JAMES C. MOHR

ABORTION IN AMERICA

THE ORIGINS AND EVOLUTION OF NATIONAL POLICY

Abortion in America

The Origins and Evolution of National Policy, 1800–1900

James C. Mohr

OXFORD UNIVERSITY PRESS
Oxford New York Toronto Melbourne

Oxford University Press
Oxford London Glasgow
New York Toronto Melbourne Wellington
Nairobi Dar es Salaam Cape Town
Kuala Lumpur Singapore Jakarta Hong Kong Tokyo
Delhi Bombay Calcutta Madras Karachi

First published by Oxford University Press, New York, 1978
First issued as an Oxford University Press paperback, 1979

Library of Congress Cataloging in Publication Data
Mohr, James C.
Abortion in America.
Includes bibliographical references and index.
1. Abortion—Law and legislation—United States—History. I. Title.
KF9315.M6 344'.73'041 77-9430
ISBN 0-19-502249-1
ISBN 0-19-502616-0 pbk.

Printed in the United States of America

Abortion in America

To Jean and Ernest Mohr

Preface

In 1800 no jurisdiction in the United States had enacted any statutes whatsoever on the subject of abortion; most forms of abortion were not illegal and those American women who wished to practice abortion did so. Yet by 1900 virtually every jurisdiction in the United States had laws upon its books that proscribed the practice sharply and declared most abortions to be criminal offenses. What follows is an attempt to understand how that dramatic and still intensely debated shift in social policy came about in the United States during the nineteenth century. When did anti-abortion laws begin to appear in criminal codes? How rapidly did early abortion policies change? What did lawmakers actually enact at the state level—for abortion policies were determined in the separate states, not by the federal government—and what were those lawmakers responding to? Most importantly, what groups fought to make abortion a criminal offense in the United States and why did they do it?

As a point of clarification, the word "abortion" will be used throughout this volume to mean the intentional termination of gestation by any means and at any time during pregnancy from conception to full term. When spontaneous or naturally occurring or accidental abortions or miscarriages are referred to, those modifying adjectives will be used. To repeat, "abortion" in this study means "*intentional* abortion *at any time during gestation.*" Some of the contemporary writers quoted, however, defined the word abortion differently. In those cases attempts will be made to identify what a particular writer meant by the word, when different from the usage employed here.

Before proceeding further I wish to acknowledge at least a few of the many groups and individuals who helped me with this project during the last several years. Three organizations supported my research financially: The Ford Foundation, the Rockefeller Foundation, and the University of Maryland Baltimore County. The first two institutions awarded me a grant under their jointly sponsored Population Policy Research Program, and without that assistance this book could not have been written. UMBC provided essential help when it was needed in the form of special library purchases, secretarial services, and the like.

My scholarly debts are more numerous. I encountered an extraordinary number of generous and helpful people in the course of my research on this subject. Some of them might recognize a reference they passed along to me, or find a particular emphasis that resulted from a question they asked, or remember a suggestion they offered. Others may not realize how much simple courtesy, or an extra ten minutes to find a lost pamphlet, or the prompt answer of a letter of inquiry could help a project like this, and I am deeply grateful to all who aided this effort in their different ways.

Carl Degler, William Rothstein, Charles Rosenberg, Paul David, and Colin Burke all read the manuscript and offered valuable suggestions. James Reed, Sarah Klos, Franklin Mendels, David L. Cowen, James Cassedy, Charles G. Sieloff, Henry P. David, Charles McCurdy, Mervyn Carey, and Lonnie Burnett were especially helpful and generous in their respective areas of expertise. The history of medicine seminar at Johns Hopkins, under the direction of Lloyd Stevenson, was kind enough to listen to some of my ideas on the role of physicians in the making of abortion policy, and their comments helped me to clarify some of those ideas. Two graduate assistants, Gloria Moldow and William Stowe, labored diligently and dependably. So did my typist, Mary Dietrich.

Historians depend upon good libraries and good librarians. I was fortunate to have access to both. At the head of the list, for a subject involving so much medical history, stand Dorothy Hanks and Patrick Dore of the History of Medicine Division at the National Library of Medicine in Bethesda, Maryland. They monitor a tremendously rich resource that is superbly well run. Next comes the Library of Congress, where most of my legal, political, social, and legislative research was conducted. I am particularly indebted to Mr. Sartain, Master of the Stacks, for permission to use the LC's immense holdings freely, and to the staff of the European Law Division of the Library of Congress for research they did on my behalf concerning statutory developments on the other side of the Atlantic. Richard Wolfe of the History of Medicine section of the Countway Library at Harvard led me to valuable resources, as did the reference staff of the Schlesinger Library at Radcliffe. The entire staff of the UMBC library likewise provided many essential services, and the director of that library, Antonio Raimo, made his private collection of relevant materials available to me as

well. Literally dozens of other librarians around the country surveyed their holdings at my request and turned up useful materials. I visited too many of them to list separately, but I was almost invariably treated politely and professionally by the nation's librarians, who deserve the unstinting support and appreciation of those of us who try to write history.

My greatest debt is neither financial nor scholarly. It is the one I owe my wife Elizabeth and my two children, Timothy and Stephanie.

Columbia, Maryland James C. Mohr
August 1977

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Abortion in America, 1800–1825

In the absence of any legislation whatsoever on the subject of abortion in the United States in 1800, the legal status of the practice was governed by the traditional British common law as interpreted by the local courts of the new American states. For centuries prior to 1800 the key to the common law's attitude toward abortion had been a phenomenon associated with normal gestation known as quickening. Quickening was the first perception of fetal movement by the pregnant woman herself. Quickening generally occurred near the midpoint of gestation, late in the fourth or early in the fifth month, though it could and still does vary a good deal from one woman to another. The common law did not formally recognize the existence of a fetus in criminal cases until it had quickened. After quickening, the expulsion and destruction of a fetus without due cause was considered a crime, because the fetus itself had manifested some semblance of a separate existence: the ability to move. The crime was qualitatively different from the destruction of a human

being, however, and punished less harshly. Before quickening, actions that had the effect of terminating what turned out to have been an early pregnancy were not considered criminal under the common law in effect in England and the United States in 1800.[1]

Both practical and moral arguments lay behind the quickening distinction. Practically, because no reliable tests for pregnancy existed in the early nineteenth century, quickening alone could confirm with absolute certainty that a woman really was pregnant. Prior to quickening, each of the telltale signs of pregnancy could, at least in theory, be explained in alternative ways by physicians of the day. Hence, either a doctor or a woman herself could take actions designed to restore menstrual flow after one or more missed periods on the assumption that something might be unnaturally "blocking" or "obstructing" her normal cycles, and if left untreated the obstruction would wreak real harm upon the woman. Medically, the procedures for removing a blockage were the same as those for inducing an early abortion. Not until the obstruction moved could either a physician or a woman, regardless of their suspicions, be completely certain that it was a "natural" blockage—a pregnancy—rather than a potentially dangerous situation. Morally, the question of whether or not a fetus was "alive" had been the subject of philosophical and religious debate among honest people for at least 5000 years. The quickening doctrine itself appears to have entered the British common law tradition by way of the tangled disputes of medieval theologians over whether or not an impregnated ovum possessed a soul.[2] The upshot was that American women in 1800 were legally free to attempt to terminate a condition that might turn out to have been a pregnancy until the existence of that pregnancy was incontrovertibly confirmed by the perception of fetal movement.

An ability to suspend one's modern preconceptions and to accept the early nineteenth century on its own terms regarding the distinction between quick and unquick is absolutely crucial to an understanding of the evolution of abortion policy in the United States. However doubtful the notion appears to modern readers, the distinction was virtually universal in America during the early decades of the nineteenth century and accepted in good faith. Perhaps the strongest evidence of the tenacity and universality of the doctrine in the United States was the fact that American courts pointedly sustained the most lenient implications of the quickening doctrine even after the British themselves had abandoned them. In 1803 Parliament passed a law, the details of which will be discussed in the next chapter, that made abortion before quickening a criminal offense in England for the first time. But the common law in the United States, as legal scholars have pointed out, was becoming more flexible and more tolerant in the early decades of the nineteenth century, especially in sex-related areas, not more restrictive.[3]

In 1812 the Massachusetts Supreme Court made clear the legal distance between the new British statute on abortion and American attitudes toward the practice. In October of that year the justices dismissed charges against a man named Isaiah Bangs not on the grounds that Bangs had not prepared and administered an abortifacient potion; he probably had. They freed Bangs because the indictment against him did not aver "that the woman was quick with child at the time."[4] In Massachusetts, the court was asserting, an abortion early in pregnancy would remain beyond the scope of the law and not a crime. *Commonwealth v. Bangs* remained the ruling precedent in cases of abortion in the United States through the first half of the nineteenth century and, in most states, for some years beyond midcentury.

Prosecutors took the precedent so much for granted that indictments for abortion prior to quickening were virtually never brought into American courts. Every time the issue arose prior to 1850, the same conclusion was sustained: the interruption of a suspected pregnancy prior to quickening was not a crime in itself.[5]

Because women believed themselves to be carrying inert non-beings prior to quickening, a potential for life rather than life itself, and because the common law permitted them to attempt to rid themselves of suspected and unwanted pregnancies up to the point when the potential for life gave a sure sign that it was developing into something actually alive, some American women did practice abortion in the early decades of the nineteenth century. One piece of evidence for this conclusion was the ready access American women had to abortifacient information from 1800 onward. A chief source of such information was the home medical literature of the era.

Home medical manuals characteristically contained abortifacient information in two different sections. One listed in explicit detail a number of procedures that might release "obstructed menses" and the other identified a number of specific things to be avoided in a suspected pregnancy because they were thought to bring on abortion. Americans probably consulted William Buchan's *Domestic Medicine* more frequently than any other home medical guide during the first decades of the nineteenth century.[6] Buchan suggested several courses of action designed to restore menstrual flow if a period was missed. These included bloodletting, bathing, iron and quinine concoctions, and if those failed, "a tea-spoonful of the tincture of black hellebore [a violent purgative]... twice a day in a cup of warm water." Four pages later he listed among "the common causes" of abortion "great evacuations [and] vomiting,"