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ORIGINAL ARTICLE

Context Matters: Understanding Why Medieval Legislators Chose to Regulate Women's Pregnant Bodies

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Abstract

The article was inspired by Justice Alito's selective and often misleading use of the medieval history of abortion law to justify the overturning of *Roe v. Wade*. Hoping to offer a corrective view of the larger conversation about abortion during the premodern era, this article hopes to drive home a number of points. First, modern authorities need to acknowledge that the word "abortion" (*aborsus*) meant something different then than it does now. Second, at its origins, abortion was conceived as a crime against husbands, and thus it falls into a larger body of misogynous law designed to protect men and their heirs from women who exploited their reproductive potential to trick men out of their rightful inheritance. And third, medieval laws against those who provided abortions labeled them as witches or poisoners. Medieval laws about abortion are thus intertwined with fears of the devil and of the woman's body as poison.

In the opinion delivered by Samuel Alito in support of the Supreme Court's ruling on *Dobbs v. Jackson*, he expressed disappointment that *Roe v. Wade* had either "ignored" or "misstated" the history of abortion law and he believed that it was time to set the record straight. Starting with *Bracton* and then *Fleta*, two thirteenth-century legal treatises, Alito hoped to create a historically grounded argument proving that from the thirteenth century onward, "abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages."[1] Historians who know well the history have had much to criticize when it comes to Alito's opinion. He cherry-picks from the evidence. *Bracton* and *Fleta* may support his argument, but *Britton* and *The Mirror of Justices* do not. Why did he not also mention

[1] *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. 215 (2022), 16.

them? He discusses legal treatises but avoids looking at law in practice. If he had, he would have quickly discovered that abortions prosecuted as felony in the English courts were assaults on pregnant women. Women who induced an abortion with the help of an herbal remedy were typically left to their confessors to assign penance (fasting and prayers, not the prison sentences or corporal punishment one might believe alluded to by the phrase "serious consequences").[2] Alito also presents the historical case as one that is emphatically about life and when it begins. Yet, as Maaike Van Der Lugt has emphatically declared, for medieval lawmakers, "[a]bortion was not about a fetus' right to life."[3] While the welfare of a live fetus mattered, it was not the primary concern, nor was it the reason why abortion law came into existence in the first place. Perhaps most importantly, as Jill Hasday's May 2022 op-ed in *The Washington Post* reminds us, we should not simply gloss over historical attitudes about women and how they may have influenced lawmakers. Sir Matthew Hale, the seventeenth-century jurist whom Alito quotes extensively and who he describes as one of the "great common-law authorities," presided over a trial in which he sentenced two women to death for being witches.[4]

If early law is going to serve as our ethical guide in determining how to regulate women's bodies, we need to follow Jill Hasday's recommendation and examine the broader historical context because, as the readers of this journal are well aware, law is not gender neutral. Until quite recently, Western law was the province and invention of elite white men. They created, administered, and executed the laws. Accordingly, legal writing reflects their anxieties about women. This is particularly true when we examine premodern abortion laws and laws about women's reproductive capacity. This study seeks to put medieval laws into greater context to better appreciate the motivation behind their creation and demonstrate why these laws provide a faulty model for modern legislation. In doing so, this study examines not just abortion laws, but also laws about women's pregnant bodies, because together they offer a more complete perspective of judicial concerns about women's reproductive potential as a threat to her husband. It moves beyond English common law and also secular law. English law existed and interacted in a much broader legal realm: laws and legal practices were frequently borrowed or inspired by those of other regions.

[2] For a summary of the concerns, see Sara M. Butler, "Alito's Leaked Draft Majority Opinion and the Medieval History of Abortion," in *Legal History Miscellany: Posts on the History of Law, Crime, and Justice*, eds. Sara M. Butler, Krista J. Kesselring, and Katherine Watson, https://legalhistorymiscellany.com/2022/05/13/alitos-leaked-draft-majority-opinion-and-the-medieval-history-of-abortion/ (May 13, 2022); Karl Shoemaker, Mireille Pardon, and Sara McDougall, "Abortion was a Crime? Three Medievalists Respond to 'English cases dating all the way back to the 13th century corroborate the treatises' statements that abortion was a crime,'" in *The Docket: Law and History Review*, ed. Gautham Rao, https://lawandhistoryreview.org/article/abortion-was-a-crime-three-medievalists-respond-to-english-cases-dating-all-the-way-back-to-the-13th-century-corroborate-the-treatises-statements-that-abortio/ (2024).

[3] Maaike van der Lugt, "Formed Fetuses and Healthy Children in Scholastic Theology, Medicine and Law," in *Reproduction: Antiquity to the Present Day*, eds. Nick Hopwood, Rebecca Flemming, and Lauren Kassell (Cambridge: Cambridge University Press, 2018), 170.

[4] Jill Elaine Hasday, "Opinion: On Roe, Alito Cites a Judge Who Treated Women as Witches and Property," *The Washington Post* (May 9, 2022); *Dobbs v. Jackson*, 3.

Looking at law across the European landscape helps us to see how England participated in a larger conversation about women's reproductive capacity. This study also recognizes that for much of this period there was no firm divide between sacred and secular. Laws emanating from royal authorities were often drafted by bishops or drawn from canon law. The passage from *Bracton* on abortion, for example, is borrowed from the work of the Catalan canonist Raymund of Peñafort.[5]

What this article will not do is provide a thorough and meticulous examination of medieval law in practice. Legislation tells us nothing about its implementation. Despite the proliferation of legislation regarding abortion across time and space, studies undertaken by myself (England), Wolfgang Müller (canon law), and Osvaldo Cavallar and Julius Kirshner (Italy) have uncovered a mere handful of trials for herbally induced abortions.[6] Moreover, while medieval laws have tended to gender abortion female, those cases of abortion that were in fact brought before the courts more often than not were brought against men who physically assaulted women causing them to miscarry.[7] These unexpected findings suggest a yawning chasm between theory and practice—indeed, between the principles of lawmakers and those of its officers and consumers. It remains without saying that the situation on the ground was much more complicated than it appears in written law. Nonetheless, law in the form of legislation and legal treatises remains the focus of this paper because it is precisely this law that jurists and politicians today employ to justify "an unbroken tradition of prohibiting abortion on pain of criminal punishment … from the earliest days of the common law until 1973."[8] If we are to continue a tradition, we should be conscious of exactly what tradition it is that we are perpetuating.

Examining the big picture of medieval legislation leads us to recognize several key points. First, modern authorities need to acknowledge that the word "abortion" (*aborsus*) meant something different then than it does now. Second, at its origins, abortion was conceived as a crime against husbands, and thus it falls into a larger body of misogynous law designed to protect men and their heirs from the materialistic designs of deceitful women who exploited their reproductive potential to trick men out of their rightful inheritance. And third, medieval laws against those who provided abortions labeled

[5] Fritz Schultz, "Bracton and Raymund de Penafort," *Law Quarterly Review* 61 (1945): 287; as cited by Richard W. Ireland, "Chaucer's Toxicology," *The Chaucer Review* 29, no. 1 (1994): 91, note 41.

[6] Sara M. Butler, "Abortion Medieval Style? Assaults on Pregnant Women in Later Medieval England," *Women's Studies: An Inter-Disciplinary Journal* 40, no. 6 (2011): 784–85; Wolfgang P. Müller, *The Criminalization of Abortion in the West: Its Origins in Medieval Law* (Ithaca, NY: Cornell University Press, 2012); Osvaldo Cavallar and Julius Kirshner, *Jurists and Jurisprudence in Medieval Italy: Texts and Contexts* (Toronto and Buffalo: University of Toronto Press, 2020), chapter 26.

[7] Zubin Mistry discusses the gendering of abortion at great length in his *Abortion in the Early Middle Ages c. 500–900* (York: York Medieval Press, 2015), chapters one and two in particular; Sara M. Butler, "Abortion by Assault: Violence against Pregnant Women in Thirteenth- and Fourteenth-Century England," *Journal of Women's History* 17, no. 4 (2005): 9–31.

[8] *Dobbs v. Jackson*, 25.

them as witches or poisoners. Laws about abortion are thus intertwined with fears of the devil and of the woman's body as poison.

Defining the Terms of the Debate: What Do We Mean by "Abortion"?

A thorough survey of the medieval laws of abortion is useful only after we define the terms of the debate: what exactly did they mean by "abortion" in the Middle Ages? That is, are we metaphorically comparing apples to apples, or apples to oranges?

When abortion is debated in twenty-first century America, it is often described in ways that would have made little sense to the medieval world. For example, pro-life proponents today contend that life begins at conception. Medieval scholastic discourse instead endorsed the view that life begins only once the fetus has acquired a recognizably human form and God has infused it with a human soul. The latter is alternately referred to as ensoulment, vivification, animation, hominization, or the quickening, and it was experienced by the mother as the first fetal movement. Before that point, not only was the fetus not alive, it was also not human.[9] For the historian, identifying exactly when that moment of transformation took place is somewhat problematic. A gloss eventually associated with the civilian Azo Porticus (d. 1202) seemingly employed Aristotle's thinking as a guide, seeing that the process depends on the sex of the infant: a boy quickens at forty days (five and a half weeks) whereas it takes eighty days (just over eleven weeks) for a girl.[10] The generation of a female fetus is more time consuming because, in essence, it is a failed process. A female fetus results when the form (the father's sperm) is not properly imposed upon the matter (the mother's menstrual blood within the uterus).[11] However, both estimates misjudge the actual length of the development process as modern medicine tells us that the first fetal movement can be felt by the mother somewhere between the eighteenth and twentieth week of pregnancy. Furthermore, few women would have been capable of dating conception accurately: high rates of anemia meant that regular menstruation was a rarity, thus a woman could not rely on a "missed period" as an early sign of pregnancy.[12]

Their view of when life begins is not the only difference. Today, abortion is firmly differentiated from miscarriage, a spontaneous and unintentional expulsion of the fetus from the womb. The medieval world did not make this

[9] Augustine of Hippo, "Quaestionum in Heptateuchum," lib. 2, c. 80, in *Opera Omnia* (Patrologia Latina, vol. 34, col. 626). For a discussion of the evolution of thinking on conception and abortion, see Marie-Hélène Congourdeau, "Debating the Soul in Late Antiquity," in *Reproduction: Antiquity to the Present Day*, eds. Nick Hopwood, Rebecca Flemming, and Lauren Kassell (Cambridge: Cambridge University Press, 2018), 109–22.

[10] Müller, *The Criminalization of Abortion in the West*, 1–2 and 29.

[11] Bettina Bildhauer, "Blood in Medieval Cultures," *History Compass* 4, no. 6 (2006): 1051.

[12] In the western world today, a woman experiences approximately 450 menstrual cycles over the course of her lifetime; a medieval woman was more likely to experience only fifty menstrual cycles. See Patricia Stuart-Macadam, "Iron Deficiency Anemia: Exploring the Difference," in *Sex and Gender in Paleopathological Perspective*, eds. Anne Grauer and Patricia Stuart-Macadam (Cambridge: Cambridge University Press, 1999), 57.

distinction. *Aborsus* as a term was multifaceted, including any form of miscarriage no matter how it came about, whether it was spontaneous, accidental, intentional, the result of an assault, or even a fetal excision after the death of a laboring mother.[13] They did not make this distinction because they did not suppose that miscarriages could be spontaneous. Pseudo-Albertus Magnus' *De Secretis Mulierum* (late thirteenth or early fourteenth century) explains sudden miscarriage as stemming from two causes. First, it is because the menses are corrupt, which happens with immoderation of the six non-naturals (diet, exercise, air, sleep, evacuation, emotion). Too much or too little of any non-natural creates an imbalance in the body's humors and corrupts the menses. For example, the treatise tells us that excessive fear of thunderstorms has been known to provoke an abortion, thus pregnant women are advised to find a "hidden, confined place" for the duration.[14] Second, abortion is caused by "too much motion on the part of the woman which breaks the womb." Ostensibly, "harlots" and "women learned in the art of midwifery," when they are pregnant, lead dances, "have a great deal of sex" and even wrestle with men, all to "be freed from their pregnancy by excessive motion."[15] One of the anonymous commentaries on the manuscript elaborates on the medical reasoning, explaining that "frequent motion and hard work on the part of the woman can loosen and corrupt the ligaments in the womb so that the fetus cannot be retained. It is for this reason that pregnant women are advised that they should not work or walk around too much. There are some evil women who are aware of this and counsel young girls who have become pregnant and wish to hide their sin that they should jump around, run, walk, and briskly move about in order to corrupt the fetus."[16] From this viewpoint, a miscarriage cannot be free of fault. Blame fell on poor diet, excessive emotion, or gratuitous exercise.

Modern medicine can tell us what it means to ignore the distinction between spontaneous and deliberate abortion. Today, the reported world rate for miscarriages is roughly 15%, that is with twenty-three million miscarriages per year, or forty-four occurring every minute across the globe, although scientists are quick to add that because many miscarriages are managed at home the absolute number is probably "significantly higher than reported."[17] The chances of having a miscarriage increase with long-term health problems, iron deficiency, malnutrition, increasing age of the mother—all factors that were markedly greater in medieval Europe than in the twenty-first century West. This is particularly true of iron deficiencies: bioarchaeological analysis performed at the Gilbertine Priory of St Andrew, Fishergate in York has demonstrated that iron-deficiency anemia was prevalent in the

[13] van der Lugt, "Formed Fetuses," 168.

[14] Helen Rodnite Lemay, ed., *Women's Secrets: A Translation of Pseudo-Albertus Magnus'* De Secretis Mulierum *with Commentaries* (New York: State University of New York Press, 1992), 104.

[15] Lemay, *Women's Secrets*, 101–2.

[16] Lemay, *Women's Secrets*, 103.

[17] Mehdi Moradinazar, Reza Rostami, Nazila Armaghan, Mohammad Shakiba, Amirraze Rai, Sogand Abbasi Azizi, et al., "Epidemiological Features of Spontaneous Abortion in North Africa and the Middle East from 1990 to 2019: Results from the Global Burden of Disease Study 2019," *Journal of Family Reproductive Health* 16, no. 3 (2022): 183–91.

medieval world because of "rampant parasitism" in which women were disproportionately affected, such that "iron-deficiency anemia [was] a chronic condition in many women's lives irrespective of their status affiliation."[18] Today, one in five women who know they are pregnant will have a miscarriage before the twentieth week; how much worse would that statistic have been in medieval Europe?[19] We have the numbers to demonstrate just how common miscarriage is. While they did not have access to statistics in the Middle Ages, surely most everyone knew multiple women who had experienced miscarriages and witnessed their grief and trauma. It is hard to imagine that everyone felt comfortable blaming women for a miscarriage they did not want. Regardless, miscarriage did make its way into the courts. The first recorded trial of a woman accused of the crime of abortion uncovered by Cavallar and Kirschner is from Venice in 1490 and is a case of spontaneous miscarriage.[20] Aleksandra Pfau has also recently presented on a French letter of remission dating to 1386, in which a woman sought royal pardon for a spontaneous miscarriage.[21]

Within the church, where penance meant spiritual rather than corporal punishment, involuntary abortion was punished as a form of negligence. For example, the Spanish *Penitential of Silos* (1075 × 1091) includes one penance for voluntary abortion (four years) and another for involuntary (two years).[22] Books of penance frequently speak of those who abort intentionally (*sponte* or *voluntarie*). So, too, does England's *Leges Henrici Primi* (ca. 1115).[23] The Synod of Angers (1216 × 1219) singles out the woman who knowingly (*cognita*) has an abortion, a canon that resurfaces also at the Synod of Clermont (1268) and the Synod of Nantes (1299 × 1304).[24] A papal decretal credited to Innocent III and dating to 1211 confirms that even accidental abortion was still punishable. Innocent's letter was in response to the prior of a Carthusian monastery who was uncertain what to do about the misbehavior

[18] Amy Sullivan, "Prevalence and Etiology of Acquired Anemia in Medieval York, England," *American Journal of Physical Anthropology* 128, no. 2 (2005): 252.

[19] "Miscarriage," The Royal Women's Hospital (Victoria, Australia), https://www.thewomens.org.au/health-information/pregnancy-and-birth/pregnancy-problems/early-pregnancy-problems/miscarriage (accessed February 23, 2024).

[20] Cavallar and Kirshner, *Jurists and Jurisprudence in Medieval Italy*, 450.

[21] Aleksandra Pfau, "Whose Personhood Matters? Abortion and Miscarriage in Late Medieval French Law," *Sewanee Medieval Colloquium* (April 6, 2024). French letters of remission would seem to be a treasure trove of information about acts that might otherwise lie hidden. Sara McDougall recently uncovered two fifteenth-century requests for royal pardons relating to forced abortion. See her "Pardoning Infanticide in Late Medieval France," *Law and History Review* 39, no. 2 (2021): 251.

[22] Francis Bezler, ed., *Paenitentialia Hispaniae*, Corpus Christianorum, Series Latina, vol. 156A (Turnhout: Brepols, 1998), 23. See also "*P. Mediolanense*" (sixteenth century), in *Die Bussordnung der abendländischen Kirche*, ed. Franz W. H. Wasserschleben (Graz: Verlag von Ch. Graeger, 1851), 713.

[23] Leslie J. Downer, ed., *Leges Henrici Primi* (Oxford: Clarendon Press, 1972), 223.

[24] All episcopal statutes are drawn from Rowan Dorin, ed., *Corpus Synodalium: Local Ecclesiastical Legislation in Medieval Europe*, June 30, 2021, www.corpus-synodalium.com (accessed February 27, 2024). Synod of Angers (1216 × 1219), c. 98 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/41/2/98/); Synod of Clermont (1268), c. 95 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/259/2/103/); Synod of Nantes (1299 × 1304), c. 69 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/515/2/70/).

of one of his monks. Not only had the man impregnated a woman, but he had also caused her to miscarry, not deliberately, but inadvertently by grabbing her girdle playfully, causing her to fall. The prior wondered, should the monk incur the impediment of irregularity for the abortion? Innocent's response was decisive: "he who causes an abortion is a murderer, if the conception was a vivified, rational animal."[25] Innocent's harsh response was probably most influenced by the monk's irregularity; nonetheless, his decretal laid the groundwork for seeing accidental miscarriage as equivalent to an induced abortion. English law also held accountable those who caused miscarriages through assault seemingly without realizing that the victim was pregnant; however, the paltry number of convictions implies that jurors did not share this determination.[26]

Deliberate abortion was also ranked according to enormity. The presence of malice was meaningful: the synodal statutes frequently target those who procure abortions "maliciously" (*maliciose*).[27] What this meant in the implementation of the law is not entirely clear, but it would seem to imply that some abortions were not malicious (and thus not subject to the same kind of censure). Certain aspects lessened the severity. Poverty was a mitigating factor, although not enough to excuse the act entirely. The *Penitential ascribed by Albers to Bede* (early eighth century) assigned a lesser penance to the "poor woman [who] does it on account of the difficulty of supporting [the child]" than the "harlot" who aborted "for the sake of concealing her wickedness." Zubin Mistry refers to this as the "mitigating *paupercula* [poor woman] clause," a key passage that reappears in many penitentials, as well as Regino of Prüm's *Libri Duo*, and presumably had a broader impact accordingly.[28] The risk a pregnancy posed to the mother's health may also have mattered. The *Arundel Penitential* (tenth or eleventh century) makes a distinction in penance between a woman who procures an abortion "to hide her lust" (ten years of penance) and those who "do this to escape death or narrowness in childbirth" (three years of penance).[29] The same penitential differentiates between the woman who causes an abortion because of her own frivolity (*pro sua levitate*) (one year) and the woman who does so because it is necessary (*pro utilitate necessaria*) (forty days).[30]

What all of this makes clear is that the medieval world's perception of abortion was substantially different than that of twenty-first century America. The

[25] Cavallar and Kirshner, *Jurists and Jurisprudence in Medieval Italy*, 446. X.5.12.20, Gregorius IX, *Decretalium Compilatio*, ed. Angus Graham (Intratext, 1996–2007), https://www.intratext.com/ixt/lat0833/_P1AA.HTM (accessed February 23, 2024).

[26] Butler, "Abortion by Assault."

[27] For example, see Synod of Angers (1216 × 1219), c. 58 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/41/2/59/).

[28] John T. McNeill and Helena M. Gamer, *Medieval Handbooks of Penance: A Translation of the Principal "Libri Poenitentiales" and Selections From Related Documents* (New York: Columbia University, 1990), 225; Mistry, *Abortion in the Early Middle Ages*, 180; Regino of Prüm, *Two Books on Synodal Causes and Ecclesiastical Disciplines*, ed. and trans. Giulio Silano (Toronto: Pontifical Institute of Mediaeval Studies, 2021), 183. *P. Vigilanum siue Albeldense*, in Bezler, *Paenitentialia Hispaniae*, 7; *P. Silense*, in Bezler, *Paenitentialia Hispaniae*, 24.

[29] Schmitz, ed., *Die Bussbücher* (1883), 443; as cited and translated in Mistry, *Abortion in the Early Middle Ages*, 187. Mistry was the first to draw attention to this passage.

[30] Schmitz, *Die Bussbücher* (1883), 444.

medieval world did not believe that life began with conception. It did not distinguish between miscarriage (spontaneous or accidental) and abortion. Perhaps the one lesson from which we might benefit here is that it also did not treat all abortions with the same degree of condemnation; the poor woman did not deserve the same censure as did the "harlot" or "frivolous" woman, and a woman's physical impediments to childbirth were relevant. Indeed, a woman and her circumstances mattered.

The real question, of course, is: did medieval legislators see the abortion of a live fetus as homicide? The answer is not entirely straightforward. The language of homicide (*homicida*) appears early on. Following Augustine, most penitentials include some recognition of forty days as the key point at which, when exceeded, turns an abortion into homicide.[31] This perspective is mirrored in the early secular law codes. The Visigothic Code describes abortion as homicide; so, too, do the Bavarian laws (mid-eighth century), and the *Leges Henrici Primi* (cited by Alito in his majority opinion).[32] Admittedly, even if lawmakers were using the terminology, homicide in the early Middle Ages was not a "crime." In state courts, it was a private matter settled by compensation; it did not even go to court unless one of the victim's relatives felt sufficiently aggrieved to initiate a lawsuit. Nonetheless, proliferation of the language of homicide persisted into the period when homicide had evolved into a criminal offence, and often one punishable by death. *Bracton*, a thirteenth-century English legal treatise, employs the term homicide in reference to the abortion of a quickened fetus.[33] So, too, do *Las Siete Partidas* (1254 × 1265).[34] Episcopal statutes also used the term and continued to distinguish the nature of the sin according to the stage of gestation with references to the animated (*animatus*) fetus, the fetus already conceived and vivified (*conceptum et uiuificatum*), the living (*de vivo*) fetus, the fetus already alive in the womb (*iam in uentre animatum*), and the formed fetus (*fetus formati*).[35] Although

[31] *P. Cummean* (seventh century), in Schmitz, *Die Bussbücher* (1883), 630.

[32] Karolus Zeumer, ed., *Leges Visigothorum Antiquiores*, Monumenta Germaniae Historica, vol. 5 (Hanover and Leipzig: Hahn, 1902), 261; Theodore John Rivers, ed., *Laws of the Alamans and Bavarians* (Philadelphia: University of Pennsylvania Press, 1977), 141; Downer, *Leges Henrici Primi*, 223.

[33] *Bracton on the Laws and Customs of England*, ed. George E. Woodbine and trans. Samuel E. Thorne, 4 vols. (Cambridge, MA: Belknap Press, 1968–1977), vol. 2, 341.

[34] Samuel P. Scott, trans., and Robert I. Burns, ed., *Las Siete Partidas, Volume 5: Underworlds: The Dead, the Criminal, and the Marginalized (Partidas VI and VII)* (Philadelphia: University of Pennsylvania Press, 2012), 1346–47.

[35] *animatus*, Synod of Roskilde (1202 × 1223), c. 3 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/34/2/4/); *animatum*, Synod of Chalon-sur-Saone (1281), c. II.4 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/350/2/16/); *conceptum et uiuificatum*, Synod of Florence (1342 × 1352), c. V.8 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1015/2/56/); *de vivo*, Synod of Bordeaux (1359), c. 3 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1082/2/15/); *iam in uentre animatum*, Synod of Genoa (1375), c. 65 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1193/2/55/); *fetus formati*, Synod of Soisson (ca. 1300), c. 120 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/518/2/120/).

once again, it is critical to underscore that canon law assigned spiritual punishments, not corporal or capital punishments.

Nonetheless, the unwillingness of legislators in general to recognize the fetus as a person—a prerequisite for a homicide accusation—remained a serious obstacle throughout the period. The Digest, which set the foundation for the Continent's ius commune as well as canon law, insisted on seeing the fetus as a part of the mother or her viscera before birth.[36] When it comes to inheritance, Roman law was capable of thinking about the fetus as a potential person. For example, when speaking of how to divide a condemned prisoner's patrimony among his children, the Digest quotes Julius Paulus, saying: "The fetus in the womb is deemed to be fully a human being, whenever the question concerns accruing to him when born, even though before birth his existence is never assumed in favor of anyone else."[37] The difficulty of seeing the fetus as an entity distinct from the woman who carries it is evident also in the so-called *Bigotian Penitential* (eighth century), which includes abortion within a section on those who kill themselves in anger, and the *Penitential of Vigila of Alveda* (ninth century), which includes abortion under the heading "Concerning the Killing of Women."[38]

Some of the clearest discomfort with recognizing a fetus as a person comes from the English legal treatises that Alito chose not to discuss. The author of *The Mirror of Justices* (1290s) wrote: "Of infants killed ye are to distinguish whether they be killed in their mother's womb or after their births; in the first case it is not adjudged murder; for that none can judge whether it be a child before it be seen, and known whether it be a monster or not."[39] "Monster" (*monstrie*) refers to the newborn's physical state: as *Bracton* makes clear, a child born with severe physical deformities was referred to as a monster, "since it is not born in the likeness of a man," in which case, "it will not be reckoned as a child nor taken into account with respect to succession."[40] As this treatise implies, jurists should not treat a fetus as a person because they cannot even be certain yet that it is going to be a legally recognizable person. *Britton*, a late thirteenth-century update and abridgement of *Bracton*, aligns with the *Mirror*, stating: "For an infant killed within her womb, she may not bring any appeal [that is, lawsuit], no one being bound to answer an appeal of felony, where the plaintiff cannot set for the name of the person against whom the felony was committed."[41] The English *Liber Assisarum*, as Richard Ireland has noted, similarly denied the possibility of recognizing a fetus as a person. A query regarding a person said to have killed a child in the womb led to the conclusion that the case should be debarred from prosecution

[36] Dig. 25.4.1.1; Alan Watson, ed., *The Digest of Justinian*, 4 vols. (Philadelphia: University of Pennsylvania Press, 2011), vol. 2, 282.

[37] Dig. 1.5.7; Watson, *The Digest of Justinian*, vol. 1, 15.

[38] Ludwig Bieler, *The Irish Penitentials* (Dublin: Dublin Institute for Advanced Studies, 1963), 229.

[39] William Joseph Whittaker, ed., *Mirror of Justices* (London: Selden Society, vol. 7, 1893), 139; *P. Vigilanum siue Albeldense*, in Bezler, *Paenitentialia Hispaniae*, 7.

[40] *Bracton*, vol. 4, 361 and vol. 2, 203–4.

[41] Francis Morgan Nichols, ed., *Britton* (Oxford: Clarendon Press, 1865), 95–96.

because of the "lack of a named victim, one who had never been in existence ('in rerum natura')."[42]

With Gratian's *Decretum* (twelfth century), canon law adopted a more strident position on both abortion and contraception. First, in a discussion on the role of sex and procreation within marriage, the authors of the collection include a passage from Augustine of Hippo, that appeared previously in works by Burchard of Worms and Ivo of Chartres, arguing that if both husband and wife agree to take contraceptives (*sterilitatis venena*), or they abort the fetus before it is born, then their union is not a marriage at all, but debauchery (*stuprum*). Truly, Augustine declares, if that had been their plan from the beginning of the marriage, then she was merely her husband's whore (*mariti meretrix*), while he was his wife's adulterer (*adulter uxoris*)—that is, their intention invalidated the marriage.[43] Second, although the authors do not come right out and state it, they imply that abortion of a living fetus is homicide: "One who procures an abortion before the soul is infused into the body is not a murderer. An embryo which is not yet formed cannot be murdered, nor can it properly be considered a human being in the womb. This depends on the soul, for when something is unformed and has no soul, it cannot be murdered. Something cannot be deprived of a soul if it does not have one."[44] The authors of the *Decretum*, too, demonstrate an unwillingness to see the fetus as a person. The section concludes with a quotation from St Jerome: "For just as seeds are gradually formed in wombs and for so long a time murder is not considered until mixed up elements take up their appearances and limbs, thus what is conceived, having been felt with reason, unless it bursts forth in labor, is still restrained in the womb and dies through a quick miscarriage."[45] Of course, the *Decretum*'s authoritative position as the textbook for canon law in the Middle Ages was not the final word; indeed, it was the starting point for a lively and diverse conversation. And because canon law was an enormous corpus incorporating not only textbooks, but also conciliar decrees, papal decretals, glosses, commentaries, treatises, many of which include conflicting statements, it is hard to know which passages influenced jurists most in their decision-making.

To return to the question at hand, then: did the medieval world consider abortion a form of homicide? Quite frankly, the answer may well depend upon whom you asked, and even if they did say "yes," they may not have considered it a "crime" as do we today. Two other points are relevant in making this assessment. First, most of the laws which refer to abortion as homicide belong to canon law; thus, more often than not, it was deemed a spiritual matter, reserved for the internal forum, and deserving of penance not punishment.

[42] Ireland, "Chaucer's Toxicology," 86.

[43] C.32, q. 2, c. 7; Emil Friedberg, ed., *Corpus iuris canonici*, I, Decretum magistri Gratiani (Leipzig: Tauchnitz, 1879), col. 1121.

[44] C.32, q.2, c. 8; Friedberg, ed., *Corpus iuris canonici*, col. 1122.

[45] C.32, q.2, c. 10; Friedberg, ed., *Corpus iuris canonici*, col. 1122; translation from Joan Ferrante, "A Letter from Jerome (late 4th or early 5th century?)," *Epistolae: Medieval Women's Latin Letters* (Columbia University Libraries, 2014), accessed October 10, 2024, https://epistolae.ctl.columbia.edu/letter/1291.html.

And as the passages from Gratian above suggest, it was also a concern primarily for married couples. Second, even when abortion did appear in secular law codes, it was not enforced with any rigor. As I indicated in the introduction to this article, the only abortions regularly addressed by the courts were physical assaults that resulted in miscarriage, which typically ended in acquittal.[46] Therefore, even if legislators were moved to formulate law regarding abortion as homicide, law enforcement officials did not implement it. As all of this implies, a straightforward comparison between medieval and modern "abortion" and its legal definition is not so simple. To return to our metaphor, it is very much a comparison of apples to oranges.

Weaponizing the Pregnant Body

The focus on the quickening as a defining moment tells us that medieval authorities did care about the life of the fetus. Nevertheless, it is critical to recognize that abortion laws did not arise out of concerns for the fetus. Nor was the fetus initially considered the victim of an abortion. Justinian's Digest describes the procuring of an abortion for oneself as an "extraordinary crime" committed by a married woman in which the husband (not the fetus) was the victim, for, as the jurist Marcian explains, "it would appear shameful that she could with impunity deprive her husband of children."[47] As Osvald Cavallar and Julius Kirshner contend, jurists in both ancient and medieval Italy "generally tolerated" abortion when it was carried out by an unmarried woman, or even a married woman whose husband approved of the decision.[48] Abortion was only a crime when it was procured without a husband's knowledge or permission.

It is no wonder, then, that in both Byzantine and early Irish law, abortion without the husband's authorization was grounds for a divorce.[49] From a male perspective, marriage was a contract to produce an heir to pass on one's property and to continue one's lineage. Contraception, abortion, and infanticide all violate that contract and thus might be used to justify its dissolution. A wife's abortion was equated to a breach of contract. In laws such as these, "the dominant concern … was the effect of abortion on the rights of the *paterfamilias* and hereditary succession."[50] To complicate matters, for a man, his reputation and standing in the community relied (in part) on his ability to father children, especially sons; his wife's actions were thus an "attack" on his honor. Stephanie Novasio insists that the offense was even more pointed. In refusing to bear children, a wife who induced an abortion was rejecting the "social obligations as dictated by the institution of marriage,"

[46] Butler, "Abortion by Assault."

[47] Dig. 47.11.4; Watson, *The Digest of Justinian*, vol. 4, 298.

[48] Cavallar and Kirshner, *Jurists and Jurisprudence in Medieval Italy*, 444.

[49] Patrick D. Viscuso, ed., *Sexuality, Marriage, and Celibacy in Byzantine Law: Selections from a Fourteenth-Century Encyclopedia of Canon Law and Theology: The Alphabetical Collection of Matthew Blastares* (Brookline, MA: Holy Cross Orthodox Press, 2008), 141; Fergus Kelly, ed., *A Guide to Early Irish Law* (Dublin: Dublin Institute for Advanced Studies, 1988), 84.

[50] Cavallar and Kirshner, *Jurists and Jurisprudence in Medieval Italy*, 445.

and striking out against the patriarchy.[51] Abortion laws in the Roman world were a means of upholding the patriarchy and keeping women in their place as wives and mothers.

The perception that abortion is a concern only when it victimizes husbands appears also in canon law, although on different grounds. Canon sixty-four of the Council of Elvira (ca. 305), the first legislation issued by the church to address the matter of abortion, framed it as an act of concealment by an adulteress: "If a woman has conceived by adultery during an absence of her husband, and after her crime she killed it, it pleased that communion be given to her only just at the end because she twinned her heinous act."[52] The Council of Lérida (546) similarly describes abortion as a means to do away with that which was "wrongly conceived [and] made in adultery."[53] The recommendations of these early councils appear repeatedly in the penitentials, and also in some secular law codes.[54] Nor did the association between abortion and adultery dissipate with time: the Synod of Noyon (1280 × 1285) employs an especially sinister invective: women who procure abortions are fornicators "following in the footsteps of Medea," the mythological Greek figure who, ironically, slew two of her children in revenge for her husband's abandonment and adultery.[55]

Even in those rare situations when Roman lawmakers disentangled abortion from adultery, they still envisioned it to be the act of a married woman. Tryphoninus is quoted in the Digest warning of the recently divorced wife who finds herself pregnant and takes revenge on her husband by doing "violence in some way to her womb … so as to avoid giving a son to her husband who is now hateful."[56] The jurist also envisioned wives paid to abort by rival heirs, a premise that appears multiple times in the Digest, including the possibility that an heir might pay to have his (step)mother abort all future children.[57]

Putting abortion legislation in conversation with other laws about women's pregnant bodies reinforces the impression of the pregnant wife as a danger to her husband and his heirs. The episcopal statutes abound with legislation intended to punish wives who pass off their lover's child as their husband's,

[51] Stephanie Novasio, "Gendering Crime in Byzantium," in *Women and Violence in the Late Medieval Mediterranean, ca. 1100–1500*, eds. Lidia L. Zanetti Domingues, Lorenzo Caravaggi, and Giulia M. Paoletti (London: Routledge, 2021), 195.

[52] Council of Elvira (ca. 305), c. 64; as cited and translated in Regino, *Two Books*, 183. The harsh sentence of excommunication until death was tempered by the Council of Ancyra (ca. 313), which set penance instead at ten years. Henry R. Percival, ed., *The Seven Ecumenical Councils of the Undivided Church. Their Canons and Dogmatic Decrees, Together with the Canons of All the Local Synods which have Received Ecumenical Acceptance* (Peabody, MA: Hendrickson Publishers, Inc., 1995), 73.

[53] Council of Lérida (546), c. 2; as cited and translated in Mistry, *Abortion in the Early Middle Ages*, 95.

[54] Downer, *Leges Henrici Primi*, 223. The rulings of both councils (without references to the councils themselves) also appear in van Rhijn, *P. Pseudo-Theodori*, 37.

[55] Synod of Noyon (1280 × 1285), c. 57 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/364/2/59/).

[56] Dig. 48.19.39; Watson, *The Digest of Justinian*, vol. 4, 368.

[57] Dig. 48.19.39 and Dig. 40.7.3.16; Watson, *The Digest of Justinian*, vol. 4, 368 and vol. 3, 459.

deceiving their husbands and cheating the legitimate heirs out of their paternal inheritance.[58] The writers of *Las Siete Partidas* worry that even infertile wives might play this game, speaking of women who pretend to be pregnant when they are not, but they are "so artful" that their husbands suspect nothing. They feign giving birth, at which point another woman's child is fraudulently substituted for her own imaginary one, duping her husband, and stealing the rightful heir's inheritance.[59] Of course, even if a wife tried to come clean and reveal that some of her children are in fact legitimate, she was not to be readily believed. As the *Coutumes de Beauvaisis* explains, "[t]he mother is not believed in any case against her children if she says they are bastards. For the hatred or love she has for their stepfather or the desire she might have for her other children to inherit her property could lead her to say that some of her children were bastards in order to give the inheritance to the others." Only a thorough interrogation about what "moved her to honesty" about her "wickedness" might reveal that she is telling the truth.[60]

The danger intensified after her husband's death. Legislators designed an ironclad system to foil the schemes of the recently widowed woman who claimed falsely to be pregnant as a ploy to defraud the legitimate heirs. In states founded on Roman law, a widow typically received one-third of the marital property; however, if she could prove that she was pregnant with her dead husband's heir, and the child was born alive, she might claim her unborn son's share also as his custodian.[61] In Scandinavia, a widow was able to claim marital property only if she had borne him a child.[62] To the imaginative lawmaker, situations such as these presented manifold opportunities for manipulation by a greedy widow. To prevent her from rushing out to get pregnant by anyone willing, or deceitfully substituting another person's child for her own, an elaborate process of "pregnancy-custody" was established under Roman law.[63] The Digest lays it out step by step. If she was indeed pregnant, she had to notify all interested parties within a month of her husband's death so that they might send in five freeborn women to examine her and evaluate her claim. What constituted an examination is unclear, although the legislation does state that "none of them must touch the woman's stomach without her consent," suggesting an external assessment.[64] Thirty days prior to what she believed to be her due date, she sent a second notification to all

[58] For example, Synod of Arles (ca. 1273), c. 12 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/284/2/10/); Synod of Vienne (1289), c. 27 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/413/2/29/); Synod of Saint-Ruf (1326), c. 22 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/790/2/24/).

[59] Scott and Burns, *Las Siete Partidas, Volume 5*, 1338.

[60] Frank R. P. Akehurst, ed. and trans., *The* Coutumes de Beauvaisis *of Philippe de Beaumanoir* (Philadelphia: University of Pennsylvania Press, 1992), 205.

[61] Rick Geddes and Paul J. Zak, "The Rule of One-Third," *The Journal of Legal Studies* 31, no. 1 (2002): 119–37.

[62] Thomas Lindkvist, ed., *The Västgöta Laws*, Routledge Medieval Translations (Milton Park, Abingdon, Oxon; New York, NY: Routledge, 2021), 100.

[63] Dig. 12.2.3.3; Watson, *The Digest of Justinian*, vol. 1, 365.

[64] Dig. 25.4.1.10; Watson, *The Digest of Justinian*, vol. 2, 283.

parties so that they might ready observers for the delivery; a final notification at the first pangs of labor. The praetor designated the house in which she must give birth on the basis that it belongs to a "very respectable woman." The birth room could have only one entrance: "If there are more, they must be boarded over on either side." At the entrance to the room were stationed three freeborn men and three freeborn women with two companions, appointed to keep watch and search anyone who enters the room or the house, in case they try to sneak in a pregnant woman or a newborn. In addition, the room must be well-lit, with at least three light sources, "[f]or darkness is better suited to substitution of a child." Finally, after birth, the child "must be shown to all interested parties or their procurators, if they wish to see it."[65]

The Roman process of "pregnancy-custody" survived in various formats across Europe to protect the disinheritance of the heir from the "suppositious birth" of deceitful widows. In medieval Castile, the legislation replicates what appears in the Digest almost word for word, with the exception that instead of moving into the home of a respectable matron, the pregnant widow is expected to have a respectable matron move in with her (presumably shifting the expense from the state to the widow).[66] In England, *Bracton* tells us that the supposedly pregnant widow must be examined by responsible matrons, "by feeling her breasts and abdomen in order to discover the truth. If there is the slightest suspicion of fraud she ought to be kept in custody."[67] All of this was to take place in the presence of "discreet and lawful knights." After the examination, she should be lodged in a royal castle, *at her own cost*, "in such a way that no maid who may be pregnant nor any other who may be suspected of contriving a deception has access to her." And she should remain there, separately guarded, attended by two or three women who are permitted to examine her once a day if they wish, until she is delivered.

Elsewhere in Europe, "pregnancy-custody" was more lax, but still humiliating and openly hostile to women. The French sources indicate four and a half months of isolation and observation as sufficient to determine whether a woman was being honest about her pregnancy.[68] If she did lie, the property was to be divided up among the proper heirs and she was required to make restitution for everything she expended from the estate during the four and half months she stayed there unjustly.[69] Swedish law aligns with what we find among the French. The widow might remain in her husband's home for twenty weeks (or five months) after his death to be certain that she was pregnant with his child. If her claim was false, she, too, lost the property and had to "make restitution for the provisions she used up while she sat at home, with her money and with a sworn oath." At the very least, if she had sown crops during that time, she was permitted to enjoy the harvest of what she had

[65] Dig. 25.4.1.10; Watson, *The Digest of Justinian*, vol. 2, 283.

[66] Scott and Burns, *Las Siete Partidas, Volume 5*, 1223–24.

[67] *Bracton*, vol. 2, 201.

[68] Akehurst, *The* Coutumes de Beauvaisis, 220; *Le conseil de Pierre de Fontaines*, ed. Ange-Ignace Marnier (Paris, 1846), 469.

[69] *Le conseil de Pierre de Fontaines*, 469.

sown.[70] The prevalence of pregnancy-custody across Europe demonstrates how willing legislators were to see widows as conniving, deceitful, and a threat to their husbands and heirs. Of course, their reasoning rests, in part, on the recognition that a widow was often left without adequate financial support and might need to resort to desperate measures to survive on her own, a situation that they did not feel moved to remedy through the promulgation of new legislation.

Finally, even in her period of lying-in after childbirth, a woman was not to be trusted. Despite strong cultural and medical taboos protecting the lying-in chamber as a feminine space, if the new mother was a recent widow, her isolation could well be interrupted by her husband's creditors, who saw her weakened state as a golden opportunity to claw back what was owed to them before she had a chance to sell his goods. The *Coutumes de Beauvaisis* forbid creditors from reclaiming beds, bedclothes, or her "everyday dresses" during her confinement, but warned that some widows might abuse this provision by hoarding their material goods in their confinement room to prevent them from being repossessed. Explaining that "we would not want this bad faith to avail them," the law required that widows be expected to provide "adequate security for the debt for which they can and should be sued, and if they will not give security willingly, people should go boldly into the room and take possession of things."[71]

Admittedly, by the later Middle Ages, these blatantly misogynistic laws coexisted with a broad array of others intent, as we have seen, to protect the life of the infant in utero. Laws also came into existence for the protection of laboring mothers. Synods across Europe published laws requiring priests to instruct pregnant women to confess before going into labor, as well as directives not to tear apart a woman's corpse to retrieve a dead infant, and to permit mothers who died in childbirth to be buried in consecrated ground.[72] None of this erases the fact that European laws about abortion are founded firmly in discomfort with a woman's control over childbirth, and the fear that she might use this as a means to hide her adulterous behavior from her husband, deprive him of children without his knowledge, or disinherit his heirs. More important still, the dominance of Roman law and its place in the medieval university kept this apprehension alive throughout the period.

Classifying Abortion

Compilations of legislation are grouped thematically. For example, the Alamannic laws (ca. 730) proceed from matters regarding the church to

[70] Lindkvist, *The Västgöta Laws*, 100. Denmark also required twenty weeks to determine if a woman was in fact pregnant. Ditlev Tamm, ed. and trans., *The Liber Legis Scaniae: The Latin Text with Introduction, Translation and Commentaries* (London and New York: Routledge, 2018), 25.

[71] Akehurst, *The* Coutumes de Beauvaisis, 580.

[72] For example, Synod of Canterbury (1213/1214), c. 59 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/25/2/59/); Synod of Albi (1230), c. 49 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/74/2/50/); Synod of Trier (1310), c. 105 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/609/2/107/).

infractions against the ducal family, then homicide, crimes against women, an extensive section on wounding, more crimes and infractions, inheritance matters, finishing up nicely with property offenses. Where abortion appears in that list is telling, in this case right between the *wergeld* of a slain man or a woman, and the price of an ox.[73] The Alamannic laws saw abortion as the act of bewitching (*instrigaverit*) a pregnant woman, a crime, similar to homicide in that it deserved full compensation, but it was also shady and corrupt, like those who try to sell an ox at an inflated price.[74] In comparison, the English legal treatise *Bracton* includes abortion in the volume dedicated to what we call crimes (pleas of the crown), amid the discussion of wounding, specifically alongside castration. To the English jurists who authored *Bracton*, abortion was an assault on a woman's reproductive organs, equivalent to the forcible castration of a man.[75] How legislators or jurists categorized abortion provides a useful understanding of what they were hoping to stamp out, but also why they felt it necessary to prosecute victims of abortion. Moreover, because the legislation generally assumes that those who provided abortions were gendered female, these categorizations offer an abundance of insight into legislators' anxieties about the social authority of women.

When sifting through the large body of legislation from the era and its categorization, a striking pattern emerges. By and large, medieval legislators saw abortion as either (1) an act of witchcraft, or (2) a poisoning. The allusion to sorcery in Alamannic law was neither the first nor the last to appear. The *Laws of the Salian Franks* (mid-eighth century) include a fine for the woman "who casts a magic spell over another woman so that she cannot have children."[76] Whether this is a reference to contraception or abortion is unclear, but legislators recognized the signs of "birth magic," a specifically female form of ancient magic, whose practitioners specialized in "inducing conception or thwarting it," as well as terminating pregnancies, and infanticide.[77] Although the end goal of birth magic might well be aligned with Christian directive—that is, inducing conception in a married woman who wanted to have children—the church saw it as anything but benign.[78] Its malevolent nature is clarified by the terminology. The key word appearing repeatedly in penitentials and law codes is *maleficium*, used "to indicate self-serving and intentionally harmful manipulation of the magic arts."[79] *Maleficium* drew on the power of

[73] *Wergeld* is literally "man-gold," that is, the value of a person to be paid in compensation.

[74] Rivers, *Laws of the Alamans and Bavarians*, 93.

[75] *Bracton*, vol. 2, 408.

[76] Jan H. Hessels, ed., *Lex Salica: The Ten Texts with the Glosses and the Lex Emendata* (London: John Murray, 188), col. 113; Katherine Fischer Drew, ed. and trans., *The Laws of the Salian Franks* (Philadelphia: University of Pennsylvania Press, 2012), 84.

[77] Martha Rampton, *Trafficking with Demons: Magic, Ritual, and Gender from Late Antiquity to 1000* (Ithaca and London: Cornell University Press, 2021), 181.

[78] Rampton, *Trafficking with Demons*, 185.

[79] Rampton, *Trafficking with Demons*, 17. The *Penitential of Finnian* (or Vinnian) (aft. 591) decries the woman who "by her magic [*maleficio*] destroys the child she has conceived of somebody." Bieler, ed., *P. Vinniani*, in *The Irish Penitentials*, 79–81. The so-called *Roman Penitential of Halitgar* (ca. 830) discusses abortion under the heading "Of Magic." Borrowing from the manuscript

demons through the use of ritual and talismanic objects. Demons might appear in a multitude of forms. Alamannic law uses the term *instrigaverit* which speaks to "the deeds of a *striga*," that is, a "she-creature" that shape shifts, drinks blood, and preys on cadavers.[80]

Of course, as Martha Rampton has noted, "women were never considered to be the primary custodians or practitioners of the magic arts. Female magic was relegated to the domestic sphere; while magic carried out in or pertaining to public spaces tended to be male dominated."[81] Birth magic was one of the few areas in which women specialized, and prompted condemnation, not out of fear, but because popular belief in all forms of magic undermined wholehearted devotion to Christianity.[82] Even so, Greta Austin sees that especial attention to birth magic by early canonists was female-focused. She argues that, in condemning magical practices, both Regino of Prüm and Burchard of Worms hoped to juxtapose the illicit and dangerous supernatural rituals of women against the righteous and efficacious divine rituals of (clerical) men.[83] The works of these men have been particularly enduring, and their legacy critical. A passage which allies abortion with witchcraft in Regino's guide for bishops disseminated and perpetuated the association for generations to come. Among a list of questions to be asked of the penitent, Regino includes: "Did you drink anything made by witchcraft, that is, herbs or other things, so as to be unable to have children, or did you give it to another?"[84] Regino is also the author of the infamous *Canon Episcopi*, a passage which speaks of certain women as followers of Satan, who believe they take night rides on beasts with the goddess Diana. Both extracts were included in Burchard's *Decretum* (1012 × 1023), a systematic expansion of the *Libri Duo* merged with excerpts from other penitentials. The result was the *Corrector*, chapter nineteen of Burchard's *Decretum*, which played a key role as a guide for confessors as well as setting the foundation for the burgeoning discipline of canon law.[85]

The link between abortion and witchcraft gained significance over time. Late medieval clergymen were less likely to be indifferent to belief in magic, such that these lingering references to *maleficium* in the penitentials, transmitted through Regino, then Burchard and eventually Gratian, took on a new valence and fed the fears of clergymen increasingly consumed by anxieties about the powers of demons and their human demon lovers. This context is integral for interpreting the persistence of the association between abortion and *maleficium* in some late medieval synodal statutes. To prelate lawmakers,

tradition associated with the *Penitential of Finnian*, it speaks of deceiving a woman with respect to the birth of a child. McNeill and Gamer, *Medieval Handbooks of Penance*, 305.

[80] Rampton, *Trafficking with Demons*, 262, 165.

[81] Rampton, *Trafficking with Demons*, 6–7.

[82] Rampton, *Trafficking with Demons*, 339.

[83] Greta Austin, "The Bishop, 'Magic' and Women: Episcopal Visitation of the Diocese, Laywomen and the Supernatural, and Clerical Authority in the Central Middle Ages," *Gender & History* 35 (2023): 8.

[84] Regino, *Two Books*, 125.

[85] Ludger Körntgen, "Canon Law and the Practice of Penance: Burchard of Worms's Penitential," *Early Medieval Europe* 14, no. 1 (2006): 103.

the act of abortion signaled the disruptive and heretical presence of female witchcraft. In canon thirty-five of the Italian Synod of Ivrea (1290), those who provide abortions are listed alongside heretics, schismatics, diviners of sorcery, and those who commit sorcery concerning the sacraments of the Church.[86] The canon does not label abortion a form of magic, but its positioning implies it. Under the category of *maleficia*, the German Synod of Fritzlar (1244) grouped those who curse spouses so that they cannot have sex as well as those who procure the sterility of women or abortion.[87] Abortion is unequivocally categorized as magic in the canons of the Synod of Bologna (1310), which includes the act of giving a woman anything to eat or drink, or to carry (such as a talisman), by which she will be unable to conceive,

> whether abortion should be performed, or spells, or divinations, or sorcery (*sortilegia*), or omens, or magic, that which are commonly called conjuring or manufacture (*facture*), and to practice the like, or to invoke demons in certain tokens, or to make astrolabes, and to reveal thefts, or to foretell the future, or to give counsel, or help or expressly consent to the doing of any of the aforesaid, or where they are done, knowingly participate in or have recourse to any person for doing any of the aforesaid.[88]

The statutes became progressively more frenetic about witches' abilities over time. The Synod of Lucca (1300 × 1330) decrees that "no sorceress (*incantatrix*) nor fortune-teller (*diuinatrix*) do any kind of witchcraft by which a pregnant woman is procured of an abortion of the fetus, or the ability to conceive is taken away, or the ability [to conceive] is hindered, or by which conjugal intercourse cannot take place between husband and wife."[89] It is noteworthy that both types of magicians are gendered female in this decree. The Synod of Volterra (1356) includes abortion among a list of sorceries and magics, side by side with divination and the incantation of demons.[90] What this tells us is

[86] Synod of Ivrea (1290), c. 35 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/416/2/37/). The Synod of Wrocław (1290) (https://corpus-synodalium.com/philologic/corpusnorm/navigate/423/2/2/) includes a very similar phrasing. The Synod of Würzburg (1298), c. 16 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/496/2/18/) also includes the procuring (maliciously) of abortions immediately after performing magic on sacraments of the church.

[87] Synod of Fritzlar (1244), c. 4 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/130/2/6/). See also, Synod of Mainz (1310), c. IV.38 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/599/2/157/).

[88] Synod of Bologna (1310), c. 84 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/591/2/86/). This canon was used to form the base of Synod of Ivrea (1395), c. 49 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1300/2/3/). Synod of Bergamo (1311), c. 19 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/611/2/21/) draws upon Bologna's canon as a model.

[89] Synod of Lucca (1300 × 1330), c. 43 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/513/2/44/).

[90] Synod of Volterra (1356), c. 43 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1069/2/46/).

that in the years leading up to the witch hunts, bishops perpetuated the notion of abortion as witchcraft, and those who provide abortions as ever more powerful witches in league with the devil.[91] By the sixteenth century, midwives were specifically required to take oaths abjuring witchcraft.[92]

Presumably, clergymen made a concerted effort to deter women from engaging in such diabolical practices also because an improperly prepared abortifacient might kill both the fetus and the woman carrying it. Abortion was likely carried out with an abortifacient, that is, an herbal draught that can be drunk or inserted into the vagina through a suppository and intended to stimulate the menses. Depending on the nature of the ingredients and the amount consumed, an abortifacient might well be doubly fatal, a possibility recognized in the Digest, as well as in multiple penitentials and law codes.[93] Records of inquests into the deaths of women killed by abortifacients remind us that even in the late medieval period, this was still a pressing concern. The Nottinghamshire coroners' rolls include an inquest into the 1503 death of Joan Wynspere, a single woman from Basford, who "drank diverse poisoned and dangerous draughts to destroy the child in her womb, of which she immediately died."[94] Time and again scholars have argued that the prohibition of abortion in the Hippocratic Oath springs less from concerns about abortion than about the method employed: abortifacients were deadly poisons that all too easily might destroy both fetus *and* mother. It is worth noting that this was not the only means of inducing an abortion. The synodal statutes warn also of abortion caused by sexual intercourse[95] and the disfiguring of the womb, which seems to imply surgery.[96] Nonetheless, the vast majority speak of herbs, potions, or abortifacients.

[91] The only instance that does not fit neatly into this category is Synod of Siena (1297), c. 25 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/476/2/27/) which speaks directly about birth magic and love magic, but directed instead to the clergy. For the importance of birth magic in the witch hunts, see the tirade against the birth magic of witches by the anonymous author of "A History of the Case, State, and Condition of the Waldensian Heretics (1460)," in *The Arras Witch Treatises*, eds. Andrew Colin Gow, Robert B. Desjardins, and François V. Pageau (University Park: Penn State University Press, 2016), 50–51.

[92] Thomas R. Forbes, *The Midwife and the Witch* (New Haven: Yale University Press, 1966), 145–46.

[93] Dig. 48.8.3.2; Watson, *The Digest of Justinian*, vol. 4, 333. Ernst M. A. Schwind, ed., *Lex Baiwariorum* (Hannover: Impensis bibliopolii Hahniani, 1926), 362–63; Bieler, "Old-Irish Penitential," in *The Irish Penitentials*, 272.

[94] Roy F. Hunnisett, ed. *Calendar of Nottinghamshire Coroners' Inquests, 1485–1558* (Nottingham: Thoroton Society Record Series, vol. 25, 1969), 8. Karen Jones has uncovered three similar cases for the county of Kent. Karen Jones, *Gender and Petty Crime in Late Medieval England: The Local Courts in Kent, 1460–1560* (Woodbridge: Boydell and Brewer, 2006), 89–90.

[95] Synod of Saintes (1280), c. 15 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/344/2/17/); Synod of Reims (1330), c. XIV.3 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/830/2/110/); Synod of Troyes (1374), c. IV.B (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1188/2/251/); Synod of Nantes (1389), c. 13 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1270/2/15/). Of course, today physicians acknowledge that sex is safe at all stages of pregnancy.

[96] Synod of Rieti (1303), c. 42 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/536/2/44/). Instruments existed also for surgical abortions. See Anne L. McClanan, "'Weapons to Probe the Womb': The Material Culture of Abortion and Contraception in the Early

It is no wonder, then, that lawmakers saw abortion also as a form of poisoning. The association dates back at least to the time of Augustine of Hippo, who referenced "poisons of sterility" (*sterilitatis venena*) in a passage included in Ivo of Chartres's *Decretum* and then later also in Gratian's.[97] The oft-repeated condemnation of abortion from the Spanish Council of Lérida (546) describes those who provide abortions as "poisoners."[98] This correlation continues into the later medieval period. *Bracton* speaks of giving a woman poison (*venenum*) to procure an abortion.[99] The categorization was somewhat regionalized: the French were most likely to describe abortion as poisoning. Two different canons lie at the base of these references. The Synod of Cambrai (1277) denounces "procuring sterility, or abortion, or giving someone poisons to drink" in a canon that reappears among the statutes of three other French synods, two of which were also held in Cambrai.[100] The Synod of L'Isle-sur-la-Sorgue (ca. 1288) includes those who provide abortions in a passage condemning not only poisoners, but also those who abet by giving advice, selling poisons, delivering them, ministering them in any way, or concealing information about them from his ordinary (an episcopal official).[101] This prohibition was repeated in somewhat different form at three subsequent synods, two held in Saint Ruf, one in Lavaur.[102]

What this tells us is that Germans and Italians saw abortion as witchcraft, while the English and French saw it as poison. Of course, we should not draw that distinction too grandly. The premodern histories of poison and magic are largely intertwined.[103] One might argue that "poisoner" and "witch" are simply different descriptions of the same dreadful villain.[104] The

Byzantine Period," in *The Material Culture of Sex, Procreation, and Marriage in Premodern Europe*, eds. Anne L. McClanan and Karen Rosoff Encarnación (New York: Palgrave, 2022), 33–57.

[97] Augustine, *De nuptiis et concupiscentia*, eds. Carl F. Vrba and Josephus Zycha, *Sancti Aureli Augustini (sect. VIII, pars II)*, CSEL 42 (Vienna, 1902), 230; as cited and translated by Mistry, *Abortion in the Early Middle Ages*, 49.

[98] Council of Lérida (546), c. 2; as cited and translated in Mistry, *Abortion in the Early Middle Ages*, 95.

[99] *Bracton*, vol. 2, 341.

[100] Synod of Cambrai (1277), c. 10 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/309/2/12/). It appears also in Synod of Cambrai (1287/1288), c. 139 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/395/2/141/), Synod of Cambrai (1300 × 1309), c. 24 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/564/2/26/), and Synod of Reims (1408), c. 61 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1352/2/63/).

[101] Synod L'Isle-sur-la-Sorgue (ca. 1288) (https://corpus-synodalium.com/philologic/corpusnorm/navigate/402/2/2/).

[102] Synod of Saint Ruf (1326), c. 18 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/790/2/20/); Synod of Saint Ruf (1337), c. 24 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/886/2/26/); Synod of Lavaur (1368), c. 116 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1144/2/118/).

[103] Manfred Horstmanshoff, "Ancient Medicine between Hope and Fear: Medicament, Magic, and Poison in the Roman Empire," *European Review* 7, no. 1 (2009): 37–51.

[104] In the revision of Salic law in the eighth century, the phrase *maleficium facere* (to cast a spell) was replaced with *herbas dare* (to poison). Franck Collard, *The Crime of Poison in the Middle Ages*, trans. Deborah Nelson-Campbell (Westport and London: Praeger, 2008), 12. Burchard's *Corrector* similarly replaced Regino's *maleficium* with *veneficium*. He may have done so out of embarrassment, perhaps

regional shift from magic to poisoning does not represent an improvement. In a society that prized honor, where death resulting from an open attack could be justified as the unlucky outcome of a fair fight, the premeditated and secretive nature of poisoning made it "murder," the worst form of homicide.[105]

Historians have long imagined poison as a woman's weapon, allowing women to compensate for their inferior physical strength. Yet, as Frank Collard has so ably demonstrated, in the Middle Ages (or any era for that matter), most (alleged) poisoners were in fact men.[106] The gendered divide in magic is mirrored also in medieval narratives of poisoning. Men's poisoning was public; women's poisoning was domestic. A natural consequence of the role played by women in food production and cooking is that women were thought to poison their families: chiefly their husbands. However, I would argue that the correlation between women and poison in the popular mentality is founded on more than her role within the household. In Western medicine, women are poison; or at the very least, they are vessels for poison in the form of menstrual blood. As Sophie Chavarria explains, to medieval scholastics, "a bleeding woman represented a latent threat to humanity." Indeed, "[n]atural catastrophes such as hailstorms, whirlwinds and lightnings could be driven away by a menstruating woman. Menstrual blood could also sour crops, wither fruits and vegetables, kill bees, drive dogs insane, dull the brightness of mirrors, blunt razors, turn linens black, and rust iron and bronze."[107] Even more ominous was the woman who did not bleed, the pregnant woman or the postmenopausal woman. Medical writers apprised their readers of the "[f]etid blood [which] collected in the uterus and decomposed, releasing poisonous vapors that rose through bodily pathways called phlebes, fused with the pneuma in the lungs and brain, and were ultimately exuded through breast milk, the evil eye, mephitic breath, venomous saliva, and even through the openings of the ears."[108] The one saving grace: like venomous snakes, women cannot poison themselves. As a medieval commentator on the *De Secretis Mulierum* wrote, "venom does not act in itself but rather in its object. Therefore, since women are naturally poisoned they do not poison themselves."[109]

in light of ecclesiastical doubts about the efficacy of magic. Collard, *The Crime of Poison in the Middle Ages*, 15.

[105] See chapters by Bridgette Slavin, Matthew Lubin, and Thomas Gobbitt in Larissa Tracy, ed., *Medieval and Early Modern Murder* (Woodbridge: Boydell and Brewer, 2018).

[106] Collard, *The Crime of Poison in the Middle Ages*, 101–11, and Franck Collard, *Pouvoir et Poison, Histoire d'un Crime Politique de l'Antiquité à nos jours* (Paris: Seuil, 2007), 97–103. See also Lydie Bodiou, Frédéric Chauvard, and Myriam Soria-Audebert, eds., *Les Vénéneuses: Figures d'empoisonneuses de L'Antiquité à nos jours* (Rennes: Presses Universitaires de Rennes, 2015).

[107] Sophie Chavarria, "Menstrual Blood: Uses, Values, and Controls in Ancient Rome," *Cahiers Mondes Anciens* 16 (2022): 5.

[108] Brenda Gardenour, "The Biology of Blood-Lust: Medieval Medicine, Theology, and the Vampire Jew," *Film & History* 41, no. 2 (2011), accessed October 10, 2024, https://go.gale.com/ps/i.do?id=GALE%7CA308435936&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=03603695&p=AONE&sw=w&userGroupName=anon%7Eafd0c5c1&aty=open-web-entry.

[109] Lemay, *Women's Secrets*, 130.

Alarm about women's venomous bodies was a guiding force in the creation of the era's legislation, which ordered the bleeding woman not to enter churches for fear of pollution, and to remain in seclusion for forty days after childbirth. Most instructive are the statutes cautioning men not to have sex with a menstruating or pregnant woman, because of the physical danger she presented to the father, who might contract leprosy (*elefancie*), but also to the offspring, which might be born leprous, hunchbacked (*gibbosus*), contracted (*contractus*), or otherwise, because "from a corrupt seed is born a corrupt fetus."[110] The poisonous nature of women and their danger to society lingers also in the background of those laws regarding monstrous births, discussed in *Bracton* aforementioned, but appearing also in the laws of Rome, Eastern Norway, and Castile.[111] Monstrous births were caused by women. If it was not sex with a menstruating or pregnant woman, it was linked to a pregnant woman's sexual behavior: bestiality, or sex at prohibited times and in unnatural positions might also produce a monstrous birth.[112] Men might wield poison as a weapon; but women produced their own poison naturally, that they could use to destroy the fetus in utero, cementing the link between poison and abortion.

Conclusion

When jurists like Samuel Alito today present the history of abortion as one continuous conversation dating back to the Middle Ages, they rarely acknowledge that we are not comparing like entities. Abortion meant something very different in the medieval world than it does today. There were no medieval proponents for the idea that life begins at conception; and while early term abortion was sinful, it was very much a matter for one's confessor. Medieval lawmakers focused on the "formed" and "ensouled" fetus, that is, late term abortion—a more serious concern which warranted a strong stance. While the term "homicide" was bandied about, it originated at a time when homicide was not a criminal act; rather, it was a private matter best settled by compensation, *if* the family of the dead felt the matter was worth pursuing. The proliferation of the term ensured that it made its way into law after homicide was

[110] Synod of Tours (bef. 1396), c. 78 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/1313/2/78/). See also Synod of Angers (1216 × 1219), c. 96 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/41/2/96/); Synod of Coventry (1224 × 1237), c. 29 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/76/2/31/); Synod of Clermont (1268), c. 94 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/259/2/102/); Synod of Würzburg (1298), c. 22 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/496/2/24/); Synod of Nantes (1299 × 1304), c. 67 (https://corpus-synodalium.com/philologic/corpusnorm/navigate/515/2/68/).

[111] van der Lugt, "Formed Fetuses," 176. Lisa Collinson, Torgeir Landro, and Bertil Nilsson, eds., *The Borgarthing Law and the Eidsivathing Law: The Laws of Eastern Norway* (London and New York: Routledge, 2021), 86. Samuel P. Scott, trans., Robert I. Burns, ed., *Las Siete Partidas, Vol. 4: Family, Commerce, and the Sea. The Worlds of Women and Merchants (Partidas IV and V)* (Philadelphia: University of Pennsylvania Press, 2012), 989.

[112] van der Lugt, "Formed Fetuses," 176–77.

criminalized; but the majority of those laws were ecclesiastical, governing the confessional and meriting penance, and even when abortion did make its way into secular law codes, it was most likely done to appease the church, because officials did little to enforce it, except in instances of abortion by assault. What is most disconcerting, however, is to discover that medieval lawmakers did not distinguish between miscarriage and abortion; rather, women seem to have been held responsible for anything that might happen to the fetus, whether the harm was deliberate, accidental, or spontaneous.

While the fetus's life was deemed important, protecting it was not the impetus for medieval laws on abortion. Abortion laws emerged to safeguard husbands from their wives, who might deprive them of heirs and undermine their honor. Putting abortion laws in context with other laws governing women's pregnant bodies helps us to recognize that legislators saw medieval women as greedy, deceitful, and uncaring adulteresses, keen to defraud their husbands and his heirs. Laws about abortion see women as the enemy in a war against the patriarchy.

How abortion was categorized at law is significant because it tells us what lawmakers found most worrisome. To them, abortion was a form of witchcraft, a lingering remnant of pagan worship that needed to be eliminated for Christianity to triumph; or it was a means of poisoning, a frightening and secretive form of homicide employed by the weak and the dishonorable. Not only did this kind of thinking pave the way for the witch hunts of the early modern era, but it also perpetuated misogynistic ideas about the deceitfulness and maleficence of women that have continued down to the present. The correlation between women and poison has been particularly lasting, in part, because the medieval world saw women as venomous bodies, a danger to family, friends, and communities alike.

Do we really want our present stance on abortion to be a continuation of these laws? Can we accept parts of these laws and reject others? That is, can we accept the idea of abortion of a "live" fetus as homicide, but ignore the fact that those who provided abortions were thought to be witches, who took night rides on beasts with the goddess Diana? Context matters, and must be considered when justifying modern regulation of women's bodies on historical precedent.

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