Dispelling the Myths of Abortion History

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A Personal Aside

Coming to terms with the presence of the traditions from which we are derived is, or should be, a fundamental part of growing up.

—Jaroslav Pelikan[1]

I have been working on this book—as such—for about 15 years, but if one looks back to when I first began to examine the history of abortion, one could say that I have been at it for more than 30 years. The earliest fruit of that effort was a law review article published some 26 years ago.[2] How I, a white man who has fathered at least five children, became so concerned about the conflicting stories we tell about abortion and so concerned about discovering the forces that have shaped those stories down through the centuries as to undertake this effort demands an explanation. Indeed, some will even consider me physiologically disqualified from thinking or writing seriously about abortion (except were I to agree with "politically correct" women). I have little to say to anyone who believes that except that I do not agree.

My race and gender, of course, might be relevant in evaluating my stories. Abortion, however, raises questions that are too important to be the exclusive domain of any particular group. Furthermore, I have had several close encounters with abortion in my life, including professional and personal relationships with women who have had abortions. Finally, while most of my children were planned, as a father of three daughters I am highly conscious of the special risks they face from unwanted pregnancy.

Some readers might assume that I am a Catholic given my family name and that I have taught at a Catholic university for 29 years. Law professor David Garrow, for example, assumed that I am a Catholic even while conceding that my work has been "among the more significant hostile critiques" of the Supreme Court's constitutionalization of abortion rights.[3] I need not address whether this too would disqualify me for I am not a Catholic. I am and have been for most of my life, by choice, a Unitarian. (Today, one might describe me as a lapsed Unitarian, for I find even that church too restrictive.) Nor am I an absolutist on abortion, as Garrow also appears to suppose. I wrote more than twenty years ago in support of a policy of unlimited choice early in pregnancy and of a carefully tailored—albeit highly restrictive—indications policy thereafter.[4] I still adhere to that view.

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1. Jaroslav Pelikan, The Vindication of Tradition 12 (1984).

2. Joseph Dellapenna, *The History of Abortion: Technology, Morality, and Law,* 40 U. Pitt. L. Rev. 359, 422–27 (1979).

3. David Garrow, Liberty and Sexuality: The Right of Privacy and the Making of *Roe v. Wade* 609, 913–14 n.16 (2nd ed. 1998).

4. Joseph Dellapenna, *Nor Piety Nor Wit: The Supreme Court on Abortion,* 6 Colum. H. Rts. L. Rev. 379, 406–9 (1974). *See also* Michael Lockwood, *When Does Life Begin?,* in Moral Dilemmas in Modern Medicine 9 (Michael Lockwood ed. 1985).

My view, based on the emergence of fetal brain activity,[5] would legalize choice only up to eight weeks of gestation—but that would take in about half of the abortions currently performed and the percentage would rise if women were concerned to beat the deadline.[6] If women did not accelerate their abortions appreciably, the law I proposed would mean approximately 500–600,000 fewer abortions annually. Such a law would have a greater impact on younger women (under 20 years of age) than on older women because younger women account for the majority of abortions performed after 8 weeks of gestation. While only 10.2 percent of all abortions occur after the first trimester, the rate rises to 16 percent for teenagers 15 to 19 years of age, and to 22.5 percent for teenagers under 15. The rate for women over 20 is only 8.7 percent.[7] One side effect of pressuring for abortions to occur earlier in the gestation process would be a marked increase in the safety of abortions for the mother.[8] I do not argue the merits of that or any other position in this book, except to note that my position places me among those whom philosopher Ann Davis has identified as "moderates" on abortion, neither "Pro-Life" nor "Pro-Choice."[9] None of this, however, answers the question of how I came to research the topic of abortion.

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5. *See also* Baruch Brody, Abortion and the Sanctity of Human Life 83 (1975); R. Alta Charo, *Biological Determinism in Legal Decision Making: The Parent Trap,* 3 Tex. J. Women & Law 265, 278 (1994); Joel Cornwell, *The Concept of Brain Life: Shifting the Abortion Standard without Imposing Religious Values,* 25 Duq. L. Rev. 471 (1987); Michael Flower, *Coming into Being: The Prenatal Development of Humans* in Abortion, Medicine, and the Law 437, 442–45 (J. Douglas Butler & David Walbert eds., 3rd ed. 1986); Michael Flower, *Neuromaturation and the Moral Status of Human Fetal Life*, in Abortion Rights and Fetal Personhood 71, 79 (Edd Doerr & James Prescott eds. 1989); Gary Gertler, Note, *Brain Birth: A Proposal for Defining When a Fetus Is Entitled to Human Life Status,* 59 S. Cal. L. Rev. 1061 (1986); John Goldenring, *The Brain-Life Theory: Towards a Considered Biological Definition of Humanness,* 11 J. Med. Ethics 198 (1985); Donald Hope, *The Hand as an Emblem of Human Identity: A Solution to the Abortion Controversy Based on Science and Reason,* 32 U. Tol. L. Rev. 205, 216–18 (2001); D. Gareth Jones, *Brain Birth and Personal Identity,* 15 J. Med. Ethics 173 (1989); J. Korein, *Ontogenesis of the Fetal Nervous System: The Onset of Brain Life,* 22 Transplantation Proc. 982 (1990); Julian Savluescu, *Why Human Research Cannot Be Locked in a Cell,* Sydney (Austral.) Morning Herald, Aug. 27, 2001, at 10; Katherine Sheehan, *The Hand that Rocks the Cradle,* 32 U. Tol. L. Rev. 229, 238–39 (2001); Peter Steinfels, *Scholar Proposes "Brain Birth" Law,* N.Y. Times, Nov. 8, 1990, at A28; Timothy Vinceguerra, *Notes of a Footsoldier,* 62 Alb. L. Rev. 1167, 1180–81 (1999).

6. Centers for Disease Control, *Abortion Surveillance: Prelminiary Data—United States, 1992,* 43 MWWR Morbidity & Mortality Wkly. Rep. 933 (1994); Kenneth Kochanek, *Induced Terminations of Pregnancy: Reporting States, 1987,* 38 Monthly Vital Statistics Rep. 1, 5–6 (1990); Lynn Wardle, *The Quandary of Pro-Life Free Speech: A Lesson from the Abolitionists,* 62 Alb. L. Rev. 853, 943, 962 (1999). Note that RU-486—the "abortion pill"—has been approved for use only up to the end of seven weeks gestation because its efficacy falls off sharply thereafter. *See* Beverly Winikoff *et al., Acceptability and Feasibility of Early Pregnancy Termination by Mifepristone-Misoprostol: Results of a Large Multicenter Trial in the United States,* 7 Archives Fam. Med. 360, 361–62 (1998). To the extent that RU-486 gains acceptance, it will tend to push more abortions into this early period. Mandee Silverman, Note, *RU-486: A Dramatic New Choice or Forum for Continued Abortion Controversy,* 57 NYU Ann. Surv. Am. L. 247, 262–63 (2000); Aaron Zitner, *Abortion Pill's Effects in U.S. Hard to Predict,* L.A. Times, Sept. 30, 2000, at A1.

7. Kochanek, *supra* note 6, at 6; Allen Rosenfield, *The Difficult Issue of Second-Trimester Abortion,* 267 JAMA 324, 324 (1994).

8. Rosenfield, *supra* note 7, at 324. The mortality rates per 100,000 abortions by week of gestation are:

up to 10 weeks	0.3
weeks 11 & 12	0.6
weeks 13–15	1.8
weeks 16–20	3.7
21st week & beyond	12.7

9. Nancy (Ann) Davis, *The Abortion Debate: The Search for Common Ground, Part I,* 103 Ethics 516, 518–21 (1993). Philosophy professor Davis identifies several recent scholarly works as expressing "moderate" positions, while indicating that these works support widely differing specific positions: L.W. Summer, Abortion and Moral Theory (1981); Roger Wertheimer, *Understanding the Abortion Argument*, 1 Phil. & Pub. Aff. 67 (1971); Jane English, *Abortion and the Concept of a Person,* 5 Can. J. Phil. 233 (1975).

When I began this project, shortly after *Roe v. Wade*[10] was decided in 1973, most law professors—especially male law professors—did not write about the decision with less than enthusiasm for the outcome of the decision for much the same reasons that made the legal academy ignore motherhood generally: "too soft, not important, no funding, few colleagues, and who cares."[11] Unitarians were even more likely to support abortion rights—if they bothered much about the question at all. This was true even though the founding president of Americans United for Life was a Unitarian minister—George Huntson Williams, Hollis Professor of Divinity at Harvard Divinity School.[12] Yet I felt something was seriously amiss in the thinking on both sides of the abortion controversy that was coming to divide the nation. I concluded that I actually had something to contribute that might help clarify the issues even if my contribution could not resolve the dispute.

To understand why I felt I had something to contribute, one might examine my rather convoluted career path between graduating from law school in 1968 and the decision of *Roe v. Wade* less than five years later, in early 1973. My first position as a lawyer was a short stint as an attorney-advisor at NASA (during which I worked, among other things, on Apollo XI). I then found employment as a research attorney at the Program for Policy Studies in Science and Technology at the George Washington University, a "think tank" working on technology assessment issues. I spent the better part of a year with the Program for Policy Studies, leaving in 1970 when I was hired at Willamette University as the first person to teach environmental law there.[13] Armed with an advance law degree in international law (earned while working at NASA and at the think tank), I set about to combine these several concerns and experiences by studying the technological aspects of world population policy, beginning about two years before *Roe* was decided.[14]

Given my interests, I was struck by the technological claims underlying the abortion history in the majority opinion in *Roe* and its companion case of *Doe v. Bolton.*[15] Justice Harry Blackmun, the author of the majority opinion in *Roe,* derived these claims from the work of law professor Cyril Means.[16] Upon reading Means' work, I found those claims seriously deficient even based on the evidence Means himself presented. During a year I spent at Columbia University earning another advanced law degree, I researched and wrote a preliminary review of Means' history.[17] This is the work that David Garrow found to be among the more significant hostile critiques of *Roe.* The rest, as they say, is history.

I seek to elucidate the history of abortion in English and American law. The focus is very much on law as the existence of the legal tradition relating to abortion is at least highly significant to any claim that our Constitution protects a right a right to choose to abort. No doubt, there are those who will doubt the relevance of history to our understanding of the Constitution. Indeed, some will object to recourse to history as unjustly elevating certain texts and certain readings of the chosen texts over other texts and variant readings of the chosen texts. At the ex-

10. 410 U.S. 113 (1973).

11. Carol Sanger, *M Is for the Many Things,* 1 Rev. L. & Women's Stud. 15, 21 (1992).

12. John Noonan, jr., A Private Choice: Abortion in America in the seventies 62 (1979).

13. Later, I would be the first person to teach a course on Environmental Law in the Republic of China (as a Fulbright Professor at National Chengchi University—1978) and the first to teach such a course in the People's Republic of China (as a Fulbright Professor at Jilin University—1987).

14. *See* Joseph Dellapenna & Philip Schuster II, *Meeting the Challenge of Population Change: Institutional Reform to Assess Population Trends,* 7 Willamette L. Rev. 232 (1972).

15. 410 U.S. 179 (1973).

16. Cyril Means, jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality,* 14 N.Y.L.F. 411 (1968); Cyril Means, jr., *The Phoenix of Abortional Freedom: Is a Penumbral Right or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?,* 17 N.Y.L.F. 335 (1971).

17. Dellapenna, *supra* note 4.

treme, such critics will conclude that reliance on historical legal materials will result in stodgy, rule-bound decision making that stifles creative reasoning.

Those who think along these lines should read *Roe v. Wade* again. They will find that Justice Blackmun structured the argument in the majority opinion as an argument about the history of abortion laws. Yet Blackmun himself, facing searing critiques of the history he presented, silently abandoned his reliance on history.[18] No doubt, like Blackmun, the staunchest defenders of abortion rights will not abandon their faith in abortion simply because history does not support their claims. Yet even they recognize the importance—whether merely as a rhetorical tool or otherwise—of history. Why else would they put so much effort into recasting history into a form that supports their position?

This is an argumentative book. In this book, I set about to set the record straight regarding the history of abortion. In order to do so, I critique the received histories presented by those who currently dominate the debate over the rights and wrongs of abortion. I am more critical of the "pro-choice" historians—their distortions of the history are far greater, and they are, after all, the current orthodoxy. Yet the anti-abortion historians also come in for a share of the criticism.[19]

Despite my focus on the Anglo-American law of abortion, I frequently examine general legal practices and the social and medical practices relative to abortion contemporary with the particular legal practices directed to abortion. I also examine related social activities occurring at about the same time. Only by placing the strictly legal materials in social, political, and technological contexts can one properly understand what happened in the past and how the law specific to abortion changed through time.

I do not say very much about events in Europe generally. In part this is because of my concern to elucidate the meaning of our Constitution, and in part this is necessary to make the project manageable given the depth of analysis I attempt in this book. In particular, I write very little about the practices of ancient Greeks and Romans or of the Teutons who replaced the Roman Empire. Although I do occasionally refer to certain aspects of the history of these practices, they did not directly influence later English practice or the resulting American practices. I do provide somewhat greater attention to the practices elsewhere in Europe (particularly western Europe) contemporary with English practices as these practices did influence events in England and later in America. Still, the focus remains throughout on English and American law.

I argue in this book that Anglo-American law has always treated abortion as a serious crime, generally even including early in pregnancy, presenting evidence of prosecutions and even executions, occurring as long as 800 years ago in England, and less serious punishments in colonial America. The reasons provided for these prosecutions and penalties consistently focused on protecting the life of the unborn child. This unbroken tradition tends to refute the claims that unborn children have not been treated as persons in our law or as persons under the Constitution of the United States.

The tradition of treating abortion as a crime was unbroken through nearly 800 years of English and American history until the "reform" movement of the later twentieth century. During much of that time, abortion was not punished as severely as the homicide of an adult human being. More than a few observers have argued from this that the prohibition of abortion was not truly based on a belief that the abortus was a "person." Perhaps, the argument goes, the law was meant to vindicate the mother's interest in continuing her pregnancy (many early cases involved involuntary abortions) or to protect the mother's health, rather than to protect the life of the child.

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18. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 922–43 (1992) (Blackmun, J., partially concurring, and saying not one word in defense of his historical arguments in *Roe*).

19. This point is developed more fully in Chapter 1, at notes 49–140.

Ronald Dworkin, one of the leading legal philosophers of the second half of the twentieth century made just such an argument in his book on the problems of abortion and euthanasia. He argued that the existence in times past of laws that punished some or even most abortions less severely than "true" homicide demonstrates that abortion was not considered the equivalent of the killing of a person.[20] He also argued that if abortion were truly considered homicide, the killing of an innocent infant could not be justified even in order to save the mother's life.[21] These appear to be compelling arguments, but Dworkin himself demonstrated that these arguments are hardly dispositive.

Dworkin described at some length the emotional reality of loss that occurs to someone close to the deceased.[22] As Dworkin put it, our sense of loss grows the later from birth the death occurs (and grows similarly even during pregnancy as birth approaches) until reaching a plateau sometime in adolescence or early adulthood. The sense of loss remains roughly on this level plateau until late in life when the sense of loss declines to the point where, in at least some instances, one feels more relief than loss when death finally comes. This appears to me to be a credible account that reflects our sense of investment (both of material resources and of hopes) in a growing child and of our growing sense of loss as age takes its toll prior to death.

Consider now the legal response to a professional murderer who guns down an adult of, say 30 years of age, in order to achieve some criminal goal. Compare that to the legal response to an elderly person who kills her diseased and despairing spouse at his request. Both have traditionally been treated as murder, but upon conviction the professional murderer will likely receive the maximum sentence, perhaps the death penalty itself, while the elderly widow is likely to receive the minimum sentence, perhaps even probation. A similar comparison arises if the killer is a mother who kills a newborn infant, where the event might even be excused as representing "post-partum psychosis"—murder, but excused by a mental disease or defect.

While some, including Dworkin, would now argue that the killing of the spouse in the circumstances described ought not to be classed as homicide, traditionally all three crimes were so classified. And not even Dworkin would argue that either the elderly spouse (sentient enough to request death) or the infant are not persons just because many of us are willing to countenance their deaths. The same points apply as well to the unborn infant if we examine how the historical actors explained themselves to themselves. They consistently spoke of punishing abortion, at whatever level punishment might take, as a means of protecting the life of an unborn child, a statement that sounds suspiciously like the protection of a "person."[23]

This book opens with an extended discussion (in two chapters) of the social practices that framed abortion laws down through the centuries. This discussion explores how abortions were done, and how else people undertook to prevent or dispose of unwanted pregnancies before the nineteenth century. The book then turns to the evolution of abortion laws from the earliest days of the common law in twelfth century England and America to the opening of the twenty-first century. The final two chapters explore certain deeper questions about how we do and understand history, and how the doing and the understanding of history—the stories we tell ourselves about our past—might be relevant to the current abortion controversy.

The history of abortion demonstrates that societies around the world had to respond to the moral challenges posed by the newfound ability to abort women with minimal risk to the physical well being of the woman undergoing the abortion. In the nineteenth century, nearly all per-

20. Ronald Dworkin, Life's Dominion: An Argument about Abortion, Euthenasia, and Individual Freedom 44, 111–12 (1993).

21. *Id.* at 94–95, 114.

22. *Id.* at 84–89, 169–70.

23. *See* Chapters 3 & 4.

sons in society—led by feminists, physicians, and religious leaders—dealt with the moral challenge by treating the problem as a legal challenge, with legislatures around the world enacting statutes to repress or prohibit abortion.[24] Changing medical technologies that made the practice less dangerous for the mother and more difficult to detect undermined the prohibition of abortion. In the later years of the twentieth century, as the medical profession perfected the techniques for doing abortions and as many men and women found that their personal goals were best served by reducing or even eliminating the role of children in their lives, many came to prefer to manage abortion as a medical problem rather than a legal problem. Legislatures in many nations consequently remolded their abortion statutes to facilitate the choices of women (and often of their men) to abort pregnancies.[25]

In the United States, supporters of abortion rights grew impatient with the slow, difficult, and uncertain legislative process; they turned, initially successfully, to the courts to establish a constitutional right to choose whether to abort.[26] Unlike the legislative solutions embraced in other countries, however, the American solution generated enormous controversy and even violence, leading the Supreme Court to disavow judicial management of the moral questions posed by abortion[27]—and of other medical technologies that upended some of our most cherished moral traditions regarding the value of life.[28] The problem thus was mostly returned to the legislative branches where perhaps it should have been all along.[29] Yet ultimately the majority on the Court could not keep their hands off the abortion controversy, leaving society confused about the possible direction abortion laws would or could take in the near future.[30]

I do not contend that anyone will ever recover the "complete truth" about any past event. But we can distinguish between the truth and the untruth of certain facts about the past even while we quarrel about the significance of these truths. History is more than a process of projecting our wishes onto the past. As for its relevance, recall again that the main opinion in *Roe v. Wade* itself was structured as an argument about history.

The book, unlike so many others dealing with abortion these days, was not supported by foundations or by time off from teaching. I never applied for such funding, and indeed turned down more than one invitation to apply for such funding, in order to avoid any taint that my work reflected the prejudices of my funding sources. I did receive several grants from the Law Alumni Fund of Villanova University for work during summers on this project. Right or wrong, the work and its conclusions are entirely my responsibility.

As a result of my determination to finish this work without significant outside funding, the time and attention for its writing came at the expense of my family. I begin by acknowledging their contribution, primarily their ability to tolerate my obsessive attention to the minutiae of abortion history. Thanks are particularly due them given the small likelihood that the publication of the results would provide recompense to the family either in material terms or in terms of widespread good will or likely influence on public policy, yet without their support this work could not have been completed.

24. *See* Chapters 5–8.
25. *See* Chapters 13, 15.
26. *See* Chapter 14.
27. *See* Chapters 16, 17.
28. See the text *supra* at notes 88–159.
29. On the range of legislative responses to abortion, see Eva Rubin, Abortion, Politics, and the Courts 126–49 (rev. ed. 1987). On possible applications of the "undue burden" test to abortion regulations, see Richard Wilkins, Richard Sherlock, & Stephen Clark, *Mediating the Polar Extremes: A Guide to Post*-Webster *Abortion Policy,* in Abortion and the States: Political Change and Future Regulation 139, 157–64 (Jane Wishner ed. 1993).
30. *See* Chapter 19.

Neither this book nor those briefs could ever have been written without the help of the many people who have kindly shared their research with me or otherwise assisted me in this work. So many have done so that thanking them all is impossible. In particular, the many research assistants that I have employed at two different law schools (the University of Cincinnati and Villanova) are just too many to list or to single out for special praise. I must also thank the staff of the Historical Medical Library of the College of Physicians of Pennsylvania, the repository in which my research assistants found many of the more obscure sources.

Apart from my research assistants, three people deserve special mention for their assistance in this project. The first is Philip Rafferty, of the California Bar, who shared his own extensive research unstintingly and frequently critiqued my work. Virtually every case, and many other sources cited in this article appear in full in the appendixes to his book.[31] That he and I differ in our interpretation of some of these sources does not detract from the importance of his work in uncovering and collecting these original sources, some of which were unknown before he found them and most of which were scattered in obscure historical studies or even more obscure collections of almost randomly assembled cases. Mr. Rafferty or I can provide copies of the originals of these sources, which until recent times are all recorded in either medieval Latin script or Law French.

Special mention is also due to John Keown, then Professor of Law and Medicine at the University of Leicester and now at Georgetown University. The research he shared with me included several early cases and, most especially, the legislative history of *Lord Ellenborough's Act* and other nineteenth-century English sources. He has published his own major work on the history of English abortion statutes.[32]

Finally, John Baker, Professor of Legal History at Cambridge University and at New York University, was also a great help, both directly and through his aid to Mr. Rafferty's research. Dr. Baker provided original translations from medieval Latin or Law French for all of the numerous records of medieval English legal proceedings, all of which he verified from the original public records. He has written the leading text on English legal history that is used in universities throughout the Commonwealth.[33]

A good deal of the material I have used in this paper was actually uncovered by historians and others seeking to establish or to refute a constitutional right to abortion, including Means, Keown, and Rafferty. One might also mention historian James Mohr, whose book on the history of abortion in nineteenth century America[34] opens a window onto the many relevant sources even though I find his analysis of the materials nearly always wrong. My own original research was mostly, but not entirely, related to the medical history that plays such a prominent part in this book. All interpretations of all data that I rely on in this book, regardless of how the data came to my attention, are, of course, my own and any errors in reporting or interpreting the data are my sole responsibility.

Earlier (and much shorter) versions of this history were presented at meetings of the Section of Legal History at the Association of American Law Schools Annual Meeting in San Francisco and at the Second International Conference on Argumentation held at the University of Amsterdam, both in 1990. I also take this opportunity to thank Frederick Dyer, Kathleen Farrell, Clarke Forsythe, Mary Ann Glendon, Kent Greenawalt, Paul Linton, Christopher Tietze, and William

31. Philip Rafferty, *Roe v. Wade:* The Birth of a Constitutional Right (University Microfilm International Dissertation Information Service, Ann Arbor, MI 1993).

32. John Keown, Abortion, Doctors and the Law (1988).

33. J.H. Baker, An Introduction to English Legal History (3rd ed. 1990).

34. James Mohr, Abortion in America: The Origins and Evolution of National Policy, 1800–1900 (1978).

Valente, all of whom reviewed and commented on drafts of parts of this work during various stages of my work.

Finally, one should note that I have cut off the research as of January 1, 2004. The year 2004 had many interesting and complex events that carry forward the story set forth in these pages, but they did not, as it turned out, result in any fundamental change of direction from what appeared to be in store at the end of 2003. While I finished the manuscript somewhat later than I expected when I chose this cut-off date, I thought it better to stick to it than to attempt to undertake to write yet more to cover the year 2004.