

“The Way of Death:”

Abortion’s Path to Criminalization During the Middle Ages

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A lightning rod of controversy since the Middle Ages, abortion has both been condemned as the “way of death” and championed as a tool of female liberation (Elsakkers, “Reading Between the Lines” 468). Current debates over the legality of abortion rely on its religious characterization as an act of murder, a lingering stamp of ill fame from Europe’s medieval past. Remarkably, however, early medieval abortion laws were in some cases ambivalent toward early-term abortions (Elsakkers, “Abortion, Poisoning, Magic, and Contraception” 101). Frankish legal codes punished abortion as a poison, Frisian laws used a “hair and nails” criterion for abortion, and Old Germanic laws punished abortion more strongly for a male fetus. Intentional abortion went virtually unmentioned in Old Germanic law (Elsakkers, “Reading Between the Lines” 465). The Roman Catholic Church, by contrast, concentrated almost exclusively on intentional abortion. Church law vigorously denounced abortion as murder and warned women that they would be punished with “spiritual death,” excommunication, and hell if they obtained an abortion at any point in a pregnancy (Elsakkers, “Reading Between the Lines” 468). As the Middle Ages progressed, secular law began to echo these grim denunciations more and more frequently. The parallel development of the legal concept of criminalization and the religious concept of ensoulment at conception made possible the transfer of the Church’s condemnation of abortion into secular law.

The wealth of secular and religious condemnations of abortion in European law seems to indicate that abortifacient herbs, one of the main methods of abortion, were criminalized for their abortive properties. However, some historians argue that abortifacient herbs were instead used to enhance fertility by cleansing the womb. Emmenagogues, herbs that induce menstruation, might have been used to shed the old uterine lining and thus promote greater fertility. Monica Green

notes that the Trotula, a collection of texts on women's medicine, does not contain any recipes for emmenagogues explicitly designed to prevent conception (Green 501). Instead, it includes recipes for emmenagogues explicitly meant to promote conception (Green 501). The Trotula is an "extraordinarily important document" for the study of women's medical practices in the Middle Ages because there was no systematic oppression of contraceptive knowledge at its time of publication (Green 501). The absence of evidence for the use of abortifacient herbs as abortives in such a key document seems to indicate that abortifacients were not used as such, supporting Green's argument that emmenagogues were used for the purpose of promoting conception.

However, Green's argument relies too heavily on evidence from the written medical literature, which likely reveals little about the knowledge women actually had and used in the medieval period. Because medieval women had a very low literacy rate, women exchanged knowledge of abortifacient herbs orally (Elsackers, "Reading Between the Lines" 533). The local herbalist may have also given out recipes and advice to supplement the circulation of abortifacient knowledge between illiterate, semiliterate, and literate women (Elsackers, "Reading Between the Lines" 533). Peter Biller affirms that knowledge of abortifacients was passed down orally and suggests that there is a real possibility that thirteenth-century parish priests disseminated information about birth control (19). Jewish communities in northern France may have also disseminated some information to women during the twelfth and thirteenth centuries, given that their use of contraception was "fairly general" (Biller 20). Evidence that women could have obtained knowledge of abortifacients through an oral tradition designed to prevent or limit

pregnancies challenges Monica Green's argument that abortifacients were used to promote fertility by cleansing the womb.

Green's argument also falters when linked to the criminalization of abortion. If women used abortifacients to promote fertility and there were no traces of recipes used to end pregnancies, medieval authorities would not have condemned abortifacients so strongly. It is most likely that if abortifacient herbs were used to promote fertility, they were already being used to inhibit it. Alexandra Brewis Slade has suggested the concept of "flipping technologies," through which knowledge of a substance's ability to cause menstruation to abort a fetus can be flipped to cause menstruation to cleanse the uterus and prepare it for conception (Green 500). If the technology of abortifacient herbs were flipped in such a fashion, promoting and inhibiting fertility would be "two sides of the same coin" (Green 500). The use of abortifacients must thus have implied some type of anti-fertility purpose in order to justify the abundance of condemnations of abortion in late medieval law. The ability of abortifacients to end or prevent pregnancy was fundamental to their criminalization during the Middle Ages.

Another potential push toward the criminalization of abortion is the association between abortion and witchcraft. The *Malleus Maleficarum* was written by a Catholic clergyman in 1487 and became the most infamous text on witchcraft in the Middle Ages (Kramer). The *Malleus Maleficarum* condemns witches for administering abortions "by natural means, such as herbs" and brands abortion as a "horrible crime which devils commit against infants" (Kramer). The paradigm of the midwife-witch suggests that medieval people strongly associated witchcraft with the use of abortifacient herbs. Historian John Riddle argues that this "unholy marriage" between witchcraft, midwifery, and birth control resulted in the criminalization of abortion as a side effect

of the repression of witchcraft (110). However, more recent scholars have argued that the midwife-witch is a mythical medieval figure. David Harley contends that although the *Malleus Maleficarum*'s claims about midwives influenced the writings of some demonologists, the witchcraft trials of the Middle Ages tried very few midwives (Harley 1). The lack of evidence for the dogged medieval persecution of midwives suggests that medieval authorities did not suppress the use of abortifacients as the work of the devil. In fact, legal concerns linking witchcraft with women administering abortifacients only appeared in 1588, well beyond the end of the medieval period (Green 504). Abortifacient herbs were not subjected to increasing scrutiny by medieval authorities for their connection for witchcraft. The wealth of references to abortifacients and witchcraft in medieval texts is best explained by the convenience of using universally-reviled witchcraft to suppress the practice of abortion by associative sin.

Although abortifacients were not used for the sinister purposes of witchcraft, they were still recognized as deadly toxins in the centuries leading up to the medieval period. Many abortifacients were poisonous and were legally punished as such. Prior to the medieval period, supplying abortifacients was penalized under Roman law, because they were classified as poisons (Elsackers, "Reading Between the Lines" 532). Roman laws against the use of abortifacients thus reflect a condemnation of poisoning people, not destroying unborn life. During the early Middle Ages, legal codes relating to the use of abortifacients followed the Roman model. Most significantly, they punished the supplier more harshly than the woman asking for an abortifacient; the woman's crime in asking for an abortifacient was not as great as the supplier's provision of a substance that could very well kill her (Elsackers, "Reading Between the Lines" 467). Visigothic law imposed the death penalty on the supplier of an

abortifacient, a punishment imposed because many abortifacients contained poisons and supplying them could constitute a form of attempted murder (Elsackers, “Reading Between the Lines” 467). Salic and Bavarian laws similarly punished suppliers of abortifacients with the death penalty (Elsackers, “Reading Between the Lines” 467). Marianne Elsackers’s study of the *Lex Salica*, Frankish civil legal codes compiled beginning in 500 CE, shows that Salic law classified abortifacients as poisons and condemned the use of poisons, yet did not condemn fertility management (“Abortion, Poisoning, Magic, and Contraception” 116). This study confirms that abortifacients were considered poisons, not fertility managers, in the early Middle Ages. Early medieval law condemned users of abortifacients without recourse to religious arguments; abortifacients had the power to kill or seriously injure women, so they were treated as criminal substances. During the early medieval period, Roman moral ambivalence toward abortion shaped secular law more definitively than religious denunciations of abortion.

However, religious arguments against abortion and birth control began to supplant Roman codes by the middle of the medieval period. By unmooring secular law from the Roman tradition, the Church coupled secular law to its own interpretation of the evils of abortion. The Church had always defined abortion as taking the life of an ensouled fetus, so revisions of its teaching on when life began prompted the religious classification of abortion as murder at any point in a pregnancy. Early medieval law punished abortion as a crime of poison, but late medieval law punished abortion as a crime against unborn life.

The Church’s teachings coalesced into a belief in ensoulment at the moment of conception by the end of the Middle Ages. The Catholic Church had staunchly condemned abortion since the “very start” (Müller 103). The oldest Church council canon on abortion, from

300-306 CE, and the earliest Christian text on abortion warn that women who attempt an abortion will be punished with spiritual death (Elsackers, “Reading Between the Lines” 468). However, Church theology equated abortion with murder only after several weeks of pregnancy during the early Middle Ages. Aristotle theorized that a fetus only received an animate soul after forty days if it were male and ninety if it were female, a concept called delayed animation (Baún 31). Aristotle did not refer to a “soul” according to Christian doctrine, but his theories were nonetheless adopted by Church Fathers such as Saint Augustine, Saint Jerome, and Saint Aquinas (Baún 31). Aristotle’s theory is significant because it established the development of the fetus as a determiner of its ensoulment and the subsequent sinfulness of abortion. The Castilian *Book of the Confessions of Martín Pérez* (1317) clearly differentiates between the abortion of an animated fetus, which is homicide, and the abortion of an inanimate fetus, which is a mortal sin but not homicide (Baún 32). Furthermore, Pope Innocent III himself ruled that different punishments applied to abortion depending on the stage of fetal development in 1211 (Dunstan 40). Later in the Middle Ages, Church writers left their reliance on Aristotle’s claims behind in favor of another strain of Greek philosophy. Arguments influenced by Stoic philosophy began to appear in the doctrine of Church Fathers such as Tertullian and Basil the Great (Baún 32). The Stoics believed a fetus had the potential to become ensouled at the moment of conception (Baún 33). This shift in doctrine defined abortion as homicide regardless of the development of the fetus. The first step in the criminalization of abortion at any point during pregnancy was the replacement of the Aristotelian concept of delayed animation with the Stoic concept of ensoulment at conception. The possibility for the legal criminalization of abortion was thus created by the ecclesiastical context of the Middle Ages.

At the same time that the Church was developing its doctrine on ensoulment, the modern legal tradition was taking root in Europe. Wolfgang Müller makes the crucial distinction that the criminalization of abortion required abortion to be punished by a secular court instead of by God's retribution (Müller 1). Criminalization was itself a product of the twelfth century, so consequently abortion could not be criminalized until the late Middle Ages (Müller 8). The evolution of laws against abortion therefore parallels the evolution of the arguments made against it by Church authorities. When Church authorities argued for delayed animation, secular codes such as the *Fuero Juzgo* (1241) and the *Fuero de Soria* (1120) differentiated the punishment for an abortion based on whether the fetus was formed or not (Baún 32). However, the distinction of fetal development soon disappeared from secular laws just as it had from Church writings.

The transition between Aristotelian and Stoic philosophical sourcing for Church arguments corresponded to a similar transition in how abortion was defined as a crime. No longer were early-term abortions considered outside the bounds of criminality, because legal authorities predicated their laws on the religious argument that fetuses received souls at the moment of conception. Gratian, author of the oldest canonistic textbook, included laws in his *Decretum* that declared killing a human fetus at any point in a pregnancy was homicide and warranted an identical punishment (Müller 1). Müller identifies Gratian as the first in a succession of intellectuals and canonists who advanced the criminalization of abortion based in the arguments made by Church Fathers (Müller 79). By 1250, Gratian's doctrine was known and accepted everywhere in the Latin Christian world, except in England and Germany, where jurists were slower to accept it (Müller 2). His laws assumed "written permanence" in *glossae*



*ordinarie*, annotations written in the margins of Biblical manuscripts used in Cathedral schools to give the Church's official commentary on the Scriptures (Müller 88). The first known trial that defined abortion as a crime, with all its contemporary legal implications, occurred in 1490 in Italy (Müller 2). This date, falling near the end of the Middle Ages, represents the beginning of the modern treatment of abortion as a crime, punishable in court by legal authorities. Pope Sixtus V attempted to officially erase the Aristotelian distinction between a formed and unformed fetus from the writings of a few heterodox writers in 1588, and Pope Pius IX succeeded in 1869, declaring that life started at the moment of conception (Dunstan 42, Baún 33). With this declaration, religious and secular law reflected the same underlying attitudes toward the issue of ensoulment and abortion. Over the course of the sixteenth century, lay authorities completed the transfer of religious objection to abortion into legal statute (Müller 3). This process was made possible by the parallel development of the legal concept of criminalization and the religious doctrine that life begins at conception.

The position of abortion in the Islamic world provides a useful comparison for the criminalization of abortion in the European West during the Middle Ages. Muslim physicians justified abortion medically, and birth control was seen as a normal part of their services (Musallam 69, 60). If a woman was too young, she had a disease or malfunction of the uterus, there was a possibility of death during childbirth, she had a weak bladder, or the fetus could not emerge due to a growth in the uterus, Muslim physicians were expected to perform an abortion (Musallam 69). This social environment was so accepting of abortion that Jewish Arab physicians provided abortifacients despite Jewish religious prohibitions of all "destruction of seed" (Musallam 66). The sanction of contraception and abortion by religious authorities was

responsible for the absence of codes criminalizing abortion in the medieval Arab world (Musallam 60). Religious authorities offered no prohibitions on abortion for secular authorities to leverage into law, so all of the major Islamic jurists permitted the use of abortifacient herbs (Musallam 70). Because abortion was defined as necessary in medical terms and not discussed in terms of religious morality, the Muslim world did not transform abortion as a wrongdoing into abortion as a crime. The development of abortion as a crime in the European West represents the opposite; because abortion was discussed in terms of religious morality, Europe transformed abortion as a wrongdoing into abortion as a crime.

The criminalization of abortion was not an inevitability during the Middle Ages. The transition from abortion as an appalling sin to a legally-punishable crime was made possible by the simultaneous development of a legal tradition in Europe; religious authorities delivered condemnations of abortion straight into lay society's legal codes. The Church developed these condemnations of abortion as murder in all cases only after eliminating the Aristotelian distinction between a unsouled and ensouled fetus in favor of an argument taken from another Greek tradition. By advancing the Stoic doctrine of ensoulment at the moment of conception, the Church firmly established abortion as equivalent to homicide at every stage of fetal development. Moving out of the Middle Ages, abortion then carried the risk of indictment in a court of law, not just of God. Because abortion has not been uniformly punished in the same ways in the West or even in different regions of Europe, an understanding of its history as a crime carries implications for modern treatments of abortion. The contemporary rift between people who support and oppose abortion is based on many of the same medieval debates over ensoulment and the rights of the woman or fetus. The history of the criminalization of abortion also reflects

the influence that Church theology has had on the formation of European law. Abortion is not a modern innovation divorced from its medieval past, so neither are contemporary attitudes towards it.

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