A Brief History of Abortion Laws in Wisconsin

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Introduction

The U.S. Supreme Court is soon expected to issue a ruling in *Dobbs v. Jackson Women’s Health Organization*, regarding the constitutionality of a Mississippi law banning abortions after 15 weeks’ gestation, except in medical emergencies and cases of severe fetal abnormality.¹ In advance of the court’s decision, the Legislative Reference Bureau has fielded various questions relating to the history of Wisconsin’s early abortion laws. This issue of *LRB Reports* provides a brief legislative history of general criminal prohibitions against abortion under Wisconsin law.

Wisconsin’s first abortion laws

The first prohibitions on abortion were introduced as part of a bill relating to homicide, 1849 Assembly Bill 116. The three revisors tasked with compiling Wisconsin’s laws in 1848 and 1849—Charles Minton Baker, Michael Frank, and Charles S. Jordan—likely drafted this bill.² The revisors played a “predominant role in the creation of new substantive law for Wisconsin.”³ To fill the “large gaps” that existing territorial laws did not address, the revisors borrowed liberally from other states’ laws, especially the Massachusetts and New York statutes, which “furnished not only much of the substantive law for Wisconsin, but also the general framework or pattern of organization for the statutes.”⁴

Section 10 of the bill stated the following:

The willful killing of an unborn quick child, by any injury to the mother of such child, which would be murder if it resulted in the death of such mother, shall be deemed manslaughter in the first degree.

Additionally, section 11 of the bill stated the following:

Every person who shall administer to any woman pregnant with a quick child, any medicine, drug, or substance whatever, or shall use or employ any instrument or other means, with intent thereby to destroy such child, unless the same shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose, shall, in case the death of such child or of such mother be thereby produced, be deemed guilty of manslaughter in the second degree.

Note that these prohibitions pertained to the administration of abortion to “any woman pregnant with a *quick* child” (emphasis added). In the early United States, “quickening”

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³. Van Alstyne Jr., “Land Transfer and Recording” 54.
meant “the first perception of fetal movement by the pregnant woman herself,” which typically took place “near the midpoint of gestation.” Accordingly, 1849 Assembly Bill 116 generally prohibited abortion after about the midpoint of pregnancy and created first- and second-degree manslaughter penalties. This prohibition reflected American acceptance of British common law, under which the termination of a pregnancy was not recognized as a crime until the fetus had quickened, since at that time, no authoritative proof of pregnancy existed apart from quickening.

In drafting 1849 Assembly Bill 116, the revisors may have modeled the language of sections 10 and 11 after title XXX, chapter 154, sections 32 and 33, of the 1846 Michigan Revised Statutes. Sections 10 and 11 were identical to these sections of Michigan law, save the penalties specified. This kind of textual appropriation was hardly unusual, as Michigan laws had formed the foundation of Wisconsin territorial laws. However, the bill did not incorporate the language of a third section of Michigan laws that established a broader prohibition against abortion. Specifically, title XXX, chapter 154, section 34, of the 1846 Michigan Revised Statutes generally prohibited administering abortion “to any pregnant woman,” regardless of whether quickening had occurred.

Revisors’ drafts were generally passed by the legislature with only minor amendment, as was the case with 1849 Assembly Bill 116. The assembly passed the bill on a vote of 28–26 on March 10, 1849, and the senate concurred on a vote of 9–3 on March 13, 1849. The bill was signed into law by Governor Nelson Dewey on March 31, 1849, and its provisions were codified under chapter 133, sections 10 and 11, of the 1849 Wisconsin Statutes.

Early changes to abortion laws

The next substantial change to Wisconsin’s abortion laws came in 1858, when legislators removed the word “quick” directly before “child” in chapter 133, sections 10 and 11, of the 1849 Wisconsin Statutes. This change effectively prohibited abortion at any stage of gestation.
As in 1849, changes to abortion laws occurred in the course of statute revisions; however, this time, changes met with disagreement. On April 30, 1858, the senate resolved itself into a committee of the whole to consider the compilation and revision of the statutes.\(^\text{12}\) The senate ultimately reported out (i.e., recommended for passage) several chapters of the revisors' compilation, including a bill relating to crimes and the punishment thereof. As introduced, the bill did not modify existing abortion provisions. However, the version of this bill reported out included an amendment proposing to "strike out the word 'quick'" under chapter 133, sections 10 and 11, of the 1849 Wisconsin Statutes.\(^\text{13}\) This amendment may have reproduced the provisions of a bill introduced earlier in the legislative session by Senator Alden Bennett, a physician and farmer representing parts of Rock County.\(^\text{14}\)

On May 3, 1858, the assembly declined to concur in the amendment in a 29–30 vote.\(^\text{15}\) After the senate refused to proceed without the amendment, a committee of conference was appointed.\(^\text{16}\) On May 10, four days after the committee was created, three committee members—Representative Samuel H. Bassinger and Senators Alden Bennett and Martin L. Kimball—recommended adoption of the senate amendment, while Representatives Perry H. Smith and Jonathan C. Hall recommended against adoption.\(^\text{17}\) Legislative records do not indicate the basis of the representatives' opposition to the amendment. The assembly and the senate ultimately concurred in the recommendation of the majority.\(^\text{18}\)

The enacted bill amended and renumbered provisions relating to abortion under chapter 164, sections 10 and 11, of the 1858 Wisconsin Statutes. As amended, these sections generally prohibited abortions, whether they occurred before or after quickening.

During the same legislative session, legislators also created penalties for any woman who intentionally attempted to "procure a miscarriage," i.e., obtain an abortion. Although

\(^{12}\) Wis. Senate Journal (1858 v. 2) 1273. Resolving into a committee of the whole enabled the senate to operate more like a committee, with each member permitted to speak more than twice on the same subject, among other things. See L. H. D. Crane, *A Manual of Customs, Precedents, and Forms, in Use in the Assembly of the State of Wisconsin; Together with the Rules, the Apportionment, and Other Lists and Tables for Reference, with Indexes* (Madison, WI: James Ross, 1859), 81–87.

\(^{13}\) A note on a slip of paper attached to the relevant section of the statutes reads: "Strike out the word 'quick' as it occurs in sections 10 and 11 of Chap 161 of compiled statutes." The reverse side of this slip of paper contains the amendment's legislative history, as recorded by the assembly and senate chief clerks. The slip of paper is titled "Senate Amendment 17 to Chapter 161 of the revisor's compilation." It is possible the slip of paper is the actual amendment itself. *Revision bills for revised statutes, 1858*, WHS Archives, 161 MAD 3/6/G4, Box 4, Title 27. See also Wis. Senate Journal (1858 v. 2) 1274 (showing the senate reporting out Ch. 161 with Senate Amendment 17).


\(^{15}\) Wis. Assembly Journal (1858 v. 2) 1619–20.

\(^{16}\) Wis. Senate Journal (1858 v. 2) 1362 (showing the senate refusing to recede); Wis. Assembly Journal (1858 v. 2) 1677 (showing the assembly requesting a committee of conference at the request of Perry H. Smith). Representatives Smith, Jonathan C. Hall, and Samuel H. Bassinger and Senators Alden L. Bennett and Martin L. Kimball were appointed to the committee of conference. Wis. Assembly Journal (1858 v. 2) 1677; Wis. Senate Journal (1858 v. 2) 1380.

\(^{17}\) Wis. Assembly Journal (1858 v. 2) 1759–60.

\(^{18}\) Wis. Assembly Journal (1858 v. 2) 1760; Wis. Senate Journal (1858 v. 2) 1447.
it is unclear which bill created these penalties, they were codified under chapter 169, section 59, of the 1858 Wisconsin Statutes, which stated the following:

Every woman who shall take any medicine, drug, substance, or thing whatever, or who shall use or employ any instrument, or shall submit to any operation or other means whatever, with intent to procure a miscarriage, shall upon conviction be punished by imprisonment in a county jail, not more than six months nor less than one month, or by a fine, not exceeding five hundred dollars, or by both fine and imprisonment, at the discretion of the court.

Historians attribute both changes—the creation of new penalties for any woman seeking an abortion and the removal of “quick” from existing prohibitions—to the influence of Dr. William Henry Brisbane, a Wisconsin doctor committed to discouraging women from seeking abortions and penalizing doctors who performed them. In 1857, Brisbane wrote to fellow doctor Horatio Robinson Storer that he intended “to get a law passed by our Legislature to meet the case, much too common, of administering drugs and injections either to prevent conception or destroy the embryo.”

Weeks later, the American Medical Association (AMA) appointed Brisbane to a committee of eight members “to report upon criminal abortion, with a view to its general suppression.” The resulting report decried “the belief . . . that the foetus is not alive till after the period of quickening” and urged the AMA to lobby state legislatures to revise their statutes accordingly.

By 1859, Brisbane reported to Storer that he had “succeeded in having enacted by our Legislature the following statute,” and enclosed the text of newly revised abortion laws. It is difficult to substantiate Brisbane’s self-professed role in enacting legislation to establish broader prohibitions against abortion. As senate chief clerk during the 1857 legislative session, Brisbane would have been acquainted with most state senators.


20. Letter from William Henry Brisbane to Horatio R. Storer, April 6, 1857, “Correspondence to Horatio Robinson Storer from various physicians relating to criminal abortion,” Harvard Countway Library, B MS b47. Quoted from the original in Mohr, Abortion, 57.


23. Letter from William Henry Brisbane to Horatio R. Storer, May 19, 1859, “Correspondence to Horatio Robinson Storer from various physicians relating to criminal abortion,” Harvard Countway Library, B MS b47. Quoted from the original in Mohr, Abortion, 57. It is unclear whether Brisbane enclosed the text of 1858 Wis. Stat. ch. 164, §§ 10 and 11, or that of 1858 Wis. Stat. ch. 169, § 59. However, Storer seems to have credited Brisbane with the removal of “quick” 1858 Wis. Stat. ch. 164, §§ 10 and 11, in referring to him as having effectuated a modification of Wisconsin laws in acknowledgement of the fetus as a living being prior to quickening. Storer, On Criminal Abortion, 74. See also R.H. Tatum, “A Few Observations in the Attributes of the Impregnated Germ” in James B. McCaw and George A. Otis, eds., Virginia Medical Journal, vol. 6 (Richmond, VA: Ritchie and Dunnavant, 1856), 455–59.

fellow co-founder Samuel H. Bassinger, a state representative and member of the conference committee that recommended adoption of the amendment striking the word “quick” from statutes relating to abortion. Although Brisbane’s diaries do not expressly mention this legislation (or the issue of abortion), they do note various trips to Madison to meet with lawmakers.

Subsequent legislative changes

In subsequent years, legislators amended statutory prohibitions against abortion, mainly to modify related penalties. Under chapter 186, section 4584, of the 1878 Wisconsin Statutes, the penalties associated with any woman seeking an abortion had decreased, with the maximum prison term falling from one year to six months and the maximum fine falling from $500 to $100. These penalties remained unchanged through the 1940s; however, two pieces of legislation—Ch. 446, Laws of 1947, and Ch. 447, Laws of 1947—increased fines and terms of imprisonment associated with administering abortions.

Lawmakers continued to amend prohibitions against abortion in the 1950s, both by defining terms and renumbering existing statutes. Ch. 623, Laws of 1953, established separate prohibitions and penalties for abortion of an “unborn child” and abortion of an “unborn quick child.” Additionally, Ch. 623 added language specifying that “‘unborn child’ means a human being from the time of conception until it is born alive.” These changes were enacted as part of an omnibus bill incorporating the recommendations of a Legislative Council subcommittee; meeting minutes indicate that recommendations relating to abortion were adopted without discussion. During the next legislative session, Ch. 696, Laws of 1955, placed general prohibitions on abortion under newly created Wis. Stat. § 940.04, which also incorporated prohibitions against and penalties for any woman seeking an abortion. However, this legislation did not substantially modify these prohibitions.


27. Such prohibitions currently exist under Wis. Stat. § 940.04 (1) and (2).

28. Such language currently exists under Wis. Stat. § 940.04 (6).


under the bill. Additionally, 2011 Wis. Act 217 repealed prohibitions against and penalties for any woman seeking an abortion. (Note that by that time, such penalties were unenforceable, as 1985 Wis. Act 56 created Wis. Stat. § 940.13, which prohibited the imposition or enforcement of penalties for a woman intentionally undergoing an abortion.)

After Roe, Wisconsin lawmakers created criminal prohibitions against abortion under other statutes. Namely, 1985 Wis. Act 56 created Wis. Stat. § 940.15, which prohibits the performance of an abortion by any person “after the fetus or unborn child reaches viability, as determined by the reasonable medical judgment of the woman's attending physician,” except if necessary to preserve the life or health of the woman. Additionally, 1997 Wis. Act 219 created Wis. Stat. § 940.16, which prohibits partial-birth abortions, defined to mean an abortion in which a person partially vaginally delivers a living child, causes the death of the delivered child with the intent to kill the child, and then completes the delivery of the child. (Note that this statute is currently unenforceable.31) Most recently, 2015 Wis. Act 56 created Wis. Stat. § 253.107 (3) (a), which prohibits the performance of an abortion by any person “if the probable postfertilization age of the unborn child is 20 or more weeks.”

As of this writing, the most restrictive, currently enforceable statute generally prohibits abortion 20 or more weeks postfertilization, per Wis. Stat. § 253.107.32 That provision includes an exception for cases involving a medical emergency wherein termination of the pregnancy “in a manner that . . . provides the best opportunity for the unborn child to survive” poses a risk of the pregnant woman's death or irreversible physical impairment of a major bodily function. Current law does not prohibit a woman from seeking an abortion or establish criminal penalties for doing so.

Conclusion

The Wisconsin Statutes first addressed abortion in 1849, when lawmakers enacted a general prohibition on abortion after quickening, providing an exception for an abortion necessary to preserve the life of the mother. In 1858, that prohibition was expanded to prohibit abortion generally, regardless of whether quickening had occurred. Although related penalties changed over time, that broad prohibition has remained under statute to the present and currently exists under Wis. Stat. § 940.04. Since 1973, this statute has been unenforceable due to Roe and subsequent court rulings. However, the U.S. Supreme Court’s holding in Dobbs, as well as subsequent post-Dobbs legal challenges, may affect the enforceability of this statute and others. ■

31. Stenberg v. Carhart, 530 U.S. 949 (2000); Hope Clinic v. Ryan, 249 F.3d 603 (2001). A federal ban under 18 U.S. Code § 1531, which creates exceptions for any abortion that is necessary to save the life of a mother, has been held constitutional and is enforceable. Gonzales v. Carhart, 550 U.S. 124 (2007).

32. This statute has not been held by a court of competent jurisdiction to be unconstitutional and is therefore enforceable. Note that similar statutes from other jurisdictions have been held unconstitutional insofar as they prohibit an abortion between 20 weeks of pregnancy and fetal viability. Isackson v. Horne, 716 F.3d 1213, 1229 (9th Cir. 2013) (analyzing Ariz. Rev. Stat. § 36-2159).