

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

ACCESS INDEPENDENT HEALTH)
SERVICES, INC., d/b/a RED RIVER)
WOMEN’S CLINIC, on behalf of itself and)
its patients; KATHRYN L. EGGLESTON,)
M.D., on behalf of herself and her patients,)
ANA TOBIASZ, M.D., on behalf of herself)
and her patients; ERICA HOFLAND, M.D.,)
on behalf of herself and her patients; and)
COLLETTE LESSARD, M.D., on behalf of)
herself and her patients,)

Case No. 08-2022-CV-01608

Plaintiffs,)

vs.)

DREW H. WRIGLEY, in his official)
capacity as Attorney General for the State of)
North Dakota, KIMBERLEE JO HEGVIK,)
in her official capacity as the State’s)
Attorney for Cass County, JULIE)
LAWYER, in her official capacity as the)
State’s Attorney for Burleigh County,)
AMANDA ENGELSTAD, in her official)
capacity as the State’s Attorney for Stark)
County, and HALEY WAMSTAD, in her)
official capacity as the State’s Attorney for)
Grand Forks County,)

Defendants.)

EXPERT REPORT OF KARISSA HAUGEBERG, PH.D.

KARISSA HAUGEBERG, PH.D., declares and states as follows:

1. I am a historian who specializes in the history of gender, medicine, and politics in the United States. I have been retained by Plaintiffs’ counsel to render expert opinions on the history of abortion in North Dakota at and around the time of statehood in connection with the above-captioned litigation.

2. This report is based on my personal specialized knowledge and informed by my education and experience as an historian, my familiarity with relevant scholarly work, my eighteen years of experience researching the history of U.S. abortion politics, my study of archival records pertaining to abortion history, and primary source research on North Dakota history.

3. I examined North Dakota newspapers using databases available through the North Dakota State Historical Society, historic newspaper collections available through Tulane University's library, and newspaper archives available through newspapers.com. I conducted legal research using Westlaw. I reviewed *The Journal-Lancet*, the medical journal of record for Minnesota, North Dakota, and South Dakota until 1968. I also examined peer-reviewed book monographs and scholarly articles about the history of North Dakota, maternal mortality in the United States, and the histories of birth control and abortion in the United States.

4. In 1996, I received a high school diploma from the Minot Public School System. In 2000, I received a B.A. degree from the University of North Dakota. In 2011, I received a Ph.D. degree in History from the University of Iowa. Since that time, I have taught undergraduate and graduate courses on U.S. women and gender; the history of medicine; American social history; the history of gender-based violence in the U.S.; and the history of reproductive health at Tulane University in New Orleans, Louisiana.

5. I am presently the Eva-Lou Joffrion Edwards Newcomb Professor of History at Tulane University, where I also serve as an adjunct instructor in the School of Medicine. I serve as a Newcomb Fellow at the Newcomb College Institute at Tulane University, and I was named a Young Mellon Fellow by the School of Liberal Arts.

6. I am the author of *Women against Abortion: Inside the Largest Moral Reform Movement of the Twentieth Century* (2017). I also wrote the article, "How Come There's Only

Men Up There? Catholic Women’s Grassroots Anti-Abortion Activism,” which was published in the *Journal of Women’s History* (2015) and was the co-recipient of the Judith Lee Ridge Prize for best article from the Western Association of Women Historians. Further, another article that I wrote, “Nursing and Hospital Abortions in the United States,” was published in the November 2018 issue of the *Journal of the History of Medicine and Allied Sciences* and received the journal’s best article prize for 2018. I also co-edit a popular history textbook, *Women’s America: Refocusing the Past*, which is published by Oxford University Press. My research has been supported by the Andrew Mellon Foundation, an Awards to Louisiana Artists and Scholars (ATLAS) fellowship, the Gerald Ford Presidential Library, and the Sallie Bingham Research Fellowship at Duke University.

7. My background, experience, and a list of publications are summarized on my CV, attached to this declaration as Exhibit A.

STATEMENT OF OPINIONS AND GROUNDS AND BASIS FOR THEM

8. At and around the time of North Dakota’s statehood, it was widely acknowledged—both by the medical community and by American society more broadly—that pregnancy poses unique health risks and dangers. Even as physicians in the mid-nineteenth century sought to make abortion illegal, they advocated for exceptions that would grant them broad discretion to provide abortions for individual life or health reasons.

9. The medical understanding of what constituted health-preserving abortion care around the time of statehood was not limited to situations where the pregnant person’s life was imminently in danger. The medical consensus was that therapeutic abortion was an appropriate treatment for an array of conditions that affected a pregnant person’s physical or mental health. Medical journals demonstrate that physicians understood that abortions could be provided to

patients who had underlying conditions that made pregnancy more dangerous, who were experiencing severe symptoms associated with the pregnancy which affected their daily lives, or who had other, unrelated conditions, the treatment of which was complicated by pregnancy.

10. In the early years after statehood, North Dakotans were highly deferential to physicians' judgment about when abortions were medically indicated. Physicians were generally only prosecuted for providing abortions if the patient died; even then, North Dakota juries were reluctant to convict.

11. Limiting physicians' discretion to provide life- and health-preserving abortion care is inconsistent with the history and tradition of this state. North Dakota law has long recognized the necessity of this care and allowed pregnant North Dakotans to obtain abortions for health reasons.

I. The Ability to Obtain an Abortion to Preserve One's Life or Health Has Been Part of Legal Tradition.

12. As explained further below, the first abortion restrictions in the United States were not motivated by moral concerns about the status of the fetus. Rather, these regulations sought to prevent the sale of unsafe abortifacients (substances that induce abortions). Later laws were motivated by elite physicians' efforts to consolidate authority within the medical establishment and enforce social norms about gender and race.

13. North Dakota law followed this pattern. Although the Dakota Territory criminalized abortion, both territorial law and the law after statehood included exceptions to permit abortions to preserve the life of the pregnant person. Medical journals and records of prosecutions show that this exception was interpreted broadly and afforded physicians extensive latitude to offer therapeutic abortions to pregnant patients.

A. The First Wave of Abortion Regulations in the United States Were Generally Poison Control Measures Aimed at Commercial Entrepreneurs Who Sold Unsafe Abortifacients: 1821-1841; These Laws Preceded the Incorporation of North Dakota into the Union.

14. Abortion legislation in early America followed English Common Law, which did not legally recognize the fetus until quickening (fetal movement occurring in approximately the fourth or fifth month of most pregnancies). Abortions performed before quickening were not punished under the Common Law. Even after quickening, the provision of abortion was a misdemeanor rather than a felony, so long as the woman who had obtained the abortion did not die as a result of the abortion.¹

15. During this period, women commonly sought counsel from midwives or herbal healers to induce abortions. These practitioners—often called “irregulars”²—performed abortion procedures or sold substances that promised to induce abortions. A select few women obtained counsel from a small pool of formally trained physicians or “regulars,” who had received at least some formal training at an American or British medical school and had apprenticed with a regular physician.³ By the end of the nineteenth century, university-trained physicians supplanted midwives in the provision of reproductive health services, including abortions.⁴

16. Between 1821 and 1841, ten states and one federal territory enacted laws prohibiting the sale of abortifacients. Historians commonly regard this first wave of abortion legislation as a poison control effort that targeted entrepreneurs, apothecaries, and others who sold

¹ James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900*, at 3-6 (1978); Carol Sanger, *About Abortion: Terminating Pregnancy in Twenty-First Century America* 8-10 (2017); Janet Farrell Brodie, *Contraception and Abortion in Nineteenth-Century America* 254 (1994).

² On the difference between “irregulars,” a category of lay practitioners that included homeopaths, herbalists, midwives, and druggists, and “regulars,” who were university-trained physicians, see Drew Halfmann, *Recognizing Medicalization and Demedicalization: Discourses, Practices, and Identities*, 16 *Health* 186, 192-96 (2012).

³ Mohr, *supra* note 1, at 11-14. Medical textbooks and course lecture transcripts from this era reveal that students were taught how to perform surgical abortions during all stages of pregnancy.

⁴ See generally Nancy Schrom Dye, *History of Childbirth in America*, 6 *Signs* 97 (1980).

unsafe products.⁵ Historians attribute these laws to concerns about women falling seriously ill or dying after ingesting poisonous drugs sold by entrepreneurs. Most states preserved at least some form of the distinction between pre- and post-quickening pregnancies and did not prohibit women from producing their own abortifacients.⁶ These laws, like Common Law, targeted people who provided potentially unsafe treatments but did not penalize women who sought such treatments.

17. In the era before reliable pregnancy tests, women enjoyed a degree of autonomy because they alone could identify when they first noticed fetal movement. Women in early America gained knowledge about abortion through female healers and midwives. Books about popular herbal treatments also contained information about how to induce a miscarriage. By the early nineteenth century, books, newspapers, advertisements, and public lecturers disseminated abortion knowledge. Abortion also became commercial, with a wide variety of abortion-inducing drugs and instruments available for purchase through mail-order.⁷ By studying the sheer number of methods that women consulted to obtain abortions during this time, historian James Mohr concluded, “Substantial evidence suggests that many American women sought abortions, tried the standard techniques of the day, and no doubt succeeded some proportion of the time in terminating unwanted pregnancies.”⁸

⁵ Leslie J. Reagan, *When Abortion Was a Crime: Women, Medicine, and Law in the United States, 1867-1973*, at 10 (1997); see also Brodie, *supra* note 1, at 224-55 (describing the commercial sale of abortifacients in the 1800s and the resulting state poison control statutes to target abortions); Mohr, *supra* note 1, at 20-21, 26-27.

⁶ Mohr, *supra* note 1, at 22-25, 40-43. Of the ten states that passed abortion laws, five retained the quickening standard. *Id.* But in the five states that expanded the scope of criminalization to include pre-quickening abortions, enforcement authorities largely ignored the new, more capacious understanding of criminal abortion. *Id.* Each of the new laws punished the person who performed the abortion and not the woman who sought it. *Id.*

⁷ Mohr, *supra* note 1, at 4-7, 12-16; Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, Wm. & Mary Q. 19, 24-25 (1991).

⁸ Mohr, *supra* note 1, at 16.

B. Fears about Women’s Changing Roles in Society, New Immigration Patterns, and the Professionalization of American Medicine Influenced the Criminalization of Abortion Nationwide: 1830s-1870s; This is The Period When the Dakota Territory Criminalized Abortion.

18. While the first wave of criminalization had been motivated by a desire to protect women from harmful poisons, the much larger second regulatory wave was guided by the impulse to shore up physicians’ control over obstetrics and gynecology and to enforce existing norms around gender, race, and class. In the mid-nineteenth century, the American Medical Association (AMA), organized in 1847, inaugurated a nationwide campaign to criminalize abortion at every stage of pregnancy.⁹

19. Spearheaded by the Boston gynecologist Horatio R. Storer, the anti-abortion campaign grew in part out of “regular” physicians’ desire to wrest power from a range of “irregulars,” to control medical practice, and to restrict their competitors, particularly homeopaths and midwives. Physicians who advocated for the criminalization of abortion argued that the state should entrust them to determine when an abortion was medically indicated.¹⁰ Determinations as to when an abortion was medically necessary were made on a case-by-case basis by the treating physician: “[T]he very success of the medical profession in claiming exclusive responsibility for abortion meant that if a reasonably plausible medical indication for abortion could be presented to a sympathetic physician, neither the medical society nor any other authority was likely to intervene.”¹¹ Even Dr. Storer, who strongly opposed abortion, believed that such exceptions were

⁹ Reagan, *supra* note 5, at 10, 55-60; Mohr, *supra* note 1, at 86-90.

¹⁰ Mohr, *supra* note 1, at 34-38. Regular physicians distinguished themselves from irregulars by adhering to the Hippocratic Oath, which condemned abortion. *Id.* at 35. Hippocrates was unusual for his opposition to abortion; both Plato and Aristotle condoned abortion, for example. *Id.*

¹¹ Kristin Luker, *Abortion & the Politics of Motherhood* 36 (1985).

necessary to permit physicians to perform abortions when patients had cancer, epilepsy, mental health issues, and in “cases of general ill health.”¹²

20. Although professional issues underlay the medical profession’s campaign against abortion, others, too, supported the criminalization of abortion as a means of enforcing existing norms regarding gender, race, and class. Scholars have characterized nineteenth century anti-abortion physicians as paternalistic: they convinced state legislators to criminalize abortion on the grounds that women were morally and intellectually unfit to weigh the consequences of their decisions.¹³ The legacy of coverture (a common law doctrine in which a married woman had no separate legal existence from her husband) influenced efforts to criminalize abortion in the mid-nineteenth century, when sex had become part of the public discourse and opportunities for women were changing. Falling birthrates, combined with women’s growing engagement in reform activities and their education outside the home seemed to be leading to a shift in gender roles. Physicians, clergy, and politicians condemned women as selfish for seeking to avoid the self-sacrifice expected of mothers. In their speeches before legislatures and the public, anti-abortion physicians and legislators negatively emphasized the new “types” of women who increasingly sought abortions. As such, Dr. Hugh Lenox Hodge, a prominent proponent of criminalization, excoriated married women for seeking to control their fertility: “Married women [shirking from] . . . the expense, or the trouble of children, or some other motive equally trifling and degrading, have solicited that the embryo should be destroyed by their medical attendant.”¹⁴ In

¹² Horatio R. Storer, *Why Not?: A Book for Every Woman* 24-25 (Boston, Lee & Shepard 1868).

¹³ Mohr, *supra* note 1, at 86-108; Samuel W. Buell, Note, *Criminal Abortion Revisited*, 66 N.Y.U. L. Rev. 1774, 1786 (1991).

¹⁴ Hugh Lenox Hodge, *Fœticide, Or Criminal Abortion: A Lecture Introductory to the Course on Obstetrics and Diseases of Women and Children, University of Pennsylvania, Session 1839-40*, at 32 (Phila., Lindsay & Blakiston 1869).

addition, in 1902, President Theodore Roosevelt warned that women who avoided having children deserved “contemptuous abhorrence.”¹⁵

C. After Achieving Statehood in 1889, North Dakota’s First Criminal Abortion Law Made It More Difficult to Convict Women Who Sought, and People Who Performed, Abortions.

21. Between the 1830s and the 1860s, every state in the United States criminalized abortion. Even then, most states and territories included exceptions to save a pregnant woman’s life. Indeed, Dakota Territory’s abortion ban, passed in 1877, permitted abortion in cases where a woman’s life was threatened by a pregnancy.¹⁶

22. North Dakota was among forty-two states that permitted abortions when they were necessary to save a pregnant woman’s life.¹⁷ Physicians interpreted the meaning of exceptions like North Dakota’s, which permitted abortions to “preserve [a patient’s] life,” broadly. In practice, exceptions to protect a patient’s “life” in this era were deliberately vague, such that “[t]he word *life* may mean physical life in the narrow sense of the word (life or death), or it may mean the social, emotional, and intellectual life of a woman in the broad style (style of life).”¹⁸ In 1936, gynecologist and professor of obstetrics Dr. Frederick J. Taussig observed that “[i]t is fortunate . . . that the law in most civilized countries permits therapeutic abortion on the basis not alone of immediate threat to the life, but also of serious danger to the health of the mother.”¹⁹ At a minimum, exceptions for “preserving the life” of a pregnant person did not require that a patient be at risk of imminent death but could also allow for treatment intended to “protect[] the process

¹⁵ Letter from President Theodore Roosevelt to Bessie Van Vorst 2 (Dec. 18, 1902), <https://www.theodorerooseveltcenter.org/Research/Digital-Library/Record.aspx?libID=o183324>.

¹⁶ Dakota Territory Rev. Code, Penal Code §§ 337, 338 (1877); Compiled Laws of the Territory of Dakota, Penal Code § 6538 (E.W. Caldwell & Charles H. Price 1887).

¹⁷ Loren G. Stern, *Abortion: Reform and the Law*, 59 J. Crim. L., Criminology, & Police Sci. 84, 86 & n.25 (1968).

¹⁸ Luker, *supra* note 11, at 34.

¹⁹ Frederick J. Taussig, *Abortion, Spontaneous and Induced: Medical and Social Aspects* 279 (1936).

and quality of [the patient's] daily life.”²⁰ In other words, physicians took into account a woman's physical, social, emotional, and intellectual life “in the broad sense” when they determined whether an abortion was necessary.²¹

23. North Dakota's history and traditions have supported the right to abortion to preserve a woman's life or health, broadly defined. Indeed, in some respects, North Dakota's abortion restrictions were more permissive than those in other states and territories. For example, North Dakota was among the states that permitted anyone to perform the operation, not just physicians or surgeons.²² Likewise, with the changes made in the 1895 Code, North Dakota reduced the offense of causing the death of the mother during the attempted provision of an abortion from murder to first degree manslaughter.²³ The 1895 Revised Codes also made it *more* difficult to convict people who sought or performed abortions by requiring more evidence than the testimony of the “injured person.”²⁴ These laws remained unchanged in the 1899, 1905, and 1913 code revisions.²⁵ North Dakota would not criminalize abortions necessary to save the life of the mother until 2007 when the Legislative Assembly passed the Trigger Ban, N.D.C.C. 12.1-31-12; this law was not eligible for enforcement until 2022.²⁶

²⁰ Luker, *supra* note 11, 34.

²¹ *Id.* at 33-34.

²² See, e.g., N.D. Rev. Code § 12-2501 (1943) (containing no limits on who may perform the abortion); B. James George, Jr., *Current Abortion Laws: Proposals and Movements for Reform Symposium: Abortion and the Law*, 17 W. Rsrv. L. Re. 371, 376-77 (1965).

²³ Dakota Penal Code § 252; N.D. Rev. Code §§ 7085-86, 7177-78, 8197 (1895).

²⁴ N.D. Rev. Code §§ 7085-86, 7177-78, 8197 (1895)

²⁵ N.D. Rev. Code § 7177 (1899); N.D. Rev. Code § 8912 (1905); Compiled Laws of the State of N.D. 1913 § 9604 (1914).

²⁶ See N.D.C.C. § 12.1-31-12; see also Nicholas Bauroth, *The Rise of the Anti-Abortion Movement in North Dakota and the Defeat of the 1972 Initiative to Liberalize State Abortion Laws*, J. Pol'y Hist. 256, 261 (2021).

II. Providing Abortions to Preserve Life or Health is Deeply Rooted in the History and Tradition of Medical Practice.

24. Abortion was commonly practiced even when it was criminalized. During the more than one hundred years of abortion's illegality in the United States, in most circumstances, physicians had the practical ability to perform abortions that they deemed medically necessary, or "therapeutic," even in states like North Dakota that did not have an explicit health exemption.²⁷ States entrusted physicians to use their professional expertise to determine what constituted a "therapeutic" abortion, which was never clearly defined by medicine or the law. Because physicians often worked in isolation in private practice rather than in clinics or hospitals until the mid-twentieth century, their judgments were rarely questioned. Physicians commonly performed therapeutic abortions in cases when they believed the procedure served a woman's health interests, broadly defined. For example, physicians, including those in North Dakota, performed therapeutic abortions for women who experienced severe vomiting during pregnancy, even after 1925, when other treatments became available to treat pregnancy-related nausea.²⁸ Physicians commonly performed medical abortions on women suffering from tuberculosis until the 1940s, even though the procedure was not necessary to save a woman's life but rather would avoid exacerbating the burdens imposed by the illness. Similarly, between 1890 and 1950, physicians "frequently assumed that abortions to preserve the health of the woman (including her mental health) were acceptable, as were abortions in cases of rape or incest or when there was a likelihood of what

²⁷ Kristen Luker has described physicians' efforts to criminalize abortion as an "ideological sleight of hand" because they enabled physicians to both "create and control a moral problem." Luker, *supra* note 11, at 32, 39.

²⁸ John H. Moore, *The Treatment of Nausea and Vomiting of Pregnancy*, 52 J.-Lancet 634, 634 (1952); R.T. La Vake & J.H. Simons, *Monthly Clinical Conference at the Minneapolis General Hospital*, 50 J.-Lancet 10, 11 (1930).

would later be called ‘fetal deformity.’”²⁹

25. Between the 1860s and 1930s, American women generally obtained abortion care in their homes or in the offices of physicians or midwives. For most of this period, women whose doctors determined the therapeutic necessity of an abortion, even in states that did not have a medical exception, received the procedure with little fanfare.³⁰ Nevertheless, physicians performed abortions under the specter of prosecution.

26. Physicians in North Dakota, like their colleagues across the nation, spoke openly among themselves about abortion and about reasons that abortions were appropriate to protect a woman’s mental or physical health. *The Journal-Lancet*, the medical journal of record for Minnesota, North Dakota, and South Dakota, illustrated that abortion was commonplace. The *Journal-Lancet* explained that “[t]here are not infrequently cases in which an abortion is imperative,” including in cases when women were “mentally unfit,” women were at risk of needing Cesarean sections or bleeding excessively, or women had preexisting medical conditions.³¹ In another article in the same edition of the journal, a physician described providing care to a patient suffering from “acute septic abortion,”³² noting that “[t]he uterus were emptied, and after a rather continued run of temperature the patient made a symptomatic recovery.”³³

27. Physicians in the upper-Midwest prioritized women’s health over any concerns about the fetus when they treated patients suffering from pregnancy complications. In 1916, a

²⁹ Luker, *supra* note 11, at 46.

³⁰ Christopher Z. Mooney & Mei-Hsien Lee, *Legislative Morality in the American States: The Case of Pre-Roe Abortion Regulation Reform*, 39 Am. J. Pol. Sci. 599, 602 (1995); *see also* Reagan, *supra* note 5, at 63-64.

³¹ *Criminal Abortions*, 34 J.-Lancet 82, 82 (1914).

³² A septic abortion is “any abortion, spontaneous or induced, that is complicated by severe uterine infection.” Sarah Prager et al., *Septic Abortion: Clinical Presentation and Management*, UpToDate (July 18, 2023), <https://www.uptodate.com/contents/septic-abortion-clinical-presentation-and-management>.

³³ A.C. Stokes, M.D., *Diseases of the Urinary Tract Produced by Diseases of the Genital Tract in the Female*, 34 J.-Lancet 593, 593-94 (1914).

physician described performing an abortion on a woman suffering from puerperal eclampsia. Her good health returned by the next day, prompting the physician to write, “This case illustrates how good the Lord is to some of our patients.”³⁴ In 1928, another physician wrote an article about treating pregnant women suffering from pernicious vomiting. He advised that when doctors are divided about whether an abortion is appropriate, “we should give the mother the benefit of the doubt and choose intervention.”³⁵ He then described how to perform an abortion.

28. Moreover, when treating patients with pregnancy complications, physicians emphasized the importance of acting swiftly. In 1917, *The Journal-Lancet* offered physicians instructions about how to perform an abortion, explaining that it could be completed in less than fifteen minutes. The physician advised his colleagues to avoid “delaying too long” the performance of an abortion in cases when women were seriously ill.³⁶ In 1918, an obstetrician from Devils Lake explained that “no hard and fast rule can be laid down” to treat women suffering from the premature separation of the placenta during pregnancy (placental abruption), an event that led to a fifty-percent mortality rate in women and nearly always resulted in miscarriage. He advised “we must empty the uterus and control hemorrhage” to relieve anemia and explained that physicians must “direct our efforts to saving the mother.”³⁷ Another physician reported that he acted quickly to perform an abortion on a woman whom he suspected was suffering from an ectopic pregnancy rupture, a condition that continues to be the leading cause of maternal mortality during the first trimester. His judgement proved sound: the surgery revealed that one of the patient’s fallopian tubes had ruptured. The patient subsequently made a “prompt” recovery and was discharged from

³⁴ O.R. Wright, *Puerperal Eclampsia*, 36 *J.-Lancet* 507, 569 (1916).

³⁵ R.T. LaVake, *Toxemia of Pregnancy Signalized by Nausea and Vomiting*, 44 *J.-Lancet* 40, 43 (1924).

³⁶ W.J. Cochrane, *Report of a Case of Pernicious Vomiting in Pregnancy*, 37 *J.-Lancet* 273, 273-74 (1917).

³⁷ G.J. McIntosh, *Premature Separation of the Placenta with Concealed Hemorrhage*, 38 *J.-Lancet* 14, 15 (1918).

the hospital.³⁸ In 1919, another physician writing in *The Journal-Lancet* affirmed that it was imperative for doctors to initiate abortions quickly if they suspected that a pregnant person was suffering from an ectopic pregnancy. He lamented the death of a patient whom he believed would have lived if her physician had performed an abortion.³⁹ In 1928, Dr. Fred Adair described his experiences treating women who suffered from severe nausea during pregnancy in *The Journal-Lancet*. He explained that there was not a bright line that indicated when an abortion was necessary. Instead, physicians had to assess a host of symptoms, including whether a pregnant person suffering from extreme nausea had a weak pulse or suffered from weight loss, dehydration, and exhaustion.⁴⁰

29. Physicians specifically recognized the importance of providing timely care to patients suffering from diseases characterized by high blood pressure, such as toxemia (now called preeclampsia) and eclampsia.⁴¹ For example, Dr. Adair encouraged his colleagues to perform abortions on women suffering from eclampsia “as easily and quickly as possible” to spare women prolonged suffering.⁴² In cases when pregnant people suffered from toxemia (preeclampsia), he also urged his colleagues to perform abortions when the symptoms first appeared, warning, “If we wait until the condition becomes so aggravated that we are forced to use haste the results are bound to be bad.”⁴³ In 1930, Dr. LaVake similarly advised his colleagues to act swiftly in cases when they believed that a pregnant person was suffering from toxemia.⁴⁴ Two years later, Dr. LaVake

³⁸ *Reports of Societies*, 38 J.-Lancet 267, 267-68 (1918); Kellie Mullany et al., *Overview of Ectopic Pregnancy Diagnosis, Management, and Innovation*, 19 Women’s Health 1, 1 (2023).

³⁹ M.J. Jensen, *Placenta Prevaria and Abruptio Placentae*, 39 J.-Lancet 197, 198-99 (1919).

⁴⁰ Fred L. Adair, *Toxemias of Pregnancy*, 48 J.-Lancet 537-38 (1928).

⁴¹ *What Causes Preeclampsia and Eclampsia?*, Eunice Kennedy Shriver Nat’l Inst. of Child Health & Hum. Dev. (Jan. 31, 2017), <https://www.nichd.nih.gov/health/topics/preeclampsia/conditioninfo/causes>.

⁴² Adair, *supra* note 40, at 542.

⁴³ *Id.*

⁴⁴ R.T. LaVake, *Cardinal Points of Importance in Everyday Obstetrics*, 50 J.-Lancet 145, 146 (1930).

was even more pointed, warning that “malingering is impossible,” and that physicians must not procrastinate in “emptying the uterus” when they encountered a pregnant person with toxemia.⁴⁵

30. Physicians in the upper-Midwest took seriously their obligation to protect women’s health; they understood that abortion was part of this obligation. In 1923, a physician wrote about his experiences treating pregnant women suffering from eclampsia in *The Journal-Lancet*. He was blunt, writing, “The advice to empty the uterus is easy to follow where dilation is advanced,” and continued, “Save the mother—disregard the child.”⁴⁶ In 1931, another physician explained that when a pregnant person suffered from serious anemia, physicians should “remove the cause” by “empty[ing] the uterus.”⁴⁷ In 1932, a Minot physician emphasized his commitment to women’s health and safety. He advised physicians who determined that abortions were necessary to protect women’s health to use methods that were unlikely to injure pregnant people and would “result in the least shock to the patient.”⁴⁸

31. Upper-Midwestern physicians’ frank discussions about the ubiquity of abortion as part of their ordinary practices was consistent with the larger national trend of physicians openly discussing therapeutic abortion amongst themselves between the 1890s and the 1940s. For example, an article from 1880 discusses a case where an abortion was provided to a patient with severe, pregnancy-related side effects and other health conditions, including uncontrollable nausea and vomiting.⁴⁹ The treating physician noted that “[i]n all cases where nature fails to bring about

⁴⁵ R.T. LaVake, *Cause and Treatment of the Toxemias of Pregnancy*, 52 J.-Lancet 636, 639 (1932).

⁴⁶ M.A. Stern, *Personal Experiences in the Operative Treatment of Eclampsia*, 43 J.-Lancet 238, 242 (1923).

⁴⁷ James B. Carey, *The Classification and Management of Anemia*, 51 J.-Lancet 467, 469 (1931).

⁴⁸ E.M. Ransom, *Eclampsia: The Responsibility of the General Practitioner in Its Prevention*, 52 J.-Lancet 701, 703-04 (1932).

⁴⁹ M.H. Jordan, M.D., *A Case of Artificial Abortion for Relief of Uncontrollable Nausea and Vomiting, with Remarks*, 10 S. Med. Rec. 275, 276 (1880).

abortion, and the patient’s life is in jeopardy, if the obstetrician does not [provide an abortion], he has not given his patient the benefit of all the resources of his vast art.”⁵⁰

32. Even physicians who staunchly opposed abortion believed that abortions were appropriate to preserve a pregnant person’s health. In 1894, Dr. T. Gaillard Thomas—who elsewhere registered his opposition to abortion—wrote that it was appropriate for physicians to perform abortions in cases when a pregnancy would “destroy the life or intellect, or permanently ruin the health of the mother.”⁵¹ At the annual meeting of the Minnesota Academy of Medicine in 1930, the state’s physicians exchanged information about the safest, most effective ways to perform abortion.⁵² In 1946, Dr. Walter Dannreuther wrote that the majority of therapeutic abortions performed in his hospital in New York City “were done to preserve the mother’s health, to prolong her life, and to prevent serious and permanent injury,” but that “the life of the mother was not always threatened imminently.”⁵³

III. North Dakotans Were Reluctant to Enforce the State’s Abortion Laws Against Physicians: Authorities Generally Permitted Licensed Physicians to Exercise Their Professional Judgement, Even When They Violated Abortion Laws.

33. Throughout North Dakota’s history, physicians were generally entrusted to decide when abortions were necessary without state oversight or second-guessing. In 1914, *The Journal-Lancet* reported that it was exceptionally rare for physicians in Minnesota, North Dakota, and South Dakota to face criminal prosecution for performing abortions. According to the *Journal*, juries were “naturally sympathetic” to physicians in the rare instances when they were charged

⁵⁰ *Id.* at 278.

⁵¹ Luker, *supra* note 11, at 34.

⁵² *Proceedings of the Minnesota Academy of Medicine: Meeting of February 19, 1930*, 1 J.-Lancet 156, 157-60 (1930).

⁵³ Walter T. Dannreuther, *Therapeutic Abortion in a General Hospital*, 52 Am. J. Obstetrics & Gynecology, 55 (1946).

and brought to trial. One physician in the upper Midwest boasted that he did not fear prosecution because he “had performed the service for the judge, the county attorney, the sheriff, and many of the jurors!”⁵⁴

34. Authorities and ordinary North Dakota citizens typically deferred to physicians’ judgement about whether to perform abortions. In North Dakota, as in other states, physicians were generally prosecuted only in cases that resulted in death of a pregnant person.⁵⁵ Even when physicians were prosecuted for providing abortions, North Dakota juries sometimes found them not guilty of violating the State’s criminal abortion laws.⁵⁶ In other cases, judges dismissed charges against physicians before cases were brought to trial.⁵⁷ In 1910, the Supreme Court of North Dakota reversed a trial court’s decision and ordered a new trial for Dr. Thor Moeller, who had been convicted of murder for unintentionally causing the death of a patient while attempting to perform a medically unnecessary abortion. Dr. Moeller maintained that the abortion was necessary to save the pregnant woman’s life because she had developed septicemia, likely from an earlier abortion attempt. The Supreme Court of North Dakota found that the physicians who testified on behalf of the State had not examined the patient thoroughly enough to evaluate Dr. Moeller’s conclusion that the abortion was medically necessary.⁵⁸

⁵⁴ *Criminal Abortions*, *supra* note 31, at 82.

⁵⁵ For example, in 1926, the Supreme Court of North Dakota upheld the conviction of Dr. W.R. Shortridge, who performed an abortion on Freda Nadler. *See generally State v. Shortridge*, 211 N.W. 336 (N.D. 1926). In that case, however, Nadler died from blood loss shortly after the procedure, and an autopsy revealed that an instrument had punctured her uterus. *Id.* at 337.

⁵⁶ *Mayville Physician Acquitted at Hillsboro*, Fargo Forum, July 14, 1917, at 10.

⁵⁷ *Case Against Hyndman Dismissed at Minot*, Fargo Forum & Daily Republican, Feb. 1, 1905, at 6; *Fawcett Case Was Dismissed*, Fargo Forum & Daily Republican, Mar. 16, 1909, at 8.

⁵⁸ *See generally State v. Moeller*, 126 N.W. 568 (1910).

35. The lack of legal scrutiny afforded to North Dakota physicians who performed abortion was consistent with the national trend from nineteenth century, lasting until the 1940s.⁵⁹ Physicians were trusted to exercise their judgement to determine when abortions were appropriate to protect the health of pregnant people, even when they were not at risk of imminent death. The broad “life” exceptions written into the state’s abortion bans, in combination with the public’s unwillingness to second-guess physicians, allowed North Dakota physicians to provide life- and health-preserving care throughout this time period based on their medical judgment as to when such abortions were necessary.

IV. The Re-Criminalization of Abortions to Preserve Patients’ Life and Health Contradicts North Dakota’s Commitment to Life, Safety, Happiness, and Equality at Its Founding.

36. I have reviewed the Amended Complaint filed in the above-captioned case. To the extent that current state law limits pregnant North Dakotans’ ability to obtain abortions for life and health reasons, including for mental health reasons, it is at odds with the long-time practice in this state of allowing broad exceptions for therapeutic abortions.

37. Adopted in 1889, North Dakota’s Constitution offers broad protections for individual rights. The first article ensures that citizens have inalienable rights, including life and liberty, and the right to pursue and obtain safety and happiness.⁶⁰ Professor Thomas M. Cooley, who addressed the Constitutional Convention on July 17, 1889, had previously described such rights as “fundamental,” noting that it “is the peculiar province” of the courts “to adjudicate upon,

⁵⁹ *E.g.*, Alicia Gutierrez-Romine, *Abortion and Intimate Borderlands*, in *Beyond the Borders of the Law* 103 (Katrina Jagodinsky & Pablo Mitchell eds., 2018).

⁶⁰ N.D. Const. art. I, §1.

and protect, the rights and interests of individual citizens, and to that end to construe and apply the laws.”⁶¹

38. North Dakota courts subsequently affirmed the State’s duty to protect citizens’ inalienable rights. In 1894, the North Dakota Supreme Court invalidated an eminent domain statute, describing its commitment to the State’s constitution’s protections for these fundamental rights. The majority wrote, “[T]he constitution is the shield which the state, in its sovereign capacity, has provided for the protection of private rights. This protection is necessary. Every period in civilized history, however remote or however recent, emphasizes the fact that unrestrained legislation is inimical to individual rights. Having provided the shield, the state has created its courts, and charged them with the special duty of seeing that every legislative blow improperly aimed at the life, liberty, happiness, or property of the individual falls harmlessly upon that shield.”⁶²

39. In 1984, the first article of the Constitution was amended by initiated measure to change the word “men” to “individuals.” With this change, “[t]he people clarified in writing what the drafters omitted—that women are born with the same natural and inalienable rights as men.”⁶³

40. In 2023, the North Dakota Supreme Court affirmed that the Constitution’s promise to citizens that they “have a right to enjoy and defend life and a right to pursue and obtain safety” applied to the abortion right. According to the Court, the North Dakota Constitution protects “a fundamental right to obtain an abortion to preserve [a patient’s] life or her health.”⁶⁴

⁶¹ *Wrigley v. Romanick*, 2023 ND 50, ¶¶ 51-52, 988 N.W.2d 231, 248 (McEvers, J., concurring) (quoting Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union*, *35, *91 (2d ed. 1871)).

⁶² *Martin v. Tyler*, 60 N.W. 392, 395 (N.D. 1894).

⁶³ *Wrigley*, 2023 ND 50, ¶ 53, 988 N.W.2d at 249 (McEvers, J., concurring) (citing N.D. Const. art. I, § 1).

⁶⁴ *Id.* at ¶ 27, 988 N.W.2d at 242.

41. The North Dakota Supreme Court recognized that pregnant North Dakotans have had the right to obtain therapeutic abortions throughout the state's history. Physicians had broad discretion to determine, on a case-by-case basis, when a therapeutic abortion was necessary. Physicians provided abortions for a broad range of reasons, including both physical and mental health. Limiting the availability of life- and health-preserving abortions is at odds with this long-standing practice.

I declare, under penalty of perjury under the laws of North Dakota, that the foregoing is true and correct.

Signed on the 15 day of March at New Orleans, Louisiana, USA.
(day) (month & year) (city, state and country)

Karissa Haugeberg
(printed name)

Karissa Haugeberg
(signature)

EXHIBIT A

Karissa Haugeberg

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EDUCATION

Ph.D. Department of History, University of Iowa, 2011

PROFESSIONAL EXPERIENCE

2020-present Associate Professor, Department of History, Tulane University
• 2024-present Eva-Lou Joffrion Edwards Newcomb Professor of History
2014-20 Assistant Professor, Department of History, Tulane University
2011-14 Postdoctoral Fellow, Tulane University

PUBLICATIONS

Books

2017 *Women against Abortion: Inside the Largest Moral Reform Movement of the Twentieth Century*. Urbana: University of Illinois Press.
2019 Co-editor w/Cornelia Dayton, *Women's America: Refocusing the Past*, 9th ed. New York: Oxford University Press.
In-progress *Nursing a Revolution: Civil Rights, Feminism, Gay Rights, and the American Nursing Profession, 1965-1990*
In-progress *Women's America: Refocusing the Past*, 10th ed. Oxford University Press.

Journal Articles and Book Chapters

Accepted, forthcoming: "Abortion after Roe," for *Cambridge History of Sexuality in the United States*, eds. Jen Manion and Nicholas Syrett.
[2024] "Filling the Unforgiving Minute with Sixty Seconds of Effort: Barbara Fassbinder, Nursing, and AIDS in the US, 1986-91." *Middle West Review* (to be published in Spring).
2024 "The Paradox of Violent Women in the US Antiabortion Movement," in *Womanhood(s) in the US: Cultural, Social and Political Conflicts in Achieving Equality since the 1920s*, eds. Christen Brysen, Anne Legier, Amélie Ribieras, London: Routledge University Press.
2023 "Protect and Control: Coverture's Logics across WIC, TANF, and Abortion Laws," co-authored with Margaret Downey, Clare Daniel, and Anne McGlynn-Wright, *Psychology of Women Quarterly* 47(4): 478-93.

- 2023 “Dobbs v. Jackson: One Year Later,” *Perspectives Daily* June 27, 2023. (invited, editorial review)
- 2022 “Pregnant People Were Once Citizens, Too,” for “Roundtable: On the Threshold of a Post-Roe Era? The Past and Future of Abortion Rights in the United States,” in *Women and Social Movements*, March 2022, Alexander Street, ed. Rebecca Jo Plant. (invited, editorial review)
- 2018 “Nurses and Hospital Abortions in the United States, 1967-1973,” *Journal of the History of Medicine and Allied Sciences* 73(4): 412-436.
- 2015 “How Come There’s Only Men Up There?” Catholic Women’s Grassroots Anti-Abortion Activism,” *The Journal of Women’s History* 27(4): 38-61.

Review Essay

- 2020 “Rethinking the Taxonomies of Civil Rights Work,” *Journal of Urban History*, 46(3): 654-62.

Book Reviews

- 2024 Review of *The Trials of Madame Restell: Nineteenth-Century America’s Most Infamous Female Physician and the Campaign to Make Abortion a Crime*, by Nicholas Syrett. *Criminal Law and Criminal Justice Books*. [January](#).
- 2021 Review of *Talking Therapy: Knowledge and Power in American Psychiatric Nursing*, by Kylie Smith. *History of Psychiatry* 32 (4): 508-9.
- 2021 Review of *Abortion and the Law in America: Roe v. Wade to the Present*, by Mary Ziegler. *American Journal of Legal History* 60 (4): 582-84.
- 2020 Review of *Birth Control Battles: How Race and Class Divided American Religion*, by Melissa J. Wilde. *Church History* 89 (3): 722-24.
- 2019 Review of *Women at the Wheel: A Century of Buying, Driving, and Fixing Cars*, by Katherine J. Parkin. *Journal of Social History*, 53(1), 292-294.
- 2019 Review of *Big Sister: Feminism, Conservatism, and Conspiracy in the Heartland*, by Erin Kemper. *The Annals of Iowa*, 78 (2019), 426-427.
- 2018 Review of *Reproductive Rights in the Age of Human Rights: Pro-Life Politics from Roe to Hobby Lobby*, by Alisa Von Hagel and Daniela Mansbach. *Law, Culture, and the Humanities*, 14(1): 191-193.
- 2010 Review of *Reforming Medical Education: The University of Illinois College of Medicine, 1880-1920*, by Winton U. Solberg. *History of Education Quarterly*, 50(2): 246-248.

SELECTED FELLOWSHIPS and AWARDS (recent)

- 2023 Sawyer Seminar, Mellon Foundation, “The New Green Wave: Reproductive Justice in the Gulf South and Beyond”
- 2022 National Endowment for the Humanities Summer Seminar Fellow: Philosophical Perspectives of Care
- 2022 Newcomb Institute Faculty Research Scholar Award, Tulane University
- 2019 Stanley Jackson Prize, *Journal of the History of Medicine and Allied Sciences*

RECENT PRESENTATIONS

- 2024 Jewish Physicians and US Abortion History, Morris Bart Lecture Series, Jewish Community Center, New Orleans, LA, March 11.
- 2024 Physicians and the History of Abortion in the US, Tulane University School of Medicine, February 28.
- 2024 Barbara Fassbinder, Nursing, and AIDS in the Midwest, University of Virginia School of Nursing History Consortium, February 20.
- 2023 "Legal History of Abortion in the United States and Louisiana," Louisiana Tech University, March 23.
- 2023 "Legal History of Abortion in the United States and Texas," Prism Health North Texas, March 15.
- 2023 "What Can Women Teach Us about the History of the Far Right in the US?" Department of Gender and Sexuality Studies, Massachusetts Institute of Technology, Boston, Mass. February 9.
- 2023 "Welfare Policy, Abortion, Surveillance and Social Control in the US," European American Studies Association, Debrecen, Hungary, March 31.
- 2022 "The Paradox of Violent Women in the US Antiabortion Movement," Womanhood(s) in the US: Cultural, Social, and Political Conflicts in Achieving Equality since the 1920s," Sorbonne Nouvelle, Paris, France, May 19-20. (keynote address)
- 2022 "Nursing and HIV in the US, 1986-91," Delta Women's Writers, Jackson, Mississippi, March 5.

SERVICE TO UNIVERSITY

Director of Undergraduate Studies
Tulane University Senate, member-at-large
Tulane University Committee on Academic Freedom & Student Responsibility, chair
Tulane University Facilities Committee, member
Come as You Are, student organization, faculty advisor
Honors Society, faculty advisor
Scholars at Risk, member
Tulane's American Association of University Professors chapter, secretary
School of Liberal Arts Graduate Studies Committee
Tulane University Graduate Council
Newcomb Institute, grant reviewer
Roe v. Wade Lecture Organizer

RECENT SERVICE TO PROFESSION

- 2021-22 American Historical Association, Local Arrangements Committee, co-chair, 2022 Annual Meeting in New Orleans.
- 2022- *Coming Home*, Red Door Films, advisory board.

- 2020- From the Front Line: Narratives of the Covid-19 Pandemic, Historic New Orleans Collection, advisory board.
- 2016- Expert witness for The Center for Reproductive Rights, The Lawyering Project, and Planned Parenthood Federation of America for abortion litigation in Virginia, Indiana, Minnesota, Utah, South Carolina, North Dakota and a comment (report) for federal reauthorization of the Title X program.

TEACHING EXPERIENCE

Courses taught at Tulane University, 2011-present:

Surveys/Lectures

US women & gender to 1865
US women & gender since 1861
Gender, sexuality & the law, US
US legal history
History of medicine, US

Seminars

History of reproductive health, US
New directions in US women's history
History of gender-based violence, US
Art & craft of history
US social history
History of conservative women, US

GRADUATE ADVISING

Current:

Darcy Roake
Kaylie McCarthy
Shannah Boucher

Past:

Anna-Morgan Leonard, Ph.D.

RECENT MEDIA

- Minna Skau, "[Abort i USA: Én lang historie om magtkamp, kaos og forvirring](#)," *Ugeskriftet for Læger* (Denmark), August 30, 2023.
- Susana Samhan, "[Aborto año cero en EE.UU.: Una distopía que aspira a más](#)," *Swiss Perspectives*, June 23, 2023.
- "[One Year after Dobbs, America's Pro-Life Movement Is in Flux](#)," *The Economist*, June 22, 2023.
- Mary Retta, "Peer to Peer: News You Can Use, Via Google Doc," *Columbia Journalism Review*, December 6, 2022.
- Madison Stacey, "'It Was Hidden, You Had to Hunt' How Covert Networks Helped Women Access Abortions before *Roe v. Wade*," *WTHR*, (Indianapolis), August 22, 2022.
- Randy Dotinga, "San Diego's Abortion History: From Pre-'Pro-Life' Reagan to a Clinic Bombing Plot," *Voice of San Diego*, July 21, 2022.
- TRT World (Ankara, Turkey), "Abortion in the United States," June 24, 2022.
- WWL New Orleans, "Before *Dobbs*: Abortion History in Louisiana," June 24, 2022.

KPPC, NPR News for Southern California, *AirTalk*, "Supreme Court Overturns Roe v. Wade, What Does That Mean For The Future Of Abortion Access And How Did We Get Here?" June 24, 2022.

Fahima Haque, "America Before and After Roe," *The New York Times*, June 27, 2022.

Throughline, "After Roe: A New Battlefield," June 16, 2022.

Helena Gustavsson, "Forskare: Abort har en lang tradition i USA," *ETC* (Sweden), June 14, 2022.

Slow Burn (Slate), "Life or Death," June 8, 2022. (Recipient of Apple's 2022 Podcast of the Year Award)

Andrea González-Ramírez, "16 Books on the Past, Present, and Future of Abortion," *The Cut* (New York), June 6, 2022.

NPR's *All Things Considered*, "Abortion Was Once Common Practice in America. A Small Group of Doctors Changed That," June 6, 2022.

Cincinnati Public Radio, "The Future of Abortion and Abortion Laws if Roe Falls," June 6, 2022

Throughline, "Before Roe: The Physicians' Crusade," May 19, 2022.

Caroline Vinet, "Le droit a l'avortement aux Etats-Unis, une histoire mouvementee," *La Vie* (France), May 10, 2022.

Grace Hauck and Chris Kenning, "Anti-Abortion Groups Could Win a 50-year Fight to End Roe. They Aren't Stopping There," *USA Today*, May 7, 2022.

The Ringer (*The Atlantic*), "The 300 Year History of Abortion in America," May 6, 2022.

Katie Bernard, "She Had an Abortion Before Roe v. Wade," *Kansas City Star*, January 10, 2022.

PROFESSIONAL MEMBERSHIPS

American Association for the History of Nursing

American Association of University Professors

American Historical Association

Coordinating Council for Women in History

Organization of American Historians

Southern Association of Women Historians