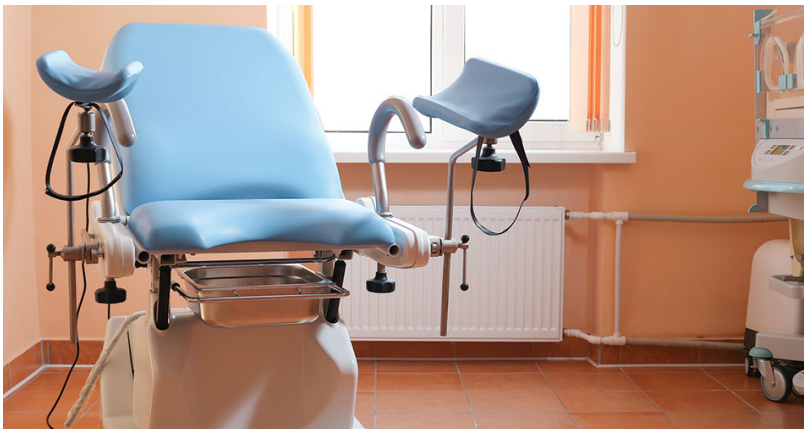
New American

Written by **Selwyn Duke** on June 30, 2022

Published in the July 25, 2022 issue of the New American magazine. Vol. 38, No. 14

# Abortionists' Termination of History



ZulkarnieievZulkarnieiev/iStock/GettyImagesPlus

"Men do not differ much about what things they will call evils," wrote G.K. Chesterton in 1909; "they differ enormously about what evils they will call excusable." Abortion has been called a number of things throughout the ages, from excusable in many times to "prenatal infanticide" at least as early as 1901 (and likely before). In reality, though, abortion may be one of those issues where people do differ much, at least now — if some recent behavior and pronouncements are any indication.

Reacting to the expected overturning of the *Roe v. Wade* (1973) decision, *National Geographic* wrote May 17 that in Justice Samuel Alito's (leaked) draft opinion, he "drew on the work of certain historians and concluded the right to abortion was not rooted in the country's 'history or tradition.'"

"But that view of history is the subject of great dispute," *NatGeo*, whose passions on this lie where you may expect, continued. "Though interpretations differ, most scholars who have investigated the history of abortion argue that terminating a pregnancy wasn't always illegal — or even controversial."

"Interpretations" do "differ," not just in soundness but also in sanity. But *NatGeo* misses the point, perhaps purposely, that Alito wrote in the above lines of the right to abortion not being rooted in our country's "history or tradition," not whether it was "always illegal — or even controversial." These are two very different things. In fact, when and where in man's history had prenatal infanticide ever been declared a "right"?

For his part, Alito points out in his draft that the *Roe* opinion did not even "claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant (e.g., its discussion of abortion in antiquity) to the plainly incorrect (e.g., its assertion that abortion was probably never a crime under the common law)." It's ironic, too, that those up in arms over *Roe's* overturning are often the same people who consider the Constitution passé and an antiquated document, for they're defending a decision that cited antiquity.

Yet it should go without saying that the laws and social codes of ancients living before Christ's birth should be irrelevant to justices whose job is, and who've taken an oath, to uphold the Constitution. Why, you could find less of a history of civilizations respecting freedom of speech or the right to be armed than you could of societies proscribing abortion. Should the actions of the ancient Babylonians or Sumerians now cast doubt on the First and Second Amendments?

As to the history, however, notable is that abortion was consistently far more frowned upon than slavery. For example, as the scholars at the Eternal Word Television Network (EWTN) write in "A Brief History of Abortion," "There are very few documents on the topic of abortion available to us [from] before the time of Christ. However, those that we can find invariably recognize that abortion is not only deadly for babies and women, but to entire societies as well."

"In the 12th century before Christ, more than 3,000 years ago, Provision 53 of the Ancient Assyrian Code stated that any woman who procured an abortion should be impaled upon a stake and left as food for the carrion eaters, whether or not the abortion killed her," EWTN continued.

In ancient Greece, though, abortion certainly was "excusable" — but not without consequence. As EWTN also tells us, the philosopher Plutarch remarked on the natural and inevitable results of his society's abortion policies, lamenting that they were at least partially responsible for his time's low birth rates and, consequently, depopulation so severe "that the towns are deserted and the fields [are] lying fallow, although this country has not been ravaged by war or epidemic."

Note, too, that at issue here were pagan civilizations that had nothing such as our modern set of human rights and our Christian concept of the sacredness of all people. This was reflected in the day's standards. As EWTN further informs:

> During the classical period, laws restricting abortion varied substantially. Greece permitted both the abortion and infanticide of imperfectly-formed children. Grecian standards regarding young children were quite loose; a child could be killed by exposure (leaving the infant outside to perish from the effects of the elements) merely if the father did not consider it handsome or beautiful enough, if the mother could convince the father that the child did not contribute to the best interests of the family, or if it did not measure up to the physical 'styles' of the time.
>
> Plato (427-341 B.C.) and Aristotle (384-341 B.C.) were two of the earliest advocates of eugenics, and approved of the exposure of offspring for the good of society, a view mirrored by [Planned Parenthood founder] Margaret Sanger nearly 2,500 years later.

In other words, though more advanced than other contemporary civilizations, ancient Greece allowed *post-birth* infanticide as well. Someone should have shown the *Roe* Court justices Santayana's famous quotation and reminded them that the value in remembering past mistakes lies in *not* repeating them.

**Not a "right":** As with theft, rape, and post-birth murder, abortion has ever plagued man. But it was generally considered a wrong, never a right. In fact, the Ancient Assyrian Code actually stated that a woman procuring an abortion should be impaled and left as food for carrion eaters.

This said, even ancient pagan societies didn't enshrine prenatal infanticide as a pseudo-right or produce the in-your-face, abortion-on-demand agenda bedeviling us today. In fact, the original Hippocratic Oath, the statement of medical ethics authored between the fifth and third centuries B.C., prohibited abortion. Traditionally attributed to Greek doctor Hippocrates (though he might not have actually written it), one of its sections reads, "Nor shall any man's entreaty prevail upon me to administer poison to anyone; neither will I counsel any man to do so. Moreover, I will give no sort of medicine to any pregnant woman, with a view to destroy the child." Yet this was rewritten in the Sexual Devolution's early stages (1964) to state, "If it is given me to save a life, all thanks. But it may also be within my power to take a life; this awesome responsibility must be faced with great humbleness and awareness of my own frailty" — thus opening the door to euthanasia and abortion.

## Abortion: "Solidly Rooted in America's History"?

Now, some may assume that the Hippocratic Oath wasn't perverted till '64 because the traditional American sense of virtue aligned with its original version. But not according to Planned Parenthood, which posted the above-quoted line, declaratively, on an "Action Page." "Leaders didn't outlaw abortion in America until the mid-1800s," the abortionist site continued. "From colonial days until those first laws, abortion was a regular part of life for women. Common law allowed abortion prior to 'quickening' — an archaic term for fetal movement that usually happens after around four months of pregnancy." But is this historically accurate?

One of many more-scholarly sources disputing it is law professor Joseph W. Dellapenna. In his 1979 work "The History of Abortion: Technology, Morality, and Law," published at the Georgetown University digital library, he writes that at "the adoption of the Declaration of Independence … on July 4, 1776, abortion was banned in all of the 13 American colonies."

"The colonies inherited English Common Law and largely operated under it until well into the 19th century," Dellapenna continued. "English Common Law forbade abortion. Abortion prior to quickening was a misdemeanor. Abortion after quickening (feeling life) was a felony."

There's record of this law being applied, too. As *National Review* related in 2015 in "The Historical Roots of Abortion Law," "Maryland, for example, applied the prohibition in the 1652 case of William Mitchell. Rhode Island applied it in the 1683 case of Deborah Allen, and Connecticut in the 1747 case of John Hallowell. In 1716, New York City prohibited midwives from performing abortions." Note that Mitchell was indicted with the accusation that he "[m]urtherously endeavoured to destroy or Murther the Child by him begotten in the Womb of the Said Susan Warren" (the woman he'd impregnated).

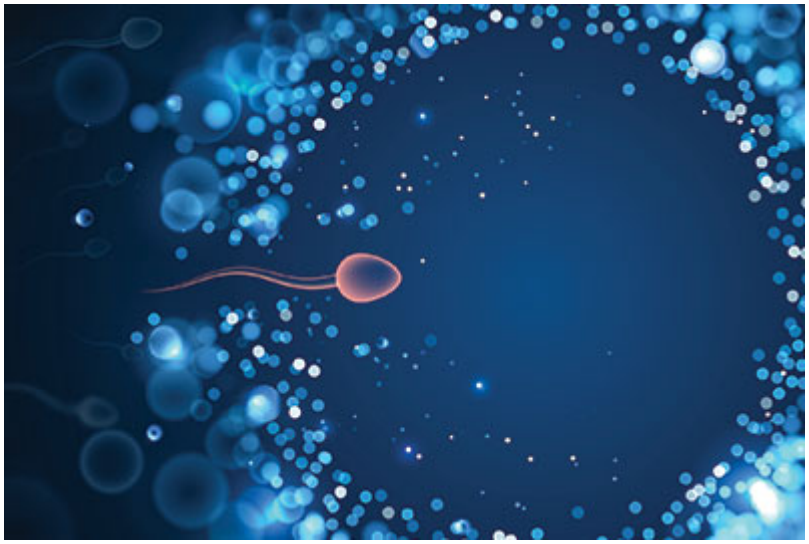
Yet the two-tiered, pre-post/quickening punishment model would change. "Inherited from earlier ecclesiastic law," it "stemmed from earlier 'knowledge' regarding human reproduction," explained Professor Dellapenna. "In the early 1800s," however, "it was discovered that human life did not begin when she [a woman] 'felt life,' but rather at fertilization."

## Following the Science

So the morality hadn't changed, but the science had — and American law followed suit. In 1821, Connecticut became the first U.S. state to go beyond the common-law standard and criminalize abortion. Providing detail, ProCon.org, not a pro-life site, tells us that Connecticut

> banned the selling of an abortion-inducing poison, but it did not punish those who took the poison. Legal consequences began in 1845 when New York criminalized a woman's participation in her abortion, whether it took place before or after "quickening." In the mid-1800s, early pro-life advocate Dr. Horatio Robinson Storer (1830-1922) convinced the American Medical Association to join him in campaigning for the outlawing of abortion nationwide. By the early 1900s, most states had banned abortion. By 1965, all 50 states had outlawed abortion, with some exceptions varying by state.

So pro-abortion revisionist historians apparently hang their hats on the notion that abortion wasn't "outlawed" early enough in the United States for such bans to ever have credibility (as if man's consensus, across times or within one's own, determines Truth); that the Founding Fathers didn't emerge from the Constitutional Convention in 1787 with an abortion bill in hand is perhaps their Exhibit A. (Of course, had they, they'd then be dismissed as narrow-minded, misogynistic, dead, white males.) Yet the Founders meant for the federal government to involve itself in little; common law was relied upon to govern much; and a newly formed nation, the fledgling United States being no exception, does not emerge from its mother's womb boasting a full palette of laws. Such development takes time.



**Seminal moment:** Described by scientists as a flash of light or a burst of fluorescence, "conception" is just what it sounds like. As abortionist-turned-pro-lifer Dr. Bernard Nathanson put it, a "human being, indistinguishable from any of us and an integral part of our human community," is created. *(Photo credit: OlegBlokhin/iStock/GettyImagesPlus)*

So Planned Parenthood may lean on the sophistic claim that leaders "didn't outlaw abortion in America until the mid-1800s." Of course, they didn't outlaw slavery (nationally) till then, either! We'll also hear, "Abortion is as old as antiquity," as Bill Moyers' website wrote in 2017. But so is murder, rape, theft, and sin itself. These are not arguments, but artifice; not reasons, but rationalizations.

Lastly, note that, as the Online Etymology Dictionary informs, in earlier times, the term "abortion" merely referenced any premature expulsion of a fetus (e.g., miscarriage); it did not assume the meaning of an "intentional miscarriage" until the late 19th century. The point: One could wonder how much of the discussion of early-American "abortion" is muddied by semantic confusion.

## Sexual Devolution to Infant Destruction

Chesterton, whom I quoted earlier, predicted in 1926 that the "next great heresy is going to be simply an attack on morality; and especially on sexual morality." So it has come to pass, too. Nonetheless, abortion laxity started "small" (if killing the smallest among us can ever be thus described). In 1959, the American Law Institute proposed "a model penal code for state abortion laws," writes the organization National Right to Life. The code advocated "legalizing abortion for reasons including the mental or physical health of the mother, pregnancy due to rape and incest, and fetal deformity." And thenceforth, more and more states found abortion "excusable," with approximately a third of them "liberalizing" relevant laws throughout the sexual devolutionary '60s and into the early '70s.

## Enter Roe

So with people's sense of morality transforming (morality, properly understood, cannot itself change), the battle for legal abortion was already turning in the anti-life forces' favor. Yet still dissatisfied, they wanted judicial activism. They just needed the right pawn, and they got it — in the form of a desperate woman named Norma McCorvey.

*Christianity Today* provided some details about her story in 2020:

> In February 1970 I was Norma McCorvey, a pregnant street person, a twenty-one-year-old woman in big trouble," writes McCorvey in her 1994 memoir *I Am Roe*. "I became Jane Roe at a corner table at Columbo's, an Italian restaurant at Mockingbird Lane and Greenville Avenue in Dallas."
>
> That short meeting with Sarah Weddington and Linda Coffee, two lawyers looking for the right case to strike a blow on behalf of abortion rights, transformed McCorvey's life. The following month, Weddington and Coffee filed a lawsuit against Dallas district attorney Henry Wade for enforcing Texas's abortion law and used McCorvey as their lead plaintiff. The case ended up at the United States Supreme Court, and on January 22, 1973, the justices overturned the law seven-to-two and legalized abortion in all fifty states.

In 1994, McCorvey made more headlines when she embraced the pro-life movement; in 1995 she was baptized, and in '98 she converted to Roman Catholicism. Yet her story wasn't over. A 2020 FX-hosted documentary titled *AKA Jane Roe* claims that she did another about-face, repudiating her pro-life position on her deathbed. Her pro-life friends question this assertion. Whatever the truth, however, one thing it's not is surprising. After all, McCorvey had a "difficult upbringing — marked by abuse, neglect and a stint in reform school — turbulent personal life, including a short-lived teenage marriage, and a decades-long relationship with girlfriend Connie Gonzalez," the *Los Angeles Times* related in 2020. So the bottom line is that McCorvey was a troubled woman, perhaps running on emotion (as too many humans do), and she deserved sympathy. She got it from her pro-life friends, too.

Yet equally troubled but warranting little sympathy are, respectively, the *Roe v. Wade* opinion itself and the judges rendering it. As Minnesota Citizens Concerned for Life (MCCL) wrote in 2020, the "Court ruled that abortion must be permitted for any reason before fetal viability — and that it must be permitted for 'health' reasons, broadly defined in [the companion case] *Doe* (such that they encompass

virtually any reason), all the way until birth. *Roe* effectively legalized abortion-on-demand nationwide." This was a clear example of the SCOTUS operating above its pay grade. As Muslim writer and attorney Abed Awad asked at NJ.com last year, addressing the viability matter, "Technological medical advancements have made test tube babies viable. Does that mean that life is viable at conception?"

## Illegal as Well as Immoral

While many apparently view the judicial adventurism that is *Roe* as "excusable," the reality is that noted liberal juridical experts have joined their conservative fellows in condemning it. For example, ex-ACLU attorney and left-wing justice Ruth Bader Ginsburg criticized *Roe* during a 2013 University of Chicago visit, making clear it was a faulty opinion. Eminent constitutional scholar and Yale law professor John Hart Ely (an abortion supporter), went further, stating, "What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure," relates the MCCL. "It is bad because it is bad constitutional law, or rather because it is not constitutional law and gives almost no sense of an obligation to try to be."

Then, bearing in mind that the *Roe* majority opinion was authored by Justice Harry Blackmun, consider the following: "Indeed, '[a]s a matter of constitutional interpretation and judicial method,' writes Edward Lazarus, a former Blackmun clerk who is 'utterly committed' to legalized abortion, '*Roe* borders on the indefensible," the MCCL further relates. "Justice Blackmun's opinion provides essentially no reasoning in support of its holding. And in the … years since *Roe's* announcement, no one has produced a convincing defense of *Roe* on its own terms."

The decision is also undemocratic. "Justice Byron White, a dissenter in *Roe*, explained the problem in his dissent in *Thornburgh v. American College of Obstetricians & Gynecologists*," the MCCL also tells us. "'[T]he Constitution itself is ordained and established by the people of the United States,' he wrote. '[D]ecisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made, and that they cannot disavow through corrective legislation.' *Roe* defied the Constitution and other laws that the American people agreed upon — and imposed the will of the unelected Court instead."

Despite this, we nonetheless heard that *Roe* was "precedent" and must be respected under the principle of *stare decisis*. Putting aside Justice Clarence Thomas's May observation "that when someone uses *stare decisis*, that means they're out of arguments," the truth is that *Roe* was never actually "settled," contends Clarke Forsythe, J.D. Writing January 20 in "A Survey of Judicial and Scholarly Criticism of *Roe v. Wade* Since 1973: Legal Criticism and Unsettled Precedent," Forsythe illustrated how thoroughly damaging the opinion was:

> Writing in the 1920s, between his two terms of service on the U.S. Supreme Court, Justice Charles Evans Hughes "referred to the decision in *Dred Scott v. Sandford* as one of three notable instances in which the Court suffered severely from self-inflicted wounds."… The Supreme Court's 1973 decision in *Roe v. Wade* has arguably eclipsed *Dred Scott* and all other cases in its negative impact on the Supreme Court and the Nation. *Roe v. Wade* (and

> the companion decision in *Doe v. Bolton*) is the most controversial decision ever issued by the Supreme Court in its 233-year history. *Roe* is more controversial than *Dred Scott v. Sandford*. The negative legal impact of *Dred Scott* was virtually eclipsed by the passage and ratification of the Fourteenth Amendment in 1868. *Roe*, by contrast, has been the subject of sustained criticism from Justices, judges and scholars for nearly five decades, and has collided with an increasing number of State governors and legislatures, as reflected in the more than forty cases (as of this writing) challenging state abortion limits that are working their way through the federal court system.
>
> By centralizing control of the abortion issue in American society, *Roe* has negatively impacted national politics and the Supreme Court nomination process for almost a half century. The *Roe* opinion was extraordinarily weak — "probably the weakest of any major decision in American history," according to one scholar — and subjected to severe criticism from major constitutional scholars for two decades leading up to the Court's *Casey* decision in 1992.
>
> Roe created at least three constitutional conflicts: Congress' debate over pro-life constitutional amendments between 1973 and 1983, the dispute between Congress and the Court over abortion funding that induced the Court to retreat a few years after Roe in Harris v. McRae, and the ongoing 48-year tension between the Court and a growing number of States that are determined to protect human life.

"*Roe's* abortion right is an unenumerated right not derived from text, structure, history, or tradition," Forsythe concludes. Put simply, *Roe* had to go — and its June 24 overturning was long overdue. The issue has been returned to the states, where it belongs.

So now we return to the world's and America's historical norm. Instead of people fantastically justifying abortion as some kind of "right," they'll more often have to defend it in the arena of debate — and legislators will have to stand and be counted when making relevant law. We'll be more likely to have that discussion over whether prenatal infanticide is an excusable evil or even, as Nation writer Sophie Lewis wrote June 22, "a clearly documented public good" that can save "gestators," as she puts it, the burden of harboring a "gestatee." For as Lewis admits, the Dobbs decision "thrusts us into a situation in which we have little left to lose." So when pro-life forces "agitate against feticide on the basis that it is killing," she insists, "pro-abortion feminists should be able to acknowledge, without shame, that yes, of course it is."

Lewis should at least be applauded for her relative honesty. Were other death cultists to join her in that — telling the truth about the history, science, and reality of abortion — perhaps it and the related Sexual Devolution could themselves, finally, be terminated.

Written by **Selwyn Duke** on June 30, 2022
Published in the July 25, 2022 issue of the New American magazine. Vol. 38, No. 14