Abortion -- Part VIII

In accordance with the divine precept "Thou shalt not kill" the Catholic Church has always condemned murder and its kindred crimes against human life, even if that life be still hidden within the sanctuary of the mother's womb. Thus, from the earliest centuries the Church has added severe penalties to her condemnations of the crime of abortion—the nefarious procedure of expelling from the womb of the mother a child still incapable of extra-uterine existence.

The censure and the irregularity for abortion as known today did not come into existence until the sixteenth and the thirteenth centuries respectively. Abortion, however, was penalized before those times.

"The Church has always held in regard to the morality of abortion that it is a serious sin to destroy a fetus at any stage of development. However, as a juridical norm in the determination of penalties against abortion, the Church at various times did accept the distinction between a formed and a non-formed, an animated and a non-animated fetus." (Preliminary note)

I

ANCIENT LAWS

The Pre-Christian Ancient Laws prescribed penalties for abortion. Among the Oriental laws, the Sumerian Code (C. 2000 B. C.) contains the most ancient penalty which was a fine levied against anyone who deliberately or accidentally struck a woman, thus causing her to lose the unborn child. The Code of Hammurabi (C. 1800 B. C.) insisted on a fine being paid by the man who struck a pregnant woman and the amount of the fine was determined by the social status of the woman. If she were of the highest class and if she were to die because of the injury, the daughter of the man was subject to death. In the Assyrian Code (C. 1500 B. C.), the fetus is referred to as a human life and a man, who caused an abortion by striking a woman, could be fined, lashed or held for public service. A woman who deliberately caused an abortion to herself could be subject to a penalty of crucifixion and impaling. In the Hittite Code (C. 1300 B. C.), in the event of an abortion, there was provision for a fine to be determined in accordance with the social status of the mother and the degree of development of the fetus. The legislation in the Vendidad of ancient Persia (no older than 600 B. C.) warned a pregnant woman not to terminate a pregnancy but, if she did, both she and the infant's father would be charged with deliberate murder and subject to a fine or flogging. The person who

provided the drugs was also considered to be guilty.

In the Greek collection of laws, there is no specific statute against abortion but there is indirect evidence in the 9th and 6th centuries, B.C. that abortion was forbidden and penalized. The Greeks were the first to advise abortion and Hippocrates, while he advised against making abortion drugs available to expectant women, did indicate how an abortion could be effected. Plato advised that the law require an abortion for a woman who conceived after forty years of age. Aristotle would allow for abortion in order to control the number of children but insisted that the abortion be accomplished before sensation and life were present—and this was verified on the fortieth day after conception for the male child and on the ninetieth day after conception for the female child.

As to the Jewish laws, there is a different penalty depending upon which text of the Scriptures is used. The citation is the Book of Exodus, chapter 21, verses 22-23. The Vulgate text speaks of an accidental abortion and states that if a person struck a pregnant woman and caused her to suffer an abortion, a fine was levied and, if the mother died, the guilty person was condemned to death. In the Septuagint version, compensation was to be paid if the aborted fetus was unformed but the death penalty was to be imposed if the fetus was formed. The Septuagint text, relying on the Greek, clearly considered the formed fetus and unborn child to be a human being.

The Jewish law, according to the Alexandrian School, held that voluntary abortion of a developed fetus was murder since the life of a human being was sacrificed. In accordance with the Palestinian School of Jewish law, which followed the Hebrew text of the Scriptures, abortion was not considered to be murder. The Talmud looked upon the fetus as part of the mother.

It is significant to note that the Septuagint or Greek text, which considered abortion to be murder, was the one used in evangelizing the Roman world and this accounts in great measure for the subsequent moral teachings on this subject.

Roman law, with respect to abortion, differed from one period to another. In the earliest history of the Monarchy, a husband was allowed to divorce his wife if she had deliberately secured an abortion. Abortion as a crime was not punished during the Republic or Empire. Under the Cornelian law, abortion was prosecuted because dangerous medicines and drugs were used. The mother was not charged with any offense but those who made or sold the drugs or administered them would be liable to prosecution. If the mother died, the death penalty was insisted upon. In the second century of the Christian era, abortion was considered a separate crime and a woman who deliberately sought an abortion would be exiled for depriving her husband of children.
Under the Roman law, the unborn was not considered to be a human being because the human soul was infused only at the time of birth. The fetus was thought to be part of the mother and a potential person. Even though this was the belief, the interference with a pregnancy was punishable because the father's rights were violated, there was danger to the mother, there was bad example or there was a denial of the State's right to children. The penalty was either condemnation to the mines, temporary or permanent exile or partial forfeiture of possessions. However, if the mother succumbed, the death penalty was demanded.

II
EARLY CHRISTIAN WRITERS AND CONCILIAR LEGISLATION

Huser introduces this chapter by saying: "At its inception Christianity encountered a widespread practice of deliberate abortion, and confronted its pagan contemporaries with the novel moral viewpoint that abortion was a serious sin and a heinous crime. Abortion was classed by the Church as murder, because abortion effected the death of a human person, albeit unborn. In opposition to the Roman law position that abortion violated the rights of others (especially of the father), the Church condemned abortion as a violation of the rights of the unborn."

The Didache (80-100, A.D.) tersely commands "Thou shalt not kill the fetus by an abortion." This same prohibition is found in the Pseudo-Barnabas Epistle (before 132 A.D.) and in the Canones Ecclesiastici SS. Apostolorum (C. 300 A.D.). The Apostolic Constitutions (C. 400 A.D.), while repeating the previous directive, all add that the formed fetus possesses a soul and it would be murder to dispose of it.

In the East, Athenagoras stated about 177 A.D. that the Christians believed that women, who resorted to abortion, were guilty of homicide. In the West, Tertullian, who died about the year 240 A.D., termed deliberate abortion murder and, since murder is forbidden, it is sinful to destroy the human being that is growing in the mother's womb. He believed that a fetus became a person only after a certain stage in its development had been reached and the destroying of the fetus would be called murder after sufficient growth had been realized. Minucius Felix, who died in the third century A.D. and St. Cyprian, who died in 258 A.D. claimed that parents, who procure an abortion, are guilty of parricide. Hippolytus, who died about 235 A.D. considered the intentional killing of the unborn child to be murder.

These statements, by early Christian Fathers, made it possible for the Councils of the Fourth Century to condemn abortion as murder and to inflict severe penalties for its commission.

The Council of Elvira in Spain was held about the year 300 A.D. Canon 63 states that, if a woman
conceived as the result of an adulterous union and killed the product of this conception, she was to be punished by being denied Communion throughout her lifetime and even on her death-bed. This is assuredly a most severe penalty and, while it could also be imposed for infanticide, tradition has always held that it was used in practice to punish abortion. Also, reference is clearly made to an adulterous union, but Huser states that the canon would have applicability also to the killing of a fetus conceived in a legitimate marriage since the primary purpose of this statute is to preserve the life of the unborn infant and not merely to punish marital infidelity.

The Council of Ancyra was held in Asia Minor in 314 A.D. and was the first Eastern Council to consider and legislate penalties for abortion. Canon 21 of this Council stipulated:

Women who prostitute themselves, and who kill the children thus begotten, or who try to destroy them when in their wombs, are by ancient law excommunicated to the end of their lives. We, however, have softened their punishment, and condemned them to the various appointed degrees of penance for ten years.

Even the attempt to kill the fetus was included in the crime and punishment.

Neither of these Councils distinguish between the formed or non-formed fetus and both Councils punished only the women who attempted the abortion on themselves.

It must be noted that the lessening of the penance is not to be interpreted as indicating that the crime of abortion was considered to be less serious but rather that the Church alters its policy of penance from time to time in accordance with what is best for the people and their spiritual salvation.

The statute of the Council of Ancyra, both in its condemnation of abortion and in its penalty, was the basis for most of the subsequent legislation in the Church down to the Middle Ages.

The answers, given to canonical questions by St. Basil the Great, (written in 374 and 375 A.D.) were considered in the East as being equivalent to legislation by a Council and in the West as having great importance and influence. Canon 2, concerning abortion, states:

A woman who deliberately destroys a fetus is answerable for murder. And any fine distinction as to its being completely formed or unformed is not admissible amongst us. For in this case not only the child which is about to be born is vindicated, but also she herself who plotted against herself, since women usually die from such attempts. And there is added to this crime the destruction of the embryo, a second murder—at least that is the intent of those who dare these things. We should not, however, prolong their punishment until death, but should accept the term of ten years . . .

In Canon 8, St. Basil observes:

And so women who give drugs that cause abortion are themselves also murderers as well as those who take the poisons that kill the fetus.

It would appear that this is the very first legislation that clearly
punished those who cooperated in making the abortion possible.

In the replies of St. Basil, only women were punished for the crime of abortion—the mother who sought abortion for herself and any woman who made the necessary poisonous drugs available.

St. John Chrysostom, who died in 407 A.D., spoke of the destruction of the unborn as "murder before birth" and stated that he really did not know what name to give to this crime because it is "even worse than murder."

St. Augustine, who died in 430 A.D., indicated that the disposing of a formed fetus was murder but the destroying of a non-formed fetus was not murder in the eyes of the law. However, it could be inferred, by this distinction, that such could be considered to be murder before God. Further, he severely condemned, in his writing, anyone who intentionally and directly interfered with any fetus, whether formed or not.

St. Jerome, who died in 420 A.D., stated that a fetus became a person only after a certain stage of development had been reached and the destruction of a developed fetus was considered to be abortion, murder and parricide.

In 524 A.D., the Council of Lerida in Spain, in its second Canon, legislated penalties against those who succeeded in killing or who even attempted to kill a child, whether born or unborn, who was conceived in adultery. Thus, abortion and infanticide were included as crimes. The penalty was imposed not only on the mother but on the actual father. Punished also were those who manufactured, sold or made the poisonous drugs (abortifacients) available and these were readmitted to communion only on their death-bed.

For the first time, clerics were subject to punishments for any involvement in an abortion but previously, they would have come under the penalty for homicide, since abortion was always considered, in the Christian era, to be a form of murder.

Finally, this Canon is traditionally interpreted as holding that a husband and wife who attempted to kill or succeeded in killing a child, conceived or born from a legitimate marriage, would also incur the penalty since the important purpose of the statute was to protect the life of the unborn and the infant.

St. Martin of Braga amplified Canon 21 of the Council of Ankyra. He does not distinguish between a conception that occurred in a legitimate marriage and one that resulted from an adulterous union. He said that abortion, attempted abortion, infanticide and contraceptive practices should be punished and added, for the first time in Western legislation, that those who cooperated in the crime also were subject to the penalty of abortion.

The Trullan Synod, held at Constantinople in 692 A.D., repeated
the reply of St. Basil the Great regarding cooperators in the crime of abortion and explicitly stated that these were subject to the penalties for murder.

Although the above-mentioned legislation was adopted at particular or regional Councils, it became the law not only of that region but of the universal Church by reason of its being received and enforced by many regions and it formed the basis for all legislation on the subject of abortion up to the Twelfth Century.

III

CANONICAL COLLECTIONS UP TO THE TWELFTH CENTURY

A. Collections of the Eastern Church

It is important to remember that, with reference to legislation on abortion, none of the Eastern collections contains any of the legislation from the Western Church.

The outstanding Greek canonical collection of this period is known as the Photian Collection and was made in the year 883 A.D. On the subject of abortion, it includes the statutes from the Council of Ancyra, the Trullan Synod and the writings of St. Basil. This collection was recognized as the official law in the Eastern Church in 920 A.D. and continues to enjoy this recognition even presently. The legislation on abortion, as incorporated in the Collection of Photius, is also found in the Pedia­lalion and in the Sacred Canons, which are recognized even today by the Greek Orthodox Church as collections of its official law.

In a collection of Canons, used by the Armenian Church and of uncertain date, there is mention of penalties of nine years penance and of three years penance for abortion.

The Nomocanon of Gregory Bar­Hebraeus, who died in 1286 A.D., is the best known of the Collections of the Syrian Monophysite Church and declares those individuals to be voluntary murderers who provide abortifacient drugs to women. It also states that a fine is to be the penalty for all those who effect abortion by bodily violence.

B. Collections of the Western Church

The Italian Collection, which appeared about 450 A.D., brought statutes of the Councils of the Eastern Church into Canonical Collections in the Western Church. With reference to abortion, the Italian Collection quoted the Council of Ancyra with its penalty of ten years of penance and this is to be contrasted with a life-time of penance, which had previously been established by the Western Council of Elvira in 300 A.D.

This statute of the Council of Ancyra was contained in other Italian collections, notably that of Dionysius Exiguus, who died about 540 A.D. and the Collectio Quesc­nelliana, which was compiled between 500 and 550 A.D.

Canon 21 of the Council of Ancyra appears in the African, Spanish and Frankish Canonical Collections but in the latter two collections, there is also incorporated the
statutes from the Councils of Elvira and Lerida and from the Collection of St. Martin of Braga. The quasi-official law in the Church in the Frankish Kingdom contained only the statute from the Council of Ancyra but the Psuedo-Isidorian Collection of 847-857 A.D. included the additional references and published them not only in the Frankish Kingdom but throughout the entire Western Church.

From these Canonical collections, the legislation of the various Councils on abortion was incorporated into the Capitularies, Penitential Books and in Synodal Statutes.

The First Provincial Synod of Mainz, held in the year 847 A.D., adopted, as its law on abortion, the legislation of the Councils of Ancyra, Elvira and Lerida.

The Council of Worms, convoked in 868 A.D., declared that women who deliberately destroyed their unborn infants were to be judged as murderers.

The Collections of Regino of Prüm (who died in 915 A.D.) and Burchard of Worms (who died in 1012 A.D.) contained the decrees of the three aforementioned Councils and a new canon (the origin of which is uncertain) which stipulates that a person, who interferes with a man or woman so that they cannot procreate or conceive, is to be considered as guilty of homicide. These collections were important sources for subsequent legislation on abortion.

At this particular period, the penances imposed for the crime of abortion, were dependent on the factor of development and animation of the fetus. If the fetus were animated, the crime was that of murder and the penance was for ten years. However, no indication was provided as to when animation occurred.

The very important Decree of Ivo of Chartres, who died in 1116 A.D., contains, with reference to abortion, the legislation found in the Councils of Ancyra and Lerida and in the writings of Martin of Braga, but the new Canon, inserted in the Collections of Regino and Burchard, is not included in this present work. However, in addition to this material, Ivo added statements of the early Fathers which had never been previously incorporated into any Canonical collection: two quotations from St. Augustine—one in which he condemns interference with fetal life and a second in which the distinction between the formed and the non-formed fetus is set forth with the resultant effect that murder involves the destroying of a formed fetus; a text that indicates that animation occurs only after a certain stage of development has occurred; a declaration by St. Jerome that the destruction of a non-formed fetus is not murder; a letter of Pope Stephen V in which it is presumed that the crime of abortion is murder.

The new Canon of Regino and Burchard will be found in the subsequent Decretals of the Popes and the five texts on abortion, presented by Ivo, will find their way into the
very important Decree of Gratian. The great contribution of Ivo to later legislation on abortion is his introduction into canonical collections of the distinction between the formed and non-formed fetus, and this had influence and impact on the law up to the present century. It is to be recalled that St. Basil had rejected this distinction and it is to be noted that no Council ever had recognized or adopted it.

IV

THE DECREE OF GRATIAN UP TO THE DECRETALS OF POPE GREGORY IX

A. Decree of Gratian

In his famous Decretum, which was prepared about 1140 A.D., Gratian collected the existing texts, attempted to reconcile many which were contradictory, interpreted and evaluated them and presented his own position. With respect to abortion, he considers the three texts of the Fathers, which had been collected by Ivo of Chartres, and a letter which was authored by Pope Stephen V, which clearly presumes that abortion is murder. From these texts, Gratian concludes that abortion of an animated fetus is definitely murder and carries the penalties for homicide, while that of a non-animated fetus is not murder. Gratian, however, does not attempt to establish when the moment of animation arrives.

Among those who made commentaries on the Decree of Gratian, Roland Bandinelli, writing about 1148 A.D., summarized and confirmed Gratian's position on abortion and Rufinus, about 1157-1159, in considering a deliberate abortion by the mother upon herself or by another individual upon her, concluded that three years of penance must be performed if the fetus was not formed and the usual penalties for murder if the fetus were formed. The penalties for murder were penances that extended from seven years to a full lifetime, depending upon the circumstances.

The Glossa Ordinaria on the Decretum of Gratian, which are commentaries on the text, and which were assembled by John Teutonicus in the years 1215-1217 A.D. and were finalized by Bartholomew of Brescia about 1245 A.D., continue the distinction between the formed and unformed fetus or the animated and non-animated fetus. The opinion was presented that abortion was murder if the soul had already been infused into the body and this occurred only after some development of the body.

B. Decretals Before Pope Gregory IX

In between the Decree of Gratian and the Decretals of Pope Gregory IX, five collections of statutes appeared, which, in general, included extant texts that were omitted by Gratian and new texts that appeared after his publication.

In the first compilation, which was assembled by Bernard of Pavia between 1188 and 1192 A.D., the text of the Book of Exodus (chapter 21, verses 22-23) from Linacre Quarterly
the Vulgate Translation, which does not distinguish between the formed and non-formed fetus, was incorporated as was the new canon, which had been introduced by Regino of Prüm and had been accepted by Burchard of Worms. This compilation holds that murder is involved when there is an abortion of a formed child and, if this is deliberate, the penalty is deposition for clerics and excommunication for laymen. If the fetus is non-formed, the penalty is as for homicide and is to be imposed at the discretion of a judge.

In this period, there was acceptance of the distinction between the animated or formed and the non-animated or non-formed fetus; that abortion of an animated fetus was murder and the penalty was that for the crime of murder; that abortion of a non-animated fetus was quasi-murder and that the penalties were similar to but not as severe as those for the crime of murder.

V
DECRETALS OF POPE GREGORY IX
UP TO THE COUNCIL OF TRENT

The Decretals of Pope Gregory IX were compiled by St. Raymond of Pennafort and were promulgated as an authentic collection of laws for the universal Church in 1234. Two canons on abortion were published: one was a letter written by Pope Innocent III in 1211 A.D. to the Carthusians, in which the distinctions between animation and non-animation was recognized and a second, the canon which had been introduced by Regino of Prüm and now, for the first time, was included in an official collection. This canon states that anyone who does anything to a man or woman or gives them anything to drink which interferes with the conception, the growth or the delivery of a child is to be held as a murderer.

In the Decretal law, abortion, sterilization, contraception and any interference with procreation was considered to be murder. The commentators on the Decretal laws interpreted the canons to mean that abortion of an animated fetus was true murder because a human being was killed and merited the full penalties for murder, which were an irregularity in addition to the usual penances for voluntary murder. The abortion of a non-animated fetus, sterilization and contraception were considered to be quasi-homicide or conditioned or interpretative homicide because of the spiritual penances, which were imposed. These were the conclusions of Raymond of Pennafort (who died in 1275), Bernard de Bottone (who died in 1266), Cardinal Hostiensis (who died in 1271), Johannes Andreae (who died in 1348) and Panormitanus (who died in 1453).

None of the afore-mentioned texts, although distinguishing between animation and non-animation, indicated when animation occurred. However, some commentaries on canons, dealing with the question of the infusion of a soul, declared that a male fetus was
without life for the first forty days and the female fetus was without life for the first eighty days. While there was divergence on this point, most of the commentators accepted the forty and eighty day norm for the beginning of life and for the existence of a true person. However, all were in agreement that a person did truly exist after animation and any abortion of such a true person was real murder.

It must be pointed out that abortion was considered by all to be a serious sin even though the fetus was not animated and even though true murder was not involved. These distinctions were adopted more for the imposition of penalties than to determine the gravity of the sin.

The Synod of Riez in 1285 imposed a penalty of automatic excommunication, reserved to the Holy See for absolution, on everyone who was involved in the commission of an abortion or a murder by knowingly assisting, advising, suggesting or by selling or providing drugs. If the person involved was a cleric, he was, in addition to the above penalties, deprived of any benefice he might hold, degraded and given over to the civil authorities. This legislation of the council of Riez did not distinguish between animation and non-animation and was adopted almost verbatim by the Councils of Avignon in 1326 and in 1337 and by the Synod of Lavaur in 1368. In order to forestall the possibility of abortion or murder, the Council of Riez declared that all persons who dealt in, sold or administered poisonous drugs must inform civil authorities before dispensing or administering them.

In addition to the crime of abortion and its penalties, the Council of Avignon in 1326 declared that the securing of an abortion on oneself or on another was a sin, which was reserved to the Bishop or his delegate for absolution. At least nineteen Synods or Councils, held between the mid-thirteenth and the mid-sixteenth centuries, also reserved the sin of abortion to the Bishop.

The Council of Trent did not legislate directly concerning abortion but the penalties it placed on homicide would apply to abortion in the event that the fetus was animated because the common opinion, at that time, although not unanimous or universal, held that only the aborting of an animated fetus was true murder. Such murder, if voluntary and even if occult, was punished by an irregularity and the loss of benefice and the exclusion from every ecclesiastical order or office.

VI

FROM POPE SIXTUS V (1588) TO THE CODE OF CANON LAW (1918)

Two important Constitutions concerning abortion were issued by two different Popes within three years of each other: the first, the Constitution Effraenatam of Pope Sixtus V in 1588 and the second, the Constitution Sedes Apostolica of Pope Gregory XIV in 1591. The
second confirmed the first in its entirety with the exception of two changes or modifications.

Pope Sixtus had declared penalties for the abortion of a non-animated as well as of an animated fetus and, in this respect, this legislation differed from what had prevailed from the Decree of Gratian in 1140 up to 1588. Also, it considered sterilizing procedures and contraceptive practices as crimes with penalties identical with those proposed for abortion and it imposed these penalties on all who cooperated in the commission of these crimes as well as on the principal perpetrators. Pope Gregory XIV, in his Constitution, limited his law solely to abortion and then only to the abortion of an animated fetus, thus returning to the decrees in force before 1588. In addition, this latest legislation provided that the penalties for the abortion of a non-animated fetus was what they previously had been.

Secondly, Pope Sixtus had decreed, as an additional penalty for abortion, an automatic excommunication which was reserved, for its absolution, to the Holy See except in danger of death. Pope Gregory XIV changed this slightly so that the reservation for absolution was to the local Bishop.

In all other matters, the two Constitutions coincided and were identical and that of Pope Gregory XIV confirmed the legislation of Pope Sixtus V. Henceforth, the penalties for procuring or cooperating in the procuring of the abortion of an animated fetus were: automatic excommunication reserved to the local Bishop, irregularity, all the penalties which had been legislated by ecclesiastical and civil laws for voluntary murder, exclusion from any ecclesiastical office, benefice or dignity and, if clerics are involved, deposition and degradation and the transfer to the civil authorities for the imposition of civil law penalties.

These two Constitutions with respect to the irregularity and other vindictive penalties remained in force and continued to be the law concerning abortion until the codification of the Church law in 1918 but the censure of excommunication was modified somewhat in the Constitution Apostolicae Sedis of Pope Pius IX in 1869.

Prior to the Constitution of 1588, neither the law nor the commentators on the law ever defined abortion but Pope Sixtus V defined this crime as ejectio fetus immaturi or "the expulsion of an immature fetus." This implies that the ejection is from the womb of the mother and that the fetus is non-viable and cannot live independently outside the mother and separated from her.

Pope Gregory XIV did not specify when animation occurred but the authors commonly accepted the classical reference of forty days for the male fetus and eighty days for the female fetus and, if any doubt arises as to the sex of the fetus, the period of eighty days was accepted. The Sacred Congregation
of the Council stated in 1771 that
the forty day and eighty day norm
was the more common and the
accepted opinion.

According to the law of Pope
Sixtus V, the actual abortion had
to result before any of the penalties
were imposed; thus, a mere intent
to procure an abortion or an un-
successful attempt could not be
punished by any of the penalties,
either censure or vindictive penal-
ties. However, the sin of abortion
could still be present even if the
attempt was not successful and if
the sin were reserved as to its abso-
lution by any local legislation, this
would have to be considered before
absolution were granted.

The penalties for the crime of
abortion were imposed on those
who, using any means, whether
physical or moral, procured an abor-
tion either by their own interven-
tion or through the agency of others
and those who assisted or coop-
erated in any effective way were
also liable to the penalties.

The “procuring” of abortion was
interpreted by the authors as refer-
ing to an express or virtual intent
to obtain an abortion, the use of
effective means and the desire of
the abortion as an end in itself or
as a means to achieving some other
objective.

The penalty of irregularity,
which prevented the reception of
or the exercise of Holy Orders to
those who procured an abortion or
cooperated, was imposed for the
abortion of an animated fetus—
which would be forty days after
conception of a male fetus and
eighty days following the concep-
tion of a female fetus. This penalty
was not incurred for the abortion
of a non-animated fetus. This
particular legislation continued
until the advent of the Code of
Canon Law in 1918. The dis-
tinction between the animated and
non-animated fetus in reference to
irregularity continued in force
even though the distinction ceased
with reference to the censure of
automatic excommunication.

Whereas Pope Sixtus V had re-
served the automatic excommuni-
cation, as regards its absolution, to
the Holy See, Pope Gregory XIV
reserved it to the local Bishop.

The Constitution Apostolicae
Sedis, which was issued by Pope
Pius IX on October 12, 1869,
concerned itself specifically and
solely with censures, particularly
automatic censures, e.g., excom-
munication. Thus, the law with
respect to vindictive penalties, e.g.,
irregularity, which were in exis-
tence at the time of the promul-
gation of this Constitution, continued
in force until the new codification
of the Canon Law in 1918, since
it was not superseded in the
interim.

Pope Pius IX did not recognize
the distinction between animated
and non-animated fetus and thus,
in the period between 1869 and
1918, the automatic excommuni-
cation was incurred for any abor-
tion or for any expulsion from the
mother’s womb of a non-viable
fetus. No longer did the forty and
eighty day rule prevail. The legislation of Pope Sixtus V on this point, which was in force from 1588 until it was superseded by the Constitution of Pope Gregory XIV in 1591 was again the law of the Church from 1869 until 1918.

The distinction between animation and non-animation continued with reference to the irregularity and other vindictive penalties up to 1918 but with respect to the censure of automatic excommunication, it was terminated by Pope Pius IX in 1869.

Under the legislation of Pope Pius IX, the abortion had to be effected or accomplished as a result of the means employed before penalties were incurred. Thus, if the attempt at abortion failed or if the abortion was obtained but as a result of means other than those employed for that purpose, no penalties could be imposed.

For the completeness of this study and also to demonstrate that the Catholic Church has always and everywhere recognized the dignity of human life and need to respect, guard and protect human life, particularly of the unborn and the newborn, it is here noted that from 1872 up to 1902, the Sacred Penitentiary and the Holy Office gave six replies to inquiries about the moral licitness of surgical procedures which destroyed the human fetus.

What prompted such a large number of questions in this thirty year period? First, it must be recalled that in 1826, Naegle, of the University of Heidelberg, read a paper at a medical convention in which he stated "that a woman in childbirth could transfer to the physician the right over her own life and that of her child, so that, with her consent, he would act with perfect propriety in either taking her life by an operation or destroying the child by embryotomy." This conclusion had a tremendous impact and effect in Europe — particularly in England, France, Germany and Belgium — and the practice of abortion and embryotomy spread greatly.

Also, embryotomy was frequently used during this period in the management of difficult obstetrical situations. However, as medical science developed and perfected new surgical techniques — principally, symphisisotomy, pubiotomy, ischyopubiotomy and improvements in the Cesarean Section by Porro in 1876 and Kehrer and Sanger in 1882 — embryotomy was not employed as frequently for medical indications.

There were some ecclesiastical writers who defended the moral propriety of embryotomy and fetus-destroying operations on the basis that: the fetus was an unjust aggressor to the health and life of the mother and, therefore, could be destroyed by the mother; in a conflict of rights between mother and child, the stronger right, that of the mother to survive should prevail; craniotomy was not a direct killing of the fetus but a mere removal with the subsequent death being permitted in accordance with the principle of the double effect.
It must be pointed out that these were the private opinions of only a few writers and were never recognized or approved by the Church. In fact, they were short-lived and ultimately condemned by the various replies and decrees of the Sacred Penitentiary and Holy Office.

The replies are as follows:

1) With reference to craniotomy, the petitioner was counselled to consult approved authors and to act wisely (Sacred Penitentiary, November 28, 1872);

2) The licitness of craniotomy cannot safely be taught (Holy Office, May 28, 1884);

3) On the licitness of other surgical operations which involve the direct killing of the mother or of the fetus, reference is made to the Reply of the Holy Office of May 28, 1884, in which the licitness of such operations cannot safely be taught (Holy Office, August 19, 1889);

4) Operations for directly procuring abortion, when the mother and fetus would otherwise perish, cannot safely be performed (Holy Office, July 24, 1895);

5) Acceleration of birth for just reasons, without harm to the life of the fetus, is licit; when the mother would otherwise perish, acceleration of birth is licit, procuring abortion is not. (Holy Office, May 4, 1898).

There was some discussion during the latter decades of the nineteenth century as to whether or not embryotomy was equivalent to abortion and therefore was punished by the censure of excommunication. Whether embryotomy was or was not abortion, it definitely was homicide and, therefore, irregularity for the crime of murder was definitely incurred.

There were some canonists who were of the opinion that the censure of excommunication was incurred by those who performed embryotomies because: these techniques were condemned by the Holy Office, the death of the fetus ensued, an embryotomy caused greater damage to the child than mere abortion and deprived the child of the opportunity to be baptized and, finally, if the censure were not incurred, there would be more inducement to perform the more damaging crime merely to avoid the penalty of excommunication.

The greater number of canonical writers concluded that the censure of excommunication for the crime of abortion would not usually be involved in embryotomy because most frequently this technique would be employed only in a well-developed and viable fetus and, by definition, abortion is the ejection of a non-viable or immature fetus. In this instance, a penal law must be interpreted strictly. However, even though the techniques of embryotomy differ from those used in an abortion, the censure of excommunication and the irregularity would be incurred, if the fetus was non-viable.
Another matter of interest and concern in the latter part of the nineteenth century was the moral licitness of extracting an ectopic fetus. Beginning in 1893, the entire subject was discussed in the 

_Ecclesiastical Review_. Four prominent moralists participated—Lehmkuhl, Sabetti, Aertnys and Eschbach.

Lehmkuhl opined that the removal of an ectopic fetus was licit when there was imminent danger of a fatal rupture of the mother's organs and there was no alternate way to avert this disaster, because it was not clearly proven that this intervention dealt a direct blow to the fetus. Under these circumstances, the removal could be morally allowed because the death of the fetus was merely permitted as a secondary, accidental and unintentional result. Lehmkuhl also considered that by interpretative intention, the fetus would agree to his deprivation of life in order that he might be baptized and the life of his mother might be saved.

Sabetti held that all operations for the removal of a non-viable fetus involved the direct killing of the fetus but they could be employed when the ectopic pregnancy imminently threatened the life of the mother because in that event, the fetus was a materially unjust aggressor and, as such, could be directly killed.

Aertnys concluded that the removal of an ectopic fetus was directly responsible for its subsequent death and, therefore, under no circumstance could it ever be licit or morally allowed. He also held that the fetus could never be regarded as an unjust aggressor. This theologian would allow the excision if there was doubt as to the presence of a living fetus because, in that situation, the certain right of the mother should prevail over the doubtful right of the fetus.

Eschbach, Rector of the French Seminary in Rome, and a champion of the rights of the unborn child, held the opinion that the excision was always illicit, regardless of how it was performed, because it certainly and directly killed the fetus and that this death could not be justified either by the presumed consent of the fetus or by declaring it a materially unjust aggressor.

It was with this background that the Holy Office issued three replies on the question of ectopic pregnancies:

1) It cannot be safely taught in Catholic schools that any surgical operation which is a direct killing of either child or the pregnant mother is allowed and this referred to inquiries concerning ectopic fetuses (Holy Office, August 19, 1889).

2) To the question: Is laparotomy licit in the case of extra-uterine pregnancy or ectopic conceptions? The answer was given: In case of urgent necessity, laparotomy for the removal of ectopic conceptions is licit, provided serious and opportune provision is made, so far as possible, for the life of both the fetus and the mother. (Holy Office, May 4, 1898).

3) To the question: Whether it is sometimes licit to remove from the mother ectopic fetuses which are immature, before the expiration of the sixth month after conception, the reply
was given: In the Negative according to the decree of May 4, 1898, which declares that as far as possible serious and opportune provision must be made for the life of both the fetus and the mother. As regards the time, let petitioner remember that according to the same decree no hastening of delivery is allowed unless it be done at a time and in a manner which are favorable to the lives of the mother and the child, according to ordinary contingencies (Holy Office, May 5, 1902).

After the replies of May 4, 1898 and May 5, 1902, it was clear that the direct removal of an immature fetus was illicit and without moral justification. However, Lehmkuhl, Genicot and Vermeersch held that the removal of an ectopic fetus was, in fact, only indirect and therefore could be allowed in virtue of the principle of the double effect. They argued that, in this instance, the diseased organ of the mother, e.g., the fallopian tube, which contained the fetus is what is directly removed and the subsequent death of the fetus is the indirect result of the operation. Other authors also might be said to have held this more lenient opinion—Ubach, Piscetta - Gennaro, Prummer, Aertnys - Damen, Arregui—but their conclusions are not definitive or apodictic.

Antonelli, Noldin - Schmitt and Sabetti - Barrett held the stricter position and would not allow the operation under any circumstances of necessity.

Very few canonists considered the question as to whether or not the removal of an ectopic fetus was direct abortion and subject to its penalties. Barrett and Beste held it to be a probable opinion that the crime of abortion was not involved because strictly speaking, an abortion is the “ejection of an immature fetus” and it is presumed that the normal site of a pregnancy is the uterus; whereas an ectopic pregnancy is extra-uterine. However, Huser takes the position that the definition of abortion does not specify the place of the pregnancy and, therefore, if this is the only reason to exempt an ectopic removal from the penalties of abortion, from this viewpoint, he would consider the technique to be a direct abortion subject to the censure of excommunication and irregularity.

Huser, however, giving attention to all of the circumstances and conditions, would hold that very seldom would the removal of an ectopic fetus entail a serious sin, because the excision of a pathological tube in most instances would be justifiable because of the principle of the double effect and without a serious sin, you could not have the crime of abortion and without the crime, there would not be the censure of excommunication or the irregularity.

In 1928, Bouscaren prepared a doctoral dissertation on the moral implications of ectopic pregnancies under the direction of the great Jesuit theologian, Vermeersch. The findings, along with new medical data, were published in an original edition in 1933 and in a revised second edition in 1943.

Bouscaren begins his search for a solution of the very complex
problem of ectopic pregnancies by indicating that the decisions of the Holy Office referred specifically to the *direct removal* of the fetus and not to the removal of the tube, which contained a non-viable fetus.

All moralists of the late nineteenth and early twentieth centuries would allow the removal of the tube once it had ruptured causing serious hemorrhage with resulting danger to the life of the mother. After perusing the medical literature and questioning a large number of doctors, Bouscaren concluded that: "It seems impossible to weigh this medical testimony without being made to realize that what is called ‘rupture’ of the tube is but the last stage of a process which is gradual, and which frequently, long before the crisis of rupture, has weakened, riddled and disintegrated the tube itself. It is consequently a gross error to conceive of tubal rupture as the sudden bursting of an organ which up to that moment had been perfectly sound..."

Bouscaren judged that sometimes the pregnant tube could be removed before actual rupture occurred because such removal would entail only an *indirect* attack on the fetus and this could be justified because a proportionately grave cause for the operation was present. Whereas the removal of the fetus from the tube would constitute a *direct* attack on the conceptus and, as such, never allowable, the removal of the entire tube, with the fetus inside, would be only an *indirect* attack on the conceptus since this is neither the "formal object of the intention nor the immediate object of the physical operation." The direct object of the surgery is the removal of the pathological tube, which is the proximate source of the trouble.

Even this indirect attack is allowed only when a proportionately grave cause is present in the *individual case*. Bouscaren is careful to state that the testimony of medical authorities on the facts "does not go so far as to prove that in *every case* and at every stage of ectopic gestation, the danger from which the mother is to be saved by operation is proportionate to the evil effect which the operation entails."

The evil effect which is permitted is the certain death of a human child. The good effect is the saving of the mother’s life. There cannot be any preference given to one life over another life since the life of the mother and the life of the child are equal in importance. One life is not weighed against the other but rather the actual probability of saving one life is weighed against the actual probability of saving the other. In the typical case, the fetus has very little chance to reach viability if the surgery is postponed.

The following ten conclusions of Bouscaren will be of interest:
1) The excision of an unruptured pregnant tube containing a non-viable fetus, done for the purpose of saving the mother’s life, is not a direct but an *indirect* abortion. Because of its grave consequence for the child, it will be illicit unless there exists a *propor-
tionately grave cause for it. But it will be a licit operation when all the circumstances are such that there exists a proportionately grave cause. In all cases, the child, if probably alive, must be baptized immediately.

2) The proportionately grave cause must consist principally in the necessity of the operation to save the life of the mother; but the greater probability of being able to baptize the child may also weigh as an added motive in favor of the operation.

3) In cases where the mother can be kept under observation, it will sometimes be possible to defer the operation without great danger. If so, it should be deferred. But if in the judgment of competent physicians the danger is such that a present operation to excise the tube offers a notably greater probability of saving the mother's life, the operation will be permissible, even before the rupture of the tube and before the viability of the fetus.

4) When the mother cannot be kept under observation the same rule applies. If, in competent medical opinion, it is judged prudent to defer the operation, it should be deferred. If, on the other hand, as may be the case, a present operation offers a notably greater probability of saving the mother's life, the operation will be permissible.

5) The same rule applies where an ectopic is discovered in the course of an operation, when the abdomen has been opened for some other cause. If the present excision of the tube offers a notably greater probability of saving the mother's life, it may be done.

6) Whenever it is licit to excise the tube, it will also be licit to attempt the transplantation of the fetus into the uterine cavity, provided it is judged that this will not very seriously add to the danger of the mother. In addition to these cases, it will also be licit to attempt the transplantation, even though the absolute excision of the tube would not be allowed, provided there is, in competent medical opinion, good probability of its success without seriously adding to the danger to the mother.

7) In cases where the pregnancy has gone beyond four months, the nearer approach of the fetus to viability will require an even more urgent necessity on the part of the mother as a proportionate cause for the excision of the tube. In such cases, the probability of her death without an immediate operation would have to be proportionately higher in order to render the excision of the tube permissible.

8) In cases where the crisis of tubal rupture or abortion has been safely passed and the fetus is still alive and developing as a secondary abdominal pregnancy, the operation should always be deferred until viability. Only in the actual crisis of dangerous hemorrhage can surgical intervention before viability be permitted in these cases; and then the removal of the fetus must be incidental and indirect.

9) The practice of allowing mature or viable fetuses to die in the abdomen when they could be removed alive, without too greatly increasing the danger to the mother is to be condemned. Where the child has reached viability or maturity, the operation to deliver him by cesarean section while still alive may, and even should be performed (with the mother's consent) if in competent medical opinion the chance of saving the child by the operation is at least equal to the chance that the mother may die as a result of the operation. There will, however, be a grave obligation on the part of the mother to consent to the operation, only in cases where it is morally certain that the effort to deliver the child alive and baptize him, will be successful. And even in this case the greatest prudence and gentleness must be used in suggesting or urging the obligation.

10) In all cases where it is even slightly probable that a living fetus has been removed from the mother, care must be taken to confer baptism on it.
immediately. If there is any doubt of the presence of a living fetus, the condition 'if you can be baptized' should be prefixed to the form of the sacrament.

Bouscaren clearly demonstrates his concern for the fetus by surrounding the termination of an ectopic pregnancy with necessary and useful precautions and safeguards, by stipulating very precise conditions and by indicating the limited situations in which such a pregnancy can licitly be ended. Responsible interest and due attention are manifested for the life of the mother and for the life of the child; there is no preference to the life of the one or callous indifference to the life of the other.

REFERENCES

2. Bouscaren, *Ethics of Ectopic Operations*, 2nd edition, Bruce, Milwaukee, 1943. This will be the source for much of the material on Embryotomy and Ectopic operations.


(Note: This historical analysis will continue in the next installment.)

[Monsignor Harrington is Vice-Officialis for the Archdiocese of Boston.]

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To a surgeon . . .

touching life as you do,
I wonder at your vision of its source:
guiding, grafting vessels,
your very grasp has known
the throb of a heart’s hum
with gifted skill you feel
the rhythm and the flow
to find a healing course
or sometimes pause and know
another asks the final pulse be now.

Sister Patrick Joseph Dete, O.S.F.
Marillac College, Department of Nursing
senior student nurse