

Abortion History Myths: The Sequel

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In his soon to be published book, *Dispelling the Myths of Abortion History*, Villanova Law School Professor Joseph W. Dellapenna systematically exposes the legions of lies—legal, historical, social, and otherwise—on which *Roe v. Wade* rests.

A review in the January 2006 NRL News touched upon the major themes of his book. Because these points bear repeating often (it may take us years to supplant “conventional wisdom” with the truth), here are Dellapenna’s main theses.

1. Contrary to Justice Harry Blackmun’s ersatz tutorial on the history of abortion in *Roe*, abortion was not commonly practiced throughout millennia. Not the least of the reasons was because abortion methods used before about 1900 fell into two, sometimes overlapping, categories: 1) ineffective and 2) injurious or fatal to the mother.
2. Also contrary to Blackmun’s version of history, abortion was not a liberty women were free to enjoy; abortion was in fact a crime under English common law and in ecclesiastical courts in England from at least the 14th century.
3. Stringent state laws enacted in the 19th century to codify the common-law crime of abortion were aimed at protecting the lives of unborn children at even the earliest stage of pregnancy. Blackmun, however, would have us believe these laws were enacted to protect women’s lives and health. This allowed him to argue the laws no longer served any purpose—abortion supposedly being “safe” for women in 1973—and the laws could, therefore, be overturned.

Naturally, in a book of 1,300 pages, Dellapenna debunks hundreds of fascinating myths and misconceptions which have been paraded around the public square as Revealed Truth for far too long. Allow me to address a few more myths he takes pains to demolish.

Myth: *Roe v. Wade* was the inevitable outcome of an ongoing abortion liberalization process that was moving forward at the state level. Justice Ruth Bader Ginsburg still propounds this viewpoint. She has written in a law review article: “The political process was moving in the early 1970s, not swiftly enough for advocates of quick, complete change, but majoritarian institutions were listening and acting.”

Fact: Prior to 1967 one state had allowed abortion for rape or incest and one for health. Between 1967 and 1970, twelve states added a few exceptions to their laws banning all abortions except where the mother’s life was endangered. They typically allowed abortion in the case of rape, incest, or if the child was disabled or, if the mother’s health was at risk. One state did so in 1972 after its protective law was struck down by the state supreme court. Only four states (Alaska, Hawaii, Washington, and New York) plus the District of Columbia repealed virtually all restrictions on abortion.

The repeal statutes caused tremendous legislative and public controversy. In 1970 the New York statute passed by one vote, but in 1971, the legislature significantly tightened the abortion law. And one year later, the legislature voted to repeal the 1970 abortion law and reinstate severe restrictions on abortion, even early in pregnancy. The measure passed both houses, only to be vetoed after the session ended by Governor Nelson Rockefeller. *Roe v. Wade* intervened to moot any further action by New York lawmakers.

New York was not the only state to oppose the liberalization trend. No abortion reform or repeal statutes were

enacted in the U.S. in 1971. By 1973 the legislative drive to reform/repeal abortion laws had completely stalled. Several reform bills were soundly defeated.

For example, Pennsylvania's Assembly voted 157–34 to prohibit all abortions except to save the mother's life, and Massachusetts lawmakers voted 176–46 to define human life as beginning at conception. After a court declared Connecticut's protective abortion law unconstitutional, the legislature promptly passed another protective law. If that weren't clear enough, referenda in several states produced resounding defeats of proposals to legalize abortion, e.g., Michigan (61% against) and North Dakota (77% against).

Elected officials who opposed reform or repeal of abortion laws were elected in 1972 by wide margins in Connecticut, Massachusetts, Michigan, New York, North Dakota, and Pennsylvania. Obviously, abortion on demand throughout pregnancy à la Roe was not a legal inevitability.

Myth: Under the gradually developing understanding of the “right to privacy,” the Supreme Court and legal scholars acknowledged that abortion laws would inevitably be declared unconstitutional.

Fact: Two years after the decision in *Griswold v. Connecticut* (finding a right to privacy in the context of marital contraceptive use, in the penumbras and emanations from assorted constitutional amendments), the Supreme Court rejected the notion of any “generalized constitutional right to privacy” in *Katz v. United States* (1967).

Naturally, it would have been awkward to mention *Katz* six years later in the *Roe* opinion. Justice Blackmun ignored it, just as he ignored at least five prior Supreme Court decisions which had upheld, or at least assumed, the constitutionality of abortion bans by affirming criminal indictments, convictions, and/or loss of medical licenses for defendants who had performed abortions.

Even a committee of the American Civil Liberties Union in 1967 concluded in “almost unanimous agreement that restrictive laws are not unconstitutional on their face. ... The Committee felt that society could decide ... to place such value on the life of the unborn child [sic!] as to render abortion possible only in a narrow range of circumstances” (Dellapenna, 628). And Cyril Means, law professor and author of the fraudulent pseudo-history of abortion law and practice on which Justice Blackmun so heavily relied, wrote in 1967 that to claim abortion prohibitions unconstitutional would be “so perspicuously absurd” (Ibid.).

Myth: Legalized abortion was inevitable because the medical profession by the 1960s strongly supported abortion reform. Prominent doctors even referred their patients to providers.

Fact: “Physician support for the abortion laws [i.e., bans] was so obvious at the time that at least one abortionist attributed his conviction to the medical profession rather than to the police, the lawyers, or the jury” (Dellapenna, 569). Even Dr. Mary Calderone, the medical director of the Planned Parenthood Federation, unequivocally condemned abortion as murder. So did Dr. Alan Guttmacher, who wrote in 1959 that he “‘would vigorously oppose’ any proposal for the unrestricted legalization of abortion. Even as late as 1969, Guttmacher was writing that once ‘[fertilization had taken place,] a baby has been conceived’” (Ibid.).

Dellapenna has a field day with one historian's claim that “over two hundred doctors, including some of Chicago's most prominent physicians and AMA members, referred patients for abortions” (Dellapenna, 560). A later footnote in the historian's book (162 pages later!) reveals that the figure of 200 referrals was derived from only 70 patient records which actually included only 18 referrals from doctors, only 11 of whom were named. Other referrals were from pharmacists and even beauticians!

Bottom line: There was nothing inevitable about *Roe*, not legally, not politically, not medically, not socially. The *Roe* abortion regime is a monumental injustice to women and their children and a monstrous aberration of law. It must end.