

# How *Roe* Got Ancient Religious Prohibitions on Abortion Wrong

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## Introduction

*Roe v. Wade*<sup>1</sup> discussed at length the history of abortion. Why did the Court look for ancient religion to support its constitutional adjudication? I do not think it should have. Theocracy, rather than constitutional democracy, comes from following biblical precedent.<sup>2</sup> But, since the Court raised the issue, this paper will examine an assumption, underlying *Roe*, that “ancient religion did not bar abortion.”<sup>3</sup> The issue is whether, in fact, ancient religion did prohibit feticide.

The first problem with the Supreme Court’s assertion that ancient religion allowed abortion is that the Court cited a medical journal as its source.<sup>4</sup> The text relied upon is not about ancient religion, but rather, is an examination of Pythagoreans and how they related to the ancient medical code of ethical conduct, the Hippocratic Oath, which explicitly repudiated abortion. Within that article, the author made the finding that ancient religion allowed abortion. This statement, however, was unsupported by any sources and is, in fact, irrelevant to the major thrust of the essay.<sup>5</sup>

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<sup>1</sup> Roe was a young lady who sought an abortion. Texas law prohibited such acts. In *Roe v. Wade* the United States Supreme Court announced a constitutional right of privacy which mandated that women and their doctors be allowed to abort pregnancies up until the point of viability. After viability, the states could prohibit abortion, except those necessary for the life or health of the pregnant woman. By overturning the Texas law which criminalized abortion, the Court overturned similar laws in the majority of the states.

<sup>2</sup> Elsewhere the Court has used the Bible as support. It recently overturned the very similar biblical historical reasoning of *Bowers v. Hardwick* (478 U.S. 186; 106 S. Ct. 2841; 92 L. Ed. 2d 140 (1986)). The *Bowers* decision reasoned that, if homosexual sodomy was disallowed, among other authorities, by God in the Bible, then it could not be of fundamental value necessary for ordered liberty and, thus, mandated by due process.

<sup>3</sup> 410 U.S. 113, 130; 93 S. Ct. 705; 35 L. Ed. 2d 147 (1973).

<sup>4</sup> Ludwig Edelstein, *The Hippocratic Oath*, SUPPLEMENTS TO THE BULLETIN OF THE HISTORY OF MEDICINE (1943), pp. 13-14.

<sup>5</sup> *Ibid.*, p. 14.

## EXODUS 21

Exodus 21 provides a significant counter-argument to the assertion that ancient religion did not prohibit abortion. This passage has long been examined in discussions about abortion. It states:

If men strive, and hurt a woman with child, so that her fruit depart from her, and yet no mischief follow: he shall be surely punished, according as the woman's husband will lay upon him; and he shall pay as the judges determine. And if any mischief follow, then thou shalt give life for life.<sup>6</sup>

Many pro-life advocates understand this verse to mean that, when a premature birth occurs because of an accident during a fight, the perpetrator must pay a fine but, when the fetus is killed, then the perpetrator must be capitally punished. Many pro-choice supporters understand this verse to mean that, when a miscarriage occurs during a fight, the person responsible must pay a fine but, when the mother is killed, then the person responsible must be capitally punished.

Different interpretations of this passage result from alterations of the original meaning of the passage.<sup>7</sup> The good book might better be termed the good books since there are so many divergent versions of it. For example, some Bibles have used the following language:

When, in the course of a brawl, a man knocks against a pregnant woman so that she has a miscarriage but suffers no further injury, then the offender must pay whatever fine the woman's husband demands after assessment. But where injury ensues, you are to give life for life.<sup>8</sup>

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<sup>6</sup> *Exodus 21: 22-23*, King James Version.

<sup>7</sup> Authors have demonstrated how the text has been interpolated by scribes (Bernard Jackson, *Essays in Jewish and Comparative Legal History*, 1975, at 75-107. Samuel Loewenstamm, *Exodus XXI 22-25*, *VETUS TESTAMENTUM* 352, 1977, at 352-360). For instance, the passage begins by referring to the third person plural (men), then jumps to third person singular (he), and then inexplicably changes to second person (thou) in the space of two verses.

<sup>8</sup> *The Oxford Study Bible*, 1992. See *The New English Bible* (1970); *The Complete Parallel Bible: New Revised Standard Version*, *Revised English Bible*, *New American Bible*, *New Jerusalem Bible* (1993); *The Holy Bible*, *Revised Version* (1962); and *The Good News Bible* (1976) for similar translations.

The operative word is *miscarriage*. However, although in Hebrew there is a word for miscarriage, it is not the word actually used here. The Hebrew word for miscarriage is used in Exodus 23:26.<sup>9</sup> The translation of “miscarriage” in Exodus 21 is a miscarriage of justice.

Correct renderings—or renderings which remain true to the original Hebrew—include the King James Version, which states that the child departs or *leaves* the woman. In other words, the passage refers to premature birth.

The New International Version is much clearer: “If men who are fighting hit a pregnant woman and she gives birth *prematurely* but there is no serious injury [then he is fined]...But if there is serious injury [then life for life]...”<sup>10</sup> The New American Standard Bible (2000) has the same translation: “gives birth *prematurely*”. The Hexaglot Bible<sup>11</sup> and the American Standard Version<sup>12</sup> match the King James’ wording of fruit departing. Departure from the womb, alone, in no way denotes or connotes harm to that life; instead it refers only to its displacement. Although the Hebrew language does have verbs for death or harm, those terms are not used in here.<sup>13</sup>

Death is invoked by the words, “thou shalt give life for life.” Capital punishment is the response if mischief or harm, worse than a battery causing premature birth, occurs - possibly something like the death of that child.<sup>14</sup>

Rabbis typically rely on Talmudic commentary which concludes that the verse refers to miscarriage rather than live birth.<sup>15</sup> Not all Jewish authorities and biblical scholars jump to that conclusion, however.<sup>16</sup>

Other writers use arguments relying wholly on comparative ancient

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<sup>9</sup> Exodus 21:22-25, (2004) at <http://www.desiringgod.org/library/topics/abortion/exodus21.html>. This source also points out that, had the author wanted to limit the injury, he could have written, “injury to her...,” to make clear that only injury to the mother was intended.

<sup>10</sup> (1996), italics added.

<sup>11</sup> Edward Levante, ed. (1874).

<sup>12</sup> The Cross-Reference Bible, 1959.

<sup>13</sup> To be sure, premature birth has often resulted in further complications or death. Exodus 21:22, however, does not say anything more than that the child leaves the woman.

<sup>14</sup> See Edward Gaffney, *The Religion Clause*, 1993 B.Y.U.L. Rev. 189, footnote 1, for views that “life for life” does not deal with capital punishment.

<sup>15</sup> Interview with Rabbi Levi Stolik, Cardozo School of Law resident rabbi (12 March 2003).

<sup>16</sup> *PENTATEUCH AND RASHI'S COMMENTARY*, Volume II, 1949, at 125. See also GEORGE BUSH, *NOTES ON EXODUS*, vol. 2, at 19; KEIL AND DELITZSCH, *PENTATEUCH*, vol. 2, at 135.

Asian law. For instance, they argue that, because other civilizations had laws where miscarriage was the word used in a comparable setting, that must have been what was meant here.<sup>17</sup> For believers the response is one of faith. The Bible did not derive from some other civilization's precedent but from God.

Further issues arise in interpreting the phrase, "if mischief follows." Some biblical scholars interpret this as a reference to stillbirth.<sup>18</sup> The Septuagint version reads: "And if two men strive and smite a woman with child, and her child be born imperfectly formed, he shall be forced to pay a penalty...But if it be perfectly formed, he shall give life for life."<sup>19</sup> This rendering seems to speak of the viability of the unborn child. Clarke interprets "if any mischief follow" to mean that "if the child had been fully formed, and was killed...then the punishment was as in other cases of murder - the person was put to death."<sup>20</sup> Documented Torah law requiring execution for individuals responsible for a woman's stillbirth strongly supports the assertion that ancient religion *did* prohibit abortion. "If an abortion caused by an accident was to be punished severely, one can assume that deliberate abortion without justifiable cause was far more serious."<sup>21</sup>

## JUDAISM

Additional evidence is available, which the Supreme Court overlooked in its conclusion that ancient religions allowed abortions. "In Talmudic times,<sup>22</sup> as in *ancient* halakhah, abortion was considered a transgression [if] the fetus was viable."<sup>23</sup> "Abortion [was] prohibited."<sup>24</sup> There existed "an

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<sup>17</sup> Loewenstamm, *op. cit.*, pp. 353-360; Roy Ward, *The Use of the Bible in the Abortion Debate*, 13 *ST. LOUIS U. PUB. L. REV.* 391-408, at 396.

<sup>18</sup> Compare PENTATEUCH AND RASHI'S COMMENTARY, Volume II, 1949, at 125.

<sup>19</sup> *The Septuagint With Apocrypha: Greek and English*, Lancelot Brenton trans., Hendrickson Publishers, 1986 (1851).

<sup>20</sup> Adam Clarke's *Commentary on the Bible*, 129 (Ralph Earle, ed., 1967).

<sup>21</sup> *OLD TESTAMENT: STUDENT MANUAL, GENESIS—2 SAMUEL*, 1981, at 139.

<sup>22</sup> The Talmud means a "collection of *ancient* Rabbinic writings" (Dictionary.com (2003) at <http://dictionary.reference.com/> (italics added).

<sup>23</sup> *ENCYCLOPEDIA JUDAICA*, Volume 2, 1971, at 100. italics added.

<sup>24</sup> *Ibid.*

*ancient* law according to which...the penalty for aborting a fetus of completed shape was death.”<sup>25</sup> “Philo specifically prescribes the imposition of the death penalty for causing an abortion, and the text is likewise construed in the Samaritan Targum and by a substantial number of Karaite commentators.”<sup>26</sup>

## HINDUISM

Ancient Hindu writings forbade abortion.<sup>27</sup> Confirmation of this can be found from another source:

Hindu scriptures and tradition have from the earliest of times condemned the practice of abortion, except when the life of the mother is in danger. Hinduism teaches that the fetus is a living, conscious person needing and deserving protection. Hindu scriptures refer to abortion as garha-batta (womb killing) and bhroona hathya (killing the undeveloped soul). A hymn in the Rig Veda...begs for protection of fetuses. The Kaushitaki Upanishad...draws a parallel between abortion and the killing of one's parents. The Atharva Veda...remarks that the fetus slayer...is among the greatest of sinners.<sup>28</sup>

## CHRISTIANITY

Early Christian leaders often called abortion murder. Barnabas prohibited killing by abortion.<sup>29</sup> Anon wrote graphically in The Apocalypse of Peter that abortionists ended up in hell to be “tortured forever, for God wills it so.”<sup>30</sup> Athenagoras called abortion “murder,” for which one was

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<sup>25</sup> *Ha-Mikra ve-Targumav*, 280-1, 343-4 (italics added).

<sup>26</sup> Spec. 3:108.

<sup>27</sup> NATIONAL BRIEFING, RELIGION: HINDUS LOOK AT ABORTION, AMER POL NETWORK ABORTION REPORT, volume 5, number 52.

<sup>28</sup> *Hinduism*, (2004) at <http://abortionismurder.org/hindu.shtml>.

<sup>29</sup> In about 125 AD. See B.A. Robinson, *Abortion: Ancient Christian Beliefs* (2004), at [http://www.religioustolerance.org/abo\\_hist.htm](http://www.religioustolerance.org/abo_hist.htm).

<sup>30</sup> *Ibid.* (in about 135 AD).

accountable to God.<sup>31</sup> Clement of Alexandria also called it murder, as did Tertullian, who said: “It makes no difference whether one destroys a life that has already been born or one that is in the process of birth.”<sup>32</sup> St. Hippolytus called feticide murder and Minicius Felix referred to it as infanticide.<sup>33</sup>

Saint Basil the Great called the woman and anyone who gave her abortive drugs murderers.<sup>34</sup> Saint Ambrose stated the same: “The poor expose their children, the rich kill the fruit of their own bodies in the womb, lest their property be divided up, and they destroy their own children in the womb with murderous poisons, and before life has passed on, it is annihilated.”<sup>35</sup> Saint John of Chrysostom stated his strong religious conviction in the following way:

Why sow where the ground makes it its care to destroy the fruit? Where there are many efforts at abortion? Where there is murder before the birth? For you do not even let the harlot remain a mere harlot, but make her a murderer also. You see how drunkenness leads to whoredom, whoredom to adultery, adultery to murder; or rather *something even worse than murder*. For I have no real name to give it, since it does not destroy the thing born but prevents its being born. Why then do you abuse the gift of God and fight with His laws, and follow after what is a curse as if a blessing, and make the place of procreation a chamber for murder, and arm the woman that was given for childbearing unto slaughter?”<sup>36</sup>

Saint Jerome said: “Frequently [women having abortions] die themselves and are brought before the rulers of the lower world guilty of three crimes: suicide, adultery against Christ, and murder of an unborn

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<sup>31</sup> *Ibid.* (in about 50 AD).

<sup>32</sup> *Ibid.* (in about 215 AD).

<sup>33</sup> *Ibid.* (in about 200 AD).

<sup>34</sup> *Ibid.* (in about 350 AD).

<sup>35</sup> *Ibid.* (in about 370 AD).

<sup>36</sup> *Ibid.* (in about 400 AD); italics added.

child.”<sup>37</sup> In his sermon on the subject, Tertullian evoked the image of John the Baptist leaping in the womb of Elizabeth at the visit of Mary, mother of Jesus Christ, and said that it did not matter when the killing took place, whether after or before birth—both were killings.<sup>38</sup> The Didache commanded: “Thou shalt not murder a child by abortion.”<sup>39</sup> The Spanish Synod of Elvira canonized that a woman, who adulterated and then destroyed the child, could be permanently barred from communion “because she has doubled her crime.”<sup>40</sup> The Synod of Ancyra’s penalty was penance for ten years.<sup>41</sup>

## BUDDISM

Ancient Buddhism opposed abortion. Daniel Maguire, author of *Sacred Choices: The Right to Contraception and Abortion in Ten World Religions*, noted that there were strong religious prohibitions in ancient Buddhism.<sup>42</sup>

## ISLAM

Mohammed fought the practice of burying female babies under the Arabian sand. His first Koranic revelation spoke of an embryo. At least for some time in ancient Iran, abortion was an “unforgivable sin”<sup>43</sup> “During the Avesta period, using instruments for abortion was not permitted; and abortion was met with the most severe penalties.”<sup>44</sup>

All of this is available in the local public library. The Supreme Court could surely have found evidence supporting this point of view in their library, one would have thought. The evidence is so clear that it is hard to

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<sup>37</sup> *Ibid.* (in about 400 AD).

<sup>38</sup> *Ibid.* (in about 190 AD).

<sup>39</sup> *Ibid.* (in about 150 AD).

<sup>40</sup> *Ibid.* (306 AD).

<sup>41</sup> *Ibid.* (314 AD).

<sup>42</sup> Terry Mattingly, *Watching the Religious Left we Pray*, (2004) at <http://tmatt.gospelcom.net/column/2004/04/28/>.

<sup>43</sup> Ayatullah Damad, *Abortion, the Shiite Tradition*, (2004) at <http://www.almahdi.4t.com/conpag/page5.html>.

<sup>44</sup> *Ibid.*

understand how or why the Supreme Court disregarded it. Yet, the Court did not simply disregard recorded history; it rewrote it. It is one thing to ignore the facts. It is quite another to do as the Court did here and alter the facts.

Even if there were no evidence of ancient religious prohibitions on abortion, it would be a logical fallacy to say that one knows that no such prohibitions existed. To say so would be to purport to know the unknowable. Though an archeologist can say that he/she knows something existed anciently because he/she found proof, such an archeologist cannot say that he/she knows a fact did not exist anciently because he/she found no proof. Otherwise, he/she is claiming to know every particle under all the surface of the planet, not to mention the fact of decomposition of artefacts over the 3,000 years it takes to become ancient. Just as no rational archeologist can say he/she knows that a fact did not exist anciently, no reasonable Supreme Court Justice can claim to know conclusively that an ancient practice did not exist.

## CONCLUSION

After over 30 years, people continue to vociferously debate *Roe v. Wade*. The topic is as contentious as ever. Prior to *Roe*, a majority of states had passed laws prohibiting abortion-on-demand, pursuant to the Tenth Amendment.<sup>45</sup> Supreme Court Justice Scalia, lover of tradition, wrote in his dissent in *Planned Parenthood v. Casey*: “How upsetting it is that so many of our citizens...think that we Justices should properly take into account their views.”<sup>46</sup> Rather than upholding democratically decided law regarding abortion, the Supreme Court relied on the views of ancients.<sup>47</sup> Even if the Court could justify that religion was applicable to this discussion, it would appear that modern religion would be much more pertinent than ancient religion.

The Court was incorrect to base part of its decision on the belief that

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<sup>45</sup> “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

<sup>46</sup> 505 U.S. 833, 999-1000; 112 S. Ct. 2791; 120 L. Ed. 2d 674 (1992).

<sup>47</sup> It is not suggested that it would be better to let contemporary people rather than the Bible influence the Justices. To the author they do not appear relevant to what the Court is constitutionally allowed to do (except perhaps to look to popular usage when reading “unusual” of the Eighth Amendment in reference to capital punishment). Clearly the Bible is not the Constitution. “Is it [not] a Constitution that we are expounding?” (McCullouch v. Maryland, 17 U.S. 316, 415; 4 L. Ed. 579; 1819).



ancient religion was not opposed to abortion. In fact, it was. Abortion in the name of the Constitution may be legal, but it is based on false premises and must be corrected.

The Constitution of the United States is bombarded with perversions like the ignoring of explicit rights as the right of a woman to self-defence by keeping arms, and the invention of non-existent rights like the right to abort.

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