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WHEN **Abortion** **WAS A** **Crime**

**Women,
Medicine,
and Law
in the United States,
1867–1973**

LESLIE J. REAGAN

When Abortion Was a Crime

Women, Medicine, and Law
in the United States, 1867–1973

Leslie J. Reagan

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*To my mother, Susan Gardner,
for her strength and creativity.*

*To my father, Phil Reagan,
for his sense of adventure.*

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At the time that abortion was becoming legal in this country, I'm not sure that I even knew what it was, but I remember a moment in the kitchen when I asked my mom about it. Her response, though of few words, and perhaps a bit embarrassed, firmly imparted the belief that women had to be able to control their reproduction and that, sometimes, they had to be able to have abortions. That brief, dimly recalled conversation, I have since learned from my research, was like many others that mothers and daughters, friends and family members had about abortion through the twentieth century.

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Introduction

There would be no history of illegal abortion to tell without the continuing demand for abortion from women, regardless of law. Generations of women persisted in controlling their reproduction through abortion and made abortion an issue for legal and medical authorities. Those women, their lives, and their perspectives are central in this book. Their demand for abortions, generally hidden from public view and rarely spoken of in public, transformed medical practice and law over the course of the twentieth century.

This book analyzes the triangle of interactions among the medical profession, state authorities, and women in the practice, policing, and politics of abortion during the era when abortion was a crime. As individual women consulted with doctors, they made them understand their needs. Sympathy for their female patients drew physicians into the world of abortion in spite of legal and professional prohibitions. Indeed, it was physicians and lawyers who initiated the earliest efforts to rewrite the abortion laws. Ultimately, women's pressing need for abortion fueled a mass movement that succeeded in reversing public policy toward abortion in the 1960s and early 1970s.

Public policy made at the national and state levels deserves to be examined where it was carried out: at the local level, in one-on-one interactions and on a day-to-day basis. Understanding the impact of abortion law requires analyzing the actual practice of abortion and the state's enforcement of the criminal laws. The stunning transformation in law and public policy regarding abortion and women's rights was rooted in

the declining conditions of abortion under the criminal law and built on generations of women demanding abortions—and getting them.

This is the first study of the entire era of illegal abortion in the United States. Most scholarship on abortion has focused on two moments of legal change: when abortion was criminalized in the mid-nineteenth century, and when it was decriminalized a hundred years later in the mid-1960s and early 1970s.¹ The century of illegal abortion is typically treated as obscure and unchanging. I find, however, that the history of illegal abortion was dynamic, not static.

This book joins a growing literature that interrogates and reconceptualizes the relationship between the public and the private. The nineteenth-century ideology of “separate spheres” bifurcated the world into the “public sphere,” the world of politics and business in which men lived, and the “private sphere,” the domestic world of women and children. The concept of separate spheres proved to be fruitful for women’s historians and produced an abundance of important new insights and knowledge.² Recently, however, women’s historians have questioned the idea of separate spheres both because it excluded the majority of women who were working class or women of color and because it inaccurately described white middle-class life. The worlds of men and women no longer appear to be as exclusive and separate as once thought: men lived in the private sphere too, and women walked on public streets, participated in business, worked for wages, and intervened in political life; indeed, women created issues of national political importance.³ Of recently renewed theoretical interest to a variety of scholars is the public sphere itself. Here, attention has been on the nature of the public sphere, its membership, democratic discourse, citizenship, and the formation of public opinion and debate.⁴

This book challenges the dichotomy between public and private in another way. It looks more toward the private sphere and finds interaction between what have been assumed to be two distinct spheres. The relationship between public and private is dynamic; it is not just that the public has invaded private life or that excluded, politically unrecognized groups, including women, have found ways to move into public life. Rather, during the period of this study, the private invaded the public. Abortion is an example of how private activities and conversations reshaped public policy. The words and needs of women had the power to change medicine, law, and public debate. The public sphere, moreover, was not the only place where crucial communication and spirited debate occurred. They occurred in “private” arenas such as the

home and the medical office. Those conversations, generally designated “private” and thus irrelevant to public discourse, impacted debates in the public sphere and eventually changed public policy. For over a century, women challenged public policy and altered medical thinking and practice through their conversation and activity in private arenas. I use the terms *private* and *public*, but with a sense of their ambiguity and interaction.

Analysis of public policy should examine how policy has been implemented and by whom, rather than be narrowly restricted to federal legislation or agency activity. Looking at statutes alone, or the actions of legislators or the judiciary, inhibits our view of how law works, how public policy is made, and who acts on behalf of the state to enforce the law. Abortion serves as a case study for rethinking the nature of the state in the United States. Much of the regulation of abortion was carried out not by government agents, but by voluntary agencies and individuals. The state expected the medical profession to assist in enforcing the law. It may be more accurate to think of the state apparatus not as the government, but as consisting of official agencies that work in conjunction with other semiofficial agencies. State officials, this history and others show, have often relied on “private” agents to act as part of the state.⁵

Feminist scholars in the 1970s tended to see the medical profession as the source of the regulation of female sexuality and reproduction, but the medical profession’s role was more complex.⁶ This book shifts attention to the state’s interest in controlling abortion and the alliance between medicine and the state. It would have been virtually impossible for the state to enforce the criminal abortion laws without the cooperation of physicians. State officials won medical cooperation in suppressing abortion by threatening doctors and medical institutions with prosecution or scandal. Physicians learned to protect themselves from legal trouble by reporting to officials women injured or dying as a result of illegal abortions. By the 1940s and 1950s, physicians and hospitals had become so accustomed to this regulatory stance toward women and abortion that they instituted new regulations to observe and curb the practice of abortion in the hospital. The medical profession and its institutions acted as an arm of the state.

Yet the medical profession’s position was contradictory. While physicians helped control abortion, they too were brought under greater control. State officials demanded that the profession police the practices of its members. The duty of self-policing and physicians’ fears of prosecution for abortion created dilemmas for doctors who at times

compromised their duties to patients in order to carry out their duties to the state.

Furthermore, plenty of physicians provided abortions. This book points to the power of patients, even female patients, to influence and change medical practice. The widespread practice of abortion by physicians attests to both the ability of patients to communicate their needs to physicians and the ability of physicians to listen. Physicians' practices were shaped by the experiences and perspectives of private life, not only by professional antiabortion values. The physician-patient relationship was often more close than distant. This was particularly true in the early twentieth century, but became more class stratified as medicine became increasingly specialized and hospital oriented. Medicine was more of a negotiated terrain between physicians and patients than has been realized.⁷

The peaks of the medical profession's public hostility to abortion have obscured the depth of medical involvement in abortion. The antiabortion stance of organized medicine should not be mistaken for an accurate representation of the views and practices of the entire profession. This study views the medical profession as complex and composed of competing groups with opposing views and practices rather than as a unified whole. The medical profession was not monolithic, but divided in its attitude toward abortion and in its treatment of patients. This book differentiates between organized medicine and individual physicians. By "organized medicine," I mean medicine's institutional structures, such as the American Medical Association (AMA) and other medical societies, medical schools, and hospitals that produced the official, public image of the profession and acted in concert with the state. Furthermore, this study distinguishes between prescriptive commentary about medical practices, as found in the medical literature, and actual practice by physicians. These official and instructional materials reveal the thought, and perhaps the practice, of only a few. Finally, attention to specialization is crucial. Specialists played critical public roles in the history of abortion; their interests and those of general practitioners were not identical.

This book is the first to chart the nation's enforcement of the criminal abortion laws. To understand the power of law in the lives of the masses of Americans requires that one take seriously the experiences of ordinary people caught in criminal investigations. Thus it is necessary to analyze the processes and routine procedures of the legal system that shape those experiences. Most historians of crime and punishment have

focused on police and prisons, while historians of women and the law have focused mainly on marriage and property rights, not crime.⁸ Surprisingly little historical work has examined the relationship between medicine and law.⁹ Few have studied law in practice.¹⁰ Analysis of the day-to-day workings of the legal system, rather than statutory changes, judicial rulings, or the volume of cases, reveals how the law intervened in the lives of ordinary citizens to regulate reproductive and sexual behavior.¹¹

Punishment for violation of the law and sexual norms has been gendered. In abortion cases, the investigative procedures themselves constituted a form of punishment and control for women. Publicity and public exposure of women's transgressions further served as punishment. This form of punishment served, in Michel Foucault's words, as "a school." The shame of public exposure was for all of "the potentially guilty," not only the individual who had been caught. This eighteenth-century mode of punishment, thought to have been replaced by the surveillance of the prison,¹² persisted in the state's response to women and their sexual crimes. Without analyzing gender, we cannot fully understand the systems of punishment.

Even as the abortion statutes remained the same through this period, the meaning of the law and the legality and illegality of abortion changed over time.¹³ Law is not fixed, but fluid. The criminal abortion laws passed in every state by 1880 made exceptions for therapeutic abortions performed in order to save a woman's life. Because the laws governing abortion did not precisely define what was criminal and what was not, this had to be worked out in practice, in policing, and in the courts. The complexity of defining "legal" and "illegal" abortions for medical practitioners and legal authorities alike, the gray and ever-shifting nature of "criminality," is an important theme in this book. Nor was medical understanding of therapeutic abortion stable. Medicine too is interpretive and changing. Throughout the period of illegal abortion, physicians disagreed on the conditions that mandated a therapeutic abortion and on the methods: there was no consensus.¹⁴ Changes in medicine influenced legal definitions of crime; at the same time, the law shaped medical thinking and practice. The medical profession and the legal profession each looked to the other to define the legality of abortion practices. Therapeutic abortion became increasingly important in the 1930s; by the 1960s the practice (and nonpractice) of therapeutic abortion was at the very heart of the campaign to reform and repeal the criminal abortion laws.

The illegality of abortion has hidden the existence of an unarticulated, alternative, popular morality, which supported women who had abortions. This popular ethic contradicted the law, the official attitude of the medical profession, and the teachings of some religions. Private discussions among family and friends, conversations between women and doctors, and the behavior of women (and the people who aided them) suggest that traditional ideas that accepted early abortions endured into the twentieth century. Furthermore, through the 1920s at least, working-class women did not make a distinction between contraceptives and abortion. What I call a popular morality that accepted abortion was almost never publicly expressed but was rooted in people's daily lives. Americans have a long history of accepting abortion in certain situations as a necessity and as a decision that, implicitly, belongs to women to make. This popular attitude made itself felt in the courts and in doctors' offices: prosecutors found it difficult to convict abortionists because juries regularly nullified the law by acquitting abortionists,¹⁵ and few physicians escaped the pressure from women for abortions. Throughout the period of illegal abortion, women asserted their need for abortion and, in doing so, implicitly asserted their sense of having a right to control their own reproduction.

I am not suggesting a "gap" between people's beliefs and their ability to live up to them, but different, even oppositional, moral perspectives. The values expressed by ordinary people deserve to be taken seriously rather than categorized and dismissed as sinful or mistaken. Though some felt guilt about abortion and found ways to justify their behavior, others never held the official antiabortion views. Prescribed morality and popular morality may not be identical. Analysis of women's practices and ideas—popular behavior and belief—rather than exclusive focus on the statements of male theologians and philosophers suggests that it is incorrect to conclude that hostility to abortion is "almost an absolute value in history."¹⁶ The reverse may be more accurate.

Although this book takes note of religious teachings and the religious background of women who had abortions, it does not focus on religious opinion. Organized religion had little interest in abortion until it entered the public, political arena in the late 1950s and early 1960s.¹⁷ There was no reason to energetically fight abortion when, for nearly a century, abortion was a crime and no social movement suggested otherwise. From the 1920s on, however, there was much religious interest in, and division over, another method of reproductive control: contraception. Birth control became a topic of interest because a movement