

Refuting the Myths of Abortion History

BY Susan Wills, Ph.D.

In a soon to be published book, *Dispelling the Myths of Abortion History* (Carolina Academic Press, 2006), Villanova Law School Professor Joseph W. Dellapenna convincingly refutes revisionist pseudo-histories of pre-*Roe v. Wade* abortion law and practice.

At 1,300 pages, with 2,000 cases cited and 9,000 footnotes, one might conclude his is an academic exercise of limited interest to the public. One would be wrong.

Truth matters. The entire edifice of U.S. abortion law is constructed on lies and deceptions—lies about when life begins, the scope of “privacy” in the Constitution, the meaning of the Ninth and Fourteenth Amendments, about applicable (but ignored) precedents, and, significantly, about the history of abortion law and practice.

The Supreme Court’s rationale in *Roe v. Wade* for finding a right to abortion in the U.S. Constitution was grounded squarely on one of the earliest and most fraudulent versions of abortion “history,” concocted by Cyril Means, Jr., general counsel for the National Association for the Repeal of Abortion Laws (NARAL).

Justice Harry Blackmun, *Roe*’s author, devotes fully half of that opinion to a pseudo-history of abortion, relying heavily on two articles by Means, citing them seven times. Sarah Weddington, who represented “Jane *Roe*,” arguing for a right to abortion, stated that “the Justices had copies of Means’ articles on the bench with them during the oral arguments” (Dellapenna, 144). Weddington referred to Means’ version of abortion history three times in her oral argument.

Without relying on Means’ “radical revision of the history of abortion” (Dellapenna, 144) it is difficult to envision how the Court could have found any pretext for overturning the abortion laws of 50 states. Even if it had been accurate, Means’ mis-story of abortion would not have remedied other constitutional flaws of *Roe*. But the historical rendition gave the Court a plausible opening, and gave the opinion a patina of legitimacy. Most legal scholars have had no trouble seeing *Roe*’s constitutional flaws through the patina.

Only a handful, however, have questioned the “history” of abortion as repeated by Justice Blackmun. Professor Dellapenna did so in a 1979 article (“The History of Abortion: Technology, Morality, and Law,” 40 U. Pittsburgh L. Rev., 359–428). His and others’ critiques generated little public attention, probably because historical analyses that contradict *Roe*’s version of events offend the prevailing orthodoxies in academia and the media.

But Dellapenna's book comes at a fortuitous time. In the past year, prominent pro-choice legal analysts and columnists have openly criticized *Roe v. Wade* in mainstream media outlets. They are not about to change their minds about the "right" to abortion, but are acknowledging the huge damage *Roe* has inflicted.

They fault the Court for usurping the role of state legislatures in crafting abortion law. They fault the extremism of U.S. abortion law that fails to recognize a life is at stake, and not simply "privacy." And they fault the corruption of the judicial nomination process where, for many senators, a litmus test of loyalty to *Roe* supplants all other criteria of judicial fitness. And moderate Democrats, after the party's 2004 election losses, are publicly questioning the wisdom of following the extreme agenda of the abortion lobby into electoral oblivion.

In *Dispelling the Myths of Abortion History*, Professor Dellapenna systematically demolishes the historical pillars supporting *Roe v. Wade*'s claim of a right to privacy that encompasses abortion. In the space of a brief review, it's impossible to catalog more than a fraction of the myths he refutes. Some of the more important ones follow.

Myth: Abortion was commonly practiced from ancient times until the advent of statutory prohibitions in the 19th century.

Fact: Dellapenna absolutely demolishes this canard. Before the 19th century, the "traditional forms of abortion had been infanticide and abandonment," according to Irish feminist Mary Kenny (Dellapenna, 56). Why? No effective abortion techniques existed before the 19th century. In 1815, a British doctor wrote in a forensics text that abortions were tantamount to suicide (Dellapenna, 36). A list of abortifacient drugs found in Greek folk medicine illustrates this point well. It includes benign substances like anise, celery, chamomile, cinnamon, cumin, ginger, leeks, licorice, human milk, mint, mustard, parsley, and sage, as well as potentially harmful substances like raw eggs, goat dung, and rabbit innards (Dellapenna, 39).

Medieval recipes were also extremely lethal to women (Dellapenna, 45). An intrusion abortion with a primitive curette was first reported (and prosecuted) in England in 1732 (Dellapenna, 54). This type of procedure was at least as dangerous as injury and ingestion abortions for the first 200 years of use, since it was performed "blind" and without "analgesics, antiseptics, anesthetics, or antibiotics" (Dellapenna, 55).

Myth: It is "doubtful that abortion was ever firmly established as a common-law crime, even with respect to the destruction of a quick fetus" (*Roe v. Wade*, 410 U.S. 113, 136).

Fact: Means based this conclusion, repeated uncritically by Justice Blackmun, on a misreading of two 14th-century cases, one of which did not even involve abortion. The defendant in the second case was indicted for abortion, but not arraigned, almost certainly due to a lack of proof that the child's death resulted from abortion rather than miscarriage. If Means had looked beyond these inconclusive cases, he could have found dozens of prosecutions for injury abortions and "ingestive" abortions (involving oral consumption of supposedly abortifacient herbs, potions, or noxious substances) in both ecclesiastical and lay courts in England in the late 15th and 16th centuries (Dellapenna, 176–183). Legal records by the end of the 16th century "indicate that both

forms of abortion were capital felonies regardless of consent or (more typically) lack of consent by the woman undergoing the abortion attempt” (Dellapenna, 185).

Myth: Sir Edward Coke, “Father of the Common Law,” who wrote “the first comprehensive and systematic treatment of the common law since Bracton” (circa 1256), recorded that an abortion after “quickening” which resulted in a stillborn child was only a misdemeanor (and by inference, abortions performed before the mother could feel the child moving were permissible).

Fact: At a time when medical knowledge of fetal development was almost nonexistent, quickening was an evidentiary requirement to prove the child was alive when the abortion was undertaken. “Quicke with child” eventually became synonymous with “pregnant.” Dellapenna reasonably posits that English courts had begun to ascribe lesser penalties for abortions resulting in still births in order to obtain convictions from juries reluctant to punish the mother with death. Prosecutions in the American colonies of Connecticut, Delaware, Maryland, Rhode Island, and Virginia were “consistent with the law of England” or were “more restrictive of abortion” (Dellapenna, 228).

Myth: “[It] has been argued that a State’s real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy. Modern medical techniques have altered this situation” (*Roe v. Wade*, 410 U.S. 113, 149). Given the “safety” of abortion in the latter half of the 20th century, the Court concludes the rationale for such laws no longer exists, and the “obsolete” laws can be struck down.

Fact: Means (and Justice Blackmun) rely on a comment selectively drawn from a single 1858 New Jersey abortion case (and a subsequent case quoting it) which described the New Jersey statute’s purpose as protecting the mother’s life. In a passage immediately preceding that statement, however, the New Jersey court explained that the protection of the child’s life was the purpose of the prohibition against abortion in the common law, and the statute was meant to supplement common law by adding protection for the mother (Dellapenna, 286). Means claimed he could find no 19th-century abortion cases that reflected a different legislative intent. Dellapenna, however, found 17 cases in the 19th century that describe the protection of fetal life as the primary reason for statutes prohibiting abortion.

Myth: The 19th-century state statutes prohibiting abortion had little to do with opposition to abortion. They represented a conspiratorial power grab by the male-dominated medical societies to drive mostly female midwives (“irregular” practitioners of medicine) out of business.

Fact: This widely accepted theory, proposed by historian James Mohr in his 1978 book, strains credulity. Physicians opposed abortion because science had begun to unlock the mysteries of conception and fetal development. The citizens who lobbied most vocally for stricter laws against abortion were in fact the early feminists. Lawyers, journalists, and clergy also are on record as supporting stricter laws against abortion.

A volume of this size is, predictably, not without flaws. Verbatim redundancies crop up occasionally. The draft we read contains trivial errors (e.g., calling former head of the National Organization for Women “Jill” Ireland instead of Patricia; awarding MDs to Carol Everett, a

former clinic operator, and to Ron Fitzsimmons, former head of an abortion lobby group). But, in sum, Dellapenna has put together a tremendous resource to further discredit an already-reeling *Roe v. Wade*.

Editor's note. Readers of NRL News will receive a 30% discount on *Dispelling the Myths of Abortion History* by Joseph Dellapenna through the month of March. Just mention this offer when you order online at www.cap-press.com. (Please note: The special price of only \$56 will not be reflected online but will be shown on the invoice.)