

CHAPTER 7

LEGAL PRE-ROE

Were there laws against abortion in the early American colonies?

The colonies inherited English Common Law and largely operated under it until well into the 19th century. English Common Law forbade abortion. Abortion prior to quickening was a misdemeanor. Abortion after quickening (feeling life) was a felony. This bifid punishment, inherited from earlier ecclesiastic law, stemmed from earlier “knowledge” regarding human reproduction.

When did this change?

In the early 1800s it was discovered that human life did not begin when she “felt life,” but rather at fertilization. As a direct result of this, the British Parliament in 1869 passed the “Offenses Against the Persons Act,” eliminating the above bifid punishment and dropping the felony punishment back to fertilization. One by one, across the middle years of the 19th century, every then-present state passed its own law against abortion. By 1860, 85% of the population lived in states which had prohibited abortion with new laws. These laws, preceding and following the British example, moved the felony punishment from quickening back to conception.

J. Dellapenna, *The History of Abortion: Technology, Morality, and Law*,
University of Pittsburgh Law Review, 1979

Quay, *Justifiable Abortion-Medical and Legal Foundations*,
49 *Georgetown Univ., Law Review*, 1960-1961

Who was punished?

Abortionists, if convicted, were sent to jail for varying lengths of time. There is no record of any having been executed.

Were women punished?

The definitive study on this gives the lie to Planned Parenthood's ads which claimed: "If you had a miscarriage, you could be prosecuted for murder."

Washington Post April 27, 1981

Studying two hundred years of legal history, the American Center for Bioethics concluded:

"No evidence was found to support the proposition that women were prosecuted for undergoing or soliciting abortions. The charge that spontaneous miscarriages could result in criminal prosecution is similarly insupportable. There are no documented instances of prosecution of such women for murder or for any other species of homicide; nor is there evidence that states that had provisions enabling them to prosecute women for procuring abortions ever applied those laws. The vast majority of the courts were reluctant to implicate women, even in a secondary fashion, through complicity and conspiracy charges. Even in those rare instances where an abortionist persuaded the court to recognize the woman as his accomplice, charges were not filed against her. In short, women were not prosecuted for abortions. Abortionists were. The charges of Planned Parenthood and other "pro-choice" proponents are

without factual basis. Given the American legal system's reliance on precedent, it is unlikely that enforcement of future criminal sanctions on abortion would deviate substantially from past enforcement patterns."

Women and Abortion, Prospects of Criminal Charges
Monograph, American Center for Bioethics,
422 C St., NE, Washington, DC 20002, Spring 1983

But why were so few abortionists prosecuted?

Because there were no scientifically accurate methods in those days to diagnose early pregnancy. The only absolute diagnosis of pregnancy, medically and legally binding, was for the doctor to hear the fetal heart, and that was only possible after four and five months. Prior to that, the abortionist could claim that her menstrual period was late or that she had some other malady, and that all he did was to bring on her period.

It is all but impossible to convict a person of murder unless the body can be produced — the corpus delicti. Since they were almost never able to obtain and examine the tissue removed from the woman's body, in a court of law it was almost impossible to prove (a) that she had been pregnant and (b) that the actions of the abortionist had terminated the pregnancy.

In practice, abortionists, therefore, were typically only prosecuted when the woman had been injured or killed. It was not until the advent of x-rays in the early 1900s (fetal bones visible at three months), and later hormone tests for pregnancy in the 1940s, that pregnancy could be legally confirmed in its earlier weeks.

When did the first state legalize abortion?

In 1967 Colorado and California legalized abortion. By June, 1970, when the State of New York passed the first Abortion-on-Demand Law (24-week limit), it became the 16th state to allow abortion. Due to an ex-

tremely loose interpretation of “mental health,” California also had de facto abortion-on-demand. Alaska and Hawaii had liberal laws. Laws in the other 12 states, which included Arkansas, Colorado, Delaware, Georgia, Kansas, Maryland, Mississippi, New Mexico, North Carolina, Oregon, South Carolina and Virginia, were very restrictive, typically allowing abortion only for pregnancies due to assault rape, incest and life of the mother as well as for severe fetal handicap.

No more laws passed after that?

Between the passage of New York’s law in 1970 and the Supreme Court’s decision of January ’73, no more state legislatures voluntarily passed permissive abortion laws. Florida did because of a court order. The other 33 states debated the issue in their legislatures, and all 33 voted against permitting abortion for any reason except to save the mother’s life.

In April of ’72, New York State repealed its most permissive law. Governor Nelson Rockefeller vetoed the repeal, and the law remained in force. In the November ’72 elections, however, so many pro-abortion legislators were swept out of office that the New York General Assembly had enough votes to override the governor’s veto. Plans were made to again repeal the law when that legislature reconvened in 1973. Before it could act, however, the Supreme Court handed down the *Roe v. Wade* decision and nothing was done.

The old state laws were challenged?

Yes. Having been stopped cold in their attempts to legalize abortion in any additional states, after 1970 pro-abortion forces challenged the legality of laws in many of the other states. These challenges to the constitutionality of the laws forbidding abortion in these states met with rather consistent results. In about one-third of the states, most of which had already legalized abortion by statute, these laws were declared unconsti-

tutional in varying degrees. Two-thirds of the federal courts in the states, however, declared existing laws to be constitutional. In general, the states on the east and west coasts were permissive, whereas the broad sweep between the Alleghenies and Rockies remained pro-life.

There were referenda?

Yes. After the pro-abortionists were stopped in the legislatures and in the courts, they tried referenda in two states to allow abortion-on-demand until 20 weeks in the November 1972 election.

- North Dakota, only 12% Catholic, voted 78% against abortion.
- Michigan, an industrial state (pre-pollled at 60% pro-abortion), voted 63% against abortion.

The tide had turned?

Yes. It seemed obvious that most people did not want abortion. But, on January 22, 1973, the U.S. Supreme Court ruled and abortion was imposed from the top down.

Roe vs. Wade, U.S. Supreme Court
410 U.S. 113, 1973
Doe vs. Bolton, U.S. Supreme Court
410 U.S. 179, 1973

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