In 1800, no state in the United States had passed a single law related to abortion; by 1900, virtually every state had passed laws making most abortions a crime—the one exception being to save the life of the mother. So what determined the legal status of abortion in America from colonial times until its criminalization? English common law. Common law is a body of customary laws that came about through judicial decisions of English common-law courts over multiple centuries going back to the Middle Ages. The common law's position on abortion will be revealed below.

The New Jersey Court of Errors and Appeals was the highest court in the state of New Jersey. As the title indicates, its functions were to hear cases on appeal and to correct errors in judgment by lower courts. In an excerpt from an 1849 opinion, the New Jersey Court of Errors and Appeals clarifies what does, and what does not, constitute a criminal abortion according to the common law.

The Legal Status of Abortion Prior to Criminalization

(*The State v. Eliakim Cooper*, New Jersey Court of Errors and Appeals, 1849)

The only point reserved, and submitted for the opinion of this court, is whether an *attempt to* procure an abortion, the mother not being quick with child, is an indictable offence at the common law. It may simplify the inquiry to consider whether the procuring of an abortion under such circumstances constitutes a crime. If the character of the act itself, when accomplished, be clearly *ascertained*, we shall be enabled with more certainty to decide upon the character of a mere *attempt* to commit the act.

Is, then, the procuring of an abortion, either by means of potions or of an operation used by the mother herself, of by another with her consent, an indictable offence at the common law, unless the mother be quick with child?

Undoubtedly, the commission of such an act without the consent of the mother is indictable, as an assault upon the mother…

But when no assault is alleged or proved, where the act is done by the mother herself or with her consent, a very different question is presented… The charge of assault, of an offence against the person of the mother, is clearly purged of criminality by her assent. The ingredient which, according to the argument, gives character to the offence, and takes away the power of the mother to consent, is the attempt to procure abortion, which it is alleged is an offence against the person of the child. But the very point of inquiry is whether that be at all an offence or not, and whether the child be *in esse* [in actual existence], so that any crime can be committed against its person.

In regard to offences against the person of the child, a distinction is well settled between its condition before and after its birth. Thus, it is not murder to kill a child before it be born, even though it be killed in the very process of delivery. Hale's P.C. 433. [*The History of the Pleas of the Crown*, Matthew Hale, lived 1609-1676.]

There appears to be at the common law a distinction equally well settled between the condition of the child before and after the mother is quick. "Life," says Blackstone, "begins in contemplation of law as soon as an infant is able to stir in the mother's womb." 1 Bl. Com. 129. [*Commentaries on the Laws of England*, William Blackstone, lived 1723-1780.]

It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. *In contemplation of law* life commences at the moment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it.

The offence of procuring an abortion seems, by the ancient common law writers, to be treated only as an offence against life. Thus Coke says, "If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her whereby the child dieth in her body, and she is delivered, this is a great misprision [misprision = misdemeanor], but no murder." 3 Inst. 50. [*Institutes of the Lawes of England*, Edward Coke, lived 1552-1634.] It was anciently held that the causing of an abortion by giving a potion to, or striking a woman big with child, was murder; but at this day it is said to be a great misprision only, and not murder, unless the child be born alive, and die thereof. *1 Hawk. B. 1, c. 31, §16*. [*A Treatise of Pleas of the Crown*, William Hawkins, lived 1682-1750.]

If a woman be *quick* or *great* with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet *in rerum natura* [in the natural realm, or born], though it be a great crime. *1 Hale's P.C. 433.* If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if anyone beat her whereby the child dieth in her body, and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor. *1 Bl. Com. 129.*

In two of these authorities (*Hale* and *Hawkins*) the term "big" or "great" is obviously used as tantamount to "quick." In all of them, the authors are treating of the crime of murder, of the offence against human life; and they distinguish between the destruction of the life of the infant before and after birth. There is in none of them a reference to the mere procuring of an abortion by the destruction of a *foetus* unquickened, as a crime against the person or against God and religion. *Abortion*, as a crime, is to be found only in modern treatises and in modern statutes. No trace of it is to be found in the ancient common law writers…

…We are of the opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offence at the common law, and consequently that the mere attempt to commit the act is not indictable. There is neither precedent nor authority to support it. If the good of society requires that the evil [abortion] should be suppressed by penal infliction, it is far better that it should be done by legislative enactments than that courts should, by judicial construction, extend the penal code or multiply the objects of criminal punishment…