

## CHAPTER THREE

# Abortion and the Law

*B*OLOGNA, January 2, 1578

The following has come to the ears and notice of the illustrious and excellent Lord Auditor Tursoni and his court: within the house of [Enea], an eminent nobleman of the Desideri family of Bologna, a certain serving-woman, attached to and dwelling within that same house, gave birth, and she disposed of the child in a certain drain or latrine, utterly without of any fear of the divine.

Responding to this matter, [the lord auditor] ordered me, the Minor Notary, to go in person with court bailiffs to the house of [Enea Desideri], the aforementioned nobleman, for the intent and purpose of understanding all the charges necessary for the matters outlined above. And he also ordered me to send her to the Torrone prison, once she had been found at the house or otherwise by the bailiffs, along with the body of the boy.

And so, in execution of the commission laid upon me, I went personally to the house of the aforementioned [Enea],

eminent Lord of the Desideri, located in Capella San Tomaso. Then, together with the said Lord [Enea], the bailiffs, and Lana, one of the pages, I entered into the lower rooms of the house, the so-called *stanza delle boccate* [laundry room with pipes where waste was collected]. In that place, in my presence and with the others around, [we located] the boy, or rather his body, and, once he was found, of identifying him and doing everything else that had to be done. Then, once the body, covered in mud and excrement, was recovered . . . I had it washed. And so, after the body was washed, I sent the dead body to the Torrone prison with the woman Maria, the serving-woman, found in a certain bedchamber.<sup>1</sup>

The notary, whose name was not recorded on the trial transcripts, described a gruesome and tragic scene. His dry, matter-of-fact Latin description of what he and the other Criminal Tribunal of Bologna personnel saw and did appears to omit any sign of emotion or evaluation. Were these men of the court accustomed to this sort of situation? An indication that this notary did however feel and evaluate was that he described the being found and pulled out of mud and excrement as a “boy” but immediately edited himself by calling it a “body.” This was not a fetus in formation but a fully developed and possibly newborn baby. The notary also decided the woman who had given birth and tried to conceal the body did not fear God. He did not however record how this case came “to the ears and notice” of the court. Perhaps the nobleman Enea Desideri himself brought the happenings of his household to their attention in an attempt to control the narrative. What is clear is that from their arrival at the Desideri palazzo, the tribunal’s men knew who was responsible for the dead body stuck in the drain: Maria da Brescia, a young woman of unspecified age who was chambermaid to Desideri’s wife, Isabella. While the men of the Torrone retrieved the body and washed it, Maria waited in her room. She then walked with them to the Torrone prison, approximately fifteen minutes through the heart of the city. What was Maria thinking? Was she rehearsing her defense? Did she stare at the wrapped infant cadaver paraded through town? Was she wondering what neighbors were making of this scene? Was she reconciling herself to the punishment she might receive? Would

she confess and plead for mercy? Or was she regretting not running away before the dead child came to the attention of the state?

In the menacing prison, Maria admitted to Judge Tursoni that she was responsible for the body in the pipes, which she called a *creatura* rather than a boy. However, she was adamant she had not committed a crime, explaining she had not known she was pregnant until the *creatura* slipped out of her body onto the floor of her room. It was dead. Shocked, panicked, and wanting to conceal it from the household, she picked it up and placed it in the latrine in the small room attached to her own. She stated repeatedly that she had no idea she was pregnant—she said she wasn't showing. She did admit to a sexual relationship with a man who was by then missing. Apparently, the noble household had also failed to notice Maria's pregnancy, or perhaps they jointly refused to admit knowing. No one knew anything about the missing impregnator.

The judge almost certainly thought Maria's claims of ignorance and a surprise delivery of a fully formed *creatura* / boy highly suspect. These were well-worn defenses criminal tribunals across Italy and Europe heard from single women and servants, like Maria, accused of procuring abortion or committing neonaticide. The laws of Bologna regarded the abortion of an animated and viable fetus to be similar, although not identical, to infanticide. The penalty was execution. However, there were important mitigating factors: to issue the maximum penalty, the court required either a full confession or certain proof that the woman knowingly and intentionally terminated her pregnancy or killed the newborn. In Maria's case, the court had neither. A forensic examination of the cadaver by experienced midwives was inconclusive, although they thought it had probably died in Maria's womb. This may have exculpated her from neonaticide charges, but not from intentionally procuring the abortion of a potentially viable fetus that could have lived outside her womb and been baptized. According to the laws of Bologna, Maria could face capital punishment.

As the primary phase of the investigation came to an end, the governor of Bologna, Giovanni Francesco di San Giorgio, received a rushed letter from Rome. Cardinal Filippo Boncompagni, cardinal nephew of Pope Gregory XIII and superintendent general of the Papal States, had directions on how this case of a lowly servant charged with

such a crime ought to be handled. He wrote: “Although that Maria, servant of sir Enea Desideri, who is in prison and deserves capital punishment (for the matter that Your Lordship will hear about from the judge of the Torrone), nevertheless, considering the fragility of her sex, [it is advised] to change her penalty [into something else], so that it would not bring shame to her kin [*parenti*]. But it is for your lordship to establish what punishment will have to be given.”<sup>2</sup> Boncompagni was a native of Bologna and had deep familial ties to the Desideri. He was almost certainly compelled to write on account of Enea. Although no one expressed it or recorded it in the case files, it was certainly possible—even probable—that it was a Desideri, perhaps Enea himself, who had impregnated Maria and helped or forced her to abort or commit neonaticide. While acknowledging that Maria might deserve capital punishment, the cardinal urged the governor to handle the case with care, “considering the fragility of her sex.” This legal concept of *fragilitas sexus*, fragility or weakness on account of sex, was a legal concept of ancient Roman origin that held that women’s responsibility in crime to be less than that of men because of women’s inherent physical, cognitive, and emotional “weakness” and vulnerability. The cardinal suggested that Maria ought not be condemned to death but rather to a lesser penalty. Cardinal Boncompagni may have pitied the young servant woman, but sparing her from the scaffold would also prevent a scandal for the noble Desideri; he suggested a penalty that would not bring infamy upon her “parenti,” a term that implied both her kin and the household she served. Cardinal Boncompagni’s intercession appears to have worked. The investigation into the circumstances that resulted in a dead creatura discarded in the pipes of the Desideri palazzo ends with his creased letter. While the trial documents do not reveal what happened to Maria, the fact that the cardinal’s letter was included and preserved in the dossier indicates it was a key element in the resolution of the case. Governor Francesco di San Giorgio likely took the cardinal’s advice.

Maria’s case illuminates important and tragic realities that underpinned and shaped legal conceptualizations of abortion and neonaticide, and their handling by civic authorities. Like theology and the Church, the law and its institutions considered abortion a moral wrong that disturbed society and required regulation and discipline. It was a crime, to be punished by the state. The theologically rooted belief that

abortion was a form of homicide, combined with pervasive anxieties linking undisciplined sexuality and pregnancy outside of marriage with disorder, motivated civic authorities to attempt to regulate it through legislation and prosecution. When procurers of abortion were denounced or the cadavers of fetuses and infants found, criminal tribunals investigated and threatened punishment, including execution. However, like their ecclesiastical counterparts, civic authorities were sensitive to context and circumstances, and judges chose not to actively pursue procurers of abortion or to impose prescribed penalties. As Maria's case reveals, abortion could be a socially and politically sensitive crime. It was also legally contentious, resisting easy categorization. Civic authorities, state legislators, and legal scholars debated what abortion meant and how and why it should be considered a crime; they deliberated over the legal status of the fetus and what penalties were appropriate for procurers of abortion and those causing miscarriage by assault. The most influential jurists of the period agreed that the criminal nature of abortion was contentious. They were also skeptical that judges could discover—with the certainty needed for conviction—the causes of terminated pregnancies and fetal death or distinguish between natural or accidental miscarriage and abortion procured intentionally, as the result of violent assault or the consequence of medical intervention. Most agreed these issues were too uncertain to be decided in a courtroom, especially when the life of the suspect hung in the balance. Judges were acutely aware that behind many cases of abortion lay abuse and injustice that men perpetrated on women, as was perhaps the case with Maria da Brescia. The law, in theory and in practice, took all these factors into account.

In this chapter I explore legal conceptualizations of abortion. Like theology and medicine, the law was a major discourse through which individuals understood and communicated about abortion. However, trying to determine what the law on abortion was in early modern Italy is complicated. Before unification, the Grand Duchy of Tuscany, the Republic of Venice, the Papal States, the Kingdom of Naples, and all other discrete political entities governing the people of the peninsula and nearby islands had their own articulations of law and systems of enforcement. Even within a single state, however, there was often not a single source of criminal law. Legislation was important, but not

all-encompassing. In the sixteenth and seventeenth centuries, a handful of states criminalized abortion in legislation through codified statutes and civic ordinances and edicts. Most states had no specific legislation, yet abortion was considered a crime. Alongside legislation, criminal law was developed in technical works of jurisprudence and penology. Jurists operating in the continental common law tradition (*ius commune*), a blend of ancient Roman civil law and Church canon law, discussed the criminal nature of abortion, analyzed various factors influencing its legal meanings, debated how it should be punished, and instructed readers—other jurists and judges—on issues of trial procedure, investigation, and evaluation of evidence.

While codes and books shaped legal understanding, law was given concrete meaning through its application and enforcement in courts. Legal discourse on abortion was therefore also produced “on the ground” in tribunals where judges encountered it, its procurers, agents, and victims in specific contexts. In trial records, we see how judges and generally non-elite individuals produced meanings at the situational level and how doctrinal and prescriptive categories and understandings of abortion fit or clashed with the messy and often tragic experiences of real life.

Not surprisingly, these three main sources of law—legislation, jurisprudence, and trials—address abortion in different ways, often producing inconsistent pictures of what abortion might have meant to the state agents responsible for its regulation and to society at large. For instance, some legislators and jurists categorized abortion as a form of homicide, deserving rigorous investigation and capital punishment. However, criminal tribunals rarely prosecuted cases of abortion. The vast archives for the years 1575–1650 of the criminal tribunals of the governor of Rome and of the city of Bologna, two of the busiest courts of early modern Italy, yield only a handful of trials for abortion. There are several reasons. Procured abortion was considered a “hidden” and “concealed crime” (*crimen occultum, delitto nascosto*), generally kept secret, and therefore rarely coming to the attention of the courts. While courts could investigate cases *ex officio*, by means of inquisition, most cases came to the court’s attention because of individual denunciations of women and men for troublesome or scandalous behaviors. When no one cared, courts did not investigate.

We know prescription almost never determines practice. However, instead of accepting inconsistency and assuming a simple gap between law as a body of theoretical discourse preoccupying the minds of elite men, on one hand, and the ad hoc meting out of local justice in court, on the other, it is more productive to consider legal thinking and practice on abortion as formed in a dialectical relationship. Doctrinal commitments, civic preoccupations with notions of stability and order, and jurisprudential standards of investigation all interacted with the local moral economies of assorted social actors and varied notions of justice (both abstract and concrete) in an inherently unequal and unjust world.<sup>3</sup> Theoretical considerations and normative law both spoke to and ignored the untidy realities of social life. While the relationship between legislation, jurisprudence, and criminal investigation is indeed tangled, it is clear that the polished thought and detailed analysis found in print guided, as best it could, the messy business of questioning frightened, traumatized, and self-interested individuals and the evaluation of complicated forms of evidence in the context of lurid, scandalous, and socially disruptive cases. Jurists often said in print what judges investigating cases may have been thinking. At the same time, what judges encountered in dramatic and often disturbing cases often influenced the development of jurisprudential thought.

### Criminalizing Abortion

“Aborting fetuses is such an enormous and impious act that every law, every doctor, and all reason condemns it and punishes it severely,” wrote Scipione Mercurio.<sup>4</sup> This was not exactly true. While all states likely held procured abortion and miscarriage caused by assault to be crimes deserving punishment, they did not agree on what exactly abortion meant, whether and how they would issue abortion legislation, or what penalties offenders merited. In the sixteenth and seventeenth century, the criminalization of abortion was a matter of contention.

State legislation offers a starting point for examining the framing of criminal abortion. Statutes were a standard and somewhat uniform type of state legislation issued regularly by cities, towns, communes, republics, and kingdoms from the Middle Ages onward.<sup>5</sup> As a strategy for state building, the reiteration and elaboration of criminal statutes

during the sixteenth and seventeenth centuries gave civic authorities the opportunity to amend, cancel, and add to their existing laws. In some states, statutes published in the sixteenth and early seventeenth centuries remained official codes of law for over a century.<sup>6</sup> Homicide, different types of violence, carrying arms, poisoning, theft, kidnapping, slander, defloration and rape, adultery, and sodomy, to name the most common, were criminal offenses punishable by the state. Abortion, however, appears in only a handful of early modern Italian criminal statutes. Of these, some made abortion a homicide, while others treated it *sui generis*, as a crime of its own.<sup>7</sup> Within these two classifications, important distinctions pertained notably to penalties, which ranged from fines—that fed state coffers or charitable institutions—to exile and corporal or capital punishment.

In keeping with canon law, most secular statutes that criminalized abortion calibrated penalties according to the fetus's level of development. The sixteenth- and early seventeenth-century statutes of Milan, Genoa, and Benevento followed the canonical formulations framing the abortion of an animated fetus as graver than that of a preanimate one.<sup>8</sup> In these states, the abortion of an animate fetus was a capital crime, and the procurer was to be executed. For example, the statute of Benevento, part of the Papal States, specified that the abortion of an animate fetus was equivalent to infanticide, and the "mother," along with any accomplice, was to receive capital punishment. Alternatively, the statutes of Perugia, Senigallia, Macerata, and Monterubbiano did not use the terms "animate" and "preanimate" but rather wrote visual cues into their abortion laws. In Perugia, a person causing the death of an "obviously pregnant woman" was to be twice punished, once for the death of the woman and once for the unborn.<sup>9</sup> The statutes of Senigallia and Monterubbiano stated that the abortion of a fetus when the woman was at least "three months pregnant" was a crime.<sup>10</sup> The visual markers "obviously pregnant" and "three months pregnant" likely meant the woman had to be showing, which also meant the fetus was advanced in its development and, therefore, animate. That these qualifiers were written into laws suggests legislators recognized that pregnancy was difficult to detect in the first few months and that this was legally relevant in the criminalization of abortion. Animation, in and of itself, was too imprecise to set judicial culpability.

Penalties—sometimes fines, sometimes corporal—also varied according to the gender and class of the perpetrator. The criminal statutes of Sezze framed abortion as a woman's crime and decreed that a woman who knowingly terminated her pregnancy would be put to death by burning.<sup>11</sup> In Senigalia and Macerata, if the person who provided the abortion was a man, he would lose his head; if a woman, she would burn unless she was able to pay five hundred lire within fifteen days.<sup>12</sup> In Benevento, social status mattered: for the abortion of a pre-animate fetus, an individual of modest class could be beaten or sentenced to pay a fine of two uncia; if of better condition, they could expect a fine of five uncia or a term of penance in a monastery or nunnery, at the discretion of the judge.<sup>13</sup> In Genoa, the offender, here assumed to be a non-elite male, could expect a sentence in the galleys, a common form of disciplinary labor.<sup>14</sup> Some statutes explicitly stated the penalty would be left to the judge's discretion (*in arbitrio*)—more on this concept below.

Because the laws criminalizing abortion are not easily contextualized, their force is difficult to assess. We do not know precisely when, by whom, or why these statutes were framed. Was Genoa's 1580 abortion law motivated by specific circumstances or pressing social issues, and how might they differ from those preoccupying the authorities and legislators in Milan, Macerata, and Benevento? It is likely that some statutes were vestiges and local permutations of ancient Roman and medieval customary law, reproduced and tweaked throughout the centuries, rather than responses to specific social concerns or intended for regular enforcement. Fuller answers depend on further research.

For scholars, the abortion laws described here are suggestive, but they are not representative. An examination of sixteenth- and early seventeenth-century statutes issued by many Italian states has turned up only this handful with specific laws against abortion. Florence issued no statute on abortion; nor did Modena, Parma, Cremona, Bologna, Treviso, Ferrara, or Venice. Strikingly, the renewed statutes of the city of Rome—issued under the pontificates of Gregory XIII in 1580, Sixtus V in 1590, Paul V in 1611, and Urban VIII in 1636—made no mention of abortion either in their laws on homicide, poisoning, parricide, and violence or in sections on sexual offences, such as rape and defloration, incest, and adultery.<sup>15</sup> This statutory silence on abortion is all the more

surprising given the direct papal interventions on the matter by Sixtus V in 1588 and Gregory XIV in 1591.

What could this pattern of omissions mean? Might they suggest that most states did not consider abortion a punishable offense or that the criminality of abortion was so obvious that it needed no statute? More likely, the absence reflects the relative simplicity of this genre of legal literature. Criminal statutes were often framed only in general terms.<sup>16</sup> Homicide laws, for example, usually distinguished neither different types of killing nor the circumstances and motivations behind actions that resulted in death. Typically, they imposed a blanket penalty: he who kills will be killed.<sup>17</sup> The important question was whether abortion fell by implication under homicide statutes. In his annotations to the statutes of Bologna (1582) the jurist Annibale Monterenzi stated that it was a widely held assumption that abortion was a form of homicide but noted that Bolognese laws for homicide, in their current articulations, made no mention of it. Monterenzi clarified that only if the fetus was animated might an abortion be considered homicide. He did not explain how a judge should apply this distinction in the courtroom nor whether the abortion of an inanimate fetus was a crime at all.<sup>18</sup> In contrast to Monterenzi, the papal secretary Leandro Galganetti and the senator Giovanni Battista Fenzonio said nothing about abortion as they annotated Rome's early seventeenth-century homicide statutes.<sup>19</sup>

Local ordinances (*bandi* or *editti*), issued by civic authorities, tell more about the criminalization of abortion. These one-page proclamations or short pamphlets, written in Italian, appeared with greater frequency and were widely distributed. They were often posted around town and read out loud by a crier in order to alert inhabitants to new rules and to remind them of existing ones. Ordinances highlighted the most troublesome infractions and the most ignored prohibitions. Common criminal themes included violence, banditry, theft, and carrying weapons. In the late sixteenth and seventeenth centuries, civic authorities in both Bologna and Rome increasingly included specific prohibitions on abortion.<sup>20</sup>

While the abortion laws found in this type of legislation reached a broader audience, they were no more standardized or unambiguous than those in criminal statutes.<sup>21</sup> For instance, in his *General Ordinances*

of 1588, the vice-legate of Bologna, Anselmo Dandino, included abortion under the law on poisoning and regarded it as a capital offense: anyone who sold poisons that caused a woman to abort an animate fetus, even if meant for other purposes, was to face capital punishment. Strictly speaking, this was not directed at or intended for the individual who sought abortion but for its provider. Furthermore, the clause “even if it was meant for another purpose” suggests the law, like the *bandi* of the *protomedicato* examined in Chapter 1, might have as much to do with fears of poisoning and medical malpractice as with policing procured abortion *per se*.<sup>22</sup> New prohibitions on abortion were issued in Bologna in 1608 and 1610 by Cardinal Legate Benedetto Giustiniano, this time in sections on homicide and parricide. In 1608, Giustiniano declared that “mothers” who willfully killed their animate fetuses by abortion were as guilty of homicide as “mothers who suffocate their babies.”<sup>23</sup> In 1610, he refined this by adding important distinctions: if abortion was committed without intent or if the fetus was inanimate, punishment was at the discretion of the judge.<sup>24</sup> Giustiniano also addressed medical practitioners in a section on crimes committed by healers, declaring no one was to give a woman products to cause abortion. If a healer did so and the woman aborted or died, the healer would be tried for a capital offense.<sup>25</sup> Forbidding healers to participate in the termination of pregnancy was also a warning against medical negligence, although the law made no explicit provision for abortions induced as therapy, which, as we saw in Chapter 1, contrasts with the decree issued by the *protomedicato* of Bologna around the same time.

Ordinances concerning abortion from the governors of Rome were fewer and less precise than those in Bologna. Abortion first appeared in a Roman regulation in November 1591, just five months after Gregory XIV’s moderation of Sixtus V’s bull. The governor of Rome at that time, Guglielmo Bastoni, listed abortion among a slew of offenses ranging from poisoning, blasphemy, and violence toward women to prostitutes dressing as men, singing bawdy songs, and other activities and behaviors deemed immoral or subversive. Including abortion in this range of behaviors suggests that it was viewed as a morally problematic but not a particularly pressing issue. No details explained what abortion was, why it was a crime, or even what penalty it earned.<sup>26</sup> A 1595 ordinance from the governor, Cardinal Domenico Toschi, a celebrated jurist,

offered slightly more: anyone who gave poison and caused a woman to abort an animated fetus “without the counsel of a physician” would incur the death penalty.<sup>27</sup> Toschi’s prohibition aimed primarily at healers and providers of drugs, but it was not a wholesale prohibition. It stated that, where an abortion needed to be induced, it had to be done by a physician, a position also maintained by the Roman *protomedicato*. The important caveat “without the counsel of a physician” contrasted with the Bolognese laws of Cardinal Giustiniano issued a decade later.

While civic legislation in both Bologna and Rome prohibited abortion, authorities did not define it in the same way nor prescribe like penalties for procurers or administrators. Seeking to centralize authority and establish some consistency over criminal matters, in 1599 Pope Clement VIII published an authoritative set of *General Ordinances* for the entire Papal States.<sup>28</sup> Regarding abortion, he declared that causing a woman to abort an animated fetus, even if unintended, merited death and the confiscation of property; if the fetus was preanimate, the procurer should be sent to the galleys and suffer the loss of goods.<sup>29</sup> As women were not punished with terms on galleys, this declaration was directed, it seems, at men, perhaps those responsible for aborted pregnancies, including forcing them upon the women, as well as healers who participated in abortions. Clement’s formulation was repeated in Roman ordinances until at least 1632. However, as evidenced by Cardinal Legate Giustiniano’s 1608 and 1610 ordinances for Bologna, the declaration was not necessarily followed throughout the Papal States as Clement had intended.

There was no single explicit and consistent abortion law in early modern Italy. As late as 1673, the cardinal and jurist Giovanni Battista De Luca wrote, regarding abortion, that “one cannot give a definite and general rule applicable to all [states], the main reason being the great diversity of styles of Principalities.”<sup>30</sup> While the legal systems and the criminal doctrines taught in universities and practiced in cities across the Italian peninsula were similar,<sup>31</sup> local social and political contexts probably gave different meanings to crimes and accounted for some of the variety we see in legislation on abortion. De Luca cited the papal bulls of Sixtus V and Gregory XIV as examples of difference. And a pope’s goals were not necessarily those of the grand duke of Tuscany.

This sample of state and municipal legislation indicates that in some places abortion was explicitly criminalized. Nevertheless, the penalties to be meted out to offenders both differed across the peninsula, and even within some areas, and changed over time and from authority to authority. The relative scarcity of legislation on abortion—compared, for example, to rape, adultery, sodomy, prostitution, poisoning, or bearing arms—likely suggests that most authorities did not address abortion as a pressing issue that required direct legislative intervention. However, it also reveals much about the nebulous nature of abortion in the minds of early modern Italian lawmakers.

Although some civic authorities deemed abortion a crime, they had difficulty defining it and assigning clear or consistent penalties. For instance, the seventeenth-century jurist and judge of the Criminal Rota of Florence Marc'Antonio Savelli discussed abortion at some length in his influential work of criminal jurisprudence and penology. Yet he could not cite a single disciplinary regulation on the matter either included in republican Florentine statutes or promulgated by the Medici grand dukes. In contrast, he readily referenced numerous statutes and edicts addressing disruptive sexual behaviors such as adultery, incest, sodomy, and premarital defloration.<sup>32</sup> Legislation was not understood as an end but rather one layer of legal discourse among many. Thus, jurisprudential commentary on abortion, to which we will now turn, reveals it to be a complex and controversial subject for which simple laws, tidy categories, and blanket penalties did not reflect—as they seldom did—the messiness of real experiences and the difficulties of investigating cases and making judgments in actual situations.

In works of criminal jurisprudence and penology, a genre of legal writing that flourished in the early modern period, Italian jurists devoted substantial attention to abortion. After long and celebrated careers hearing cases in court and teaching legal doctrine and procedure, some jurists composed, for a professional audience, treatises on the practice of criminal law (*practica criminalis*) and collections of exemplary cases and sentences (*decisiones*) issued by royal and senatorial tribunals. Works like Prospero Farinacci's *Practice and Theory of Criminal Law* were massive and multivolume works containing analysis and citations on many subjects from legal doctrine to points of procedure.<sup>33</sup> In this genre, authors offered insight into how a jurist might categorize a

type of crime or investigate cases, what problems or controversies might arise, and what penalties were appropriate for the offense committed. Most of the time, authors preferred to cite as many authoritative opinions as possible on a given subject rather than directly state what they themselves thought and did in practice—this was partly because every case of crime came with a unique set of circumstances, and therefore a judge was supposed to render a decision based on his judgment of these circumstances in relation to the wisdom provided by eminent jurists and the legal tradition. However, within a maze of citations, the jurists sometimes stated their own views or appeared to side with one authority, interpretation of doctrine, or moral and social imperative over another; these personal opinions will be privileged here. In the decisions genre, jurists curated collections of decisions made and sentences given by important appellate courts, such as the Sacred Royal Council of Naples and the Senate of Turin. Though legal historians continue to debate whether the concept of precedent had weight in early modern Italy, the rationale for publishing these decisions was clearly to present historical examples of how judges might engage with specific criminal offenses.<sup>34</sup>

These works reveal that abortion often preoccupied the minds and writings of the most influential jurists of the sixteenth and seventeenth centuries and occasionally took up the time and resources of important courts. While most jurists agreed that abortion was a crime that generally fell under the category of homicide, they also acknowledged that there were too many uncertainties, at both the doctrinal and practical level, to really treat it as such in court.

To be sure, there was a long legal tradition of debating doctrinal issues relevant to the criminality of abortion. When working to sort out abortion as a crime, sixteenth- and seventeenth-century jurists relied heavily on ancient Roman law and its medieval commentators. The Roman legal tradition was the main source of the continental common law (*ius commune*) that jurists learned in university and later used, in relation to local political and social contexts, to make and judge cases. Concerning abortion, ancient Roman law, particularly three precepts found in the *Digest of Justinian*, deemed neither procured abortion nor miscarriage caused by assault a homicide, because the unborn fetus was not legally a human being. In this Roman tradition, abortion was a

crime but not a capital one; exile, fines, and the confiscation of property were appropriate penalties.<sup>35</sup> Medieval Christian commentators were uneasy with these laws because they overlooked the soul and were, therefore, at odds with theology and canon law and their paradigm of animation. A rich medieval legal discussion developed.<sup>36</sup> Some jurists drew a clear distinction between abortion pre- and postanimation; others wondered whether and how to apply this principle to actual criminal cases. Later, in a post-Tridentine context, and especially after the two papal bulls on abortion, early modern jurists again confronted the risks of challenging theological orthodoxy. Most commentators balanced moral and theological commitments with legal reasoning, the practicalities of investigating cases, and the social consequences of prosecution and meting out penalties. Where statutes and municipal ordinances represent a diversity of concerns in their abortion laws, jurisprudential writings, even though they might differ on points of interpretation, reflect a movement toward consensus. Like their predecessors, early modern jurists contemplated several themes: the circumstances under which abortion could be homicide, whether a fetus could and ought to be regarded as a human being, and whether a procurer or administrator of abortion or someone who caused a miscarriage by assault should be tried as a murderer.

Most jurists began their discussion of abortion with the legal status of the fetus. On this point, civil law aligned with theology and canon law. Civil jurists accepted the distinction between the abortion of a pre- and postanimate fetus, and that the latter was considered homicide and the procurer open to due punishment. However, animation was always regarded to be a problematic form of evidence; it was clear to all that gestational age and development dates for animation were contentious. Farinacci cited theological, scientific, and medical authorities variously claiming that male fetuses could be animated in thirty, forty, sixty, and even eighty days and females at forty, sixty, eighty, and ninety days.<sup>37</sup> Commentary by the forensics expert Paolo Zacchia was influential. Although he found Thomas Fyens's new theory of immediate animation more convincing than the traditional view of delayed animation, Zacchia concluded that a precise moment of animation could not be determined with certainty.<sup>38</sup> Most jurists, however, clung to the canonical opinion that was reaffirmed by Pope Gregory XIV in 1591.

While jurists acknowledged the importance of the soul and baptism to eternal life, most thought animation too ambiguous a basis for defining a homicide that could result in capital punishment. Giacomo Menochio explained that, even though the statutes of his own city of Milan (where he was a judge, professor, senator, and consultant to Philip II of Spain) distinguished between the abortion of animate and inanimate fetuses, most states did not because the matter was too ambiguous.<sup>39</sup> Nevertheless, at the end of the seventeenth century, the standard legal doctrine (*communis opinio*) on abortion went unchanged. In 1673, Cardinal De Luca repeated the distinction between animate and inanimate fetuses and the corresponding penalties for abortion but noted in a deprecatory way that these distinctions mattered more to jurists “who speak in generalities and in abstractions.”<sup>40</sup>

Some jurists thought that physical fetal formation was a better measure than animation for determining the gravity of abortion and its punishment. They spoke of “perfect formation” (*formatus perfectus*), which meant a fetus completely developed and able live outside the womb, at least for a time. While animation gave the fetus a soul, in the transition from fetus to human being, viability and live birth was what legally mattered. Yet jurists discussed the haziness of this boundary, too. Asking whether one should speak of a “child” (*infans*) and “person” (*homo*) from conception, animation, or only from birth, Giacomo Menochio concluded that before it is born, a fetus is not a person or a child.<sup>41</sup> Antonino Tesauro, senator and judge at the Royal Court of Turin, was especially firm in his assertion that a fetus in utero does not have the same legal status as a born child. “It is one thing to *be* a thing,” he argued, “and another to be *held* as a thing.” A human being is never called “a true human [being] except after [she or he] has been born”; “a fetus that has not yet come out is not rightly said to be a person [homo].” Tesauro was unequivocal: “There is a difference between killing [a child] already born, and [killing] an immature [fetus] still in the womb.”<sup>42</sup> The latter was not homicide or a capital offense, the former was.

These considerations were also important in the civil law arena. Because a fetus was not considered a human being, it could not affect the course of inheritance until after its emergence, alive and viable, from its mother’s womb.<sup>43</sup> Fathers or other heirs sometimes resorted to delivery

by caesarean section after the death of the mother, even if the child was certain to die during the process or shortly after drawing a few breaths, in order to direct the flow of inheritance.<sup>44</sup> In general, then, although timing was always debatable, jurists, often citing Hippocrates and, in the seventeenth century, Paolo Zacchia, regarded a fetus to be fully formed and viable around eight months from conception.

Although jurisprudence tended to require a fully formed and viable fetus born alive for abortion to qualify as a homicide, the legal commentators remained ambivalent and even anxious. All jurists who wrote on the subject felt the need to discuss the nature of fetal personhood and the criminal categorization of abortion (whether or not it might be homicide) and, ultimately, to defend the common opinion. Discussions generally started from the premise that abortion was widely assumed to be a form of homicide because it meant the loss of a soul and a potential and imagined future human life. This was partially due to the fact that theological thinking on the nature of the fetus and the subject of abortion permeated all forms of discourse. Nevertheless, even with the papal incursions at the end of the sixteenth century, the legal consensus until the end of the seventeenth century continued to be that the criminal severity of abortion increased with the gestational age of the fetus, only becoming unambiguously homicide with the intentional killing of a perfectly formed and viable infant—De Luca specified that this crime should be called infanticide and not abortion.<sup>45</sup> But the moments of transition remained hazy and subject to varying views. It was generally agreed that determining a penalty, and therefore what type of crime had been committed, based on fetal animation or level of formation was, according to the Florentine jurist and judge Antonio Maria Cospi, “[a] matter of great controversy” and “beyond the legal profession.”<sup>46</sup> Civil law, like canon law, struggled with the resulting conflict: the crime of abortion had to be discouraged, but the earlier in the pregnancy, the less severe the crime. In the case of the Desideri maidservant Maria da Brescia, capital punishment was an option because her creatura was considered fully developed and viable, and she was suspected of neonaticide.

While often focused on points of doctrine, jurists could not separate abortion’s abstract meanings from the lived experiences of gender and social status. Sometimes social norms and practices coincided and

collaborated with legal doctrines; other times custom challenged and resisted the application of precept. In the following two sections, I explore some of the ways in which legal doctrine on abortion both ran up against and incorporated social facts; how it struggled with evidentiary standards; and how, in turn, individuals on trial made creative use of gender and body assumptions to exculpate themselves from wrongdoing. In doing so, ordinary people contributed, albeit unwittingly, to the formation of legal discourse on abortion.

### Mitigating Circumstances

Amid academic discussions of animation and formation and whether to punish abortion as homicide, jurists often addressed the question of who procured abortion and why. Their answers identified women as the primary agents of the crime and acknowledged the gender, age, and social pressures that often motivated the practice. Unsurprisingly, almost all legal explanations linked the words “women,” “honor,” “shame,” and “scandal.” For example, in his published collection of decisions drawn from the Royal Court of Naples, the protonotary Vincenzo de Franchis titled his discussion of abortion “Whether a woman who procures abortion ought to be punished with the death penalty.”<sup>47</sup> Similarly, the Florentine Cospi discussed the question “Which women are suspected of abortion?”<sup>48</sup> Answers spoke of status and life stage. Abortion was, according to De Luca, a practice of young, unmarried women (*zitelle* or *donniciole*), but widows and married women pregnant from adultery were also among the usual suspects. All these women had motives in common. According to Farinacci, abortion was a means of “concealing disgrace” and preserving honor and reputation.<sup>49</sup> Cospi echoed that women procured abortions to “escape the disgrace of their shamelessness.”<sup>50</sup> For De Luca, abortion was committed by “those women who are dishonest to hide their dishonesty, and to continue to remain in the opinions of others as honest, because they are afraid of their family, or for their own reputation.”<sup>51</sup> In printed works of jurisprudence, the gendering of abortion and its motivations often were clear and uncontroversial.

Unlike the moralists and religious writers examined in the previous chapter, who wrote to mold popular conscience and behavior,

jurists addressed a professional audience, usually in Latin, and generally avoided inflammatory language. Rather than scolding hypothetical unmarried, adulterous, or widowed women for their debauchery, jurists often displayed a marked paternalism. The law and its officers accepted gender, age, and the need to preserve honor and avoid disgrace as legitimate factors that ought to diminish penalties for this crime. First, because of their inherent weakness, the law regarded women to have diminished responsibility in many legal and criminal matters.<sup>52</sup> Cardinal Boncompagni invoked this concept of *fragilitas sexus* in his letter where he sought to persuade the governor of Bologna to soften the penalties against Maria da Brescia. Second, jurists recognized youth and social vulnerability as mitigating factors. For example, they agreed that a “young girl” who had an abortion to conceal sexual relations and to avoid infamy and the wrath of her family merited rather milder penalties (*poena extraordinaria*) and left these to the judges’ discretion. In most jurisdictions, the legal category of “minor” included women under the age of twenty-five.

Legal commentators were well aware that in the matter of seeking an abortion, young women might be subject to others in positions of power and authority. In print, rather than signaling the man responsible for the pregnancy, jurists usually blamed a young woman’s mother, who likely convinced her daughter that abortion was the only way to avoid disgrace and hardship. According to Tesauro, the “impious mother” should be held responsible “if she allowed her daughter to be so unchaste that she could so easily be committed to the embrace of a man.” Tesauro counseled, however, that the hypothetical mother or other matron responsible for a young woman should try to conceal the pregnancy and after delivery abandon the illegitimate child at an foundling hospital.<sup>53</sup> Recommending a similar solution, De Luca reported that in big cities women could easily bring their newborns to an orphanage. Yet he worried that in smaller places without these institutions, women might abandon their newborns in the streets or squares, where, he lamented, if no one took them in, the infants could die from exposure.<sup>54</sup>

Jurists were, on the other hand, glaringly silent regarding men’s roles in procuring abortions. This omission did not imply that writers assumed men’s innocence; rather it reflects broad misogyny and

patriarchal privilege enacted in legal institutions and in print. In actual criminal investigations, however, the law did confront varying degrees of men's participation in and responsibility for abortions. Judges heard that it was often men who desired, arranged for, or administered abortions. But they also knew that men were responsible for abortions in less direct, more insidious ways. Men also caused abortions by putting women into situations where they had to decide between trying to terminate an unwanted pregnancy and carrying and giving birth to a child in the face of social, economic, and even mortal dangers. Unsurprisingly, women investigated for procuring abortion or committing neonaticide made these arguments. In doing so, they drew on and adapted discourses of *fragilitas sexus*, of female weakness, vulnerability, and victimhood, to shift blame to their impregnators. A common narrative was to explain non-marital pregnancy as the product of violent rape or of a sexual relationship where the man reneged on a promise of financial support or marriage. In these framings, pregnancy and its termination came not from reckless abandon or misjudgment on the part of women but rather the abuse and duplicity of men. Three cases investigated by the criminal tribunals of Rome and Bologna reveal this defense in action and illuminate the social realities that underpinned its legitimacy.

In 1602, Mennoca Liberatori, from the small town of Filettino (about seventy kilometers east of Rome), tried to abort the product of a violent, adulterous rape.<sup>55</sup> Mennoca was married, but her husband, Antonio, had been away for six years fighting in the company of the nobleman Orazio Caetani. At the time of the trial, no one knew whether Antonio was alive or dead. Mennoca lived with her young son and a kinswoman named Lucretia and her daughter. According to Mennoca, one night in January when her companion was away, Don Cinthio d'Andrea Palocho forced open her tightly locked door and entered her bedroom. Startled awake by his cold hand over her mouth, she cried, "Help me, Our Lady." To quiet her, Cinthio allegedly said, "Have no fear, it is me." Cinthio was related to Mennoca through marriage, but perhaps his statement "it is me" also implied a closer intimacy. He got into her bed, kissed, touched, and disrobed her, and said he wanted to do with her what husbands do with their wives. "I said that I did not want to, and resisted him, but, in the end, I being naked and him having

more strength than me, he jumped on top of me and knew me carnally.”<sup>56</sup>

Mennoca’s description of their sexual encounter fit the legal requirements of rape of a married woman. In cases of defloration, women and their families seeking redress from the deflowerer had to prove nonconsent and resistance, which was evidenced by screams, torn clothing, bruises, wounds on the body, and bleeding. This was also required in cases of adulterous rape—minus the bleeding—where the woman had to clear herself of any willingness or acquiescence. Mennoca may have described what transpired, but she also knew what she had to tell the court. She said this was the only time she had had sex with Cinthio, explicitly stating that she was not engaging in a sexual relationship with her rapist, and insisted that she had not had sex with anyone else, a statement that was necessary to establish her sexual reputation. Her testimony reflects the formal and professional culture of the law and codes of sexual morality as much as it might reflect what she actually suffered that night with Cinthio.<sup>57</sup>

While Mennoca described the sex as forced and nonconsensual, some elements of her language were ambivalent. Several times in her testimony she described the sex as a sin and a misdeed that *she* committed: “this sin, by which I mean that I find myself pregnant since January”; “I have committed a misdeed with a man other than my husband”; “I have committed this misdeed only one time with don Cinthio”; “I find myself pregnant from this sin which I committed with don Cinthio”; “my husband Antonio was not in these lands at the time that I committed this sin with don Cinthio.”<sup>58</sup> Mennoca’s penitential and active rather than passive language gives the impression she also thought herself an agent in this wrongdoing. She articulated a conception of sex where nonconsent and force did not necessarily exculpate a woman from responsibility—the sin lay as much in the act as in its intention. However, remorse could also be strategic and may have been intended to move the judge to sympathy. Both sincerely and tactically, Mennoca described herself as a victim but also as a penitent sinner.

Mennoca’s shame turned to fear as she discovered she was pregnant. Fear turned to action as she tried to have an abortion. She knew what to do and may have even been preparing for such an eventuality. Mennoca acquired the herb colocynth and a purgative beverage (of

undisclosed ingredients), though she did not say from whom. The reason for the attempted abortion was obvious: it would conceal the sinful sex, and she and her family would avoid shame and stigmatization. Mennoca, however, also feared violence: she told the judge she feared her brothers might beat or kill her in vengeance for the disgrace her adulterous pregnancy would bring to their family. While it was sinful, criminal, and potentially dangerous, Mennoca decided abortion was a necessary course of action. She allegedly told her sister-in-law, "Oh for the love of God, I want to recover as best as I can, I want to eat a *melo scriccio* [local idiom for colocynth] in the hope that it will make my belly go away."<sup>59</sup> But this did not happen. She consumed the purgative for a few days but then decided to stop. She did not explain why she abandoned the plan, and the judge did not ask. As her belly grew, her neighbors began to talk, and her pregnancy became public. Mennoca took refuge with a sympathetic kinsman for fear her brothers would kill her in her own home.<sup>60</sup> The commotion caught the attention of the vicar, who imprisoned her and began the investigation. At the beginning of the trial, Mennoca's father, Christophoro, came to court to officially state Mennoca's rape and pregnancy was an affront to his and his family's honor, for which he demanded justice in the form of the rapist's punishment. He also disavowed his daughter: "My Lord, I come [to court] because I understand that Your Lordship has imprisoned my daughter . . . , who, I understand, is pregnant, and because this pertains to my reputation and to the honor of my house, I have come to launch a lawsuit against my daughter and against the person who has done this wrong and dishonor to me, as well as against anyone who aided or showed favor. . . . I demand that [the court] proceed with the full rigor of justice."<sup>61</sup> Christophoro's public condemnation of both his daughter and her rapist / impregnator, and anyone else who aided and abetted them, was an attempt to recoup his and his family's damaged honor. It seems he either assumed Mennoca was somehow complicit in the illicit sexuality, or he did not care either way and was willing to sacrifice her to protect his own and his family's honor.

Had Mennoca gone through with the abortion, the events of that fateful night may never have come to light. However, something prompted her to stop taking the colocynth. Perhaps she was afraid of the physical dangers of abortion. Or perhaps, reflecting on the advice of

familiars or even a confessor, she decided that terminating the creatura in her womb was a sin she could not live with. Or maybe she tried more times than she admitted, it simply did not work, and, in her retelling, she transformed inefficacy or fear into a moral decision to stop.<sup>62</sup> Mennoca did not say, the judge did not ask, and we cannot know.

The court tried to find her impregnator, but Cinthio had escaped in the night to the Kingdom of Naples, an act implying guilt. He clearly thought he would be punished for his behavior. Cinthio's misconduct may have provided him with short-term satisfaction, but it turned the lives of two families upside down. The consequences were grave for him as well—he was officially banished from Filettino and would have to piece together a life away from family and friends, unless of course he and his family found a way to compensate Mennoca's father and brothers and restore their honor. While the court tried to locate him, Mennoca, seven months pregnant, faced the wrath of her dishonored family, communal stigmatization, and potentially punitive action by the court, although there is no indication in the trial records that that was how the judge was leaning. Unfortunately, we do not know how this case ended. In her testimonies, Mennoca presented herself as vulnerable and susceptible to multiple forms of violence: physical, emotional, and now, facing pregnancy alone and the birth of an illegitimate child, social and economic. What would happen to her should her husband return from war? Would she keep the illegitimate child or abandon it at an orphanage? Would her disgraced family support her? Her attempted abortion, she told the judge, was sinful and wrong, and she had therefore abandoned that plan. But it was also completely understandable given the stakes. The real malefactor, she made clear, was don Cinthio.

A 1586 case investigated by the Criminal Tribunal of Bologna reveals another example of highly gendered vulnerability, this time economic in nature, used to explain a non-marital pregnancy that ended in a late miscarriage or stillbirth. The accused was Aorelia di Battista, a widow from the Apennine town of Camugnano (about fifty-four kilometers southwest of Bologna). Aorelia was suspected of neonaticide or abortion—the charges were not specific as it could not be determined whether the creatura died inside or outside her womb. Aorelia denied any foul play and vehemently argued that she had delivered a dead creatura, which she buried under a chestnut tree.<sup>63</sup> Forensic examination of

the exhumed *creatura* revealed it to be fully formed and “perfect” in all its parts, but witnesses could neither confirm nor deny whether it was born dead.<sup>64</sup> With the cause of death unclear, Aorelia’s reputation was the best evidence available. The context surrounding her pregnancy might make the claim of an abortion procured later in pregnancy or of neonaticide more or less plausible.

Aorelia was forthcoming. The dead *creatura* was the product of her sexual relationship with Pietro di Lazzaro, an unmarried agricultural laborer from Cavaliera (about fifteen kilometers south of Bologna). In Aorelia’s version, Pietro had propositioned her many times, but she only yielded to his advances after he began helping her support her five children from her deceased husband. According to Aorelia, Pietro promised to help her raise the children; he gave her money and food and, according to one witness, may have proposed marriage. Their public relationship lasted over two years. Pietro ate and drank at her house, slept over, and acted “as if he was my husband.” Aorelia emphasized the public nature of their relationship to imply she had nothing to hide and that the community did not object. While the evolution of their relationship cannot be known in greater detail, in her retelling, Aorelia portrayed it as both affective and self-interested. She told the judge several times she surrendered to Pietro’s advances because she was poor: “Seeing as I am poor and that I cannot sustain my aforesaid family . . . he helped me and did what he could to help raise my children.”<sup>65</sup> Trading sex for help raising her children was, in Aorelia’s calculus, moral and responsible behavior. At the same time, she knew it was also a gamble. About one year earlier, she had been pregnant with Pietro’s child; when she gave birth, Pietro demanded the child be given to the *Ospedale degli Innocenti*.<sup>66</sup> The couple continued their relationship, but when she became pregnant again, Pietro abandoned her. Aorelia then found herself more vulnerable than before.

When he was questioned, Pietro unsurprisingly gave a radically different account of their relationship. He told the judge that Aorelia was a prostitute whom he paid for sex: “I came and went, both day and night, from the said Aorelia’s house, as I wanted and as it pleased me, and I slept there, and I screwed her at my convenience, and I gave her money, when I had it, and I screwed her like the whore that she is, as did other [men]. I cannot say who else screwed her, but I heard it said publicly that

this woman is screwed by diverse people.”<sup>67</sup> To exculpate himself from responsibility, Pietro labeled Aorelia a whore, exploiting typical stigmatizing assumptions about sexual commerce with unmarried women. Furthermore, saying that Aorelia had sex with many men meant that her impregnator could be any one of them. Pietro’s language discounted a more intimate relationship akin to stable concubinage. He also denied getting her pregnant or sending a baby to the orphanage. Aorelia’s pregnancy was her problem. Although no other witnesses called Aorelia a prostitute, neither did they intimate that Pietro owed her anything.

Aorelia’s case offers an example of how non-marital sex might have been negotiated between desire, promise, and economic need but also clearly shows this was a dangerous gamble for women. Pregnant by a man who may have reneged on a promise to support her and her children, this widow and mother of five faced the prospect of another shaming, energy- and resource-draining pregnancy, and another mouth to feed, or perhaps another trip to the orphanage in Florence. Rather than shying away from it, Aorelia linked her pregnancy to her poverty. A hungry brood of children justified sinful sex; temporary economic security and potentially affective attachment resulted in non-marital pregnancy, which ultimately brought the relationship to an end. When Aorelia delivered a dead creatura, onlookers assumed foul play; to the judge who investigated her case, the alleged miscarriage or stillbirth appeared to have been a convenient end to a stressful relationship. The court had Aorelia tortured to see if her story would change, but she steadfastly maintained her innocence.<sup>68</sup>

Pregnancy was also not an uncommon result of sex with a false promise of marriage, as Lucia Pivinelli, a woman in her early twenties from the small commune of Montagu just outside Bologna, learned in 1610. Like Aorelia, she was impregnated and abandoned by a man who made promises. Knowing that she was pregnant, she concealed it from her neighbors and planned to give birth in Bologna and to pass the child to the Ospedale dei Bastardini. Unexpectedly, at about seven months she delivered a stillborn fetus. Like Aorelia’s, Lucia’s stillbirth was investigated by the criminal tribunal.

Lucia explained she was deflowered and impregnated by Sabatino Masotti, who, like Pietro di Lazzaro, was a roaming laborer. A few

months earlier, Sabatino spied Lucia, identified her as vulnerable, and took advantage of her. Lucia lived with her sister and did not have male protectors or providers. Sabatino pestered her for sex and promised money and even marriage: "You are poor, I will take care of you or take you as my wife," he allegedly said. He would come to her house and molest her every other night. She resisted until she surrendered: "Being poor and hoping he would give me something, I consented," she explained to the judge. Lucia described the sexual intercourse that followed as fitting the requirements of defloration: it was painful and she bled. More frequent sex followed the first time; afterward, Sabatino sometimes gave her a gift or money.<sup>69</sup> A few months later, she thought she might be pregnant and told Sabatino. As their relationship cooled, she accused him of renegeing on his promise to take care of her. Later, he broke off communication entirely, leaving her to deal with the pregnancy alone.

Sabatino turned up one and a half months after the stillbirth and was arrested and brought to the Torrone prison in Bologna, where Lucia was also being held. When asked about his relationship with Lucia, Sabatino claimed to have talked with her only once in church. The officials then read him portions of Lucia's testimony about having sex and getting pregnant, but Sabatino denied it all and accused Lucia of framing him for her own misdeeds. In a face-to-face confrontation before the judge, Sabatino called Lucia a liar. She agreed to confirm under torture her testimony about his mistreatment of her and did so steadfastly.

Mennoca, Aorelia, and Lucia blamed men for the criminal and potentially life-threatening situations they faced. All three women tried to shift responsibility away from their alleged wrongdoings and toward the injustices committed against them that led to the pregnancies and dead fetuses the criminal tribunals were investigating. Although absent from jurisprudential analysis, it was men like Cinthio, Pietro, Sabatino, and many others who lay behind abortions, stillbirths, and neonaticides. With her husband away at war, Mennoca was prey to the desire and overwhelmed by the physical force of Cinthio. Pregnant against her will, she contemplated and attempted but ultimately abandoned abortion as the solution to her woes. A poor widow struggling to raise five children, Aorelia was tempted by a promise of economic security for herself and her children into a non-marital relationship that

resulted in pregnancy and ended with a dead fetus. Lucia was younger than Mennoca and Aorelia and more inexperienced when it came to men. A poor woman without protectors and providers, she was coerced into a sexual relationship with a man promising security and marriage. Like the judge, we cannot know whether Aorelia and Lucia suffered late miscarriages as they claimed or whether they procured abortions or committed neonaticide as some suspected. It is possible that they did not know how to interpret their terminated pregnancies themselves. Like Mennoca, they too would face social stigma and potential punishment.

Trial records such as these bring into sharp relief facets of gender injustices that are completely effaced in jurisprudential literature. Mennoca, Aorelia, and Lucia did not fit the stereotypical image of sexually wanton and dishonest young women and widows who procured abortion to maintain honor. Rather, these women portrayed themselves as prudent and deliberate; their respective judges encountered them as vulnerable, targeted, and self-described victims of men's abuse of power. These representations may have accurately reflected the way these women perceived themselves and felt about their situations, but they were also fashioned with hopes of eliciting sympathy from their judges. For Mennoca, admitting to procuring abortion was partly utilitarian, as it shifted culpability onto the man responsible for the pregnancy—"Look what he drove me to." This strategy could only work for her because she did not actually terminate her pregnancy and because her brothers threatened her with violence for the dishonor she brought them. While Aorelia and Lucia did not admit to procuring abortion or committing neonaticide, they did link their dead fetuses to Pietro's and Sabatino's immorality and exploitation—these men caused their pregnancies and hardships and therefore were also, in an essential way, responsible for the stillbirths. Although they did not articulate it explicitly, it is hard not to interpret their testimonies as implying that the root cause of the contemplated abortion and the miscarriages suffered, as well as the troubles they now faced, was the malice of men and the cruel circumstances they took advantage of and exacerbated.

The law recognized women as the weaker sex, and expected women on trial to present themselves accordingly. Women knew they had to be victims to elicit mercy and protection from paternalistic authorities: to be absolved or forgiven, these women could not be agents. While

Mennoca, Aurelia, and Lucia likely never read the works of jurists, they knew to play up the *fragilitas sexus* assigned them by the law. In doing so, they reproduced and made creative use of misogynistic gender assumptions to mollify an intimidating and asymmetrically powered institution.<sup>70</sup> Judges used this principle to mitigate their criminal responsibility. Regardless of what jurists failed to say in print, judges knew that men were responsible for unwanted pregnancies and often for abortions. Judges sometimes sympathized with women in these situations, but dispensing discretionary mercy, a quintessential feature of early modern justice, also reinforced their own power and fortified gender and social norms.

### Bodies of Crime

For a mix of reasons, abortion was difficult to prosecute. Besides the potential social costs of scandal and even violence, from a purely legal perspective, the acquisition and interpretation of evidence about such an intimate crime posed major obstacles. The courts recognized and sought several kinds of evidence. Reports of local knowledge about both specific events and personal reputations were, although circumstantial, central to trials. Judges listened carefully to accounts of gossip and rumors regarding an illicit sexual relationship, pregnancy and its termination. *Fama*, a person's publicly acknowledged reputation for bad behavior, spurred courts to investigate, might justify the use of torture, and contributed to conviction. Nevertheless, for cases of alleged abortion and neonaticide, where a death sentence might follow, the court needed less fickle forms of evidence.<sup>71</sup> In such prosecutions, for a capital sentence, the law required clear demonstration that the fetus was fully formed and viable and that the abortion was committed knowingly and intentionally (*scienter, scientemente, studiosamente*) and with, as we might say, "malice aforethought" (*con sceleratezza, con dolo*).<sup>72</sup> This level of certainty best rested on a confession. Since even with torture these were rare, judges depended on evidence drawn from the body.

Judges primarily relied on the two main "bodies of crime": that of the accused woman and the product of her womb. These were both the material substances of the alleged crime and its primary witnesses. A body, when studied by experts, could have objective, evidentiary value.

The mouth might lie, but the *corpus delicti*, laid bare, could betray its possessor and confess its past. While all bodies challenged interpretation, the female body and its products, as we saw in Chapter 1, were deemed notoriously enigmatic. Engrained in law, the intrinsic ambiguities of women's bodies shaped judicial practice. Jurists assumed that both women and men exploited these ambiguities to fabricate illness narratives and procure abortions, and if caught, to exculpate themselves in court from intentional wrongdoing. Similar narratives of ambiguity were used in cases of miscarriage caused by assault. Although jurists lacked good answers for how to bypass these difficulties and to test intentionality, they did try. Works of criminal jurisprudence and trial records document the standards of bodily evidence for procured abortion and miscarriage caused by assault, and show how judges used them.

Legal discussions on abortion and its investigation in tribunals reflect the increasing importance placed on forensic medicine (medical knowledge and practitioners at the service of justice) and contributed substantially to its development. Judges relied on medical practitioners as expert witnesses in cases ranging widely from physical and sexual violence (including homicide, poisoning, and sodomy), to mental illness and spiritual offenses (such as witchcraft and demonic possession), to establishing sainthood.<sup>73</sup> In a context of necessary skepticism, expert testimony was regarded as a particularly high form of truth telling. It was their duty to put unpartisan words and objective narrative to the evidence of the body.

Although most forensic medical experts were men, in abortion cases, midwives with years of specialized experience were the preferred authorities. Despite women's losses to professionalization, Italian midwives remained instrumental agents in the legal system well into the modern period. For reasons of propriety and perhaps for consequent lack of experience, male physicians and surgeons were infrequently called on to testify in cases involving the physical examination of women's genitals and reproductive organs. As well for a fetus or a stillborn infant, judges first turned to midwives. The Roman midwife Angela Ferranta testified that she often delivered women of dead fetuses in various stages of development; furthermore, clients paid her—generally five *giulii*—to come to their houses to determine whether a uterine

expulsion was a miscarried fetus, if it was male or female and how many months developed, or whether it was actually some other object of the womb.<sup>74</sup> This expertise made midwives indispensable to the criminal justice system and crucial to the development of forensic medicine.

While midwives and male medical practitioners were the experts, many judges were trained to evaluate their forensic testimonies. Early modern jurists increasingly possessed a sophisticated knowledge of medicine, and some authors incorporated a thorough discussion of the slippery signs of pregnancy and the ambiguities of the female body in their published work. These discussions aimed to equip judges with relevant medical information and to instruct them on the pitfalls of hasty assumptions and unwarranted evidentiary interpretations. Commentaries cited both ancient and modern medical authorities, but by the late seventeenth century, jurists relied mostly on Paolo Zacchia's influential compendium *Medico-Legal Questions*. This text included authoritative discussion on the signs of pregnancy, fetal development, and the bodily signs of abortion, childbirth, and neonaticide. Still, jurists knew and accepted that the mysteries of the female body would often prevent the certain discovery of whether a knowing and intentional abortion had occurred. This uncertainty allowed judges further lenience to issue discretionary clemency to women and men on trial.

In abortion trials, according to jurists, the body of the aborted fetus or dead infant provided primary evidence of whether a crime had been committed and how grave it was. The status of perfectly formed and viable could only be determined when the fetal body was available for examination. Yet an aborted fetus was often easy to hide, especially in the countryside.<sup>75</sup> Younger fetuses were quickly disposed of. Testifying in Rome in 1634, midwife Angela Ferranta reported that "we throw aborted fetuses that do not have a soul in the latrine, and I do not baptize them because they are not alive."<sup>76</sup> If a miscarried fetus was further along, a woman or her familiars might call a gravedigger to collect and bury the body, though not in consecrated ground.<sup>77</sup>

Lacking a fetal body, judges relied on witnesses for firsthand observation of pregnancy and delivery. Family and neighbors routinely monitored women's bodies. In court, witnesses often linked a woman's swelling and diminishing belly to a non-marital sexual relationship and to abortion or a secret delivery and neonaticide. In 1574, several

women from the commune of Capugnano, southwest of Bologna, told the court that Pellegrina d'Angelo had been pregnant from adultery and must have either aborted a *creatura* or killed it after birth. They had watched Pellegrina's belly grow over several months, but then one day it suddenly subsided. One neighbor, Sandra de Lancialini, told the judge: "I said to [Pellegrina], grabbing her belly: 'what did you do to your belly which was so big and now is gone?'"<sup>78</sup> Sandra's tone was mocking and her touch threatening. Pellegrina was married, but her husband had been away working for some time. Neighbors described her as a dishonorable woman, but they refused to speculate on who impregnated her or what she had done with the *creatura*. In her defense, Pellegrina denied adultery and pregnancy, explaining that her swollen belly was a symptom of a womb-related illness that she regularly suffered in the late summer and early fall.<sup>79</sup> Without compelling evidence, the judge dropped Pellegrina's case.

Jurists were preoccupied with the ambiguity of the signs of sexual intercourse, pregnancy, and delivery, which had as much bearing in cases of abortion, miscarriage caused by assault, and neonaticide as they did in cases of rape and defloration, impotence, and civil cases where the flow of inheritance depended on the generation and delivery of living offspring. The ambiguities of the female body as they pertained to medicine were discussed in Chapter 1. Here we shall revisit them in the discussions of jurists and examine how they were encountered by judges in actual cases and how they shaped criminal investigations.

Following medical authorities, jurists expounded on the signs of pregnancy and childbirth only to cast doubt on their accuracy as indicators. With the Roman *Zacchia* and their own cumulative courtroom experience as their guides, the Florentine jurists Antonio Maria Cospi and Marc'Antonio Savelli taught that a growing belly could be as much a symptom of womb-related illness as a sign of pregnancy. They warned that pathological retention of menstruation, forms of dropsy, and the generation of *molae* and other "pieces of flesh" mimicked the signs of pregnancy but were actually dangerous illnesses that required therapy.<sup>80</sup> The traces that recent delivery or abortion left on a woman's body might be more pronounced. A woman who had been pregnant and aborted or gave birth to a later-term fetus would have a saggy and

wrinkled belly. Lactation, one of the most potent signs of pregnancy, could start before delivery but was especially noticeable afterward. Finally, the conditions of a woman's reproductive organs—swollen, stretched, and loose labia; a wide vagina, cervix, and uterus; and the disappearance or division of the *myrtoides caruncula*, “little pieces of flesh” inside the vagina and the walls of the uterus—were signs of recent delivery. When all these signs are combined and sufficiently pronounced, Zacchia wrote, “it is permissible to suspect that, although she bore it in her womb, such a woman has gotten rid of her fetus through abortion.”<sup>81</sup>

Since Zacchia and his readers knew that alternative medical explanations might account for all these signs, what was the legal force of the words “permissible to suspect”? An important case from early seventeenth-century Rome, analyzed by Zacchia and cited by jurists well into the eighteenth century, demonstrated the need for caution and skepticism. Mattia de Bello, whose husband had been exiled from Rome for a crime, earned the distrust, even the “intense hatred,” of her neighbors, who denounced her to the authorities for adulterous pregnancy, attempting abortion, delivering in secret, and throwing the child in a latrine. According to Zacchia, Mattia's neighbors suspected first pregnancy, because her belly had swollen, and then childbirth, because it suddenly subsided. Some witnesses allegedly heard a baby's cries coming from Mattia's home. When the notary searched the house and the latrine carefully, he found no infant cadaver. What he did see was a blood-stained floor and some rags with pieces of coagulated blood. Denying the charges, Mattia explained that her swollen belly had been a symptom of severely retained menstruation; it deflated following a strong purge that expelled copious amounts of obstructed blood. Three midwives and a surgeon were brought in by the court to examine Mattia's body and its expulsions. They confirmed that Mattia's belly had recently and rapidly deflated, that her genitals were swollen, and that she was still emitting blood. Two midwives concluded that these signs indicated recent delivery, and therefore Mattia stood guilty of at least some charges—of adulterous pregnancy and childbirth, if not of abortion or neonaticide. The third midwife and the surgeon, however, read these signs as more consistent with a lengthy and stubborn bout of menstrual retention and its recent release.

Zacchia was asked to review the evidence and resolve the deadlock between the medical witnesses. He did not examine Mattia himself but rather formed his opinion from the witnesses' reports. He concluded that the available evidence did not indicate that Mattia had been pregnant or had an abortion but rather was consistent with her own diagnosis of a severe and pathological menstrual retention. In making his judgment, Zacchia relied on the more detailed reports given by the midwife and surgeon who judged Mattia innocent. He identified and expounded on several important points that led him to concur. First, Mattia's swollen labia was only slightly swollen; had she given birth, her entire pudenda would have been greatly swollen. Related to this, the midwife and surgeon who judged her innocent said that they detected *myrtoides caruncula*, small fleshy protuberances, inside her vagina and womb, which, had she given birth, would have been imperceptible because the whole area would have been swollen. Second, the blood that stained rags and the floor of her home and that Mattia was still emitting was not the mixture of blood, urine, and milk that postparturient women normally expel but rather was menstrual blood, "pure blood," containing blood clots. The former blood mixture usually flows abundantly, "like that of a sacrificial animal," he wrote; the latter flows heavily, moderately or thinly, depending on the woman's health. Third, Mattia's belly had deflated quickly, which was an effect of a strong and violent menstrual purge; the belly of a postparturient woman subsides slowly and regularly as the uterus contracts back to its pre-pregnant size. Fourth, Mattia was energetic and healthy, not weak and bedridden as women naturally are following childbirth. Fifth, no one mentioned whether she was lactating—an ambiguous sign but still a crucial one that could have been easily observed. Lastly, Zacchia interpreted Mattia's behavior as a sign of her character: had she been pregnant and either aborted or delivered and killed her newborn, she would surely have cleaned up the blood on the floor of her home and washed the stained rags. The fact that she left them there, Zacchia thought, indicated that "she was not afraid for herself, knowing that her conscience was clear, and she certainly knew there was no foundation for any suspicion of her."<sup>82</sup>

In his analysis of the evidence, Zacchia transformed Mattia into an object of medico-legal knowledge and emphasized a hierarchical

regime of truth that privileged elite medical practitioners like himself over lower-order practitioners, like midwives. In its published form, Zacchia's consilium was intended to impress upon his readers the danger of putting faith in the testimonies of lower-status medical practitioners who focus on "trivial and equivocal signs and conclusions."<sup>83</sup> Their opinions could lead a judge astray. Zacchia's learning allowed him to understand the precise meaning of specific phenomena and identify other things that had been missed but were crucial to understanding what Mattia's body had experienced. To the untrained eye and the ignorant mind, Mattia's body might suggest pregnancy and crime, but what it really indicated was illness and cure.

Jurists and judges who read Mattia's case would have recognized Zacchia's aim to diminish lower-status healers' authority in legal matters and to increase that of university-educated physicians. However, they primarily cited Zacchia's discussion of Mattia's ordeal as an example of the difficulties they might face when investigating similar cases that rested on the ambiguities of women's bodies. Cospi and Savelli treated these evidentiary problems at length. They warned judges that, for example, not all women who had been pregnant and given birth had a drooping and wrinkled belly. Zacchia had taught that "there are some women, particularly among the nobility, who avoid this kind of unpleasantness or deformity by artifice and medicines," using straps and waistbands to hold up the belly during pregnancy and apparently preventing it from stretching too much. Cosmetics could also conceal what a woman's body had gone through. Women applied creams, ointments, and plasters after delivery to reduce stretch marks and tighten the belly. Because cosmetics could conceal the body's experiences, it was "not safe to declare that these women have not given birth from the smoothness of their bellies, since they could have given birth despite that." The opposite was also true: the wrinkles commonly associated with a postpartum belly also occurred in virgins and even in men who had suffered from dropsy and at one time had a large and distended belly and then had it subside. Judges were "to inquire beforehand as to whether the woman has experienced one of these illnesses in the past so that we are not misled by this sign," warned Zacchia.<sup>84</sup> The appearance of a woman's reproductive organs could also deceive because there was no "normal." Some women had stretched, flaccid, and

loose genitals and a wide and loose womb by nature. Women could also have an unusually narrow and tight womb and retain their “vaginal integrity” even during labor. Women also used cosmetic products to tighten their genitals after sexual intercourse and childbirth. Some women would be judged “incorrupt [i.e., virgins] because of the narrowness and tight form of their uteruses . . . , although they have been corrupted and have given birth”; “other women will be judged corrupted and accused of abortion or secret delivery, even though they are virgins and innocent of these charges.”<sup>85</sup> Even lactation was ambiguous, because, as Cospi explained, “when menstrual blood is not expelled from the uterus, the superfluity is transmitted to the breasts, just as we see in pregnant women.”<sup>86</sup> A virgin or a chaste nun could have milk come out of her breasts due to irregular purgation, and even men were prone to lactate from time to time.<sup>87</sup> Zacchia warned that the ambiguities of the female body made it so that “even being virgins [women may] appear corrupted.”<sup>88</sup> Judges were to accept that there was little certainty.

The fact that both Mattia and Pellegrina d’Angelo were suspected of having extramarital affairs as married women living apart from their husbands shaped their neighbors’ and the court’s perceptions of their bodies and the expectations of what had taken place within them. And yet these perceptions remained suspicions, powerful to be sure, but not certain or unimpeachable fact. In terms of the prevailing standards of evidence, the physical signs of pregnancy and delivery were considered “fallacy,” “conjecture,” and “presumption” (*fallacio*, *coniectura*, and *presumptio*).<sup>89</sup> The degree of uncertainty and doubt encountered in cases of alleged abortion was often great, and judges struggled to find secure and unambiguous physical evidence (*indicia indubitata*) on the body of crime. The quantity and combination of observable signs in relation to the confidence interpreters had in their meanings might incline a judge to presume a woman had been pregnant and had an abortion, but jurists urged skepticism and caution. Cospi insisted judges learn about the ambiguities of women’s bodies because “their passions might be moved to believe that a woman might [have been] pregnant,” and they might torture her and pass a harsh sentence, only to later discover that she had been sick rather than pregnant and was actually innocent.<sup>90</sup> Zacchia’s analysis of Mattia’s case and Cospi’s and Savelli’s commentary on it make clear that even in cases involving women with dubious

sexual reputations, accusations of hiding pregnancy, having abortions, or committing neonaticide could be unfounded. These authorities urged caution and moderation.

Of course, if a fetus or the cadaver of a newborn was found, the accused woman had a harder time in court. But, here too, ambiguity loomed. Women could employ legitimate and well-used defenses to try to exonerate themselves. They could claim they had not known they were pregnant until they miscarried or delivered a stillborn child. The “ignorance defense” was common throughout early modern Europe.<sup>91</sup> Prospero Farinacci warned judges to expect a woman to claim she did not know she was pregnant until she felt “pain in the belly” and delivered a fetus into a latrine while performing “natural functions.” Though jurists viewed the defense with suspicion, especially when coming from an unmarried woman, they had to contend with it because it was plausible, perhaps somewhat common, and difficult to disprove.<sup>92</sup>

Maria da Brescia, the young chambermaid with whom this chapter began, used this defense on the judge of the Criminal Tribunal of Bologna in 1578 to exculpate herself from charges of committing abortion or neonaticide. Maria admitted delivery—which she described as a stillbirth—but claimed she did not know she was pregnant until she saw the fetus slip out of her body. She told the judge that the night before the delivery she felt pain in her stomach but attributed it to digestive disturbance—some bad onions she had eaten earlier that caused what she interpreted to be painful gas. She went to bed hoping it would dissipate, but the next morning the pain was more intense. She felt the need to use the latrine, and as soon as she got out of bed, “I expelled that creatura on the floor, dead, it did not cry.” Panicked, she picked it up and threw it in the latrine because she feared her brother would beat or kill her for the disgrace she brought to her family; no doubt, she also feared dismissal from the Desideri house. When pressed, Maria named her impregnator, a certain Pierino with whom she had had a sexual relationship before getting the job serving the noble family, but the court did not seem interested in this man. Perhaps the judge suspected or even knew a Desideri was responsible for the pregnancy. Nevertheless, Maria never swayed from her story that she delivered a dead creatura onto the floor of her bedroom and that it was a complete surprise. Her defense rested on the claim of bodily ignorance and inexperience of

pregnancy: "I didn't know I was pregnant—I had never been pregnant and I did not know what I had in my body."<sup>93</sup> Apparently Maria had not been noticeably ill or unable to do her household chores, and the rest of the household staff who testified had also failed to notice her pregnancy or, perhaps fearing a charge of complicity, refused to acknowledge it to the judge.

Another important and difficult element for a judge to investigate was the claim that the fetus was born dead. Jurists, of course, knew and took into account the frequency with which women miscarried, especially in the first months of pregnancy. According to the jurist and judge from Bari Francesco Vivio, the fetus "hangs like a fruit on a tree" and any jostle or rumbling, as a cough, a bout of gas, or even a sneeze, could shake it loose.<sup>94</sup> Paolo Zacchia conceded that "investigating the signs of an early [term] abortion seems to me to be a pointless endeavor since sometimes a miscarriage occurs so readily in the first months that women themselves experience it as a rather difficult purgation of the menses."<sup>95</sup> Later in pregnancy, strenuous labor, fatigue, stress, and violence were often identified as causes of terminated pregnancies. Aorelia di Battista claimed her 1586 stillbirth was caused by stretching to reach and straining to pull a heavy load of grain toward her the day before. A single mother of five, Aorelia could not take time off work just because she was pregnant. That night, after she pushed her house door closed and locked it, she felt her belly turn, and the creatura fell out of her body without any effort.<sup>96</sup> In a 1593 case of alleged father-daughter incest in the Venetian countryside, Mattia Stanghelin purported to miscarry from labor in the fields: bending and lifting reportedly caused the fetus to slip out "like a slice of ham."<sup>97</sup>

Judges were suspicious of such claims of ignorance of pregnancy, strain, accelerated delivery, miscarriage, and stillborn fetuses, yet even with the help of the most experienced midwives and physicians, they often could not distinguish between causes that brought pregnancy to an end and that resulted in a dead creatura. When available, the examination of fetuses and infant cadavers for signs of foul play was crucial. Judges and notaries often inspected cadavers themselves first before turning to midwives and sometimes physicians and surgeons for professional examination and interpretation.<sup>98</sup> Medical witnesses carefully examined the body and gave detailed and somewhat

standardized reports regarding its physical state and level of development. They recorded its sex and size, the articulation of limbs, whether it had hair and nails, and other essential features. They also described any marks or bruises on the body and assessed its level of decomposition. The aim was to establish the developmental stage of the creatura, for the gravity of the crime could be measured only by reference to the body's maturity. Finally, these experts were asked to pronounce on the causes that led to its death and expulsion from a woman's womb.<sup>99</sup> While the general level of development could be somewhat easily determined, especially the closer the fetus was to what might have been considered full term, medical experts often struggled to determine the cause of death.

In Maria da Brescia's case, the court had two experienced midwives examine the fetus found in the latrine. Both agreed it was a fully developed male *putto*; however, the cause of death was uncertain. The midwife Lucrezia said: "Having to give my judgment on whether it was born dead or alive, I will say that this is dubious, but that I lean more on the side that it was born dead than otherwise." Her reason was simple: if this woman really wanted to kill a live newborn, she likely would have suffocated it immediately, so its crying would not alert the rest of the household. Suffocating it would have left marks on the body, which this fetus did not have.<sup>100</sup> The midwife Veronica agreed with her colleague's assessment and added the curious statement that, in her experience, women "even with help [i.e., with a midwife], make dead babies all the time, which we midwives, with our learning, give them breath, by various means, so that within an hour they return to life."<sup>101</sup> This last statement is intriguing and difficult to interpret but seems to suggest midwives tried to intervene on stillborn, or seemingly stillborn, babies in hopes of getting them to draw breath or appear to draw a breath (perhaps a premodern form of CPR?), so they might live long enough for emergency baptism. It seems Veronica's statement was meant to impress on the judge that midwives regularly confronted situations where it was unclear whether the *putto* had died in the womb or after its delivery. Like cause, the time and place of death could be ambiguous.

In Lucia Pivinelli's case, the court had two Bolognese midwives examine her body and assess the reports of witnesses in Montagu who saw and described the fetus. Virginia Vigorosi and Elisabetta Jacobi

both examined Lucia in a cell in the Torrone prison. They digitally examined her genitals and womb and determined she had recently delivered. They also reported Lucia told them during the exam that she had not yet expelled the afterbirth—this would have been nine or ten days postpartum—and could feel it throbbing in her uterus. The midwives told the judge she ought to be given medicine to expel it immediately, as it was decaying and would cause fevers and might lead to her death.<sup>102</sup> Regarding the fetus, the midwives based their interpretation on the reports given in Montagu. The fetus was described as female, three-quarters of an arm long, with proportioned limbs, reasonably long hair, nails, and toenails. Those who saw it noted it was wrapped in Lucia's shirt and was warm, suggesting it had recently come out of her body. They noted there were no marks or signs of violence or suffocation. The report also mentioned the umbilical cord had been severed but not tied or clamped. Based on these descriptions, the midwives thought the fetus was about seven or eight months developed, no more because Lucia was not lactating.<sup>103</sup> Regarding causes of death, the midwives stated newborns could die without violence or force by simply having their umbilical cords left untied, which allowed their breath to escape their bodies little by little, so they died within a few hours. The midwives also added that when a fetus was born dead, it came out of the mother's body cold and did not seem to have blemishes or rashes but was white, like washed cloth. They also explained it was more difficult and painful for a woman to deliver a dead fetus than a live one, because it did not collaborate in the process and the woman had to do it entirely by force. Although they did not explicitly say so, the assumption was that, had Lucia delivered a dead fetus as she claimed, it would have been very difficult, and she would likely have needed help, which would probably have caught the attention of neighbors. Moreover, the fetus would have been described as cold rather than warm. Lastly, that the umbilical cord was not tied raised suspicion Lucia had left it open to allow the newborn's "breath" to escape, leading to its death.<sup>104</sup>

The judge arranged for Lucia to go to the Ospedale della Morte and receive medical attention, and when she was out of harm's way and deemed strong enough, he questioned her again about how her putto came into the world, when, and why it had died. Lucia confirmed its

level of development and said that, by her count, she was in the seventh month of pregnancy, so the fetus would have been more than six but less than eight months developed, but she could not be more precise. The judge read the midwives' testimonies to Lucia and insinuated she had intentionally left the umbilical cord untied to kill the living newborn. Lucia's response was blunt and logical: Why would she have tied its umbilical cord if it had been born dead?<sup>105</sup> Evidently, the judge thought this a reasonable response and did not mention it again. Regarding its temperature, Lucia maintained it was cold to the touch, "not ice-cold, but cold." The judge pressed her repeatedly to admit the child was born alive and she had killed it, but Lucia was steadfast: "It was not alive, my lord, and I will never be able to say why it was not, and I cannot do anything about this, I cannot supersede the one who is the master of the whole world: it pleased God that it was born dead, and I don't know what to make of it."<sup>106</sup> She ended her testimony by restating she had not hurt the *creatura*, that it had been dead when she delivered it, and therefore "I do not think I deserve any punishment." "May God pardon me all my sins, but may he never pardon me this one [because I didn't do it]."<sup>107</sup>

In the sixteenth and seventeenth centuries, forensic examination was often unable to confirm whether a *creatura* died inside or outside a woman's body and whether a woman had an abortion, miscarriage, stillbirth, or committed neonaticide. Early modern jurists, medical practitioners, and laypeople alike looked for observable traces of violence on the body, but the absence of these signs did not confirm innocence—as the midwives Virginia and Elisabetta said, the newborn's "breath" could leak out of its untied umbilical cord. The contentious "lung flotation test" (which assumed the lung of an infant born alive and having drawn breath before dying would float due to its expansion, whereas one from a fetus that had died in the womb would sink because it was compact and dense) does not appear to have been practiced in Italy before the eighteenth century.<sup>108</sup> Without visible marks of violence, no certainty could be had. Women's claims of miscarriage and stillbirth, therefore, had to be taken seriously. Even though judges assumed women like Maria and Lucia could take advantage of the quotidian nature of miscarriage and stillbirth to obfuscate intentionally procured abortion or neonaticide, there was no way of knowing with

certainty. Because it was often impossible to distinguish between miscarriage and intentionally procured abortion, stillbirth, and neonaticide, jurists agreed that a woman who claimed innocence, especially under torture, as a general rule, should not be given the ordinary capital punishment; if there was substantial plausibility, judges could issue a milder penalty according to the specifics of the case.<sup>109</sup>

The ambiguities surrounding maternal and fetal bodies of crime also characterized criminal investigations into miscarriage caused by assault. While criminal tribunals took all forms of *aborto* seriously, they encountered cases of miscarriage by assault more frequently than cases of procured abortion and neonaticide. Some women suffered terrible violence and traumas during pregnancy, a time during which, contemporaries agreed, they were at their most vulnerable and ought to be treated with care and sensitivity. While early modern Italians were accustomed to seeing varying degrees of gender-based violence in their daily lives, everyone knew assaulting a pregnant woman was anathema, and courts actively prosecuted violators of these norms, sometimes including abusive husbands.<sup>110</sup> Women, their husbands, and kin brought lawsuits against individuals they deemed responsible for a miscarriage and the ensuing health traumas women faced. Jurists categorized miscarriage caused by assault as a form of potentially fatal violence. The termination of pregnancy and the death of the fetus were treated as a grave loss, but generally not as a form of homicide unless the pregnant woman died from the assault or complications of the miscarriage.<sup>111</sup> The standard penalty for causing a pregnant woman to miscarry was monetary compensation to the aggrieved and potential corporal punishment; should the woman die, her assailant could be exiled or potentially executed. Women turned to family, friends, and neighbors for help and support, and to courts as a resource against their assailants, whether they were strangers, enemies, family members, or husbands.

Cases of miscarriage caused by assault came with evidentiary ambiguities similar to cases of procured abortion and were as difficult to investigate. Establishing whether a woman's body and the objects it expelled constituted evidence of crime was contentious. Defendants accused their accusers of fraud: they claimed that women tried to pass off natural or spontaneous miscarriages as caused by assault and even alleged women faked miscarriage altogether. Judges also struggled to

determine intentionality. Those accused of causing a woman to miscarry might admit to violence but could claim they did not know the woman they assaulted was pregnant because she was not showing; they also argued that the violence they enacted was mild and could not have caused miscarriage. Defendants, both women and men, mobilized discourses of ignorance and uncertainty against pregnant women: assailants claimed that women used the ambiguities of the female body to frame them, in the same way women might exculpate themselves from procured abortion.

In cases of miscarriage caused by assault early in pregnancy, defendants often pled ignorance. In 1608, Ginevra Rossi, a candy maker's wife who helped run the family shop in Rome, suffered a miscarriage allegedly caused by being forced by inspectors, who threatened her and her husband, Guglielmo, with criminal charges for allegedly selling fraudulent candy, to climb up and down stairs and move heavy boxes under duress. Ginevra died of complications resulting from the miscarriage. To justify their rough treatment of Ginevra, the inspectors claimed they did not know she was pregnant—the implication being that had her pregnancy been obvious, they would not have treated her so roughly.<sup>112</sup>

As in cases of procured abortion, jurists held the “ignorance defense” to be convenient and expected but also valid, and conceded that determining culpability was very difficult. Farinacci and Savelli favored lenience, especially if the assailant “unknowingly or inadvertently persecuted a pregnant woman,” if the woman did not yet have a noticeable belly, or if it was not public knowledge that she was pregnant. The burden of proof fell to accusers: women and their witnesses had to make the case that she was visibly pregnant and her assailant should have known not to assault or treat her improperly. The earlier she was in pregnancy, however, the less the law required others to treat her with care; her assailant could be charged for violence and injury, but not necessarily for terminating the life of an unborn.<sup>113</sup>

Defendants also claimed their accuser had not been pregnant or had not suffered a miscarriage but was trying to pass off menstrual or other blood and objects as a miscarriage.<sup>114</sup> In 1632 in Rome, the abusive Domenico Cocchi accused his wife Elena and her aunt Polisana of faking miscarriage to get him in trouble. Although he admitted to

assaulting his wife, he claimed she could not have been pregnant because she was still nursing their young son, had recently had her period, and did not have a distended belly. He told the judge that her aunt Polisana had a reputation for helping women fake miscarriages to get their husbands to treat them better: she had recently given her friend “some mass of blood” to present to her husband to make him “think that his wife had aborted on account of some sort of harm [he had] done her . . . so that from then on [he] would not harass her, and [instead] treat her with affection.” “All these suppositions are great lies that come from deceitful women,” Domenico argued.<sup>115</sup> Such misogynistic tropes about women’s bodies and women’s dishonesty were culturally pervasive, and Domenico used them to good effect. Men on trial could use this discourse of deception to exculpate themselves because it was plausible. And indeed, the judge took Domenico’s claims seriously, but could not send medical witnesses to inspect the miscarriage, which Elena, her familiars, and her midwife friend all claimed was an approximately three-months-developed male fetus, because it had been disposed of. While there is no way of knowing whether Elena suffered a miscarriage or feigned it, what is clear is that she was seeking justice against and protection from her very abusive husband. As bleak as it might sound, miscarriage could be a resource against domestic violence and grounds for a marital separation.<sup>116</sup>

Cases of miscarriage by assault later in a pregnancy were also contentious. Aside from determining whether the accused actually assaulted the pregnant woman, in these cases, the difficulty lay in making a causal connection between violence and terminated pregnancy, and jurists summarized medical opinions on how to assess this. A blow to the viscera, especially near the kidneys, was thought likely to cause a miscarriage; a blow to the head or upper body less so. If the pregnancy was further along, more than four or five months, it would take greater violence to cause the miscarriage because the unborn would be more robust and tightly fixed to its mother. Facilitating investigation, such a beating, it was thought, would leave marks on the woman’s and the fetus’s body, and likely cause a scene drawing witnesses. Closer to delivery, even a mild beating was thought sufficient to cause miscarriage because the fetus was more exposed to the impact of a blow. The time between an assault and miscarriage also needed close inquiry.

According to Copsi, if a miscarriage occurred two or three days after a beating, the assault was likely causal and the assailant responsible; beyond three days, causal likelihood diminished and the judge was to consider other explanations, such as illness or even intentionally procured abortion.<sup>117</sup>

Of course, things were less clear in practice. In 1603 Rome, Angela da Filetino denounced Venere da Bologna for assault and causing her to miscarry a six-months-developed fetus. Both women were self-described courtesans. Venere confessed to an altercation with Angela but vehemently denied hitting her obviously pregnant rival, to which witnesses gave mixed and conflicting testimony. Venere also rejected the possibility that the argument had somehow caused Angela's miscarriage, which occurred almost three weeks later. Venere argued that the miscarriage must have had another more proximate cause: Angela continued to have sex with "rough men" and this likely injured her growing fetus. Venere alleged she was being framed.<sup>118</sup> The court sent the midwife Chiara Tibaldi and physician Timoteo Camotio to tend to Angela, examine the miscarried fetus, determine when it had died in Angela's womb, and whether violence could have been the cause. The medical practitioners concluded that the fetus had been dead for about six to ten days before Angela expelled it. They felt it was conceivable that the assault Angela said she had suffered led to the death of her fetus approximately seven to ten days later. However, both practitioners were cautious when it came to stating that assault was *the* cause of its death. "I cannot judge whether Angela's fetus died because of the blows that she said she was given," midwife Chiara testified, "because [the miscarriage] could have been caused by her sexual encounters or from illnesses she might have. . . . For this reason, I cannot judge whether the fetus died because of the alleged beating, but perhaps the physician might tell you."<sup>119</sup> But Doctor Timoteo was also cautious and disinclined to speculate, giving a similarly elusive response. The experts recognized multiplicity of meaning and may have thought that certainty about the specific cause of Angela's miscarriage could not be had.

Evidence based on women's bodies and fetal cadavers was as contentious in cases of miscarriage caused by assault as it was in cases of procured abortion and neonaticide. As in the latter, judges's perceptions were influenced not only by the nature of the available evidence

but also by the reputation of the accuser and the accused and the circumstances that brought cases to court. Suspicion ran deep that women used the ambiguities of their bodies to their advantage, and to commit fraud. But judges also knew that their assailants, both men and women, mobilized these same discourses to exculpate themselves from charges of assault and causing miscarriage. The claims and counterclaims of all the litigants, as well as the attempts of medical practitioners to discover whether bodies were truly bodies of crime, all contributed to the shaping of general and legal perceptions and conceptions of women's bodies and abortion. In these cases, the same judges who investigated cases of procured abortion and neonaticide confronted brutal violence inflicted on women, including their experience of trauma and death. These experiences no doubt shaped how judges thought about and would investigate cases of procured abortion.

### Punishment to Fit the Crime

How did criminal tribunals punish individuals who they decided were guilty of procured abortion or of neonaticide, or who were responsible for miscarriages caused by assault? Let's consider these types of *aborto* separately, for the law conceptualized them differently.

As we have seen, the developmental stage of the fetus was supposed to determine the penalty for its termination: the rule was that if the fetus was considered animated, fully formed, and viable, the ordinary penalty (*poena ordinaria*) was execution, as it was for homicide. However, jurists also agreed that in practice there were too many evidentiary uncertainties and social imperatives making the ordinary penalty legally unsound, morally severe, and socially unproductive. The registers of the Bolognese Compagnia di Santa Maria della Morte, a lay confraternity whose brothers tended to individuals on the eve of their executions, indicate that between 1570 and 1700, no one was sentenced to capital punishment for committing abortion or causing miscarriage by assault; in comparison, at least ten individuals were executed for infanticide.<sup>120</sup> Luckily, Maria, Aorelia, Pellegrina, and Lucia's names do not appear on the registry of individuals comforted before their execution. It seems capital punishment would only be meted out should a case be cut and dried and an individual confess to neonaticide. In most cases,

jurists thought extraordinary or lesser penalties (*poena extraordinaria*) issued at the judge's discretion (*ad arbitrium iudicis*) were more suitable for individuals they believed guilty of wrongdoing. The judge was to assign a sentence he thought appropriate to the "quality of the case," the evidence available, his opinions regarding the culpability and character of the suspects. He had the discretion to determine what justice meant in a particular situation.<sup>121</sup> This was even the case in trials for unambiguous infanticide. Cardinal De Luca wrote that, while infanticide is truly voluntary homicide and therefore capital punishment was justified, generally this crime was "committed by young women not because they have soul so perverse as to murder a creatura, but only to protect their honesty." When committed for this reason, "it can be said that it is a crime committed for the defense of one's own life . . . and the individual is excused from the ordinary penalty of life [i.e., capital punishment]."<sup>122</sup> De Luca was silent on men's participation in infanticide.

What then were the extraordinary and actual penalties individuals on trial might expect? Trials investigated by criminal tribunals can be problematic sources for discovering sentences. For the governor of Rome's criminal tribunal, sentences are generally not included in the trial dossier but in a separate series of documents, and unfortunately many, if not most, are lost, damaged, or in an unreadable condition. Aside from archival loss, difficulties also lie in the fact that official decisions were often not rendered. Judges dropped cases for myriad reasons at various stages of investigation. For instance, the Criminal Tribunal of Bologna, which sewed its sentences into investigation packages that are well preserved, appears not to have issued official decisions in the cases against Maria da Brescia in 1578 or Aorelia di Battista in 1583, suggesting they were likely absolved. On the front page of Pellegrina d'Angelo's trial dossier, next to her name, there is a marginal note simply stating "absolved."<sup>123</sup>

We do, however, have some sentences related in printed works that are suggestive and might allow for extrapolation. Antonino Tesauro reported in his *Decisions of the Sacred Senate of Piedmont* on a case he heard in December 1554, where an unnamed woman delivered a dead fetus into a latrine. Like Maria da Brescia, she maintained she did not know she was pregnant until the moment the fetus came out of her body. Tesauro reported his colleagues in the Senate thought she was lying and

had intentionally committed a later-term abortion or neonaticide. She was tortured twice, but her story did not change. Tesauro and his colleagues debated how to punish her. Four senators allegedly thought she should be put to death; Tesauro however argued that murder with malintent was not proven, and therefore a milder penalty was more appropriate. He was able to sway the other senators, and in the end, she was sentenced to a lashing and banishment from her town. Tesauro did not discuss why he thought she deserved a punishment at all. Rather he congratulated himself as this woman's "savior."<sup>124</sup> He also reported a similar 1563 case from the town of Vercelli (approximately seventy kilometers northeast of Turin), where a woman claimed she had delivered a stillborn child but was suspected of abortion or neonaticide. The town magistrate sentenced her to death, but the senate convinced the Duke of Savoy, Emmanuele Filiberto, to pardon her and lessen the penalty to a lashing and five years' exile.<sup>125</sup> Vincenzo de Franchis reported that in 1597 in Naples, the Grand Court of the Vicar, the main criminal tribunal of the city, sentenced a woman to death for procuring the abortion of an animated and well-developed fetus; however, the case was appealed to the Sacred Royal Council (the primary court of appeal), where the sentence was overturned: by a vote of six to two, the court sentenced the woman to a lashing and exile.<sup>126</sup> The Sicilian jurist Girolamo Basilico reported that in the summer of 1636, a man named Francesco Basili was investigated by the Royal Court of the Kingdom of Sicily for providing "drugs and a medicated potion to induce abortion." We do not know whether Francesco had impregnated the unnamed woman for whom he procured the abortion, but this seems likely. Although he was subjected to torture, he did not confess. The judge evidently thought Francesco guilty but lacked enough evidence to have him sentenced to death—according to Basilico, because Francesco's defense was strong and he had refused to confess under torture, the court could only sentence him to five years of exile "due to the seriousness of the crime." Unlike the women Tesauro and de Franchis wrote about, Basili was not whipped. Basilico was silent on the fate of the woman who consumed the abortifacient medicines.<sup>127</sup> Later in the seventeenth century, Marc'Antonio Savelli reported having seen two women convicted by Florence's criminal tribunal, the Eight on Public Safety, for procured abortions and sentenced to permanent incarceration in the Stinche

prison.<sup>128</sup> Unfortunately, these jurists gave few details regarding these cases and we are left to wonder what evidence and circumstances led courts to these sentences.

If these examples are anything to go by, corporal punishment in the form of lashings, banishment, and sometimes incarceration were expected sentences for procured abortion and neonaticide—execution was not. In their books, jurists recommended moderation, and judges investigating complicated and sensitive cases operated with this maxim in mind, although particularly scandalous cases that troubled communities may have been punished more severely. Criminal tribunals, like ecclesiastical ones, sought to punish deviance and transgression in ways that disrupted social order as little as possible.

The concluding pages of Lucia Pivinelli's case seem to reflect this: "It seemed conclusive to the lords" of the Criminal Tribunal of Bologna that Lucia "had killed the aforementioned little girl . . . and therefore that she is not able to evade the penalties imposed against those who commit crimes of this sort." However, several Bolognese notables, including a senator and the prior of the Archconfraternity of Santa Maria di Vita, presented an apostolic brief of indemnity given by Clement X "for the purpose of freeing one person condemned to death, whomsoever the aforementioned lord officials desired." The archconfraternity had the privilege of "interrupting justice" and pardoning an individual they deemed worthy of mercy, which usually meant women who were deemed vulnerable.<sup>129</sup> Unfortunately, the trial records do not indicate what it was about Lucia or her case that moved these men to come to her defense and demand she "not be condemned." The governor accepted the intervention, and Lucia was pardoned, handed over to the archconfraternity, and likely entered an asylum for women at risk.<sup>130</sup>

Individuals found guilty of miscarriage caused by assault appear to have been sentenced to pay fines and sometimes to exile. For causing Angela da Filettino to miscarry, Venere da Bologna was fined thirty scudi—fifteen scudi to be paid to Angela and fifteen to the court. This was a substantial sum, and it is unknown whether Venere, a self-declared courtesan, could or did pay the fine.<sup>131</sup> In contrast, the candy maker Guglielmo Rossi asked the judge of the Criminal Tribunal of Rome to sentence the inspectors whom he blamed for his wife Ginevra's

miscarriage and her death to a much higher fine: he demanded one thousand scudi for the loss of a miscarried child and four thousand for the death of his wife. It is unclear what the judge thought of this claim for damages or whether these amounts were representative or extraordinary. Nevertheless, Guglielmo's demand for one thousand scudi for the loss of his sixth-months-developed fetus renders the fifteen scudi Angela was to receive for her loss and life-threatening injuries rather minor. Cases of miscarriage caused by domestic assault were investigated less frequently and came with their own set of complications. Like ecclesiastical court judges who tried cases of marital separation, criminal judges likely preferred to rehabilitate marriages rather than break them up. However, they did punish husbands who severely abused their pregnant wives. Tesauro wrote that, in 1591, the Senate of Piedmont sentenced a man named Bota de Eugenia to several years' exile for causing his wife to miscarry by severely beating her—although Tesauro did not mention marital separation, it seems unlikely the couple would be expected to reunite after his five-year banishment.<sup>132</sup> Unfortunately we do not know how Elena Cocchi's case against her abusive husband ended.

### Conclusion

Civic authorities joined their ecclesiastical counterparts in identifying abortion as a crime requiring regulation and discipline and tried to change thinking toward its practice by issuing laws threatening severe penalties. Legislation and civic ordinances reflected agreed-upon norms and values meant to govern behavior; however, they were imprecise and varied from place to place. In works of criminal jurisprudence, jurists analyzed the intricacies of abortion and fetal personhood and discussed the acquisition and interpretation of evidence and the ambiguities of intentionality. Criminal investigations situate these discussions in specific settings and particular contexts, illuminating personal dramas and their social and physical consequences. Judges, representing the state, sought to balance the moral requirements and prescriptions of Romano-canonical law with the particularities of individual cases. What emerges from these different sources of law is tension and ambivalence.

In technical treatises, jurists discussed and debated what criminal abortion meant, how it was to be categorized, investigated, and punished, and the numerous factors judges should consider before making decisions and issuing sentences. While they were professionally obliged to treat abortion as a grave crime, sixteenth- and seventeenth-century jurists were reluctant to grant the fetus in utero legal personhood, even if it was animated and formed: live birth and viability was needed to influence the flow of inheritance and to make the death of a *creatura* homicide. Aside from doctrinal issues concerning the nature of the fetus and of the crime, cases of abortion were difficult to investigate from an evidentiary perspective. Jurists were increasingly medically literate and regularly consulted and learned from experienced midwives and physicians, but still, the uncertainties of women's bodies and of pregnancy and its termination made conviction difficult. Without a confession, determining intentionality was often impossible, and, therefore, the ordinary penalty of capital punishment was inapplicable. Sometimes abortion was procured intentionally; sometimes it was an accident; often it was hard to distinguish between the two. When judges felt there was enough evidence of wrongdoing, they sentenced procurers of abortion and individuals who may have caused miscarriage by assault to fines, corporal punishment in the form of lashings, disciplinary labor, or banishment. More often than not, they issued no punishment at all. The ambiguities surrounding women's bodies and the termination of pregnancy gave women and men exculpatory narratives to use in court, but they also gave judges pretense to absolve them when they thought it was in the best interests of justice and social order.

Alongside evidentiary uncertainties, judges weighed the social factors motivating women and men to procure abortions. Civic authorities did not try to regulate abortion by means of widespread surveillance, prosecution, and harsh punishment. Authorities appear to have been responsive to the social pressures that might lead women to have abortions and prioritized honor and the suppression of scandal and its effects over the rigorous enforcement of laws. The toleration of the practice also clearly served male prerogatives; men of all classes procured abortion to regulate reproduction stemming from their own illicit, transgressive, and violent sexual behaviors. On one hand, authorities demonstrated paternalism when they showed mercy and absolved

women who had abortions; on the other, they had to because it was often their impregnators who caused, demanded, and orchestrated the ordeal or put women into situations where they may have felt they had little choice. Procured abortion was tolerated, to a certain extent, because it was inevitable and needed. When it worked, it allowed women to escape the social and economic perils of threatening pregnancy and single motherhood, and men to evade punishment for their sexual behaviors. The toleration of abortion simultaneously served overlapping moral and social imperatives.

Tensions and ambiguities in these sociolegal frameworks created spaces where women and men who found themselves in court for abortions could maneuver. Individuals on trial, both defendants and plaintiffs and their witnesses, made creative use of gender and body assumptions to cast doubt on their accusers or elicit their sympathy, exculpate themselves from wrongdoing, and evade harsh punishment. Some women shifted blame and guilt onto the men who impregnated them; others deployed discourses of corporal ambiguity to buttress their defense of unintentional abortion, late miscarriage, or the surprise delivery of a dead creatura. In doing so, they contributed to the formation of legal discourses and practices by astutely manipulating and simultaneously fortifying assumptions regarding female vulnerability and the ambiguities of the female body. Legal thinkers, judges, and civic authorities anticipated and often accepted these defenses—they may have even encouraged them. While they might regard abortion to be the destruction of a potential, if not actual, human life, they also understood it to be a comprehensible and not unexpected response to untimely reproduction, gender-based violence and various forms of injustice. The ambiguities surrounding women's bodies gave women, men, and healers exculpatory narratives to use in court, but they also gave judges pretense to absolve them or grant discretionary mercy when they thought it was the just thing to do. In sixteenth- and seventeenth-century Italy, social realities and practical considerations shaped legal thinking and judicial practices in general and on abortion in particular. Most of the time, these realities trumped doctrinal and moral commitments.

## *Maria and Superio*

MARIA DE VECCHIS, from the small town of Sezze (eighty kilometers southeast of Rome), spent a lot of time in front of medical practitioners in 1613. A young, unmarried woman of undisclosed age, Maria was physically impaired and sickly, often suffering from various illnesses, fevers, general weakness, swelling, and bodily emissions caused, it was believed, by menstrual irregularities. She received regular therapy from the physician, surgeon, and apothecaries of Sezze. That year, Maria was also forced, on more than one occasion, to remove her clothes and present her body to court-appointed medical practitioners for forensic examination. The townspeople of Sezze believed she had been having sexual relations with her uncle, Superio de Magistris, a local man of wealth. They believed that she had been pregnant and that she had had an abortion. They asked the criminal court of Rome to investigate.<sup>1</sup>

Maria lived with her mother, Cornelia, and older brother, Mutio. Maria's father is absent from this story and was likely dead. Another older brother, Tolomeo, died a few years earlier. By all accounts, the de Vecchis family was respectable, but Maria was allegedly unmarriageable due to her health and appearance: Maria described herself as visibly impaired and chronically suffering from a cough or lung illness, an illness of the ear, and "every [other] illness."<sup>2</sup> Her bodily and health issues apparently framed her position in Sezze society. Records reveal less about Superio de Magistris. A member of a noble family with branches in Sezze, Terracina, Priverno, and Rome, Superio was wealthy and locally powerful—the current-day town hall of Sezze is located in Piazza de Magistris, a testament to Superio's familial prominence.<sup>3</sup> Superio had at least four acknowledged sons. The de Vecchis and de Magistris families were related; Superio was Maria's kinsman—she used the word

“uncle”—by virtue of him being a first cousin to her mother, Cornelia. The two families also collaborated in a legume business: crops were stored in a supply room attached to the de Vecchis house, and Superio would visit to take count of the stock, which he would later sell in Rome. The de Vecchis family, it seems, depended on this business and their relationship with Superio for their livelihood.

Townspeople believed that Superio had been taking advantage of his power over the de Vecchis family and that he and possibly his son Simone had been having regular sexual relations with Maria for at least two years.<sup>4</sup> It was assumed that the de Vecchis family knew and either turned a blind eye or even allowed this. Maria’s neighbors claimed Superio kept a mattress in the legume storage room at the de Vecchis house and that they had seen him and Maria spend time there together. The transgressions were held to be public knowledge. The people of Sezze admittedly disapproved of this sexual relationship, but their clamor seems to have intensified after Maria allegedly became pregnant in early 1613 and had an abortion in May. Everyone in town “knew” she had been pregnant, but only a few witnesses testified to seeing Maria with a distended belly. Maria was apparently shut up at home and did not leave her house for a few months.<sup>5</sup> During this time, Superio allegedly went to great lengths to procure an abortion, reportedly soliciting the services of various local and foreign healers. Maria’s mother was said to be fully aware of these efforts. In May, when Maria was five or six months pregnant, they were apparently able to make “the creatura go away.”<sup>6</sup> Everyone believed Superio or his son had impregnated Maria and that she had had an abortion: “Even the chickens know,” one witness ardently reported, “so much is this fact known.”<sup>7</sup>

The criminal statutes of Sezze stated that a woman who procured an abortion was to be executed by burning, but the townspeople were more interested in punishing Superio than Maria.<sup>8</sup> The magistrates of Sezze had apparently begun to inquire into the incestuous relationship and abortion a few months earlier, but Superio allegedly “corrupted the authorities” with a bribe of five hundred scudi. Others kept quiet because they feared Superio or one his henchmen might shoot them. Angelo Cima, a local prosecutor linked to the papal government, apparently refused Superio’s bribe and was not afraid to proceed. He wrote to the Governor of Rome, detailing Superio’s crimes and corruptions and

requesting a judge be sent to investigate and bring justice to Sezze.<sup>9</sup> Although Superio claimed Cima was fabricating accusations to further a personal feud against him and perhaps to advance his own career, the governor agreed that a full inquiry was needed.<sup>10</sup> The apostolic commissary Ottavio Giandi was sent to investigate. Over several weeks in August, he questioned many townspeople. Having amassed enough evidence, he transported the accused and key witnesses to Rome, where they were detained in the Savelli and Tor di Nona prisons, for further questioning by Judge Girolamo Felicio Lunte.<sup>11</sup> While the charges against Superio included defloration, incest, and abortion, it was this last offense that most preoccupied the court, both because of its gravity and for reasons of evidence. Much of the trial focused on interpreting the signs of Maria's body for pregnancy and delivery and on investigating the healers who may have contributed to the abortion.

Superio and Maria were questioned three times in Sezze and once in Rome. Each time, the judges urged the defendants to freely confess their crimes, but they maintained their innocence. Maria expressed disgust at the accusations of incest with her uncle and his son: "They are my relatives," she said. "I have done no such thing." "I have never been known carnally by anyone and I have never been pregnant, nor have I aborted, or sought out to commit an abortion or to make myself abort with any kind of remedy."<sup>12</sup> Superio, too, angrily denied any sexual relationship with Maria and soliciting healers for an abortion. He admitted to visiting Maria often and to bringing healers to see her but said this was on account of her chronic bouts of illness. He explained that he engaged healers as a favor to Maria's mother, who may not have been able to afford the treatment on her own.<sup>13</sup> In her only testimony during the trial, Maria's mother confirmed Superio's story and cataloged her daughter's illnesses and the appropriate medical therapies she received.<sup>14</sup> The family's story was consistent: Superio was a caring and honorable relative, and Maria was a sickly girl in need of regular medical intervention, which the town physician also confirmed.<sup>15</sup> Confronting their accusers, Superio and Maria called them "mad liars and infamous," accusing them of telling "a thousand lies" and saying terrible things because they wished Superio ill.<sup>16</sup>

With witness testimonies called into question, the court turned to what it perceived to be more objective evidence: Maria's body. At the

very beginning of the trial in Sezze, Maria was examined by three midwives: Giulia, Adlotia, and Beatissima who were brought in from Rocagorga and Ceccano, towns just outside Sezze. All three women were experienced, having helped many women through pregnancy, childbirth, and related issues but had likely not examined a body in a forensic capacity. Nevertheless, the court considered them expert witnesses. They were asked to carefully examine Maria's body and identify any signs of sexual experience, pregnancy, and childbirth.

In a room in the town hall, Maria was forced to expose her body to these three strangers who were specifically tasked with finding evidence of mortal sin and crime. Examining Maria's genitals, the midwives found her vagina to be larger and more stretched than it ought to be, not only for a virgin but for a woman who claimed never to have given birth. After prodding and manipulating Maria's belly, the midwives also explained that an unmarried woman who had never been pregnant was supposed to have a tight abdomen, but Maria's looked like a "flabby" and "wrinkly" sac. In addition, when the midwives squeezed her breasts, milk came out, the most certain sign of pregnancy and recent delivery, they said.<sup>17</sup> Maria's body had betrayed her. But the midwives could not determine how her pregnancy had ended: Maria had "either given birth or had aborted," midwife Adlotia said. "I cannot know which."

When it was her turn to account for her body, Maria ascribed different meanings to its shape and emissions. She admitted she was not a virgin but still insisted she had never had sexual intercourse with a man. She told the judge "how this disgrace has happened to me." About one year earlier she had been staying in the countryside outside Sezze with her since deceased brother, Tolomeo. Staying with them was a woman named Silvia and her little boy. One day, Maria and the boy had gone off to play, and as they were running around, they came across a ditch. Maria tried to jump over it, but, "being small, I ruptured myself." "I began to feel a great heat down below, that is in my vagina, and then I began to leak out a great quantity of blood." Silvia later examined her and determined that Maria was now deflowered. She told the judge that Tolomeo was furious when he found out what had happened—that is, "that I had been deflowered by jumping." He began yelling, calling Maria a disgrace. He said that "I have ruined myself for nothing." Had

Maria been marriageable, Tolomeo told her, they would have to report her accident to the court, so a prospective husband might not assume she had been deflowered by a man, “but because I am crippled I did not have to.” Tolomeo could not confirm this tale for the court because he had died the same year the event occurred.<sup>18</sup>

Continuing to address the midwives’ findings, Maria could not deny emitting liquid from her breasts but insisted her menstrual issues, not pregnancy, were the cause. “When my purge comes, I usually get milk in my breasts.” Her flabby stomach, she explained, also came from her illnesses. A bout of dropsy might have stretched her stomach to make it appear as though she had been pregnant, while menstrual retention transformed blood into milk and escaped through her breasts. “My illnesses made me like this,” she explained.<sup>19</sup>

Commissary Giandi had the midwives confront Maria with their testimonies to see if she would change her story, but she did not. The midwives specifically pressed her on her lactation. Midwife Giulia said, “My girl, a young woman who has not been pregnant and who has not given birth cannot have milk the way that you do.”<sup>20</sup> Midwife Adlotia mocked Maria and asked whether the milk she expressed “came from the heavens,” and Giulia impatiently said, “Show your breasts because I want the lord judge here present to see the milk!” Maria angrily replied, “Is it not enough for you to see it once? I have already confirmed to him that milk comes out of my breasts, the lord Commissary does not need to see it.”<sup>21</sup> Referring to Beatissima’s description of her body, Maria told the judge, “Everything that she says is true. I only assert that it is not true that I was pregnant, because I have never known a man.”<sup>22</sup> In their testimonies, Superio and Cornelia also drew attention to Maria’s frequent bouts of illness to dispel the accusations of incest, pregnancy, and abortion.

Once Maria’s body had said what it could, both Commissary Giandi and, later, Judge Lunte in Rome concentrated their efforts on discovering the individual or individuals who might have participated in the alleged abortion. According to witnesses, Superio solicited several local and foreign healers—all men with whom he had varying relations—to terminate Maria’s pregnancy. He allegedly approached Cola Cocchiarello, a young man who was a healer to whom locals turned when they had minor ailments. Superio asked Cola for herbs to purge

Maria, and Cola agreed to provide them, although it is unclear whether he understood they were intended to cause an abortion. The apothecary Pasquale de Tantis testified that, around the time everyone gossiped about Maria being pregnant, Cola came to his shop to grind aristolochia, which he had picked wild. Pasquale permitted Cola to use his grinder, knowing he was a healer, but on this occasion he warned him: “Cola, be careful of what you do because it is not your job to give things by mouth, and you can make some mistake.”<sup>23</sup> But Cola would not be questioned by the judge; his mother, Tarquinia, said that, around ten days earlier, her son left home, saying he was going to his brother’s vineyard in the countryside, but she was skeptical about his actual whereabouts. Searching Cola’s things in her house, the authorities found a handwritten book containing various remedies, as well as several herbs and roots. These were shown to the apothecary Pasquale, who identified a good quantity of aristolochia, rue, centaurea, roots of valeriana, and powdered colocynth, all purgatives.<sup>24</sup>

Superio allegedly also asked the town physician, Ortensio Simeoni, who had a history of treating Maria, for a prescription to have her bled, but the doctor would not comply without examining her first.<sup>25</sup> According to the tailor Emilio de Bonis, the apothecary Tomeo Ciolli told him that Superio had explicitly asked him for a purgative remedy to make a woman abort—apparently he did not say Maria’s name. Tomeo said he refused because “this was a sin and he cannot do it.” But Superio tried to convince him, saying “that he can confess it, because it was for a woman from a good family and it would remedy possible scandals that might occur, that [Tomeo] would be doing it out of mercy.” Tomeo said he was not persuaded.<sup>26</sup> Superio was allegedly also direct with the barber Marzio Bracci, who witnesses said was offered the very high sum of fifty scudi to bleed Maria without a prescription.<sup>27</sup>

When questioned by the judges, all these healers accused their denouncers of fabrication or misinterpreting what they had told them. The barber Marzio vehemently denied the claim that Superio offered him fifty scudi to bleed Maria. The physician Ortensio wanted to be clear about his interactions with Superio: he said that on several occasions Superio had indeed approached him, saying Maria was not feeling well and suggesting she be bled. Ortensio was adamant that he refused to give Superio a prescription without first examining Maria and

maintained that Superio never brought her or divulged the reasons he wanted her bled.<sup>28</sup>

The apothecary Tomeo Ciolli received more judicial scrutiny than the other healers. Tomeo was a foreigner in Sezze. Originally from Bassiano, he had practiced as an apothecary in Priverno and in Rome before coming to Sezze in 1610. He had been jailed several times in his life but stipulated only for minor offences. He had also amassed quite a large debt: approximately 260 scudi to various creditors. In Sezze, he worked at the Pillorci shop for three years but had recently been fired.<sup>29</sup> Superio may have thought that, being out of work and in considerable debt, Tomeo would have little trepidation in providing him with purgative drugs. Tomeo, however, denied Superio had ever solicited him for this purpose. In Rome, Judge Lunte had the apothecary tortured on the corda to see if he would change his story. As Tomeo hung in agony, the judge urged him to confess that Superio had tried to buy remedies from him to make a woman abort. He endured this torture for a quarter of an hour without a confession. The judge evidently did not buy it; the notary wrote that Tomeo “persisted in his lies.”<sup>30</sup>

After two months of investigation, the case rested on gossip and an ambiguous body—all suggestive, to be sure, but not conclusive. But a break in the investigation came when the court in Rome was able to locate another individual who witnesses said had helped Superio with the abortion. This was the roaming Franciscan friar Giovanni Giuseppe da Siccolo, better known as fra Maccabeo. After some effort, the court found Maccabeo in Terracina (approximately eighty kilometers to the southeast) and transported him to Rome’s Savelli prison for questioning.

Fra Maccabeo was a Franciscan friar, originally from Sicily, but primarily living at a convent in Terracina. He went to Sezze and Rome somewhat regularly, stopping at small towns along the way. He testified with almost no interruption from the judge. He said that he was in Sezze in January of that year (1613), and one day, Superio approached him in the town’s piazza, whispering that he needed “a great service.” Without mincing words, he told Maccabeo he had deflowered and impregnated a young woman—Maccabeo said he never learned her name—that she was two or three months pregnant, and he wanted to procure an abortion. Superio told him he had tried a few remedies, including

savin, and had had her bled from the foot, but these had failed to terminate the pregnancy.<sup>31</sup> He “wanted me to teach him remedies to make her abort.” The friar replied that he had no remedies available, but Superio begged him to acquire some, and finally, Maccabeo obliged, saying he was returning to Terracina the next day but would be back in Sezze in three or four days and would bring remedies “to make this abortion happen.” Superio promised that if they worked, he would buy Maccabeo a new habit to replace his shabby-looking Franciscan robe, but the friar said he did not need one, that he lacked nothing. The next morning, Maccabeo found Superio waiting for him outside the convent to beg him not to let him down.

Maccabeo soon returned to Sezze and gave Superio a flask containing an infusion of colocynth, saying, “If the woman drinks the infusion that is in the flask in the morning, without anything else, she will abort.” However, one or two days later, an angry and nervous Superio told him that all the potion did was make the unnamed woman empty her bowels and throw up. Maccabeo was preparing to leave Sezze for Rome, and Superio asked him to find a better remedy in the big city. Superio specifically requested fresh savin, which Maccabeo told the judge was very efficient at causing abortion. Superio told Maccabeo he had already used savin, but it had not caused the abortion because it was dried—evidently the fresh herb was stronger. Although the head of Rome’s health office prohibited its sale without a written prescription from a physician, under penalty of twenty-five ducats, possible corporal punishment, or even execution, fra Maccabeo had no difficulty acquiring savin from an herb seller in bustling Piazza Navona.<sup>32</sup> After giving the savin to Superio, Maccabeo returned to Terracina, but a few weeks later, Maccabeo learned from his friend and fellow friar Pietro that the fresh savin had not worked either. Superio allegedly told Pietro to tell Maccabeo this and to let him know he had found something else that would get the job done. That was the last thing Maccabeo heard about the affair.<sup>33</sup>

Even though, of all the witnesses questioned, Maccabeo was the only one who admitted to being explicitly solicited by Superio and to helping him procure an abortion, Judge Lunte had few follow-up questions for the forthcoming Franciscan. He did however ask why, with all the medical practitioners available to him, Superio had asked a

Franciscan friar, and specifically fra Maccabeo, for this service. The friar told the judge he was a healer and well known for treating women for bewitchment. Maccabeo may have been an exorcist (licensed by his order or not).<sup>34</sup> Officially, exorcists were supposed to combat supernatural illness with spiritual cures. In practice, they often blended prayer and sacramentalia with drug therapy to literally purge visible “evils” from suffering bodies.<sup>35</sup> In varying degrees, exorcists knew a great deal about pathology and pharmacy. Maccabeo demonstrated a sophisticated knowledge of purgatives when he explained to the judge that his first remedy, the infusion of colocynth, had not caused the woman to abort because she was further along in her pregnancy than Superio had said, colocynth being a milder purgative best used in the first two months of pregnancy or in a higher dose.<sup>36</sup> Maccabeo did not however disclose why he agreed to help Superio. He did say that it was not for compensation—he made a point of telling the judge that he had refused Superio’s offer of a new habit. Although Maccabeo claimed not to know the abortion was for Superio’s niece Maria, he did know it was for a young woman from a good family who was supposed to be a virgin and for whom pregnancy could cause social trouble and even physical harm or death. Did the Franciscan friar agree to procuring an abortion because he sympathized with her hardship? Did he see it as the lesser of two evils? Judge Lunte did not ask.

When presented with Maccabeo’s confession, Superio denied it, and Judge Lunte had them confront each other in the investigation room. When Maccabeo confirmed his testimony, Superio called him a liar, “pathetic,” a “defrocked scoundrel sorcerer!” And he accused the friar of making up the story to get him in trouble, likely at the behest of Superio’s enemies.<sup>37</sup> Maccabeo told the judge that, in the end, the remedies he provided had not resulted in abortion, but Judge Lunte must have felt Maccabeo’s confession was suspicious, because he ordered the friar be tortured “to remove any doubt that could arise concerning [Maccabeo’s] character or statements . . . due to the fact that he made himself a partner to the crime, and in order to remove any stain . . . and to aid and fortify his deposition.” But before specifying the torture, Lunte asked Maccabeo how old he was and was told, “This September I finish my eighty-ninth year, and you can see that I have only four teeth left in my mouth, the rest have fallen out [during my many] years.” The

notary checked Maccabeo's mouth and confirmed he indeed had only four teeth.<sup>38</sup> Maccabeo's age meant he could not be strung up and tortured with the corda. Judge Lunte did, however, threaten him with the *stanghetta* torture: his right ankle would be placed in a metal vice that would be tightened, causing crushing pain and stopping blood flow. He urged Maccabeo to tell the truth and warned him that if he had given false testimony against Superio, "he would be called to render an account not only in this world but also in the other [world], especially because [Maccabeo] was a priest and a religious of the order of Saint Francis, therefore he should take good care to speak the true truth, which is all that was required of him."<sup>39</sup> To this Maccabeo replied: "My lord, what I have said in my examination is the truth, and if it weren't true, how could you ever think, for I am a priest and a member of a religious order, that I came here to bear witness in such a fashion as to put my soul at risk."<sup>40</sup> In the end, the *stanghetta* was a scare tactic and Maccabeo was not tortured. Judge Lunte released him, and with this last testimony, Maccabeo disappears from the historical record.

But—unlike the apothecary Tomeo, the barber Marzio, and the physician Ortensio—Maccabeo had confessed to having been solicited by Superio and to providing him with substances to terminate a young, albeit unnamed, woman's pregnancy. Likely hoping to extract more definitive evidence from Maria's body, Judge Lunte had her examined again by Roman midwives and this time by a surgeon. In a room in the Tor di Nona prison, Maria was again forced to bare her body to the menacing sight and touch of strangers. Again, her genitals, abdomen, and breasts were offered to three women the judge had brought in to "see and discover whether she had had children." All three midwives agreed with the previous assessments: "Having carefully seen and touched [her] where it was necessary, I say that this woman has certainly given birth and had children." The midwife Ginevra did not need her thirty-plus years of experience to know Maria had been lying: "The signs are so obvious that a blind person would know" that Maria had been pregnant and had recently delivered.<sup>41</sup> When the midwives left Maria's cell, the surgeon Vincenzo Pastore entered. He, however, examined only her feet, finding a scar on the right one, which he deemed caused by a lancet used to draw blood from what is "popularly called the vein of the mother."<sup>42</sup> The surgeon did not speculate as to why this

vein might have been cut or even when the phlebotomy occurred, and Judge Lunte would have known there was no way of proving blood was let from Maria's foot to induce abortion. On Maria, however, the scar, in tandem with the bodily evidence the six midwives found and fra Maccabeo's confession, must have confirmed what the whole town was alleging: "Even the chickens know so much is this fact known."<sup>43</sup>

The investigation into Superio and Maria's alleged sexual relationship, her pregnancy, and the abortion concluded on October 8, 1613. Judge Lunte did not issue a sentence. Rather than punishing anyone for wrongdoing, he exercised judicial discretion and decided the best way to bring this affair to an end was to force Superio to make peace with Angelo Cima, the prosecutor from Sezze who had denounced him to the Roman court in the first place. The court made them pledge "that they would neither offend nor cause [each other] to be offended," on pain of a three-thousand scudi payment to the offended.<sup>44</sup> About the incest and Maria's alleged abortion, the judge said nothing. Presumably, the enigmatic fra Maccabeo resumed his business. The other witnesses returned to their lives in Sezze, including Maria and her corpus delicti.