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STATE OF MICHIGAN
IN THE SUPREME COURT

In re EXECUTIVE MESSAGE OF THE GOVERNOR REQUESTING THE AUTHORIZATION OF A CERTIFIED QUESTION.

GRETCHEN WHITMER, in her capacity as Governor of the State of Michigan,

Plaintiff,

v.

JAMES R. LINDERMAN, Prosecuting Attorney of Emmet County, DAVID S. LEYTON, Prosecuting Attorney of Genesee County, NOELLE R. MOEGGENBERG, Prosecuting Attorney of Grand Traverse County, CAROL A. SIEMON, Prosecuting Attorney of Ingham County, JERARD M. JARZYNKA, Prosecuting Attorney of Jackson County, JEFFREY S. GETTING, Prosecuting Attorney of Kalamazoo County, CHRISTOPHER R. BECKER, Prosecuting Attorney of Kent County, PETER J. LUCIDO, Prosecuting Attorney of Macomb County, MATTHEW J. WIESE, Prosecuting Attorney of Marquette County, KAREN D. McDONALD, Prosecuting Attorney of Oakland County, JOHN A. McCOLGAN, Prosecuting Attorney of Saginaw County, ELI NOAM SAVIT, Prosecuting Attorney of Washtenaw County, and KYM L. WORTHY, Prosecuting Attorney of Wayne County, in their official capacities,

Defendants.

_______________________________________/

Supreme Court No. 164256

BRIEF OF *AMICI CURIAE* PROFESSORS OF HISTORY AND LAW IN SUPPORT OF GOVERNOR'S EXECUTIVE BRIEF

Oakland Circuit Court
No. 22-193498-CZ

HON. JACOB J. CUNNINGHAM

This case involves a claim that a state governmental action is unconstitutional.

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Cases

Box v. Planned Parenthood of Ind. and Ky.,
139 S. Ct. 1780 (2019) 26

Brackett's Estate v. Burnham's Estate,
199 Mich. 326 (1917) 8

Buck v. Bell,
274 U.S. 200 (1927) 20

Burdeno v. Amperse,
14 Mich. 91 (1866) 8

Citizens Commercial & Sav. Bank v. Raleigh,
159 Mich. App. 110 (1987) 29

Commonwealth v. Bangs,
9 Mass. (8 Tyng) 387 (1812) 5

Commonwealth v. Parker,
50 Mass. (9 Met.) 263 (1845) 5

Dobbs v. Jackson Women's Health Organization,
142 S. Ct. 2228 (2022) 4, 18, 26, 30

Lair v. Lair,
355 Mich. 10 (1959) 19

Lewis v. Lewis,
338 Mich. 197 (1953) 19

Mays v. Governor of Michigan,
506 Mich. 157 (2020) 27

Michigan Trust Co. v. Chapin,
106 Mich. 384 (1895) 8

Montgomery v. Stephan,
359 Mich. 33 (1960) 24, 25, 30

People v. Barltz,
212 Mich. 580 (1920) 9

People v. Kubasiak,
98 Mich. App. 529 (1980) 20

RECEIVED by MSC 9/8/2022 3:52:11 PM

People v. Murphy,
145 Mich. 524 (1906) 20

People v. Nixon,
42 Mich. App. 332 (1972)....................23, 25

People v. Pizzura,
211 Mich. 71 (1920) 9, 20

Planned Parenthood of Michigan v. Attorney General of Michigan,
Case No. 22-000044-MM (2022), 12–14 26

Ridky v. Ridky,
226 Mich. 459 (1924) 29

Roe v. Wade.,
410 U.S. 113 (1973)....................2

Rouch World LLC v. Dep't of Civil Rts.,
No. 162482, 2022 WL 3007805 (Mich. July 28, 2022)....................28

Sierra v. Minnear,
341 Mich. 182 (1954) 19, 29

Smith v. State,
33 Me. 48 (1851)....................5

Stackable v. Estate of Stackable,
65 Mich. 515 (1887) 8

State v. Cooper,
22 N.J.L. 52 (1849)....................5

Tong v. Marvin,
15 Mich. 60 (1866) 8, 29

West v. West,
241 Mich. 679 (1928) 19

Constitutional Provisions

Mich. Const. art. 1, § 2....................2, 4, 27

Mich. Const. art. 10, § 1....................28

Statutes

Act of Feb. 7, 1835, In. Rev. Stat. §§ 1, 3 (1838)....................5

Act of Feb. 27, 1834, §§ 1–2, 1834 Ohio Laws 20–21 5

Ill. Rev. Code § 46 5

Mich. Comp. Laws § 37.2202 28

Mich. Comp. Laws § 37.2302 28

Mich. Comp. Laws § 37.2402 28

Mich. Comp. Laws § 37.502 28

Mich. Comp. Laws § 557 .... 8, 19, 29

Mich. Comp. Laws § 722.21 et seq. 28

Mich. Comp. Laws. § 722.541 7

Mich. Comp. Laws §§ 750.1 et seq. 23

Mich. Comp. Laws § 750.14 .... 4, 18, 23

Mich. Comp. Laws § 750.52*l* 20

Mich. Comp. Laws § 750.520*l* 29

Mich. Comp. Laws § 11484.1 19

1867 Mich. Pub. Acts 61 16

1869 Mich. Pub. Acts 106 16

1873 Mich. Pub. Acts 138 17

1907 Mich. Pub. Acts 218 17

1911 Mich. Pub. Acts 76 17

1913 Mich. Pub. Acts 707 17

1921 Mich. Pub. Acts 462 17

1927 Mich. Pub. Acts 315 17

1929 Mich. Pub. Acts 746–7 19

1974 Mich. Pub. Acts 258 29

1974 Mich. Pub. Acts 266 29

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RECEIVED by MSC 9/8/2022 3:52:11 PM

Mich. Rev. Stat., ch. 85, § 25 8

Mich. Rev. Stat. ch. 153, §§ 33–34 7

Mo. Rev. Stat. art. II, §§ 9–10, 36 (1835) 5

Books and Periodicals

Aaron K. Bowran, *The Elliott-Larsen Civil Rights Act: Celebrating the Progress of Michigan's Civil Rights Laws*, Mich. Bar J., Aug. 2012 28

Burke Shartel, *Sterilization of Mental Defectives,* 24 Mich. L. Rev. 1 (1925) 20

C.C. Slemons, *Michigan's Department of Public Health*, XXIX J. of the Michigan State Med. Soc'y 739 (1930) 24

C. Willston, *Prevention of Conception*, 5 Mich. Med. News 23 (1882) 12, 14

Chas. H. Barrett, *Criminal Abortion as a Cause of Insanity*, 2 Detroit Rev. Med. & Pharm. 105 (1867) 12

D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 Transactions Am. Med. Ass'n 239 (1871) 10

Daniel K. Williams, *Defenders of the Unborn* (2015) 10

Donna Hoyert, National Center for Health Statistics, Division of Vital Statistics, *Maternal Mortality Rates in the United States, 2020* (Feb. 2022) 26

Editorial, *Criminal Abortions*, 5 Peninsular J. Med. 97 (1857) .... *passim*

Editorial, *Why Not?*, Detroit Rev. Med. & Pharm 238 (1866) 15

Edward Cox, *Criminal Abortion*, Mich. State Med. Soc. 369 (1879) 13, 14, 16

Elizabeth A. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstet. Gynecol. 215 (2012) 25

E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 Detroit Rev. Med & Pharm. 145 (1867) 11

George E. Smith, *Foeticide*, Paper Read Before the Southern Michigan Medical Association, Dec. 8, 1874, 10 Detroit Rev. Med. & Pharm. 211 (1875) 15

Horatio Robinson Storer, *On Criminal Abortion* (1860) 11

Horatio Robinson Storer, *Why Not? A Book For Every Woman* (1866) .... *passim*

RECEIVED by MSC 9/8/2022 3:52:11 PM

H.W. Humble, *Seduction as a Crime*, 21 Colum. L. Rev. 144 (1921) 5

Ian Robert Dowbiggin, *The Sterilization Movement and Global Fertility in the Twentieth Century* (2008) 26

Janet Farrell Brodie, *Abortion and Contraception in Nineteenth-Century America* 254 (1994) 11

James C. Mohr, *Abortion in America: The Origins and Evolution of A National Policy, 1800–1900* (1978) .... *passim*

James Wilson, *Of the Natural Rights of Individuals* (1790) 5

Jeffrey Alan Hodges, *Dealing with Degeneracy: Michigan Eugenics in Context* (2001) 21

Jeffrey Alan Hodges, *Euthenics, Eugenics and Compulsory Sterilization in Michigan, 1897–1960* (1995) 21, 22

J.H. Kellogg, *Ladies' Guide in Health and Disease* (1882) 11, 13, 14, 16

J.J. Mulheron, *Foeticide: A Paper Read Before the Wayne County Medical Society*, 10 Peninsular J. Med. 385 (1874) 13, 14, 15, 16

John P. Stoddard, M.D., Albion, Michigan, before the Southern Michigan Medical Association, *Foeticide—Suggestions Toward Its Suppression*, July 13, 1875, 10 Detroit Rev. Med. & Pharm. 653 ....12, 13

Katherine Kortsmit et al., CDC Morbidity and Mortality Weekly Report, *Abortion Surveillance — United States, 2019* (Nov. 26, 2021) 26

Leslie J. Reagan, *When Abortion Was a Crime Women, Medicine, and Law in the United States, 1867–1973* (1996) 10

Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998) 8

Mary Ziegler, *Abortion and the Law: A Legal History: Roe v. Wade to the Present* (2020) 27

Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* (2015) 27

Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2025 (2021) 27

Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 Harv. L. Rev. 415 (2021) 26

Michigan Dept. of Health, *Fifty-Eighth Report of the Commissioner of the Michigan Department of Health* (1930) 23

Michigan Supreme Court Historical Society, *Haynes v. Lapeer Circuit Judge: Eugenics in Michigan*, Michigan Bar Journal Supplement: The Verdict of History (Jan. 2009)........20

Morse Stewart, *Criminal Abortion*, Detroit Rev. Med. & Pharm. (Jan. 1867)........14

Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000) 8

Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (1999) 8

Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (1982)........8

O.E. Herrick, *Abortion and Its Lesson*, 5 Mich. Med. News 6 (1882) 12

O.S. Phelps, *Criminal Abortion*, 1 Detroit Lancet 725 (1878) 11, 12, 13

Patricia Cline Cohen, *Married Women and Induced Abortion, 1820 – 1860* (June 22, 2022), http://ssrn.com/abstract=4197554 ....5, 6

Race Betterment Foundation, *Proceedings of the Third Race Betterment Conference* (1928) 21

Report of the Crime Commission of Michigan 1930 (1930)........22, 23

Report of the Special Committee on Criminal Abortion, Ninth Annual Report of the Secretary of the State Board of Health of the State of Michigan (1882) 12

Report of the Trial of Ammi Rogers For a High Crime and Misdemeanor, in the High Handed Assault on the Body of Asenath Caroline Smith (Oct. 5–7, 1820) 6

Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 Yale L.J. 1073 (1994) 8

Reva B. Siegel, *Reasoning from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992)........10, 12

Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 Geo. L.J. 2127 (1994) 8

Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* (2011)........10

Simone Caron, *Who Chooses? American Reproductive History Since 1830* (2008) 10, 11

RECEIVED by MSC 9/8/2022 3:52:11 PM

RECEIVED by MSC 9/8/2022 3:52:11 PM

State Crime Commission of Michigan, *Report of the Crime Commission of Michigan 1930* (1930) 22

Susan P. Fino, *Michigan State Constitution* (1996) 2, 27

Wallace D. Loh, Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labelling, 37 J. Soc. Issues 28 (1981) 21

Wendy Kline, *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom* (2001) 21

U.S. Dept. of Justice, *Forcible Rape: An Analysis of Legal Issues* (1978) 20

U.S. Dep't of Labor, Children's Bureau, *Maternal Mortality in Fifteen States*, Bureau Publication No. 223 (1934) 24

U.S. Dept. of Labor, Children's Bureau, *Minimum Standards for Child Welfare* (1919) 19

Newspaper Articles

Claude Markle, *The Crime Commission Findings*, Marshall Evening Chronicle, Jan. 31, 1930 22

Draft of New Criminal Code About Finished, St. Joseph Herald-Press, Sep. 13, 1930 23

Proceedings of the Seventy Sixth Day of the Session, Detroit Free Press, 18 March 1879 17

Eugenicists Hold Meet Here, Battle Creek Enquirer, Dec. 27, 1928 22

Lay Foundation for Eugenic College Here, Battle Creek Enquirer, Oct. 14, 1929 22

Lindsay Knake, *Dark Past: Michigan Sterilized More than 3000 People from the 1900s to the 1970s*, Michigan Live, June 23, 2011 30

Nearly Relax Ban on Gambling, Lansing State J., May 12, 1931 23

The Abortion Bill, True Northerner, 28 March 1879: The State CAPITAL 17

The Case of Caroline A. Clark — Seduction and Death, Boston Daily Atlas, June 26, 1843 7

Court Filings

Brief for Northland Family Planning et al. as Amici Curiae in Support of Governor's Executive Brief, *In re Executive Message of the Governor Requesting the Authorization of a Certified Question*, Case No. 22-193498-CZ (2022) 26

Brief of Conservative Legal Defense and Education Fund in Support of Petitioners, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) 26

Other Sources

Library of Michigan, *Michigan Legislative Biography: Women Members*, https://mdoe.state.mi.us/legislators/legislator/WomenMembers?sortOrder=sessionYears&isSort=1 9

Michigan.gov, Health and Human Services, *Family Planning*, https://www.michigan.gov/mdhhs/adult-child-serv/childrenfamilies/familyhealth/familyplanning 30

National Association of Commission For Women, *History*, https://www.nacw.org/history.html#:~:text=The%20Commission%20movement%20began%20in,Department%20of%20Labor%2C%20Women's%20Bureau 27

Pope Pius XI, encyclical letter on Christian marriage, *Casti Conubii*, given at St. Peter's in Rome, Dec. 31, 1930, https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.html 18

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are professors of law and history who research, write, and teach about legal history and constitutional law, including a scholarly focus on the history of gender, reproduction, sexuality, and the Constitution. *Amici curiae* have substantial knowledge regarding gender, reproduction, and the law, and share a professional interest in ensuring that this court is provided with adequate historical context regarding the development of Michigan's abortion-related laws and the extent to which the development of those laws was shaped by outdated gender-based stereotypes and norms. This brief demonstrates that Michigan's laws restricting abortion access are based on now-anachronistic views about gender and reproductive health and are incompatible with Michigan's constitutional protections for sex equality.[1] The names, titles, and affiliations[2] of *amici curiae* are below. Biographies of *amici curiae* are attached in Appendix A.

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[1] Pursuant to Michigan Court Rule 7.212(H)(3), *amici curiae* and their counsel certify that no counsel for a party authored this brief in whole or in part, and no party, counsel for a party, or any other person made a monetary contribution to fund the preparation or submission of this brief.

[2] Affiliations are listed for identification purposes only.

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SUMMARY OF THE ARGUMENT

The State of Michigan has long been a pioneer of equality under the law. The framers of Michigan's 1963 constitution drafted what was then an unusually progressive guarantee of equality and created the nation's first constitutional civil rights commission.[3] Michigan law recognizes women as fully equal to men in their rights, including their right to bodily integrity. The state's abortion law, first enacted in 1846 and revised in 1931, sprang back into effect after the U.S. Supreme Court reversed *Roe v. Wade*. This brief provides the court with newly available historical evidence demonstrating that the 1931 law is at odds with myriad subsequent developments in Michigan law, and especially with the state constitution's 1963 promise that "no person shall be denied the equal protection of the laws."[4]

Before the mid-nineteenth century, Michigan law did not heavily regulate abortion. In the 1840s, when Michigan passed its first abortion law, news reports focused on abortion-related maternal mortality—a concern that, while not without basis in the early nineteenth century, is out of place today, when abortion is safe and abortion-related maternal mortality has fallen to roughly 0.41 per 100,000 abortions.[5] Although fueled by concern for maternal mortality, the lawmakers who passed the 1846 Act also operated in a world in which women's unequal status pervaded virtually every corner of Michigan law. Michigan women could not vote or hold political office, and the law denied married women everything from the right to own property to protection from marital rape.

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[3] Susan P. Fino, *The Michigan State Constitution* 26–35 (1996).

[4] Mich. Const. art. 1, § 2.

[5] *See infra* Pt. II(A).

Later in the nineteenth century, as Michigan lawmakers worked to strengthen the state's abortion laws, many of the state's physicians were swept up by a doctors' campaign to criminalize abortion, led nationally by the American Medical Association ("AMA"). The AMA drafted and promoted in state legislatures across the country a model law punishing women for obtaining or self-managing an abortion. Physicians in Michigan and elsewhere who fought to fortify criminal abortion laws not only invoked the risks of abortion for women and the importance of protecting life in the womb; they also condemned married women's defiance of their pre-ordained maternal destiny and warned that immigrants' birth rates would outpace those of white, Protestant, native-born women, degrading the nation's racial and religious character.

In 1929, Michigan chartered a crime commission to propose changes to reduce what was perceived to be a soaring crime rate. That crime commission proposed a significant expansion of criminal liability for abortion, in what became the 1931 Act. The commissioners who helped shape the state's abortion law in the early twentieth century were steeped in stereotypes about women's capacities and primary roles as wives and mothers. Married women in Michigan still labored under limits on their ability to protect themselves from sexual violence or participate in the economy. Michigan law also presumed that the state should control reproduction: just two years before the 1931 abortion law, Michigan radically expanded its compulsory eugenic sterilization law, a statute used to victimize women viewed as promiscuous or otherwise indifferent to prevailing gender norms. It is no surprise that key members of the crime commission played a leading role in Michigan's thriving eugenics movement. Both the 1929 sterilization law and the 1931 abortion law were passed against the same backdrop of indifference to the bodily integrity of women; conviction that the state could and should dictate individual reproductive decisions, especially for the poor; and outright hostility to immigrants and the disabled.

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The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* offers one perspective on the history of abortion at common law. Regardless of whether one finds this account persuasive, the history of Michigan's laws on abortion—and pursuit of equality under the law—has followed its own trajectory. As new historical evidence makes clear, Michigan's abortion law cannot be squared with the state's deep commitment to equality under the law.

ARGUMENT

The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), resurrected a Michigan abortion law enacted in 1846 and last revised in 1931. The Michigan law is antithetical to modern understandings of equality and bodily integrity and disregards a century of medical advances. It is the product of a time when women's legal status remained profoundly unequal, lawmakers endorsed eugenic measures to regulate sexuality and ensure racial purity, and women often perished from unsafe abortions. In the intervening years, advances in law, ethics, and medicine have rendered key purposes underpinning the 1931 law illegitimate, outdated, or both. Developments in health care have made medical abortion safe—safer than childbirth—so abortion bans can no longer be justified as protecting the life and health of pregnant persons. Michigan law now firmly rejects sex-role stereotypes and eugenicist beliefs, and recognizes the equality, dignity, and bodily integrity of all persons regardless of sex, race, religion, or national origin. The 1931 statute, which bans abortions throughout pregnancy with the sole exception of abortions "necessary to preserve the life of such woman," Mich. Comp. Laws § 750.14 (Appendix B at B-13) (hereinafter "App. B"), contravenes Michigan's commitment to guarantee to each individual equal protection of the law and "the enjoyment of his civil or political rights." Mich. Const. art. 1, § 2.

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I. HISTORICAL BACKGROUND OF MICHIGAN'S ABORTION RESTRICTIONS

A. The First Abortion Regulations in Michigan Were Enacted in the Mid-1800s Amidst Alarming News Reports of Women's Deaths from Abortions and Deep-Seated Assumptions About Women's Roles.

In the early United States, abortion was not heavily regulated. States followed the English common law, which did not prohibit the termination of a pregnancy prior to "quickening," the point in time when a woman first felt the movement of the fetus, typically between thirteen and twenty-two weeks gestation. The common law doctrine was articulated by James Wilson, delegate to the U.S. Constitutional Convention of 1787, in a celebrated series of lectures on law he gave in 1790 in Philadelphia. Wilson quoted with approval the words of jurist William Blackstone, "[i]n the contemplation of law, life begins when the infant is first able to stir in the womb." James Wilson, *Of the Natural Rights of Individuals* (1790), *reprinted in* 2 *The Works of James Wilson* 316 (James DeWitt Andrews ed., Chi., Callaghan & Co. 1896). In 1812, the Massachusetts Supreme Judicial Court confirmed that the common law did not govern pre-quickened pregnancies. *Commonwealth v. Bangs*, 9 Mass. (8 Tyng) 387, 388 (1812).[6]

It was not until the 1820s, in the wake of alarming news reports of women's deaths from abortions, that state legislatures began to enact statutes restricting access to the procedure.[7] In 1821, Connecticut became the first state to regulate abortion by statute by including the procedure

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[6] *See also Commonwealth v. Parker*, 50 Mass. (9 Met.) 263, 264 (1845); *State v. Cooper*, 22 N.J.L. 52, 52 (1849); *Smith v. State*, 33 Me. 48, 57 (1851).

[7] The news reports, initially very few in number, accelerated in the late 1830s, surged in the 1840s, and became commonplace in the 1850s. *See* Patricia Cline Cohen, *Married Women and Induced Abortion, 1820–1860* at 2 (June 22, 2022), *available at* http://ssrn.com/abstract=4197554. Their rise was driven both by changes in journalistic practices of the Early Republic favoring dramatized news and by changes in courtship and marriage practices that highlighted the dangers of criminal seduction. *See* H.W. Humble, *Seduction as a Crime*, 21 Colum. L. Rev. 144, 144–45 (1921) ("[S]eduction as a crime may be defined as the act of a male person in having intercourse with a woman of chaste character under promise of marriage, or by the use of enticement or persuasion.") (emphasis omitted).

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in its anti-poisoning law. *See* James C. Mohr, *Abortion in America: The Origins and Evolution of A National Policy, 1800–1900*, at 20–21 (1978). Connecticut approved the statutory provision after widespread publicity about the trial of a minister who, after impregnating a young woman, forced her to ingest an abortion-inducing "potion" and, when that failed, attempted to use a tool to "penetrate [her] womb" to induce abortion. *Report of the Trial of Ammi Rogers For a High Crime and Misdemeanor, in the High Handed Assault on the Body of Asenath Caroline Smith*, vii–ix (Oct. 5–7, 1820). In 1828, New York wrote the first law explicitly making abortion before quickening a misdemeanor and abortion after quickening a felony, unless the procedure was necessary to save the life of the woman. *See* Mohr, *supra*, Abortion in America, at 26–27. By 1839, four other states had passed provisions regulating abortions.[8]

Beginning in 1839, a surge of news reports of women's deaths, disseminated nationally, prompted yet more states to enact abortion restrictions. Contemporaneous news accounts usually drew directly from coroner's inquests detailing the circumstances of the illicit pregnancy, the measures taken to secure the abortion, any dying declarations, and eye-witness testimony. News reports focused on the parties to the pregnancy with sympathy for the female partner, who was almost always young and unmarried in stories published before the mid-1850s.[9] For example, in 1843, an adolescent girl from Detroit impregnated by her married brother-in-law was carried off to Oakland County where she died of sepsis post abortion. Michigan papers sympathized with the

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[8] Ill. Rev. Code § 46 at 131 (1827); Act of Feb. 27, 1834, §§ 1–2, 1834 Ohio Laws 20–21; Act of Feb. 7, 1835, In. Rev. Stat. §§ 1, 3 (1838); Mo. Rev. Stat. art. II, §§ 9–10, 36 (1835).

[9] Notably, news reports rarely focused on the fetus, beyond the estimated gestational age decided by autopsy doctors. These generalizations emerge from a collection of 225 reports of distinct abortion cases, culled from 4 newspaper databases from 1800 to 1860. (Genealogybank.com; Newspapers.com; Chronicling America (Library of Congress); and Pro-Quest's 19th century U.S. Newspapers.) *See also* Digital Michigan Newspapers Collection, Central Michigan University (digmichnews.cmich.edu). For preliminary findings, *see* Cohen, *supra*, at 1–7.

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girl as an innocent victim and scorned the man: "up to the time of the fatal denouement of their illicit intercourse, both she and her heartless seducer and murderer, (for he can scarcely be looked upon in any other light,) moved in the best society." *The Case of Caroline A. Clark — Seduction and Death*, Boston Daily Atlas, June 26, 1843, at 2 (reprinted from the Pontiac Jacksonian). The press in Michigan participated in the coverage of notable abortion accounts surfacing from 1837 to 1845 in New England, New York, and Ohio.[10]

With national attention focused on abortion and its dangers to women, the Michigan legislature enacted its first statutory prohibition against abortion in 1846. Like New York's law, the 1846 statute treated abortions pre-quickening as misdemeanors and abortions after quickening as felonies, unless "necessary to preserve the life of the mother." *See* Mich. Rev. Stat. ch. 153, §§ 33–34 (1846) (App. B at B-2). The 1846 Michigan law closely paralleled new laws passed in 1845 in New York and Massachusetts. Mohr, *supra*, at 129–30.

Michigan's law, like the abortion statutes of other states, was enacted against a backdrop of profound legal and social inequality of the sexes. Marriage and childbearing constituted the expected destiny of most women of all classes.[11] In the 1840s, there were but a few alternative pathways for women to support themselves. Marriage brought male protection and economic

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[10] Coverage appeared in the *Pontiac Courier*, *Kalamazoo Gazette*, *Pontiac Jacksonian*, *Ann Arbor Argus*, *Coldwater Sentinel*, and *Ypsilanti Sentinel*. In addition to the Michigan death of Clark in 1843, another lurid case surfaced in Adrian in 1846.

[11] Michigan law, like the law of other states, discriminated based on sex in determining child custody: an 1873 statute, for instance, presumed that mothers should be caregivers of young children, while fathers retained their traditional custodial prerogative over older children. Mich. Comp. Laws. § 722.541 (1948) (repealed 1971) (expressing preference that the "mother . . . shall be entitled to the care and custody of all such children under the age of twelve (12) years, and the father . . . shall be entitled to the care and custody of all such children of the age of twelve (12) years or over").

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support, but it compromised women's legal agency.[12] Though statutory reforms had given Michigan women some control over their separate property by 1846, common law principles of coverture continued to severely limit wives' contractual and property rights.[13] The same Michigan legislature that enacted the abortion restriction clarified that "nothing [in Michigan law] . . . shall be construed to authorize any married woman to give, grant or sell any such [non-separate] real or personal property during coverture without the consent of her husband." 1846 Mich. Rev. Stat., ch. 85, § 25 (cited in *Tong v. Marvin*, 15 Mich. 60, 67–68 (1866)). Husbands owned their wives' earnings,[14] and were entitled to wives' caregiving and housekeeping labor, as well as their sexual services.[15]

[12] *See, e.g.*, Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998); Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (1982); Norma Basch, *Framing American Divorce: From the Revolutionary Generation to the Victorians* (1999); Nancy F. Cott, *Public Vows: A History of Marriage and the Nation* (2000).

[13] In *Burdeno v. Amperse*, 14 Mich. 91 (1866), this Court explained how married women's property acts enacted in the 1840s excepted certain separate property from the common law rule, which held that "[t]he wife, by her coverture, ceased to have control of her actions or her property . . . . The wife could neither possess nor manage property in her own right, could make no contract of a personal nature which would bind her, and could bring no suit in her own name. In short, she lost entirely all the legal incidents attaching to a person acting in her own right." *Id.* at 92.

[14] In Michigan, husbands owned their wives' earnings until a statutory reform in 1911. *See* Mich. Comp. Laws § 557.11 (1970) (repealed 1981) (codifying 1911 Mich. Pub. Acts 196). Thereafter, courts often limited wives' remuneration for certain labor, distinguishing, for example, between money earned by wives for services rendered to boarders and board itself. *See, e.g.*, *Brackett's Estate v. Burnham's Estate*, 199 Mich. 326, 331 (1917) (quoting *Stackable v. Estate of Stackable*, 65 Mich. 515, 518 (1887) ("[Husband] was the head of the household, and furnishing the family supplies" so earnings from board belonged to him alone)); *see also* Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 Geo. L.J. 2127 (1994).

[15] *See, e.g.*, *Michigan Trust Co. v. Chapin*, 106 Mich. 384, 386 (1895) (finding that a husband's "promise to pay for [wife's housekeeping] services which the very existence of the [marital] relation made it her duty to perform" was "without consideration" and "contrary to public policy"); *see also* Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 Yale L.J. 1073 (1994).

In this period, the law also provided little protection for women's bodily integrity. For instance, husbands could rape their wives with impunity, as the law effectively considered women to have consented irrevocably to sexual intercourse upon marriage. *See, e.g., People v. Pizzura*, 211 Mich. 71, 73 (1920) ("A man cannot himself be guilty of an actual rape upon his wife. One of the main reasons for this is the matrimonial consent which she gives when she assumes the marriage relation, and which the law will not permit her to retract . . . ." (quotation omitted)). Certainly women could not vote, serve on juries, or hold office for many years to come.[16] And medical advances rendering abortion safe lay a century in the future.

B. In the Late Nineteenth Century, Michigan Enacted Additional Abortion Regulations Following an Anti-Abortion Campaign Animated by Archaic Views of Women and Nativist Fears.

Beginning in the late 1850s, physician-led anti-abortion campaigns spurred lawmakers in many states, including Michigan, to restrict abortion further. During this period, anti-abortion doctors sought to enhance their professional stature and undermine irregular practitioners who threatened regular physicians' livelihoods. Mohr, *supra*, at 37.[17] Earlier public discourse on abortion centered on maternal death, a concern that remained prominent. Physicians now also argued that life began not at quickening but at conception—a point, they claimed, was only

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[16] Over the next several decades, Michigan lawmakers rejected calls for woman's suffrage. *See, e.g.*, J. Mich. Senate 680 (1858); J. Mich. Senate 810 (1871). Women could not serve on juries in Michigan until 1918, and the first women elected to the state legislature took their seats in the 1920s. 3 Mich. Comp. Laws 1915, § 12190; *People v. Barltz*, 212 Mich. 580 (1920); Library of Michigan, *Michigan Legislative Biography: Women Members*, https://mdoe.state.mi.us/legislators/legislator/WomenMembers?sortOrder=sessionYears&isSort=1 (last visited August 23, 2022).

[17] In 1857, Michigan physicians lamented the lack of enforcement of existing abortion restrictions. *See, e.g.*, Editorial, *Criminal Abortions*, 5 Peninsular J. Med. 97, 98 (1857) ("[W]e are yet ignorant of any conviction [in an abortion case]—even when as graceless scamps and notorious quacks as ever poisoned silly women were the parties concerned.").

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understood by better trained "regular doctors" and not their competitors, such as (female) midwives with whom they competed for authority and business.[18] The doctors' campaign to criminalize abortion also prominently featured claims about women's biologically and divinely ordained role as mothers, as well as nativist concerns about increasing abortion rates among married white native-born Protestant women. *See* Reva B. Siegel, *Reasoning from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261 (1992).[19]

Dr. Horatio Storer, who led this anti-abortion effort, claimed that childbearing was "the end for which [married women] are physiologically constituted and for which they are destined by nature." *See* Horatio Robinson Storer, *Why Not? A Book For Every Woman* 75–76 (1866); Mohr, *supra*, at 78–79, 89, 148–51 (recounting Dr. Storer's role in persuading lawmakers to ban abortion). Women who sought to avoid their pre-ordained maternal role via abortion or contraception inevitably met devastating physical and social consequences, according to Storer and his allies. *See* Storer, *supra*, at 37 ("[Any] infringement of [natural laws] must necessarily cause derangement, disaster, or ruin."). Such views pervaded the American Medical Association's campaign against abortion. In 1871, the AMA denounced the woman who ended her pregnancy: "She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed by the marriage contract." D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*,

[18] On the quickening distinction, *see* Mohr, *supra* at 34–35; Janet Farrell Brodie, *Abortion and Contraception in Nineteenth-Century America* 254 (1994); Leslie J. Reagan, *When Abortion Was a Crime Women, Medicine, and Law in the United States, 1867–1973*, at 8–9 (1996); Daniel K. Williams, *Defenders of the Unborn* 11 (2015).

[19] On nativism, *see also* Mohr, *supra*, at 89–91; Simone Caron, *Who Chooses? American Reproductive History Since 1830*, at 25 (2008); Sara Dubow, *Ourselves Unborn: A History of the Fetus in Modern America* 21 (2011).

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22 Transactions Am. Med. Ass'n 239, 241 (1871). At Storer's behest, the AMA advocated to state legislatures around the country a strict and punitive model criminal abortion law that penalized women for obtaining or self-inducing an abortion. Horatio Robinson Storer, *On Criminal Abortion* 90–99 (1860); *see also* Caron, *supra*, at 25 ("Storer, with AMA support, drafted an 'ideal' law for states to adopt. . . . Storer's law removed quickening, established equal guilt for abortions performed at any time . . . , and imposed stiff sentences.").[20]

Influenced by Storer, many Michigan physicians elaborated on the idea that women who had abortions defied their natural maternal role and suffered a terrible price. Dr. John Harvey Kellogg, an influential Michigan physician and longtime member of the state's Board of Health, explained that "[t]he motherly instinct is without doubt the ruling passion in the heart of the true woman." J.H. Kellogg, *Ladies' Guide in Health and Disease* 381 (1882).[21] A woman who ended her pregnancy "often pay[s] the penalty of her unnatural crime with her own life then and there," Dr. O.S. Phelps of Homer told the Calhoun County Medical Society in 1878. O.S. Phelps, *Criminal Abortion*, 1 Detroit Lancet 725, 727–28 (1878).[22] Women who survived abortion, wrote

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[20] Storer's model legislation provided: "'Every woman who shall solicit, purchase, or obtain of any person, or in any other way procure, or receive, any medicine, drug, or substance whatever, and shall take the same, or shall submit to any operation or other means whatever, or shall commit any operation or violence upon herself, with intent thereby to procure a miscarriage, unless the same shall have been by two competent physicians (in consultation) pronounced necessary to preserve her own life, or that of her unborn child, shall be deemed guilty,' etc. etc.; 'and if said offender be a married woman, the punishment may be increased at the discretion of the court.'" Storer, *On Criminal Abortion*, *supra*, at 99.

[21] *See also, e.g.*, Editorial, *Criminal Abortions*, *supra*, at 100 (urging physicians to warn women that if they survived abortion, it would render them "unfit[] for the future performance of maternal duties, the highest and holiest in which a woman can be engaged").

[22] Dr. E.P. Christian of Detroit cautioned in 1867 that "violence against the physiological laws of gestation" would cause a "severe and grievous penalty" because of the "intimate relation between the nervous and uterine systems manifested in the various and frequent nervous disorders resulting from uterine derangements." E.P. Christian, *The Pathological Consequences Incident to Induced*

another Detroit physician in 1867, risked "functional and organic diseases of the reproductive system which . . . wreck the mind and entail a pitiable life worse than death," since abortions were "very fruitful causes of insanity." Chas. H. Barrett, *Criminal Abortion as a Cause of Insanity*, 2 Detroit Rev. Med. & Pharm. 105, 107 (1867).[23]

The ability to control their reproductive lives corrupted women morally as well as physically, anti-abortion doctors claimed.[24] A committee of physicians who reported to the Michigan Board of Health in 1881 called abortion "a sinful habit which opens the way to unbridled licentiousness," and warned that "to take away the responsibility of motherhood is to destroy the greatest bulwarks of female virtue." *Report of the Special Committee on Criminal Abortion*, Ninth Annual Report of the Secretary of the State Board of Health of the State of Michigan 164, 165

Abortion, 2 Detroit Rev. Med. & Pharm. 145, 146 (1867); *see also, e.g.*, Phelps, *supra*, at 728 (asserting that a woman who has an abortion "destroys her health . . . [and] sooner or later comes upon the hands of the physician suffering with uterine disease").

[23] S*ee also, e.g.*, John P. Stoddard, M.D., Albion, Michigan, before the Southern Michigan Medical Association, *Foeticide—Suggestions Toward Its Suppression*, July 13, 1875, 10 Detroit Rev. Med. & Pharm. 653, 656 (attributing to abortion "the wide prevalence of female complaints, the physical decay and the fearfully increasing tendency to insanity of the race"); Editorial, *Criminal Abortions*, *supra*, at 99–100 (noting, in addition to "the dangers, the agonising sufferings, and painful death so frequently the immediate consequence" of abortion, "the years perhaps of lingering suffering more intolerable than the prospect of a release by death itself").

[24] Storer and many anti-abortion physicians during this period also opposed contraception as contrary to nature, to women's primary purpose of childbearing, and to nativist aims. *See* Siegel, *Reasoning from the Body*, *supra*, at 294 (quoting Storer's view that "[i]ntentionally to prevent the occurrence of pregnancy, otherwise than by total abstinence from coition" was also "disastrous to a woman's mental, moral, and physical well-being"). Michigan physicians expressed similar views. *See, e.g.*, C. Willston, *Prevention of Conception*, 5 Mich. Med. News 23, 23 (1882) (attributing women's unhappiness in marriage to "trying either not to have children, or to limit their number" because "by an immutable law of nature, there are no harmless ways by which gestation can be interrupted *or conception shunned*") (emphasis added). A few physicians publicly dissented; for example, Dr. O.E. Herrick of Grand Rapids touched off a debate among Michigan physicians when he argued in favor of birth control in the 1880s. O.E. Herrick, *Abortion and Its Lesson*, 5 Mich. Med. News 6, 7 (1882).

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(1882). Detroit doctor J.J. Mulheron wrote in 1874 that because "[t]he bearing of children is a physiological function, and the noblest pertaining to women, it cannot be contravened with impunity." J.J. Mulheron, *Foeticide: A Paper Read Before the Wayne County Medical Society*, 10 Peninsular J. Med. 385, 390 (1874). He warned that "[v]irtuous woman cannot borrow 'the equipments of the brothel' [condoms] with a view to shirk the responsibilities for which she was created" without dire consequence. *Id.*[25] "Criminal abortion," asserted Dr. Phelps, "blunts the moral senses and leads to vices [including] intemperance, . . . adultery, prostitution, infanticide, murder." Phelps, *supra*, at 727.

Physicians who urged abortion restrictions portrayed women as "selfish and unprincipled," "silly," "deceptive," and immoral stewards of their bodies and reproductive lives. In 1882, Dr. Kellogg disparaged women's attempts to control their fertility and plan their families: in his view, they sought abortions "*only*" because they "do not wish to endure the inconvenience and trouble of pregnancy and childbirth," "do not want to have children," "have children enough," or—in his estimation—for "*some other equally frivolous excuse*." Kellogg, *supra*, at 355 (emphasis added). Battle Creek doctor Edward Cox wrote in 1879 that "abortions before quickening are of daily habit," justified by "excuse[s]" such as "poverty," short duration of marriage, "poor health," and a "deceptively given" assertion that the woman "could not live through another labor." Edward Cox, *Criminal Abortion*, Mich. State Med. Soc. 369, 374 (1879). The "worst of all shirks," Cox maintained, "is she whose god is Fashion . . . . She will not forego the anticipated tour of Europe, a trip to Saratoga or Long Branch, nor even the pleasures of the gay

[25] *See also, e.g.*, Stoddard, *supra*, at 657 ("[E]very forced and premeditated miscarriage is indelibly stamped on the face divine . . . to be forevermore a tell-tale witness against the so unchristian and unnatural mother.").

season." *Id.*[26] Doctors must assert control over women's reproductive decisions, these physicians argued, to counteract the "wiles, artifices, and strategems which women use when besieging their physicians for the commission of this unnatural practice." *Id.* at 380.[27]

Physicians in Michigan and elsewhere expressed particular alarm at what they perceived to be the increasing prevalence of abortion among middle-class and affluent married women. In earlier periods, abortion appeared to be the last resort of young, unmarried women desperate to avoid the ignominy of nonmarital childbirth. As Detroit physician Morse Stewart told the Wayne County Medical Society in 1866: "Formerly [abortion] was almost exclusively adopted to rid of the encumbrance and shame of illicit intercourse." Morse Stewart, *Criminal Abortion*, Detroit Rev. Med. & Pharm. (Jan. 1867), at 7. Now, however, "the exceeding prevalence of the evil is found to be among an entirely different class, and the fruit of legitimate wedlock in every grade of society, high and low, but especially the former." *Id.*[28] Hillsdale physician George E. Smith despaired in 1874 of the "*wide-spread* determination on the part of many [women] who are married

[26] *See also, e.g.,* Editorial, *Criminal Abortions*, *supra*, at 98 (characterizing abortion as often sought by women "whose only reason for it is the deprivation of the gaieties and frivolities of a fashionable life"); Kellogg, *supra*, at 363 (citing women's "desire to get rid of their unborn infants simply for their convenience; because they do not want to settle down to sober life just yet, or because they have planned a trip to Europe, or a summer at Saratoga"); Mulheron, *supra*, at 387 (excoriating women "who would resort to the inhuman crime of destroying the fruit of their wombs for no better reason than that children are to them not blessings but nuisances, interfering with their rounds of fashionable dissipation"); Willston, *supra*, at 23 ("[C]riminal abortion and prevention of conception . . . come from the dainty dilletanteism of our women, which shrinks from having its patrician pleasures disturbed by the cares of maternity.").

[27] Some Michigan physicians, such as Detroit's Dr. Morse Stewart, lamented that the education that young women and girls received about human physiology corrupted their "innocence" and "chastity," enabling them "to appreciate the numerous and shameful advertisements" of abortifacients. Stewart, *supra*, at 9–10.

[28] *See also, e.g.*, Cox, *supra*, at 370–71 (noting that as of 1839 "this vice [abortion] was almost unknown and scarcely ever practiced by married women. None but the unfortunate maiden or brazen courtezan were guilty of the crime").

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to avoid the labor of caring for and rearing children." George E. Smith, *Foeticide*, Paper Read Before the Southern Michigan Medical Association, Dec. 8, 1874, 10 Detroit Rev. Med. & Pharm. 211, 211 (1875) (emphasis in original).[29]

The phenomenon of well-off married women avoiding or ending pregnancies disturbed anti-abortion physicians and others concerned about the nation's racial and religious composition. Storer and his compatriots blamed declining family size among white native-born Protestants on married women's attempts to exercise control over pregnancy and childbearing through abortion. If married women could end pregnancies with impunity, immigrants' large families would overwhelm the native-born white Protestant population since abortions, Dr. Storer observed, were "infinitely more frequent among Protestant women than among Catholic." Storer, *supra*, at 64. Storer questioned whether "the great territories of the far West, just opening to civilization, and the fertile savannas of the South" would be filled by "our own children, or by those of aliens? This is a question that our own women must answer; upon their loins depends the future destiny of the nation." *Id.* at 85.

Michigan's anti-abortion doctors echoed these sentiments. Detroit physicians lamented in 1866 the future of "[a] country owing its numerical propensity to the importation of inhabitants, because . . . American born women are not willing to fulfill the ends of their being in giving the natural number of offspring life!" Editorial, *Why Not?*, Detroit Rev. Med. & Pharm 238, 238 (1866) (citing Storer). Dr. Mulheron warned in 1874 that because of abortion, "America is fast losing her national characteristics. The Puritanic blood of '76 will be but sparingly represented in

[29] *See also, e.g.,* Editorial, *Criminal Abortions*, *supra*, at 98 ("[N]or do [abortions] come . . . chiefly from those having the excuse of shame or poverty, but from those happily married, and comfortably if not more fortunately circumstanced.").

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the approaching centenary. It will have lost its identity in that of the immigrants flocking to these shores." Mulheron, *supra*, at 391.[30] Because the "increase of population" was now "almost entirely due to immigration and the numerous families of the natives of foreign countries," the "monstrous vice [of abortion] threatens to exterminate the race," Dr. Kellogg cautioned in 1882. Kellogg, *supra*, at 353.

Anti-abortion doctors in Michigan and elsewhere did not seek merely to educate their colleagues or the public; they also pushed for greater legal restrictions on abortion. *See* Mohr, *supra*, at 200–25. Against this backdrop, the Michigan legislature enacted more abortion-related laws in the 1860s and 1870s. An 1867 Act relieved the prosecution of proving that the abortion was not necessary to save the life of the woman. *See* 1867 Mich. Pub. Acts 61 (App. B at B-3). Two other laws passed during this period penalized the advertisement and sale of abortifacients (that is, substances used to terminate a pregnancy). An 1869 law made illegal "the publication or sale within this State of any circular, pamphlet, or book containing recipes or prescriptions in indecent or obscene language for the cure of chronic female complaints or private diseases, or recipes or prescriptions for drops, pills, tinctures, or other compounds designed to prevent conception, or tending to produce miscarriage or abortion." 1869 Mich. Pub. Acts 106 (App. B at B-4). In 1873, Michigan lawmakers enacted a law "to prevent advertisement and sale of drugs and medicines designed to produce illegal abortion" and making such transactions in abortifacients

[30] *See also, e.g.,* Cox, *supra*, at 382 (beseeching doctors to "do[] their part in rescuing the people occupying the land recently wrested from Indian paganism from a condition leading to a *half-civilized heathenism*") (emphasis in original).

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misdemeanors. 1873 Mich. Pub. Acts 138 (App. B at B-5).[31]

Michigan lawmakers considered other anti-abortion legislation in the coming years, some of it successful.[32] But unlike many other states, Michigan would not abolish the distinction between pre-and post-quickening abortions, nor penalize women who consented to or self-managed abortions, until 1931.[33]

C. In 1931 Michigan Lawmakers Enacted a Statute Criminalizing Abortion Regardless of Stage of Pregnancy as Part of an Omnibus Overhaul of the State's Criminal Code.

In 1931, Michigan legislators re-codified and strengthened the state's 1846 and 1867 statutes criminalizing abortion. The 1931 Act was proposed by a newly-created crime commission. The statute incorporated both the 1846 Act's criminalization provisions and the 1867

[31] By 1873, Dr. I.H. Bartholomew, a member of the state medical society, had won election to the Michigan House and served as chairman of its public health committee. *See* Mohr, *supra*, at 219–22 (describing physicians' advocacy in the Michigan legislature).

[32] *See* 1907 Mich. Pub. Acts 218 (declaring that The Board of Registration in Medicine will refuse to issue a certificate of registration to any physician who engages in "grossly unprofessional conduct" which includes "the procuring, aiding, or abetting in procuring a criminal abortion"); 1911 Mich. Pub. Acts 76 (prohibiting "criminal advertising" of "any means whatever whereby…miscarriage or abortion [may be] produced"); 1913 Mich. Pub. Acts 707 (affirming that The Board of Registration in Medicine may revoke a physician's registration if they commit "grossly unprofessional conduct," which includes "the procuring, aiding, or abetting in procuring a criminal abortion"); 1921 Mich. Pub. Acts 462 (requiring physicians with "first knowledge of the death of any person who shall have died…as a result of…an abortion, self-induced or other" to notify the coroner); 1927 Mich. Pub. Acts 315 (stating that "an indictment…for manslaughter may also contain a count for procuring or attempting to procure an abortion, and the jury may convict of either offense.").

[33] Some efforts to restrict abortion further were unsuccessful. In 1879, for example, Michigan legislators pursued a bill to hold women and girls over age fifteen accountable with fines and imprisonment if they consented to the procedure, but the bill ultimately failed to pass in the Michigan House. *See The Abortion Bill*, True Northerner, 28 March 1879: The State CAPITAL (Paw Paw, MI newspaper printing "the full text of Representative Kuhn's Abortion bill, which has been so hotly discussed in the House this week"); *Proceedings of the Seventy Sixth Day of the Session*, Detroit Free Press, 18 March 1879 (noting the bill's failure).

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Act's burden shifting provision, and also expanded criminal liability by elevating pre-quickening abortions, whether successful or not, to "felony." Mich. Comp. Laws § 750.14 (App A–15). Moreover, if the woman died because of an abortion or attempted abortion, the abortion provider "was guilty of manslaughter." *Id.* Only abortions "necessary to preserve the life" of a pregnant woman were permitted. *Id.* The statute made no exception for abortions performed in cases of rape, incest, or where there were significant health risks to the woman that were not considered life threatening.

This is the statute that the U.S. Supreme Court's opinion in *Dobbs* has resurrected. It, like its 1846 predecessor statute, was very much a product of its time. In the late 1920s and early 1930s, abortion did not spark a social movement similar to the physicians' crusade of the nineteenth century. A robust debate about the legality of birth control in Michigan and across the country prompted opposition from Catholic leaders, who expressed concern about fetal life and condemned what Pope Pius XI called "the taking of the life of the offspring hidden in the mother's womb." Pope Pius XI, encyclical letter on Christian marriage, *Casti Conubii*, given at St. Peter's in Rome, Dec. 31, 1930, https://www.vatican.va/content/pius-xi/en/encyclicals/documents/hf_p-xi_enc_19301231_casti-connubii.html.

To the extent that Michigan lawmakers who enacted the strict abortion law in 1931 were concerned about fetal life, however, they also harbored understandings of women's social and legal status that are barely recognizable today. Even at this relatively modern moment, Michigan law continued to assume that women were destined to serve as wives and mothers under the authority of their husbands, who were the legal and political heads of marital families. Although Michigan women's legal status had improved somewhat by 1931, state laws continued to enforce the notion that men were the dominant actors in public and commercial affairs, as well as private

life. For example, despite statutory reforms giving married women in Michigan the right to contract without their husbands' permission in certain situations, *see, e.g.*, Mich. Comp. Laws § 557.11 (1948); Mich. Comp. Laws § 557.51–557.55 (1948); 1929 Mich. Pub. Acts 746–47, traditional common law doctrines continued to restrict their ability to operate in the commercial world in various ways. *See, e.g.*, *Sierra v. Minnear*, 341 Mich. 182, 187–89 (1954) (describing limitations on statutory abrogation of coverture in Michigan).

The belief that women's proper place was in the home raising children also shaped laws governing parental rights and sexual relations. Laws regulating parental rights and responsibilities assumed that mothers were the caregivers of young children, while fathers were breadwinners with authority over their dependents. In the early twentieth century, Michigan legislators re-enacted an 1873 "tender years" statute that, in the case of divorce, awarded mothers custody of children under 12, unless they were found to be "unfit." This was because, as this Court explained in 1959, "welfare of children of this age requires a mother's care." *Lair v. Lair*, 355 Mich. 10, 13 (1959); *Lewis v. Lewis*, 338 Mich. 197, 200 (1953) ("The child is of tender years. It should be with the mother and there is not even the slightest intimation that she is not a proper person to have custody of the child."); Mich. Comp. Laws § 11484.1 (1915). Meanwhile, Michigan courts continued to enforce "common-law obligation of the father to support his child." *West v. West*, 241 Mich. 679, 684 (1928). And for children who lacked the "support of the natural breadwinner," Michigan granted mothers cash payments to support their children but gave no such support to fathers who had fallen on hard times. U.S. Dept. of Labor, Children's Bureau, *Minimum Standards for Child Welfare* 11–12 (1919) (citing Mich. Comp. Laws § 11484.1 (1915)).

The legislators who enacted the 1931 abortion statute also operated in a world in which the state offered inadequate protections to women's bodily integrity. Indeed, at that time it was widely

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presumed that the state could and should control women's sexual and reproductive lives. For example, early twentieth century Michigan rape statutes did little to protect women from sexual violence: under Michigan law a woman was required to do "everything she could . . . to prevent [the] defendant from accomplishing his purpose" and to "resist[] . . . from the inception to the close, because if she yielded at any time it would not be rape." *People v. Murphy*, 145 Mich. 524, 528 (1906). Convictions were few and far between, and the law routinely held women responsible for their own sexual assaults. U.S. Dept. of Justice, *Forcible Rape: An Analysis of Legal Issues* 2 (1978). Once married, moreover, women in Michigan still lacked legal protection from their husbands' sexual predations, as it still was legally impossible for a husband to rape his wife. *Pizzura*, 211 Mich. at 73; *People v. Kubasiak*, 98 Mich. App. 529, 533–35 (1980); Mich. Comp. Laws § 750.52*l* (1948).

The lawmakers who expanded Michigan's criminal abortion law in 1931 also oversaw a dramatic expansion of the state's program to compulsorily sterilize women. In 1923, Burke Shartel, a University of Michigan law professor, wrote a compulsory sterilization bill passed by the legislature that May. Michigan Supreme Court Historical Society, Haynes v. Lapeer Circuit Judge*: Eugenics in Michigan*, Michigan Bar Journal Supplement: The Verdict of History 1–6 (Jan. 2009). At first, because lawmakers worried about constitutional challenges to the law, Shartel chose to exempt the "insane," whom Shartel and other eugenicists argued might be curable, while targeting the "feebleminded," a group Shartel described as "too often endowed with normal sexual power and appetite but entirely devoid of shame." Burke Shartel, *Sterilization of Mental Defectives,* 24 Mich. L. Rev. 1, 3–4 (1925). In 1927, in *Buck v. Bell*, 274 U.S. 200 (1927), the U.S. Supreme Court rejected most of the leading constitutional arguments against sterilization and removed the perceived obstacles to expanding Michigan's sterilization law. The following year,

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Judge Clark Higbee, a leading supporter of eugenics in Michigan, spoke at the Third Annual Racial Betterment Conference in Battle Creek, suggesting that compulsory sterilization—especially of the promiscuous feebleminded woman—was "supported by intelligent people in every state." Race Betterment Foundation, *Proceedings of the Third Race Betterment Conference* 177–81 (1928).

In February 1929, Representative David R. Cuthbertson introduced a bill expanding the categories of people subject to compulsory sterilization; it was passed almost unanimously three months later. Rates of compulsory sterilization shot up, with women in the crosshairs: between 1923 and 1935, three quarters of those sterilized in Michigan were women, with the total number of sterilizations doubling between 1929 and 1930. Jeffrey Alan Hodges, *Euthenics, Eugenics and Compulsory Sterilization in Michigan, 1897–1960*, at 59 (1995) (Master's Thesis, Dept. of History, Michigan State University), Jeffrey Alan Hodges, *Dealing with Degeneracy: Michigan Eugenics in Context*, at 166 (2001) (Ph.D. Dissertation, Dept. of History, Michigan State University). The term "feebleminded" often applied to women who did not conform to contemporary sex stereotypes. As historian Wendy Kline has shown, the idea of feeblemindedness had, by the late 1920s and early 1930s, "become almost synonymous with the illicit sexual behavior of the woman adrift." Wendy Kline, *Building a Better Race: Gender, Sexuality, and Eugenics from the Turn of the Century to the Baby Boom* 29 (2001). In Michigan, roughly 20 percent of sterilization records called out promiscuity in addition to feeblemindedness—70 percent of those designated as promiscuous were women.[34] *See* Hodges, *Euthenics*, *supra*, at 68.

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[34] Michigan sterilization records on the race of victims are incomplete and at times difficult to parse: race is not mentioned on every record, and referrals to "mixed" victims may apply either to people of color, to white victims with more than one ethnic heritage, or both. Nevertheless, the records that are available suggest that Michigan's sterilization laws disproportionately harmed

As Michigan targeted a growing number of women for sterilization, lawmakers expressed concern about a perceived spike in the crime rate and chartered the crime commission that proposed the overhaul of Michigan's criminal code of which the 1931 Act was part. Key figures in the state's eugenics movement also were charter members of the crime commission. Burke Shartel, the professor who drafted the state's 1923 sterilization law, served on the commission, as did Judge Higbee, one of the state's most ardent champions of the sterilization of "feeble-minded" women. Claude Markle, *The Crime Commission Findings*, Marshall Evening Chronicle, Jan. 31, 1930, at 6. Dr. John Harvey Kellogg, an outspoken critic of legal abortion, *see supra* Part I.B., remained a key figure in Michigan's eugenics movement. In 1928, he hosted the American Eugenics Society and the Eugenic Research Association to consider obstacles to the progress of eugenics. *Eugenicists Hold Meet Here*, Battle Creek Enquirer, Dec. 27, 1928, at 16. The year that Michigan expanded its compulsory sterilization law, Kellogg joined other eugenicists in laying the foundation for a new eugenics college in Michigan, one he hoped would create "the foundation for a new human aristocracy—possibly, in some distant future, a superior race." *Lay Foundation for Eugenic College Here*, Battle Creek Enquirer, Oct. 14, 1929, at 1, 16.

Unsurprisingly, the commission's findings concerning the causes of increased criminality echoed the conclusions of contemporary eugenicists. Among the leading causes of crime listed by the commission were "the congenital criminal" and the "Foreign-born population." State Crime Commission of Michigan, *Report of the Crime Commission of Michigan 1930*, at 44 (1930). The hearings held by the commission reinforced these conclusions: Chairman Higbee stressed that "all criminals have faulty biology." *Id.* at 44–46. The commissioners drafted a version of the new

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citizens of color—who, in available records, were sterilized at a rate four times higher than would be expected given their share of the state's population at the time. Hodges, *Euthentics*, *supra*, at 58.

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criminal code in 1930. *See Draft of New Criminal Code About Finished*, St. Joseph Herald-Press, Sep. 13, 1930, at 1. One of the commissioners, Claude Stevens of Highland Park, was elected to the state senate in 1930 and proposed a new criminal code based on the commission's suggestions. *See Nearly Relax Ban on Gambling*, Lansing State J., May 12, 1931, at 1. Stevens took up the commission's recommendation to "revise, consolidate, codify, and add to the statutes enacted primarily to define and punish crimes." *Report of the Crime Commission of Michigan 1930*, *supra,* at 8. With few amendments, the legislature enacted Stevens' bill in September 1931. *See* Mich. Comp. Laws §§ 750.1–750.568 (codifying as amended 1931 Mich. Pub. Acts 328). Michigan's 1931 abortion law, which enhanced the criminality of *all* abortions performed in the state, was part of that omnibus crime bill. *See* Mich. Comp. Laws § 750.14 (App. B at B-13).

The 1931 abortion statute was a product of a pervasive world view in which women's status in law, and their bodily integrity, were consistently compromised. It also was passed against a backdrop of growing anxieties about maternal mortality. Indeed, as the Michigan Court of Appeals has since recognized, the 1846 law on which the 1931 statute was based was intended to address "the problem of the health and safety of the woman" during a time that "predated the advent of antiseptic surgery." *People v. Nixon*, 42 Mich. App. 332, 337 (1972). The 1931 statute preceded the availability of antibiotics to treat sepsis. Between 1929 and 1930, the Michigan Department of Public Health estimated that 256 deaths were due to maternal sepsis, including postpartum sepsis, but expressed special worry about abortion-related deaths, which were "more difficult to control since they frequently followed the illegal procedure." Michigan Dept. of Health, *Fifty-Eighth Report of the Commissioner of the Michigan Department of Health* 144 (1930). Although maternal sepsis for non-abortion related problems led to a vast majority of the maternal deaths, C.C. Slemons of the Michigan Department of Health estimated that abortion accounted for at least

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twenty-two percent of all maternal deaths, a number he called "appalling." C.C. Slemons, *Michigan's Department of Public Health*, XXIX J. of the Michigan State Med. Soc'y 739, 739 (1930). Another study found that in Michigan the percentage of sepsis deaths attributed to induced abortion was even higher, at thirty-one percent. *See* U.S. Dep't of Labor, Children's Bureau, *Maternal Mortality in Fifteen States*, Bureau Publication No. 223 (1934) 132 tbl.77. This concern for maternal health was reflected in the 1931 law.

II. MICHIGAN'S 1931 CRIMINAL ABORTION LAW IS BASED ON OUTDATED ASSUMPTIONS THAT ARE INCONSISTENT WITH MEDICAL ADVANCES AND MODERN RECOGNITION OF EQUALITY AND BODILY INTEGRITY

Historically, sex-stereotyped views of women, nativist sentiments, religious bigotry, eugenic aims, and fears about maternal mortality and morbidity from pregnancy terminations have animated Michigan's laws restricting abortion. None of these concerns resound today. Legal abortions are far safer now, and much less dangerous than carrying a fetus to term. Michigan constitutional and statutory laws recognize women as equal bearers of legal rights and responsibilities, honor individuals' bodily integrity, and decisively reject discrimination based on sex, race, religion, and national origin. The 1931 criminal abortion law reflects archaic and illegitimate ideas and practices that have no place in Michigan today.

Even before the Michigan legislature initiated major statutory and constitutional changes in recognition of women's equal status under law, Justices of this Court acknowledged that it was no longer legitimate to enforce statutes premised on antiquated ideas about women's role in society. *See Montgomery v. Stephan*, 359 Mich. 33, 49 (1960) ("The precedents . . . are violative of women's statutory rights and constitutional safeguards. They are out of harmony with the conditions of modern society. They do violence to our convictions and our principles."). For example, in 1960, this Court rejected the idea that women had any lesser claim than men for loss

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of consortium through tortious injury to a spouse, finding that even if under "ancient precedents" a wife "could not sue because she was a legal nonentity," that was no longer true, "either as a matter of fact or as a matter of law." *Id.* The wife was now the "equal partner" of her husband, this Court announced, and "the older cases are not valid precedents" because they are "out of harmony with the conditions of modern society." *Id.* Any "[d]ecision founded upon the assumption of a bygone inequality are unrelated to present-day realities, and ought not to be permitted to prescribe a rule of life." *Id.* at 41. The same can be said of the abortion statute challenged in this case, which dates back to the middle of the nineteenth century, and was shaped by understandings of women's legal status that have no place in a modern, egalitarian state such as Michigan.

A. Medical Abortion is Now Safer Than Childbirth.

Nearly 50 years ago, the Michigan Court of Appeals recognized that "modern medical science" has made it "safer for a woman to have a hospital therapeutic abortion during the first trimester than to bear a child." *Nixon*, 42 Mich. App. at 339. In light of the safety of modern medical abortion, Michigan's 1931 criminal abortion status had already "become unproductive of the end for which it was originally intended, i.e., the health and safety of the woman." *Id.* at 340. That conclusion is no less true today.

Today, the risk of death arising from a legal, medical abortion is significantly lower than the risk of choosing to carry a child to term. For example, results from a 2012 comparative medical study found that "[t]he risk of death associated with childbirth is approximately 14 times higher than that with abortion." Elizabeth A. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstet. Gynecol. 215, 219 (2012). Research by the U.S. Centers for Disease Control and Prevention ("CDC") echoes this finding,

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reporting that "the national case-fatality rate for legal induced abortion for 2013–2018 was 0.41 deaths per 100,000 abortions."[35]

In contrast, mortality and morbidity from pregnancy and childbirth is egregiously high in the United States. According to the CDC's National Center for Health Statistics, the maternal mortality rate from childbirth was 17.4 per 100,000 live births in 2018,[36] rendering abortion *bans* dangerous to women and other pregnant persons. Risk of maternal mortality is especially high among Black Americans. Pregnant Black Michiganders are almost three times more likely to die than their white counterparts; the disparity is even larger in cities such as Detroit. Severe morbidity from pregnancy occurs 100 times as often as mortality, and Black women are twice as likely to suffer these harms. *See* Brief for Northland Family Planning et al. as Amici Curiae in Support of Governor's Executive Brief, *In re Executive Message of the Governor Requesting the Authorization of a Certified Question*, Case No. 22-193498-CZ (2022), 9–11 (citing sources). Thus to the extent Michigan's law was designed to protect women from abortion-related mortality, it no longer serves—and indeed detracts from—that end.[37]

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[35] Katherine Kortsmit et al., CDC Morbidity and Mortality Weekly Report, *Abortion Surveillance— United States, 2019*, (Nov. 26, 2021) at 8, https://www.cdc.gov/mmwr/volumes/70/ss/pdfs/ss7009a1-H.pdf.

[36] *See* Donna Hoyert, National Center for Health Statistics, Division of Vital Statistics, *Maternal Mortality Rates in the United States, 2020*, (Feb. 2022) at 3, https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf.

[37] Some contemporary opponents of abortion rights have sought to connect abortion with eugenic aims. They point to the support for eugenics expressed by Planned Parenthood founder Margaret Sanger; to the ties between eugenicists and family planners in the early twentieth century; and to the connections between eugenicists and the population control movement that thrived after World War II. *See*, *e.g.*, Brief of Conservative Legal Defense and Education Fund in Support of Petitioners, 18–20, *Dobbs v. v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (No. 19-1392); Michael Stokes Paulsen, *Abortion as an Instrument of Eugenics*, 134 Harv. L. Rev. 415 (2021). Justice Thomas has expressed similar concerns. *See Box v. Planned Parenthood of Ind. and Ky.*, 139 S. Ct. 1780, 1784 (2019). Support for eugenics in the early twentieth century was widespread, and prominent family planners, including Sanger, did voice support for eugenic aims.

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B. Michigan Law Today Reflects Transformed Understandings of Women's Legal Status and of Equality and Bodily Integrity.

The ideas that underpin the 1931 criminalization of nearly all abortions in Michigan—that women occupy an inferior position in Michigan society, and that the state is authorized to control their sexual and reproductive lives—are no longer acceptable bases for legislation in Michigan. Over the past 60 years, Michigan often has led the way in safeguarding equality and bodily integrity. For example, Michigan was the first in the nation to establish a constitutional civil rights commission and a state commission on the status of women.[38] In 1963, Michigan approved a new state constitution that includes expansive guarantees of civil and political rights for all, and a capacious right to bodily integrity.[39] Mich. Const. art. 1, § 2. Michigan's state antidiscrimination

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See Ian Robert Dowbiggin, *The Sterilization Movement and Global Fertility in the Twentieth Century* 64–71 (2008). The post-war population control movement also enjoyed bipartisan support and served as a refuge for some who had endorsed compulsory sterilization programs. *See* Mary Ziegler, *After Roe: The Lost History of the Abortion Debate* 168–89 (2015).

But equating the profoundly personal reproductive decisions of individual women who are deciding whether to carry a pregnancy to term with state-mandated eugenics ignores a much more complicated history. Sterilization, and sometimes birth control—but not abortion—were the tools of choice for early twentieth-century eugenicists. The population control movement of the 1960s and 1970s attracted many who had no interest in eugenics, from those working for women's equality to those interested in conserving scarce environmental resources. *See* Mary Ziegler, *Abortion and the Law: A Legal History: Roe v. Wade to the Present* 35–39 (2020). Moreover, many of those who fought to make abortion legal had no ties to the population control movement, and many leading population controllers rejected legal abortion in favor of more coercive solutions. *See* Ziegler, *After Roe*, *supra*, at 168–75. Further, this argument falsely equates state-sponsored eugenic measures designed to control the nation's demographic character with individuals' right to make the most intimate and personal decisions about their health and lives. *See, e.g.*, Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 Harv. L. Rev. 2025, 2090 (2021).

[38] *See* Fino, *supra*, at 26–35; National Association of Commissions for Women, *History*, https://www.nacw.org/history.html#:~:text=The%20Commission%20movement%20began%20in,Department%20of%20Labor%2C%20Women's%20Bureau. (last visited August 23, 2022) ("Michigan had set up the first commission [for women] in 1962.").

[39] *Cf. Mays v. Governor of Michigan*, 506 Mich. 157 (2020) (holding that Flint residents who suffered injuries from ingestion of and exposure to a toxic water supply stated a claim for violation of bodily integrity under the state constitution's Due Process Clause).

statute, too, provides broad protections that reach beyond federal law: for example, Michigan's Elliot-Larsen Civil Rights Act prohibits sex discrimination[40] in public accommodations as well as in housing, real estate, employment, education, and the provision of public services, *see* Mich. Comp. Laws §§ 37.220(c), 37.2302(a), 37.2402(a), 37.502; applies its ban on pregnancy discrimination to all employers regardless of size, *id.* § 37.2202(d); and prohibits discrimination based on marital status, family status, height, and weight, *id.* § 37.2202(a), 37.2202(b)—all categories that often overlap with sex-based discrimination.

This shift toward greater recognition of women's equality occurred across a wide range of Michigan laws. Today, Michigan law firmly rejects the sex-based stereotype that women's primary role is as wives and mothers. Parental rights and responsibilities have become more egalitarian, recognizing that both fathers and mothers are proper caretakers of the "hearth and home." For example, in 1970, the Michigan legislature repealed the "tender years" statute that had been enacted in 1873, replacing it with a child custody statute acknowledging that both mothers and fathers were proper caregivers for children. Mich. Comp. Laws §§ 722.21–31 (codifying the Child Custody Act of 1970). The laws severely restricting married women's ability to manage their own financial affairs also fell in the late twentieth century. The 1963 Michigan Constitution abolished "the disabilities of coverture as to Property." Mich. Const. art. 10, § 1. Eighteen years later, in 1981, the Michigan legislature finally eliminated the last vestiges of

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[40] This Court recently interpreted the Elliott-Larsen Civil Rights Act's sex discrimination prohibition to include discrimination based on sexual orientation and gender identity. *Rouch World LLC v. Dep't of Civil Rts.*, No. 162482, 2022 WL 3007805 (Mich. July 28, 2022); *see also* Aaron K. Bowran, *The Elliott-Larsen Civil Rights Act: Celebrating the Progress of Michigan's Civil Rights Laws*, Mich. Bar J., Aug. 2012, at 20–21 (describing Michigan's pioneering role in equality law).

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coverture, repealing the Married Women's Property Acts of the nineteenth century and decisively "abrogat[ing] the common law disabilities of married women." Mich. Comp. Laws, ch. 557.[41]

Thanks to the efforts of champions of women's rights in Michigan, women in this state now enjoy protections of their bodily integrity and autonomy that would have been incomprehensible to legislators in the 1840s and the 1930s. In 1974, Michigan revised its rape laws, modernizing the definition of the crime and humanizing the approach to rape victims by offering them more protection. *See* 1974 Mich. Pub. Acts 266. Michigan's 1974 rape law provided a model for other states. *See* Wallace D. Loh, Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labelling, 37 J. Soc. Issues 28, 28–29 (1981) ("Since the enactment in 1974 by Michigan of the first comprehensive reform rape legislation in the nation, some forty states have modified existing or passed new statutes on rape." (citations omitted)). Fourteen years later, the Michigan legislature took another important step to protect women's bodily integrity: It repealed the marital rape exception. Mich. Comp. Laws § 750.520*l* (codifying 1988 Mich. Pub. Acts 138). Both legislative reforms signified legislators' recognition of the central importance of Michigan women's bodily integrity, and women's self-possession more generally. The same can be said of Michigan's repeal of its involuntary sterilization laws in 1974, the same year that the state reformed its rape laws. Mich. Comp. Law §§ 720.301–720.310 (repealed by 1974 Mich. Pub. Acts 258). Michigan has not only eliminated its laws on compulsory sterilization: the Michigan

[41] As in most states, in Michigan coverture ended in stages. For cases discussing the demise of laws that limited women's legal rights and agency within marriage, *see Sierra*, 341 Mich. at 186–87; *Ridky v. Ridky*, 226 Mich. 459 (1924); *Tong v. Marvin*, 15 Mich. 60 (1866); *Citizens Commercial & Sav. Bank v. Raleigh*, 159 Mich. App. 110 (1987).

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Department of Community Health issued a formal apology to victims and survivors.[42] In addition, the State of Michigan now recognizes family planning as a public health issue.[43]

In sum, the 90-year-old Michigan statute resurrected by *Dobbs* is the product of a bygone era. To the extent that the abortion bans enacted between 1846 and 1931 rested on concerns about maternal mortality and morbidity, medical advances have rendered them obsolete and dangerous, as abortion bans now pose a grave risk to women and pregnant people. Michigan has jettisoned the archaic ideas about sexuality, gender, race, and religion that animated these laws, and embraced a legal and constitutional regime that values the equality and bodily integrity of all Michiganders. The 1931 law is "out of harmony with the conditions of modern society" and "founded upon the assumption" of "bygone inequalit[ies]." *Montgomery*, 359 Mich. at 41, 49. Moreover, Michigan's outdated and unjust abortion ban is inconsistent with this state's constitutional commitment to equality.

CONCLUSION

For these reasons, this Court should authorize the circuit court to certify questions of public law concerning the right to abortion under the Michigan Constitution and the enforceability of the state's abortion law to this Court, and this Court should declare the law unconstitutional.

[42] *See, e.g.*, Lindsay Knake, *Dark Past: Michigan Sterilized More than 3000 People from the 1900s to the 1970s*, Michigan Live, June 23, 2011, https://www.mlive.com/news/2011/06/dark_past_michigan_sterilized.html.

[43] *See* Michigan.gov, Health and Human Services, *Family Planning*, https://www.michigan.gov/mdhhs/adult-child-serv/childrenfamilies/familyhealth/familyplanning (last visited August 23, 2022).

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit set forth in Michigan Court Rule ("MCR") 7.212(B)(1) because it contains 10,388 words, inclusive of all portions of the brief required to be counted pursuant to MCR 7.212(B)(2). This brief also complies with the typeface and type-style requirements of MCR 7.212(B)(5) because it was prepared using Microsoft Word 2016 in 12-point font, double-spaced, and with 1-inch margins.

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Appendix A: Biographies of *Amici Curiae*

Patricia Cline Cohen is a professor emerita at the University of California, Santa Barbara. Her research centers on American history from 1750 to 1870, with emphasis on women, gender, sexuality, journalism, historical demography, and medicine. Her current project studies abortion, fertility decline, and medical jurisprudence, with preliminary results in "Married Women and Induced Abortion, 1820–1860," *available at* http://ssrn.com/abstract=4197554. Professor Cohen has authored three books and numerous articles published in *The Journal of the Early Republic*, *The Journal of Women's History*, and *The Oxford Handbook of American Women's and Gender History*. In addition to a Guggenheim Fellowship, she has had year-long residential fellowships at the National Humanities Center and the American Antiquarian Society, where she was the Distinguished Mellon Fellow. She served as the President of the Society for Historians of the Early American Republic from 2012–2013.

Kristin Collins is Professor of Law and the Honorable Frank R. Kenison Scholar at Boston University School of Law. In 2023, Professor Collins will join the faculty of the University of Michigan Law School. Professor Collins teaches courses on federal courts, civil procedure, citizenship law, family law, and legal history. She has written extensively on the history of women's status in American law. Her articles have appeared in the *Yale Law Journal*, *Harvard Law Review*, *Duke Law Journal*, the *Vanderbilt Law Review*, and the *Law and History Review*. Professor Collins was the senior visiting fellow at Oxford University's Rothermere American Institute for 2017–2018. In 2018 she was a visiting professor at the University of Chicago Law School, and in 2013–2014 she was the Sidley Austin–Robert D. McLean Visiting Professor of Law at Yale Law School.

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Serena Mayeri is Professor of Law and History at the University of Pennsylvania Carey Law School, where she teaches and writes about legal and constitutional equality, family law, employment discrimination, gender, and reproduction. Her book, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution*, received the Littleton-Griswold Prize from the American Historical Association and the Darlene Clark Hine Award from the Organization of American Historians. Her work has also appeared in the *Yale Law Journal*, the *California Law Review*, *Constitutional Commentary*, and in several edited volumes. Mayeri holds a secondary appointment in Penn's Department of History, and serves on the executive committees of the Andrea Mitchell Center for the Study of Democracy and the Program on Gender, Sexuality, and Women's Studies. Mayeri was named a Distinguished Lecturer by the Organization of American Historians in 2016.

Mary Ziegler is the Martin Luther King Jr. Professor of Law at UC Davis Law School and one of the world's leading historians of the U.S. abortion debate. She is the author of five books on social movement struggles around reproduction, autonomy, and the law, including *Abortion and the Law in America: A Legal History,* Roe v. Wade *to the Present* (Cambridge University Press, 2020), *Beyond Abortion:* Roe v. Wade *and the Fight for Privacy* (Harvard University Press, 2018), the award-winning *After* Roe*: The Lost History of the Abortion Debate* (Harvard University Press, 2015), which won the Harvard University Press Thomas J. Wilson Prize for best first manuscript in any discipline, and *Reproduction and the Constitution* (Routledge, 2022). She serves on the board of directors for the American Society for Legal History.

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Appendix B: Compendium of Statutes

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REVISED STATUTES OF MICHIGAN
PASSED AND APPROVED 1846

CHAPTER 153 (EXCERPTED)

OFFENSES AGAINST THE LIVES AND PERSONS OF INDIVIDUALS

SEC. 32. The wilful killing of an unborn quick child by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter.

SEC. 33. Every person who shall administer to any woman pregnant with a quick child, any medicine, drug or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter.

SEC. 34. Every person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose, shall, upon conviction, be punished by imprisonment in a county jail not more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

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Public Act No. 61 of 1867

AN ACT to add a new section to chapter one hundred and eighty, of the compiled laws, in regard to evidence in certain criminal cases.

SECTION 1. *The People of the State of Michigan enact*, That a new section be added to chapter one hundred and eighty, of the compiled laws, to stand as section thirty-five, as follows:

SEC. 35. In case of prosecution under sections thirty-three and thirty-four of this chapter, it shall not be necessary for the prosecution to prove that no such necessity existed, or that the advice of two physicians was not given.

Approved March 15, 1867.

*   *   *

Public Act No. 106 of 1869

AN ACT to prohibit the publication of the virtues of patent, and other simple and compound medicines in the State of Michigan, in language of immoral tendency, or of ambiguous character.

SECTION 1. *The People of the State of Michigan enact*, That no person or persons, their agents or clerks, shall print, stamp, or engrave on any cards, bills, or posters for public display or advertisement, or publish in any newspaper in the State of Michigan, the virtues or applications and its or their effects of any such patent and other simple or compound medicine, in language of immoral tendency or of ambiguous character. Any person or persons, their agents or clerks, who shall fail to comply with the requirements herein expressed, shall be deemed guilty of a misdemeanor, and shall be liable to a fine not less than fifty, nor more than one hundred dollars, or to imprisonment in the county jail not exceeding three months, or both, for each and every offense. Any proprietor or proprietress of any newspaper published in the State of Michigan, who shall permit any such publications to appear in consecutive issues, each and every day shall be deemed a new and separate offense, and shall be liable to a penalty as herein expressed.

SEC. 2. The publication or sale within this State of any circular, pamphlet, or book containing recipes or prescriptions in indecent or obscene language for the cure of chronic female complaints or private diseases, or recipes or prescriptions for drops, pills, tinctures, or other compounds designed to prevent conception, or tending to produce miscarriage or abortion is hereby prohibited; and for each copy thereof, so published and sold, containing such prohibited recipes or prescriptions, the publisher and seller shall each be deemed guilty of a misdemeanor, and shall be liable to the same penalties provided for a violation of the preceding section.

Approved April 3, 1869.

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Public Act No. 138 of 1873

AN ACT to prevent the advertisement and sale of drugs or medicines designed to produce criminal abortion.

SECTION 1. *The People of the State of Michigan enact*, That no person shall in any manner, except as hereinafter provided, advertise, publish, sell, or publically expose for sale any pills, powers, drugs, or combination of drugs, designed expressly for the use of females for the purpose of procuring an abortion.

SEC. 2. Any drug or medicine known to be designed and expressly prepared for producing an abortion, shall only be sold upon the written prescription of an established practicing physician of the city, village, or township in which the sale is made; and the druggist or dealer selling the same shall, in a book provided for that purpose, register the name of the purchaser, the date of the sale, the kind and quantity of the medicine sold, and the name and residence of the physician prescribing the same.

SEC. 3. Any person violating any of the provisions of this act, shall upon conviction thereof, be punished by a fine of not less than twenty-five nor more than one hundred dollars, in discretion of the court.

Approved April 22, 1873.

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Public Act No. 285 of 1923

AN ACT to authorize the sterilization of mentally defective persons.

The People of the State of Michigan enact:

SECTION 1. The words “mentally defective person” or “defective” in this act shall be deemed to include idiots, imbeciles and the feebleminded, but not insane persons. Throughout this act the words “adjudged defective” shall mean any mentally defective person who has been found and adjudged to be defective by a court of competent jurisdiction according to the laws and the statutes of this state. Throughout this act where words or pronouns of masculine gender are used, said words shall be deemed to include female persons as well as male persons.

SEC. 2. Whenever adjudged a person is adjudged defective by a court of competent jurisdiction, said court may, after hearing as herein provided, order such treatment by X-rays or the operation of vasectomy or salpingectomy or other treatment as may be least dangerous to life to render said defective incapable of procreation.

SEC. 3. The court may make an order as aforesaid on the application of:

1. The father, the mother, husband, wife, brother, sister, child or next of kin of the adjudged defective;

2. Any of the following persons resident in the county in which the adjudication was made:

(a) The prosecuting attorney, sheriff or any peace officer;

(b) Any director, superintendent or supervisor of the poor;

(c) The board of control, board of guardians or trustees or other governing board of any state penal, corrective or charitable institution, if such institution be wholly under control of the state;

(d) Any other person whom the judge of probate upon examination into the facts and circumstances of any particular case, shall determine to be a proper person to make such application.

Said order may be made at the time when the person is adjudged defective or at any later time.

SEC. 4. When an application is made as aforesaid, the court shall fix a day for the hearing thereof, and notice of the time and place of said hearing shall be served personally at least ten days before said hearing:

1. Upon the person adjudged to be defective if above the age of ten years;

2. Upon the prosecuting attorney of the county in which the hearing is to held; and

3. Upon the husband or wife, father or mother, or child of full age of said defective, or the person with whom said defective resides, or in whose house he may be, and if none of the relatives named in this subdivision can be found; also

4. Upon his guardian ad litem who shall be appointed by the court to receive said notice and represent said defective at the hearing. In its discretion the court may cause notice to be served in any part of the state upon any relative of the defective or upon any interested person.

SEC. 5. The court shall cause the defective to be examined by three reputable physicians in the manner now provided by law for the examination into the mental condition of persons alleged to be defective (feebleminded) with a view to obtaining the 'opinion of said physicians on the question whether the adjudged defective should be dealt with under the terms of this act.

SEC. 6. The court shall take full evidence in writing at the hearing as to the mental and physical condition of the adjudged defective and the history of his case and shall, if no jury is required, determine whether he is a person subject to be dealt with under this act for his own welfare or the welfare of the community.

If the court shall deem it necessary, or if such defective, or any relative or the guardian ad litem shall so demand, a jury of six freeholders having the qualifications of jurors in courts of record shall be summoned to determine the question of whether such person is subject to be dealt with under this act; such jury to be selected in the same manner as is provided for the selection of a jury for the condemnation of land for railroad purposes.

The jurors shall receive the same fees for attendance and mileage as are allowed by law to jurors in the circuit court. The alleged defective shall have the right to be present at such hearing, unless it shall be made to appear to the court by certificate of two reputable physicians that his condition is such as to render his removal for that purpose or his appearing at such hearing improper and unsafe.

SEC. 7. The court may order treatment or operation to render an adjudged defective incapable of procreation whenever at the hearing aforesaid it shall be found:

1. (a) That the said defective manifests sexual inclinations which make it probable that he will procreate children unless he be closely confined, or be rendered incapable of procreation;

(b) That children procreated by said adjudged defective will have an inherited tendency to mental defectiveness; and

(c) That there is no probability, that the condition of said person will improve so that his or her children will not have the inherited tendency aforesaid; or

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2. (a) That said defective manifests sexual inclinations which make it probable that lie will procreate children unless he be closely confined, or be rendered incapable of procreation; and

(b) That he would not be able to support and care for his children if any, and such children would probably become public charges by reason of his own mental defectiveness.

SEC. 8. The court may with the consent of the parents or guardian of an adjudged defective order treatment or operation to render such defective incapable of procreation whenever at such hearing it shall be found that the mental or physical condition of said defective would be substantially improved by such operation or treatment, or that such operation or treatment is otherwise for the welfare of such defective.

SEC. 9. Any defective shall have the right to appeal from an order directing treatment or operation to render him incapable of procreation, in the same manner and upon the same terms, and persons found and adjudged defective (feebleminded) may appeal, and while said appeal is pending and undetermined the execution of the order shall be suspended, and the court may make any necessary or proper order for the care and custody of the defective pending the final determination of said appeal.

SEC. 10. Whenever the court shall order treatment or operation as provided in this act, it shall direct a competent physician or surgeon with proper assistance to perform said operation or give said treatment. The said physician or surgeon shall receive the sum of twenty-five dollars for every such operation or treatment.

SEC. 11. The invalidity of any part, section or provision of this act shall not be construed to affect the validity of any other part capable of having practical operation and effect without the invalid part, section or provision.

Approved May 25, 1923.

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Public Act No. 281 of 1929

AN ACT to prevent the procreation of feebleminded, insane and epileptic persons, moral degenerates, and sexual perverts; to authorize and provide for the sterilization of such persons and payment of the expenses thereof; and to repeal act number two hundred eighty-five, public acts of nineteen hundred twenty-three, and amendments thereto.

The People of the State of Michigan enact:

SECTION. 1. It is hereby declared to be the policy of the state to prevent the procreation and increase in number of feebleminded, insane and epileptic persons, idiots, imbeciles, moral degenerates, and sexual perverts, likely to become a menace to society or wards of the state. The provisions of this act are to be liberally construed to accomplish this purpose.

SEC. 2. The words "mentally defective person" or "defective person" in this act shall include all feebleminded, insane and epileptic persons, idiots, imbeciles, moral degenerates and sexual perverts. Where such persons are referred to in this act as of the masculine gender, the same shall be deemed to include persons of the feminine gender as well.

SEC. 3. The several probate courts within the state of Michigan shall have power to receive petitions, hold hearings and make orders for the purpose of carrying out the provisions of this act and perform all necessary acts in connection therewith. For that purpose the general provisions of law applicable to the jurisdiction of probate courts and particularly the laws and procedure governing the holding of hearings and making orders of admission of mentally diseased persons to the several hospitals of the state, shall be construed as a part of this act insofar as the same are not inconsistent herewith.

SEC. 4. Whenever the medical superintendent, warden, or principal officer of the Kalamazoo state hospital for the insane, the Pontiac state hospital for the insane, the Traverse City hospital for the insane, the Newberry state hospital for the insane, the Ionia state hospital for the criminal insane, the Michigan home and training school for feebleminded at Lapeer, the farm colony for epileptics at Wahjamega, the state psychopathic hospital at Ann Arbor, the Michigan state prison at Jackson, the branch of the, state prison at Marquette, the Michigan reformatory at Ionia, or any other hospital, training school, farm colony, prison or public institution maintained and supported in whole or in part by the state of Michigan, shall be of the opinion that any inmate or person under the custodial care of such institution is a mentally defective person who would be likely to procreate children unless closely confined or rendered incapable of procreation; that such children would have a tendency to mental defectiveness and that there is no probability that the condition of said defective person will improve and that it is for the best interest of such person and of society that such mentally defective person should be sexually sterilized, it shall be the duty of such medical superintendent, warden, or principal officer to bring to the attention of the governing board or body of such institution and to the state welfare commission, the facts, records, family history, traits, and mental and physical condition of such person so far as the same can be ascertained. It shall be the duty of the governing board or body of such institution and the state welfare commission to cause an investigation, and examination to be made to determine whether such mentally defective person would be likely, if allowed to mingle in society, to

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procreate children having an inherited tendency to feeblemindedness, insanity, idiocy, imbecility, epilepsy, or sexual degeneracy, and who would be likely to become a social menace or a ward of the state, and whether there is no probability that the condition of such person would improve to such an extent as to avoid such consequences. It shall be the duty of such governing board or body and the state welfare commission to keep a record with reference to each such person embodying its findings and conclusions in said respects, and either to obtain the consent hereinafter referred to or to file or cause to be filed a petition in the probate court of the county in which such mentally defective person was a resident at the time of commitment or admission, or in the probate court of the county in which such institution may be situated, for the purpose of carrying out the provisions of this act, and to procure an order directing the sterilization of such defective person. Nothing in this act contained shall be considered to require a court order when consent is given as hereinafter referred to. Whenever the defective person is of the age of sixteen years or more and not otherwise incapable of giving consent, such operation or treatment may be performed upon obtaining a consent thereto in writing, signed by such defective person, together with a similar consent in writing signed by his or her legal guardian, if any, and also by one or more of the following persons, in the order named; husband, wife, father, mother, brother, sister, child or next of kin. If such defective person is in the custodial care of a state institution said written consent shall be filed and kept as a part of the records of such institution; otherwise, the same shall be obtained and kept by the surgeon performing such operation. Upon complying with the foregoing provisions, it shall thereupon be lawful to perform such operation.

SEC. 5. The father, mother, husband, wife, brother, sister, child, or guardian of a mentally defective person, the medical superintendent, director or principal officer of any state institution, the state welfare commission, any sheriff or superintendent of the poor, or supervisor of any township, may petition the probate court of any county in which a mentally defective person resides or in which may be located any state institution having the custodial care of a mentally defective person, for an order directing such treatment or operation of vasectomy, salpingectomy, or other operation or treatment as may be least dangerous to life, to effectively render said defective person incapable of procreation. Upon receiving such petition the court shall fix a day for hearing thereof, which shall be not less than fourteen days after the date of filing such petition. Notice of such hearing shall be personally served at least ten days before the date thereof as follows: (1) Upon such defective person, if above the age of ten years; (2) Upon the father, mother, husband, wife, brother, sister, child or next of kin who may be of full age, of such defective person, other than the petitioner, if there be any such known to be residing within the county; (3) If such defective person has no father, mother, husband, wife, brother, sister, child or other next of kin who may be of full age, known to be residing within the county, such service shall be made either personally or by registered mail on one or more of said relatives who may be residing outside of the county, and within this state, if there be any such known to the petitioner or to said court; (4) Upon the legal guardian of such defective person if a legal guardian has been appointed; if not, the court shall at the time of receiving such petition appoint a guardian ad litem upon whom such notice shall be served and who shall represent said defective person at the hearing; (5) If such defective person shall be residing with or in the custodial care of some person or institution other than the petitioner, such notice shall also be personally served upon the person, or principal officer of the institution, having the custodial care of such defective person, if within

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the county of jurisdiction; if without said county, said service shall be made either personally or by registered mail; (6) Upon the prosecuting attorney of the county in which such hearing is to be held; (7) Upon such other persons, if any, as the court may, in its discretion, determine to be proper persons who should have notice of such hearing. Due proof of such service shall be filed with the court at or before such hearing.

SEC. 6. The court shall appoint two reputable physicians who shall make an investigation and examination of the mental and physical condition, and personal and family history of such defective and report the same to the court with the opinion of said physicians as to whether said person is a defective person within the meaning and intent of this act who should be rendered incapable of procreation. The certificates of said physicians shall be filed with said court before an order shall be made for such operation or treatment. The court shall at such hearing take testimony in writing as to the mental and physical condition of such defective person and the history of his case and shall, if no jury is required, determine whether lie is a mentally defective person subject to be rendered incapable of procreation in order to prevent the production of children who may be mentally defective or a menace to society or become wards of the state.

SEC. 7. If the court shall deem it necessary or if such defective person or any relative or the legal guardian or guardian ad litem of such person shall so demand, a jury shall be summoned in accordance with the rules and practice of summoning juries in probate court to determine the questions of fact as to whether such person is a mentally defective person and should he rendered incapable of procreation under the provisions of this act. Such defective person shall have the right to be represented by counsel at such hearing and to be present in person unless it shall be made to appear to the court by certificate of two reputable physicians that his condition is such as to render his removal for that purpose or his appearing at such hearing improper and unsafe.

SEC. 8. Whenever at such hearing it shall be found by the court or by a jury that such person is a mentally defective person and the court shall find that said defective person would be likely to procreate children unless he be closely confined or rendered incapable of procreation, that such children would have a tendency to mental defectiveness and that there is no probability that the condition of said defective person would improve, and the court shall find that such children might be a menace to society or might become wards of the state, the court shall make an order requiring and specifying that such defective person shall be treated or operated upon by X-rays or by the operation of vasectomy or salpingectomy or other treatment or operation best suited to the condition of such person, and most likely to produce the beneficial results intended by this act and which will effectively render such defective person incapable of. procreation. The court may in said order direct that such defective person be admitted at the university hospital at Ann Arbor for such operation or treatment whenever the mental and physical condition of such person is such that lie may be admitted and cared for in said hospital; or may direct that such operation or treatment be performed by a reputable surgeon whose duty it shall be to perform such operation or treatment.in accordance with said order. The expense of such operation or treatment together with physician's fees and all other expenses incurred in connection with such proceeding shall be a proper charge against the state of Michigan: *Provided,* That such operations or treatment shall be performed or provided by the regular surgeon of the state institution whenever possible, without fees therefor, and

when not so performed, the liability of the state for surgeon's fees and other expenses, including care, etc., shall in no one case exceed the sum of fifty dollars; that when such person be admitted to tile university hospital at Ann Arbor the provisions of act number two hundred seventy-four, public acts of nineteen hundred thirteen, shall be considered to apply to such case insofar as the same are not contrary to the provisions of this act. The auditor general of the state of Michigan is hereby required to reimburse the county or other claimant for all said expenses upon receipt of a certified copy of such order and a proper certificate of the court that such expenses are reasonable and proper, accompanied by an itemized statement thereof from the treasurer of said county, or other claimant. If on investigation it shall appear that such defective person has means or property sufficient for the payment of such expense or if those persons legally liable for the care and support of such defective person as an indigent person under the laws of this state have sufficient means for that purpose, the court shall require that payment or reimbursement for such expense shall be made by him or them. The provisions of law regarding the care and maintenance of insane persons, as well as indigent persons, are hereby expressly made applicable to the provisions of this section so far as the same are not inconsistent with this act.

SEC. 9. Said mentally defective person or any one in his behalf shall have the same right of appeal from such order as is provided by statute for appeals from orders of probate court; and any such appeal may be taken in accordance with such statutes and the rules and practice of said court. It shall be unlawful to perform any such treatment or operation during the period of five days next following the (late of such order unless the court in said order shall find that such operation or treatment is immediately necessary and imperative in order to protect the physical health and well-being of such defective person; nor shall any action be taken to carry out such order during the pendency of an appeal therefrom or until such appeal, if any, shall be determined or dismissed.

SEC. 10. No surgeon performing an operation or providing treatment under the provisions of this act shall be held liable either criminally or civilly on account thereof, except only in case of negligence in the performance of such operation.

SEC. 11. This act is hereby declared severable in its provisions and the invalidity of any part, section or provision of the same shall not be construed to affect the validity of any other part which may be given practical operation and effect without the invalid part, section or provisions.

SEC. 12. Act number two hundred eighty-five, public acts of nineteen hundred twenty-three, entitled "An act to authorize the sterilization of mentally defective persons", and amendments thereto, are hereby repealed.

Approved May 22, 1929.

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Public Act No. 328 of 1931

CHAPTER III

ABORTION

750.14 Miscarriage; administering with intent to procure; felony, penalty.

SEC. 14. Administering drugs, etc., with intent to procure miscarriage—Any person who shall willfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.

In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

750.15 Abortion, drugs or medicine; advertising or sale to procure; misdemeanor.

SEC. 15. Selling drugs, etc., to produce abortion—Any person who shall in any manner, except as hereinafter provided, advertise, publish, sell or publicly expose for sale any pills, powder, drugs or combination of drugs, designed expressly for the use of females for the purpose of procuring an abortion, shall be guilty of a misdemeanor.

Any drug or medicine known to be designed and expressly prepared for producing an abortion, shall only be sold upon the written prescription of an established practicing physician of the city, village, or township in which the sale is made; and the druggist or dealer selling the same shall, in a book provided for that purpose, register the name of the purchaser, the date of the sale, the kind and quantity of the medicine sold, and the name and residence of the physician prescribing the same.

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