to comprehend either contingency.

2. As the section now reads, the offence is declared to be "manslaughter in the second degree," which is a statutory felony and punishable as such (3 R. S., 5 ed., p. 941, § 20), by imprisonment in a State-prison, "for a term not less than four *and not more than seven years*."

As the proper name for the intentional destruction of the *fœtus* is unquestionably *murder*, it is hoped the time will soon arrive for its punishment as such. It has been truly and forcibly said that an induced abortion, if undertaken before the viability of the *fœtus*, necessarily contemplates and intends its death. And it may be added, the same is nearly certain to result at a subsequent period, from injuries inflicted on itself or its mother during the operation. The subsequent death of the latter, when, as too often happens, she succumbs to the operation or its consequences, does not change the character of the crime, but rather adds to it the enormity of a *double murder*. But it is of importance, as fixing the true character of the deed in at least its moral aspect, to bear in mind that an abortionist does not intend the death of the mother. Through all his wickedness and ignorant bungling, it is at once his interest and aim to save her life. But he must always and necessarily intend the destruction of the *fœtus*, if he attempts or induces an abortion before the period of its viability. Consequently, as already observed, the crime is, in regard to the *fœtus*, an act of cool, deliberate, unrelenting murder, or attempt at murder, and the mother is often, undoubtedly, *particeps criminis*.

In view of the foregoing fact, it has been suggested by some of the most influential jurists of this city that the offence

specified in the first section of the act of 1869 should be made a capital felony. One of these distinguished gentlemen, Judge Bedford, to whom the committee is indebted for valuable assistance, has since explained that his advocacy of this view was only intended for its effect on "professional" abortionists. However intrinsically just such a view may be, and is in the opinion of your committee, any serious attempt to carry it into practice at the present time would probably result in lessening the chances for a conviction in any case. This is evident from the recent trial of Rosenzweig in the New York General Sessions, when two jurors united in a recommendation to mercy, thus showing a disinclination to convict even of the felony, though the prisoner did not attempt to justify his conduct, but rested his defence upon his alleged innocence of the whole matter. And, under the section of the Revised Statutes still in force (2 R. S., 1st ed., p. 661, § 8), it is questionable whether, when the facts of the case warrant the indictment as for murder under that statute, a conviction therefor would not be upheld as good.

For these and similar considerations your committee have not thought it expedient to advocate any change in the *denomination* of the crime under consideration. They have chosen what they believe to be a more practicable course; one which, if adopted, will, they apprehend, give an effectual check to the practice of criminal abortion.

There can be no question, in a community so grievously shocked as this by the terrible deeds of certain abortionists lately exposed, that some serious defect in the existing statutes, which not even the punishment at present authorized by law to be inflicted can overcome, renders them less efficacious than they ought to be in checking child-murder. A statutory enactment punishing the crime with death would be the most effectual preventive if it were practicable; but, while there remains a doubt on this subject, such a change may be substituted in the degree of punishment already awarded as will doubtless prove of almost equal effect. The *maximum* of punishment now inflicted is clearly insufficient for this purpose. In the following act it is proposed to make the offence a felony without specific name, and to fix the *minimum* of

punishment at not less than four years, leaving the *maximum* to be proportioned to the degree of guilt, as shown by the facts in the specific case, at the discretion of the court. Such discretionary power seems requisite to meet certain aggravated cases of criminal abortion. After the jury have found upon the facts of the case and returned a verdict, say of guilty, it is then the privilege of the judge, before passing sentence, to consider the circumstances peculiar to the criminal act. It may be a first offence, or other sufficient reasons may lead him to mitigate the severity of the punishment which he is called upon to inflict. On the other hand, the criminal before him may be a "professional" abortionist, a being who recognizes no higher law than his own base interests, whose heart has long ceased to know a humane feeling, whose soul is freighted with abominable crimes, whose hands are stained with the blood of innocent children, victims of his foul lust for gain. The sentiments of our common humanity revolt against so vile a wretch. Shall he be suffered to return to his old haunts and his old evil ways, with appetite whetted for more blood, after a few years spent in prison? All experience utters a solemn warning against so blind a policy.

3. The first section of the act of 1869, while providing for the punishment of any person who shall advise or procure any woman with child to take any medicine, etc., strangely enough, omits to provide for the punishment of any person *who shall advise or procure the use or* employment of any *instrument* or other means. So that, as the law stands, if the seducer, or person desirous of causing the miscarriage of the woman, intentionally advises or procures her to take any medicine, he is guilty of a felony; but quite otherwise if he advises or procures *instruments* to be used for the same purpose.

The passage of the following act will, it is believed, remedy the defects in the existing law:

AN ACT for the better prevention of the procurement of abortions and other like offences, and to amend the laws relative thereto.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

SECTION 1. The first section of an act entitled "An act relating to the procurement of abortions and other like offences," passed May 6, 1869, is hereby amended, and shall read as follows:

SECTION 1. Any person who shall administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, drug, substance or thing whatever, or shall use or employ, or advise or procure her to submit to the use or employment of any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless the same shall have been necessary to preserve her life or that of such child, shall, in case the death of such child or of such woman be thereby produced, be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in a State-prison for a term not less than four years.

SEC. 2. The eighth section of the first article of the second title of the first chapter of the fourth part of the Revised Statutes is hereby repealed.

SEC. 3. This act shall take effect immediately.

*Committee:*

- JAMES J. O'DEA, M. D., *Chairman*,
- ELBRIDGE T. GERRY,
- GEORGE F. SHRADY, M. D.,
- WILLIAM SHRADY,
- STEPHEN ROGERS, M. D., *ex-officio member*,
- GUNNING S. BEDFORD, *member by invitation*.