

Testimony
of the
National Conference
of Catholic Bishops
before the
Subcommittee
on the Constitution
of the
U.S. Senate
Judiciary Committee

November 5, 1981



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Oral Testimony of Archbishop John Roach

On November 5, 1981, Archbishop John Roach and Terence Cardinal Cooke testified before the Senate Subcommittee on the Constitution in support of S.J. Res. 110 (Hatch Amendment). Archbishop Roach is President of the National Conference of Catholic Bishops. Cardinal Cooke is Chairman of the NCCB Committee for Pro-Life Activities.

In addition to the oral presentations by Archbishop Roach and Cardinal Cooke to the Senate Judiciary Committee's Subcommittee on the Constitution, the National Conference of Catholic Bishops submitted a written statement presenting the case for a Human Life Amendment.

On December 16, 1981, the Subcommittee on the Constitution passed the amendment with a 4-0 vote. On March 10, 1982, the amendment was passed by the full Senate Judiciary Committee with a 10-7 vote.

I am Archbishop John Roach of St. Paul and Minneapolis. I appear before this subcommittee today in my capacity as president of the National Conference of Catholic Bishops and U.S. Catholic Conference. With me is Cardinal Terence Cooke of New York, chairman of the Committee for Pro-Life Activities for the bishops' conference. We are very grateful to you for this opportunity to speak to a matter of urgent concern to us and many Americans: the reality of permissive, legalized abortion in the United States and the pressing need for a constitutional remedy for this national scandal.

Twice before the Catholic bishops of the United States have testified before committees of Congress on this matter. I ask permission to submit for the record our testimony on those occasions as well as our longer written statement to this subcommittee, which reviews recent developments and updates the record on several matters.

I commend and I thank you for your decision to hold these hearings. Certainly the time is at hand—and indeed long overdue—for congressional action to correct the situ-

ation which has existed since the Supreme Court's abortion decisions of 1973. We are hopeful that these hearings will mark a major step toward early enactment and ratification of a constitutional amendment to remedy the court's tragic and repeated error in this matter.

I realize that I have used strong language in referring to the situation: "national scandal," "tragic error." But I do not use these terms casually or for rhetorical effect. The rate of legalized, permissive abortion in the United States is now approximately 1.5 million a year—nearly 30,000 a week, more than 4,100 a day. Destruction of human life on that scale boggles the mind, and the fact that it occurs under the mantle of law calls into question our status as a civilized nation. In cold fact, 1.5 million legal abortions a year can be understood, though never justified, only as symptoms of a kind of disease of the national spirit eroding respect for life and hardening hearts against the most elementary claims of compassion.

I think it is valid to question the right of a religious leader to say that we are speaking here of "human life." Is this not a question

for science to settle? I readily concede this, for science has long since settled it—and done so in favor of the unborn. The scientific data fully support the common-sense claim that each human individual comes into existence at conception, and all subsequent states of development are simply that—phases of growth and development in the life cycle of an individual already in existence.

It is true that some scientific and medical professionals misinterpret what is at issue here. But, I submit, it is they who attempt to introduce subjective ideology and myth into the debate. Having concluded on the basis of their private value systems that life before birth is either valueless or has less value than the social benefits of legal abortion, some reason backward and seek to reject the evidence for the humanity of the unborn without being able to disprove or even seriously to question it. This is what it means to substitute subjective beliefs for scientific facts.

Plainly, the implications of the abortion decisions reach far beyond the abortion issue and impinge upon the legal status and rights of human beings who are handicapped or de-

pendent on others, or who in any way fall below the standard of what some court or legislature may consider "meaningful life." They affect the very nature and purpose of law in relation to human rights. So the debate is not between science and religion, nor between one view of morality and pluralism, nor between competing interpretations of scientific data. Ultimately it is between the conviction that all human beings are inherently equal in rights and dignity, and the idea that the inherent dignity of all members of the human race is in fact irrelevant from the viewpoint of law.

It would be a happy thing if the Supreme Court, acknowledging that the bad arguments propping up its decisions have had disastrous consequences, would reverse itself. Unfortunately there is no reason to think it will in the foreseeable future. Hence the need, which we have urged from the very beginning, for a constitutional remedy.

We have considered amendments proposed during this Congress in light of the same concerns which prompted the bishops to

testify before this body in 1974. Now, as then, we wish Congress to give its support to an amendment which effectively reverses the Supreme Court's abortion decisions, allows for effective and universal protection of unborn children against abortion, and has good prospects for ratification. In light of these criteria we support Sen. Hatch's proposal, embodied in S.J. Res. 110.

There should be no misinterpretation about our own position on the abortion issue. We are committed to full legal recognition of the right to life of the unborn child and will not rest in our efforts until society respects the inherent worth and dignity of every member of the human race. When a constitutional amendment is ratified and hearings are held on a national abortion law, we shall again request permission to testify in order to urge Congress to enact laws protecting the unborn child to the maximum degree possible.

We realize that other groups and individuals will put forward other views on this matter. But our

understanding of national attitudes and our commitment to the democratic process convince us that this strategy for returning the abortion controversy to the legislative arena has the great merit of being an achievable solution to the present situation of abortion on demand. We cannot in conscience tolerate the continued destruction of unborn human lives at the rate of 1.5 million a year on the hypothetical grounds that some day another, theoretically ideal constitutional solution might be found.

Mr. Chairman, Cardinal Cooke will present further reflections on these questions. In conclusion, I thank you again for the opportunity to testify on behalf of S.J. Res. 110. Acknowledging that other approaches have their merits, we nevertheless stand prepared—should this committee give its endorsement to S.J. Res. 110—to use all our efforts to urge support among our people and adoption by the appropriate legislative bodies.

Thank you again.

Oral Testimony of Terence Cardinal Cooke

I am Terence Cardinal Cooke, Archbishop of New York. I offer this testimony today as Chairman of the Committee for Pro-Life Activities of the National Conference of Catholic Bishops. I welcome the opportunity to appear before this subcommittee in order to affirm once more that abortion is detrimental to our nation, and to urge the enactment of a constitutional amendment rectifying that situation.

The promotion of abortion which we have witnessed since the Supreme Court decisions of 1973 has grave effects on the lives of individual human beings, on families, and on society itself. It has rendered defenseless before the law millions of the unborn and has created a system of selective justice where some members of society decide who will live and who will die.

I am, further, grateful for the opportunity to appear before you today in fulfillment of our right to speak on matters of public policy, precisely as a religious leader concerned with the moral and spiritual welfare of our society. While noting the complexity of the abortion issue and agreeing that it has moral and religious dimensions, I am convinced that legal protection for the unborn child must be based on a respect for human dignity and fundamental human rights commonly held by people of good will, regardless of their religious affiliation. This conviction is not restricted to one particular religious denomination, or to one particular theory concerning natural law, but it is at the very root of American law. It requires that, if the laws of our government are to be considered valid, they must recognize that human rights are grounded in human dignity and cannot be freely bestowed

and removed by government. Instead human rights call out to be recognized because they exist prior to any particular government. Laws which violate or ignore these rights do not truly remove them, but instead, render themselves invalid.

I am convinced that each day that permissive abortion on demand continues to reflect a situation of lawlessness in our country, the concept of the acceptability of violence is reinforced, the respect for the dignity of each human being is diminished, and the moral fiber of the nation is further unravelled.

Abortion is not a victimless procedure. Every time an abortion is performed, the developing life and future of a human being is violently destroyed. There is no more permanent or decisive form of child abuse than the aborting of the unborn, and yet we live in a society which has attempted to make abortion socially acceptable by fostering an abortion mentality.

Some people in our country have even asserted that abortion is a God-given right, an affirmative good, and have gone to great lengths to promote this attitude toward the destruction of unborn human life. Others have insisted that taking away the opportunity of abortion is an invasion of the privacy which should mark the relationship between a woman and her physician. This ignores totally the fact that there is someone else to be considered. Yes, abortion involves a woman and her physician, but it also affects an unborn child as an innocent third party.

Every abortion also has consequences for the future of the society in which it takes place, for it involves moral, psychological, and emotional factors which play an im-

portant role in making up the character of that society.

All of us are concerned about the growing evidence of violence in our nation. I am convinced that a society is doomed to violence when it allows direct attacks on the most fundamental of all human rights, the right to life itself. The potential for destructiveness in such actions reaches to the very roots of our system and turns its most basic principles upside down. The right to life is replaced by the right to destroy. The very concept of inherent rights is replaced by the concept of privileges bestowed by the state upon those it considers worthy of recognition.

Ready access to abortion has failed to solve society's problems as some of its proponents claimed it would. It has become instead a legal and social disaster and its consequences will be felt for many years to come. We must reverse the current policy if we are to promote the common good of all who live in our society. Without such a reversal of policy we fear that our society's commitment to the common good can only erode further.

The society in which we live has always placed an emphasis on family life. The family, as the United Nations' Declaration on Human Rights says, is "the natural and fundamental unit of society, entitled to protection by society and the state." The family is the place where life originates and human relationships are first experienced, where values and beliefs are found and formed and passed on from one generation to the next.

We find ourselves now in a situation where the widespread practice of permissive abortion brings about the rejection of the concept of protecting family life

through the ordinary means of society and the state. In addition to denying the sanctity of human life and allowing its ultimate destruction, abortion involves a denial of family values and parental responsibilities. It constitutes a threat to all family relationships and so contributes to destabilizing and weakening society itself.

In recent years, especially since the Supreme Court decisions of 1973, our government to a large extent has failed to recognize and support the family as a basic institution with its own roles and prerogatives. The Supreme Court and other federal courts have gone beyond the promotion of permissive abortion with decisions that have undermined various family relationships between husbands and wives, parents and children. At the same time, notions used as a rationale in the abortion decisions have been extended into other areas, such as the care of the terminally ill, and used to override the role traditionally assigned to the family as a mediating agent between the individual and the state.

Increasingly our government

has come to look upon abortion simply as a matter of private, individual choice, as a mechanism to limit population growth, or as a way to deal with poverty or unplanned pregnancy. In doing so, government intervenes in the internal dynamics of the family and substitutes its policies and technical solutions for the compassion, mutual assistance, support, and human love on which family life is based.

These developments are inherent in the logic of promoting abortion, and they underscore the need for corrective action.

In calling for a constitutional remedy, we have no intention of asking the government to take over our own task of teaching moral principles and forming consciences. However, the law does have a teaching function, which is exercised by encouraging or forbidding specific actions according to their assessed impact on the common good.

In evaluating abortion, legislators and jurists inevitably make judgments as to the moral principles which will be reflected in the law. In a real sense, therefore, the question

now before Congress is not whether it will legislate morality, but whether the morality reflected in the law shall respect human life, or legitimate its destruction, along with undermining family structures and values. I submit that the time has come for our elected representatives, in the face of the arbitrary and destructive action by the courts, to resume and exercise their role to protect the common good of all, to enact legislation which embodies moral values essential to the well-being of society and which guarantees the most basic of all human rights, the right to life.

I join with Archbishop Roach in accepting the concept expressed in the proposed Hatch Amendment, and I encourage it as a step in this process.

This approach recognizes that the Constitution does not confer a right to abortion, and it grants to the Congress and the state legislatures the power to legislate against the destruction of unborn life.

Thank you very much.

The Case for a Human Life Amendment

In addition to the Nov. 5 oral presentations by Archbishop John Roach and Cardinal Terence Cooke to the Senate Judiciary Committee's Constitution subcommittee, the National Conference of Catholic Bishops submitted a 50-page written statement which reviewed a number of developments during the past five years that the bishops said "strengthen the case" for a human life amendment. The statement discussed recent developments in prenatal technology, the legal and social effects of legal abortion on American life and responded to charges that enactment of any law protecting the unborn child would violate constitutional guarantees of religious liberty by imposing Roman Catholic beliefs on U.S. society. "The question before our legislators is not whether they will 'legislate morality' — it is whether the morality reflected in the law will be one which respects all human life or one which legitimates the destruction of particularly inconvenient and dependent human lives," they said. The statement follows.

The National Conference of Catholic Bishops has testified before congressional subcommittees on two previous occasions on the subject of abortion and the need for a human life amendment: March 7, 1974, before the subcommittee on constitutional amendments of the Senate Committee on the Judiciary; and March 24, 1976, before the subcommittee on civil and constitutional rights of the House Committee on the Judiciary.

Neither in 1974 nor in 1976 was any version of a human life amendment reported out of committee and voted on by Congress. As a result this issue has not been brought before the state legislatures for their own determination. It is our fervent hope that this subcommittee and this Congress will show their respect for the democratic process by making it possible for the elected representatives of the American people to consider such a constitutional amendment.

In our previous testimony we have commented on a great many aspects of the abortion debate.

In 1974, we presented a wealth of evidence on the humanity and dignity of the unborn child. We pointed to the American legal tradition which recognizes the inherent right to life of all human beings and noted that until the Supreme Court stripped virtually all legal protection from the unborn child the life of that child was seen as deserving of legal protection. We noted the virtually absolute character of the right to abortion created by the court, which gave the unborn child no recourse or appeal under the law. The conclusion reached in that testimony was:

"After much consideration and study, we have come to the conclusion that the only feasible way to reverse the decision of the court and to provide some constitutional base for the legal protection of the unborn child is by amending the Constitution. Moreover, this is a legal option consistent with the democratic process. It reflects the commitment to human rights that must be at the heart of all human law, international as well as national, and because human life is such an eminent value, the effort to pass an amendment is a moral imperative of the highest order."

On March 24 of this year the NCCB Administrative Committee voted unanimously to reaffirm this 1974 statement.

In 1976 our testimony concentrated on reactions to the Supreme Court's abortion decisions and on the early effects those decisions had on law and society. By that time many distinguished legal scholars, representing a wide variety of views on abortion itself, had criticized the 1973 decisions as having little or no basis in the Constitution or in American legal history. Preliminary statistics suggested that legalization did increase the number of abortions performed by making abortion more easily available and more socially acceptable. This situation produced its own threats to women's lives and health while failing to put an end to illegal abortions.

The abortion mentality was already helping to erode some physicians' respect for human life in other spheres, most noticeably in the treatment of handicapped newborns who could be classified as falling below someone's standard of "meaningful humanhood." At that time we condemned as patronizing and sometimes punitive the attitude that "abortion is good enough for the poor," as well as the general tendency to see the quick and violent "solution" of abortion as the answer to a variety of social ills which have their own appropriate and infinitely more humane solutions.

We renewed our criticism of the abortion decisions themselves, observing that they had created a "new legalism...destructive of the human spirit." The Supreme Court had imposed this "new legalism" by replacing the facts about the beginnings of human life with new legal fictions and by failing even to recognize many of the individual and social values at stake in public policy decisions on abortion. By isolating the pregnant woman in her "right of privacy," the court had done a disservice both to her and to her child, cutting them off from the familial and societal bonds which can support and encourage life-affirming attitudes.

We responded to the claim that laws restricting abortion constitute an establishment of religion or a denial of religious freedom, pointing out that the idea of abortion as an affirmative good is a novelty created by the Supreme Court and not one maintained by any major religious denomination. While noting the complexity of the abortion issue and agreeing that it has moral and religious dimensions, we reasserted our conviction that legal protection for the unborn child can be based on a respect for human dignity and fundamental human rights commonly held by people of good will regardless of their religious affiliation.

Without repeating our 1974 and 1976 testimony in detail, we wish to take this opportunity to reaffirm our continued adamant opposition to the

current public policy on abortion and our conviction that a constitutional amendment is necessary to correct this unjust and destructive policy. During the past five years there have been a number of developments which strengthen the case on behalf of an amendment. In addition, the arguments put forth to defend legalized abortion have changed in some ways, requiring new responses. These recent developments will be noted during the course of this testimony, which will address four important aspects of the abortion controversy:

First, the central issue of the human dignity of the unborn child, with special emphasis on the complementary roles which scientific evidence and ethical insight can play in appreciating this dignity.

Second, a review of Western and specifically American legal traditions on human rights and the protection of unborn human life, with comments on the ways in which the reasoning of the Supreme Court's abortion decisions distorted and weakened those traditions.

Third, the legal and social effects of *Roe v. Wade* upon American life.

Fourth, the issue of the relationship between law and morality as it applies to the abortion issue.

The Human Dignity of the Unborn Child

In 1974 and 1976, we cited a wealth of scientific literature to show that individuated human life begins at conception — that is, that a unique human individual comes into existence when male sperm and female ovum successfully unite, and that all subsequent stages of development are simply phases in the continuous process of maturation into an adult human being. No new evidence has been found to contradict this simple fact and a great deal of evidence has accumulated to confirm it. The testimony presented on this matter before the Senate subcommittee on separation of powers April 23 of this year presents a small sample of the evidence available. The federal government itself officially acknowledges the biological facts on this point. A 1979 publication of the Department of Health and Human Services reports:

"Life is a constantly evolving process that begins with conception and continues until death. Movement through time necessitates change and therefore is synonymous with life itself; the opposite state is stasis and death....With the passage of time, the human organism grows from a single cell to a fully developed adult....Life begins when a male sperm unites with

a female egg. The new life created by this union starts as a single cell....In relation to the total life span of the individual, the early developmental years are short and serve as the foundation for the remainder of one's life span. The needs of a child in the support of this growth and development begin before birth and continue throughout the growth years until maturity is reached."¹

The development of new biological techniques has served to underscore the fact that a new human life begins at conception.

Despite the lack of a moral and legal consensus on the advisability of human *in vitro* fertilization experiments, there is consensus on one point: Baby Louise Brown, born in England in 1978, attracted so much publicity because her life as an individual began in a laboratory rather than in her mother's fallopian tubes. There is little point in claiming that this new life is a part of the mother's body when it is technically possible to transfer the developing embryo into another woman's body and may soon be possible to bring a child to maturity using an "artificial womb." It is clear that from the moment of fertilization there exists a new individual who requires nothing but a hospitable environment in which to direct its own growth and development.

Perhaps even more interesting than the strictly scientific evidence on the life of the unborn child, however, is the newfound status of the unborn child in medical practice. In 1974, when Dr. Bernard Nathanson first publicly admitted his "increasing certainty" that he had "presided over 60,000 deaths" as director of the world's largest abortion clinic, he did not attribute his new attitude to newly discovered scientific evidence that life begins at conception, for he knew that such evidence had existed for more than a century. Rather the unborn child's humanity had been brought home to him in a new way by his experience as the director of a new perinatology unit at St. Luke's Hospital Center in Manhattan. Here, Dr. Nathanson was able to study the child in the womb for extended periods of time, to chart his or her development, to locate and correct medical problems — in short, to treat the child as a patient and thus to realize that the child in the womb is as much a member of the human community as is a newborn infant or a mature adult. Based on his medical experience and his own thoroughly secular medical ethic, Dr. Nathanson has now concluded that legal protection should be restored to the unborn child.²

Dr. Nathanson's medical experiences have now been duplicated many times over. The new specialties

of fetology and perinatology have advanced at a tremendous rate. Amniocentesis, fetoscopy and high-resolution sonography allow us to observe the development of the unborn child and the onset of possible medical problems long before birth. The prescribing of drugs and nutritional programs for children still in the womb is becoming commonplace, and the specialty of prenatal surgery is coming into its own.³

Such recent medical developments add an important human dimension to what might otherwise seem like rather abstract scientific evidence on the beginnings of human life. As Dr. John C. Fletcher noted in an editorial in *The Journal of the American Medical Association*, physicians are now being confronted in new ways with the inescapable reality of the unborn child as a human patient in need of care and support.⁴ Our developing prenatal technologies are stripping away the veil of ignorance which some would like to maintain with regard to the humanity of this child, forcing physicians and society as a whole to appreciate the continuity between life before and after birth.

Unless our society wants to be blind to the point where it can ignore the increasingly obvious status of the unborn child as a member of the human family, it must come to grips with the fact that the abortion debate is not over "when life begins." Rather the core of the issue concerns the intrinsic dignity and value of life already in existence. We are faced with a moment of decision which cannot be avoided: We must decide whether every human being in need of medical care will be approached with instinctive concern or with the detached eye of the technician who is equally ready to cure or to kill in accordance with the whim of family or society.

The temptation to evade this all-important decision is pressing. To face the decision honestly is to admit that acceptance of abortion is a violation of the physician's most sacred vow in all circumstances "to help or at least to do no harm." Some have therefore tried to claim that science has nothing to say about the point when a human being's life begins because such terms as "human life" and "human being" have only a religious or metaphysical rather than a scientific meaning. They attempt to dissolve the ethical dilemma of abortion by re-defining the word "human" in terms of various functional abilities which make human beings worthy of respect and protection. Having concluded, then, on the basis of their own value systems that life before birth is either valueless or of less value than the social benefits of legal abortion, they reason backward from this conclusion

to deny that pre-natal life is "fully human."⁵

This evasion is not a new phenomenon by any means, for it was described in 1970 by the journal *California Medicine*:

"The reverence of each and every human life has been a keystone of Western medicine and is the ethic which has caused physicians to try to preserve, protect, repair, prolong and enhance every human life.

"Since the old ethic has not yet been fully displaced, it has been necessary to separate the idea of abortion from the idea of killing, which continues to be socially abhorrent. The result has been a curious avoidance of the scientific fact, which everyone really knows, that human life begins at conception and is continuous, whether intra- or extra-uterine, until death. The very considerable semantic gymnastics which are required to rationalize abortion as anything but taking a human life would be ludicrous if they were not often put forth under socially impeccable auspices. It is suggested that this schizophrenic sort of subterfuge is necessary because, while a new ethic is being accepted, the old one has not yet been rejected."⁶

We take some consolation in the fact that the "new ethic" for medicine has apparently still not caught on completely since "semantic gymnastics" are still necessary; but we can only regret the confusion created when such tactics are used to avoid facing the facts.

Such attempts to deny the humanity of the unborn betray the lack of understanding of the social and moral dilemma confronting our society. We do not claim that unborn children have all the physical and social abilities proper to adults, any more than we would claim that newborn children possess all such physical and social abilities. We do claim that each human individual comes into existence at conception, and that all subsequent stages of growth and development in which such abilities are acquired are just that — stages of growth and development in the life cycle of an individual already in existence.

Each abortion destroys the life of an individual human being at an early stage in his or her development. Recognition of these facts does not automatically settle the moral and legal issue of abortion, but it does focus attention directly on the fundamental question involved: Will we treat human life as having inherent dignity and worth or will we treat it in accordance with a sliding scale of value in which the right to life is a privilege granted only to those with certain functional abilities?

As spiritual leaders and representatives of an ethical tradition

concerned with this question for centuries, we can give only one response to it. That response was succinctly summed up by the assembled Catholic bishops of the world at the Second Vatican Council when they ranked abortion, murder and infanticide as "offenses against life itself" and declared that such offenses "debase the perpetrators more than the victims and militate against the honor of the creator."⁷ Our witness on this point is rooted in a commitment to the sanctity of life which reaches to every level of our convictions as Christians, as believers in God the Creator and as human beings.

As Christians we look to the Gospel of Jesus Christ as our norm for faith and action. In Jesus we see that God has a special concern for the most lowly and despised human beings, and we see that each human being has infinite worth as a brother or sister of Jesus who is called to eternal life with God. Jesus is presented to us in the Gospels as the paradigm of human dignity who calls to our consciences with the challenge: "As you did it to one of the least of these my brethren, you did it to me" (Mt. 25:40). At the same time we are forced to admit that in comparison with this perfect example of humanity each of us is a very imperfect specimen indeed; and we therefore deny that we or any human being can sit in judgment upon another and proclaim him or her to be "not fully human."

The New Testament parable of the Good Samaritan teaches us that no Christian can sit back and ask "Who is my neighbor?" in an attempt to define limits to his or her obligations with respect to others. Rather, each one of us has, in the words of the Second Vatican Council, "an inescapable duty to make ourselves the neighbors of every man no matter who he is."⁸ This duty moves us not only to condemn abortion as the killing of our neighbor, but also to reach out to the pregnant woman with assistance and support both for her and for her child, offering life-giving alternatives to abortion and seeking the help of private agencies and of government in responding to this human need.

Finally, the Gospel calls us to a mission of forgiveness and reconciliation with regard to the woman who has had an abortion. Christ teaches us that the Father's mercy is always available and without limit. It is our duty to witness to this mercy toward all.

As heirs to the Judeo-Christian spiritual and ethical tradition which recognizes one Creator as Lord of all, we proclaim with Pope John Paul II that "all human life — from the moment of conception and through all subsequent stages — is sacred, because

human life is created in the image and likeness of God."⁹ God is not the Lord only of some lives or of some stages of life, but as the author of life itself, he is intimately concerned with the life of every human being from its very beginning.

The ethical tradition common to all Christians has always recognized this, condemning abortion at every stage despite occasional philosophical speculations concerning the time of "ensoulment."¹⁰ Our Protestant brethren in particular have argued that speculations about "ensoulment" or "personhood" do not change the character of abortion as the destruction of a nascent human life called into existence by God.¹¹ We share the conviction that the deliberate destruction of innocent human life is the violation of God's commandment and the usurpation by man of divine authority over life and death. We believe that no human person has dominion over life and death, and therefore that no human individual or government has the right or the authority to dispense with unborn human life as it pleases.

Finally, as human beings committed to the common good of our society and the promotion of justice in the human community, we reject abortion as the killing of one who shares in our common humanity. Because the unborn child is undeniably a fellow human being, he or she deserves the same respect and the same protection as any other member of the human family. Simple human justice demands this much, as does the Golden Rule that calls on all human beings to treat others as they would have themselves treated. From a purely human viewpoint, therefore, the promotion of abortion is the prelude to the disintegration of all human dignity. It is the promotion of a selective justice in which only the powerful can survive.

At every level of our convictions — as Christians, as religious leaders and as concerned human beings — we believe the Supreme Court's abortion decisions constitute an egregious offense against human dignity. We do not suggest that every aspect of our religious convictions on this point can or should be represented in the law. But we defend our right to speak on matters of public policy precisely as religious leaders concerned with the moral and spiritual welfare of our society. We maintain that no human authority can arrogate to itself the power to classify some human lives as devoid of value, because no human authority gives human life its value. Any law which directly violates the divine law and the inherent rights of human beings, as the Supreme Court's decisions have

done in this case, is itself unworthy of human respect.

Western Traditions on Human Rights and the Unborn Child

Having stated our conviction that the protection of the unborn child is a demand which our common humanity makes upon us, we also wish to emphasize that this conviction is in complete harmony with our commitment as American citizens to the defense of fundamental human rights. On this point it is important to remember both the United States' traditional commitment to inherent human rights in general and its legislative record with respect to the protection of unborn human life.

At the root of Western jurisprudence and especially of American law is the conviction that governments must act according to certain commonly held moral principles and respect certain inherent rights if their laws are to be considered valid. This conviction is not restricted to one particular religious denomination or to one particular theory concerning "natural law," but is Western civilization's alternative to arbitrary, unjust or totalitarian government.

It was in recognition of government's responsibilities to a higher law that the founders of our nation claimed the right to revolt against what they considered an unjust system of colonial law. This recognition is also what justifies America's criticism of violations of human rights by certain foreign governments. Without adherence to the idea of a higher law, all such condemnation of injustice is meaningless, because there is no independent standard by which the most abhorrent practices and policies of a legally constituted authority can be considered as either just or unjust.

If human rights are grounded in human dignity, then they cannot be freely bestowed and removed by government. Instead they call out to be recognized because they exist prior to any particular government. Laws which violate or ignore these rights therefore do not truly remove them, but instead render themselves invalid.

The articulation of such rights has been the intent of some of our most revered national and international documents. The right to life is proclaimed as the most fundamental of all rights and is recognized as existing equally in all human beings regardless of their condition.

Our Declaration of Independence recognizes the right to life as inherent and inalienable from the first moment of each human being's existence when it proclaims

that "all men are created equal" with respect to this right. The Fifth Amendment to our Constitution states that no person shall be deprived of life or liberty without due process of law. The 13th and 14th Amendments attempt to strengthen the protection of human life and to assure that no class of human beings will ever again be deprived of legal protection in the United States.

The U.N. International Covenant on Civil and Political Rights provides that "every human being has the inherent right to life" and implicitly recognizes the rights of the unborn child by rejecting the use of the death penalty upon pregnant women. The U.N. Declaration of the Rights of the Child is more explicit, stating that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Here the mental and physical immaturity of the unborn, so often used as arguments in favor of abortion in the current American debate, are seen precisely as reasons for providing especially strong protection to the unborn because of their helplessness and greater need for the care of others. The American Convention on Human Rights, proposed by the Organization of American States in 1969, provided: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."¹²

The presumption in favor of legal protection for the unborn child created by this human rights tradition is a strong one. Since the unborn child is now recognized more clearly than ever before as a member of the human race in science and medicine, such a tradition calls on legislators to protect the right to life of the unborn child as they protect the rights of other human beings. Indeed the only sure means of avoiding such a conclusion is to deny that membership in the human race is sufficient reason in and of itself for being considered worthy of legal protection and thus ultimately to deny that the idea of inherent human rights is relevant to the law. This denial should be familiar to those who recall the history of the degrading institution of slavery in America and the constitutional remedies which were necessary in order to put an end to it. The same denial can be found more recently in Nazi Germany's ideal of the absolute sovereignty of the state over the individual and in the concept of "life devoid of value" by which it gave official sanction to a program for eliminating those considered medically or socially undesirable.¹³

Beginning in 1972, this denial has also played a role in federal court decisions dealing with abortion in the United States. In that year the highest court in the state of New York admitted that the unborn were "human" and "unquestionably alive," but ruled that there was no obligation to protect them because "it is not true that the legal order corresponds to the natural order." In dissent, Judge Adrian Burke focused directly upon this questionable disjunction between fact and law, citing the Declaration of Independence to argue that human beings are created with inherent rights. These rights, claimed Judge Burke, could not simply be overruled by the state in the name of whatever happens to pass for enlightened social policy at any particular time.¹⁴ But in January 1973, the U.S. Supreme Court accepted the approach suggested by the majority opinion in this case, handing down the first in a series of rulings in which the concept of the inherent dignity of all human beings has been denied its proper role in the law.

Many have failed to notice this feature of the 1973 abortion decisions, because they think that the Supreme Court merely found itself unable to determine which of several views on the beginnings of human life is correct. In fact the court said that it "need not resolve the difficult question of when life begins," and implied that it could reasonably ignore the claims of the Texas state legislature that life begins at conception, because the question of whether someone was actually a living member of the human race was not determinative of legal status as a person.¹⁵ This position was made more explicit by a federal judge in Rhode Island later in 1973, when he cited the Supreme Court's decisions as the basis for his ruling that the existence of human life at conception is "irrelevant" to the question of public policy on abortion.¹⁶

The result of such decisions has been the creation of a new area of law in which the natural and legal orders are separated with a thoroughness hitherto unknown in the United States, with the possible exception of early American law dealing with slavery. This is the "new legalism" which we discussed in our 1976 testimony. While claiming to promote the freedom of physicians to practice good medicine, the Supreme Court substituted legal fictions such as "meaningful life" in place of the medical facts about abortion and unborn life.

In its 1973 ruling in *Roe v. Wade*, the Supreme Court attempted to show that this approach to the unborn child has some basis in American legal history. American

legislators, it claimed, granted little or no protection to the unborn child prior to the 19th century, and they never considered themselves as obliged to acknowledge a particular set of biological facts concerning the beginnings of life. But after eight years of research and reflection, American legal scholars and historians are still finding previously undiscovered ways in which the court's historical argument on this score is faulty.¹⁷

In part, the court's historical statements in *Roe v. Wade* can now be seen as relying on incomplete information. For instance, its claim that there were no civil statutes against abortion until the 19th century ignored laws of the 15th through 18th centuries regulating midwifery, in which abortions performed for any reason were prohibited.¹⁸ More often, the court's historical arguments involved an apparent misunderstanding of the way in which the law in each historical period has interacted with contemporaneous scientific knowledge and medical realities. Thus it mentioned that abortion was considered a crime only after "quickening" for some centuries, but it failed to appreciate that this subjective sensation on the part of the pregnant woman was given undue importance because of the primitive state of medical technology at that time.¹⁹

The court discussed medieval speculations concerning "delayed animation," grossly misrepresented them as having been Catholic "dogma" until the 19th century, failed to note that the church's moral teaching always condemned abortion at every stage and seemed oblivious of the fact that the philosophical speculations in question were based partly on Aristotelian biological ideas now totally obsolete.²⁰

Similarly the court noted the role of the American Medical Association in enacting new abortion laws in the 19th century, but simply juxtaposed its statements with the AMA's pro-abortion statements of the 1960s instead of looking carefully at the reasons behind those statements.²¹ In 1859, when the AMA urged American legislatures to enact much stricter laws against abortion, it based its stance specifically on scientific evidence that human life begins at conception. In 1871, the AMA could quote with approval from *Archbold's Criminal Practice and Pleadings*:

"It was generally supposed that the foetus becomes animated at the period of quickening; but this idea is exploded. Physiology considers the foetus as much a living being immediately after conception as at any other time before delivery, and its future progress but as the development

and increase of those constituent principles which it then received. It considers quickening as a mere adventitious event, and looks upon life as entirely consistent with the most profound foetal repose and consequent inaction. Long before quickening takes place, motion, the pulsation of the heart and other signs of vitality, have been distinctly perceived, and, according to approved authority, the foetus enjoys life long before the sensation of quickening is felt by the mother. Indeed, no other doctrine appears to be consonant with reason or physiology but that which admits the embryo to possess vitality from the very moment of conception."²²

This position has never been contradicted by more recent AMA statements; instead, its statement of fact has been subordinated to a subjective view of social progress which has little to do with the AMA's scientific competence. A recognition of developing medical knowledge is also behind the Catholic Church's decision in the 19th century to treat all abortions from conception on as equally serious crimes against human life in the context of canon law.²³

In other words, the history of Western law on abortion had demonstrated a clear trend toward greater and greater protection for the unborn child, based on the perceived need for such legislation and on the developing medical knowledge at a given point in time concerning life's beginnings. The Supreme Court's documentation in *Roe v. Wade* juxtaposed differing laws on the matter from different historical periods and argued that these differences create an irreducible pluralism which the court cannot resolve — as though it were forced to give equal attention, for example, to modern medical knowledge and ancient Stoic philosophy.²⁴

Roe v. Wade's treatment of constitutional "personhood" is another example of its inadequate reflection on this entire issue. The court simply went through the Constitution with a concordance and concluded that most uses of the term "person" therein (with regard to voting, eligibility for presidential office, etc.) have only "postnatal application."²⁵ Almost all of the examples noted by the court, in fact, apply only to adults. Yet the 14th Amendment proclaims that all persons who are either born or naturalized in the United States are citizens of the United States. No court has used this wording to argue that new immigrants who are not yet naturalized are "non-persons" who can be killed with impunity — rather it is assumed that immigrants are "persons" with an inherent right to life long before

assuming the special rights and responsibilities of American citizens. The Supreme Court interpreted this clause in the opposite sense in the case of those not yet born, as though the absence of full-fledged citizenship automatically meant the absence of any inalienable human rights.

This interpretation is imposed upon the 14th Amendment from without, ignoring evidence that the amendment was intended to prevent any class of human beings from being denied the rights of persons. It is clear from the legislative history of the 14th Amendment that the word "person" was not intended to distinguish between members of the human race who had rights and those who did not — on the contrary, words such as "man," "human being" and "member of the human race" were all used in congressional debate by the framers of this amendment as common-sense synonyms for the term "person."²⁶

The status of the unborn child in relation to laws on abortion was not explicitly discussed during the debate; but when the AMA urged new abortion laws in 1859 and 1871 to protect the unborn child from conception on in all but the most extreme cases, the same state and federal legislators who ratified the 14th Amendment responded promptly in recognition of their solemn responsibility to protect human life.²⁷ The protection of unborn life was seen as being in harmony with the basic purpose of the 14th Amendment, which was, in the words of one of its Senate supporters, to "establish...equality before the law, and...give to the humblest, the poorest, the most despised of the race the same rights and the same protection before the law as it gives to the most powerful, the most wealthy, or the most haughty."²⁸ It is this principle of the innate equality of all members of the human race which the Supreme Court denied in the case of the unborn child, reversing the obvious trend toward protection of all human life found in American law prior to the "liberalization" of some state abortion laws in the late 1960s.

The implications of *Roe v. Wade's* principles for the legal status of human beings who are handicapped or dependent on others, or those who in any way fall below the standard of what some court or legislature may consider "meaningful life," reach far beyond the abortion issue itself. To appreciate these implications is to realize that the abortion debate is not between science and religion, or between moralism and pluralism or between two different interpretations of scientific data. The debate is between the conviction that all human beings are inherently equal

in rights and dignity, and the idea that the inherent dignity of membership in the human race should be considered irrelevant to the law.

Some who agree with the Supreme Court's abortion decisions argue that legal protection should be accorded only to those who can articulate and justify their needs in the public forum; others propose a sliding scale of rights corresponding to the possession of certain mental or physical abilities; still others eschew such considerations, arguing simply that legal abortion is necessary for the efficient pursuit of social goods and liberties and that this is sufficient reason for its acceptance. But these positions all have two things in common: They require us to reject the idea that all human beings have inherent value and inherent rights by reason of a commonly shared humanity, and they can easily be applied to the killing of other classes of human beings in addition to the unborn.

We have recognized for years that the arguments by which the Supreme Court devalued unborn life have the potential for undermining the idea of inherent human rights with regard to those already born. In its 1974 Declaration on Abortion, the Roman Catholic Church's Sacred Congregation for the Doctrine of the Faith stated that an unequivocal defense of the right to life of human beings must be grounded in the conviction that this right exists prior to any state's recognition of it, indeed that it must exist as soon as life itself comes into existence. To argue that the right to life rests instead on official legal recognition by the state or that it exists only upon arrival at some particular stage or condition of life which the state is willing to regard as socially valuable or "meaningful," is to deny that there is such a thing as an inherent right to life at all.²⁹ The logical conclusion of the principles used by the Supreme Court to legalize abortion is that our own fundamental rights are held only as privileges bestowed upon us by the state. Thus when Pope John Paul II said last year that there is a "patent contradiction" in the attempt to reconcile abortion with the furthering of human dignity, his words held special significance for the situation in the United States, in which the very principles used to justify abortion involve a denial of our traditional commitment to the natural rights of mankind.

With Pope John Paul we hold that "the right to life is the most fundamental right of the human being, a personal right that obliges from the very beginning," and that the attempt to deny this right with respect to the unborn child is an attack upon the

fundamental rights of all of us.³⁰

The Legal and Social Effects of *Roe v. Wade*

When *Roe v. Wade* and *Doe v. Bolton* were handed down by the Supreme Court in 1973, the public policy they created with regard to abortion was hailed by some Americans as an example of progressive social policy. Abortion advocates predicted that a variety of social benefits would soon follow. Safe and legal abortion would make unsafe "back alley" abortions a thing of the past; infant and maternal mortality rates would plummet; every child who was allowed to be born would be a "wanted" child, and so the abuse and neglect of children would become less of a problem; teen-age childbearing and illegitimate children would become less of a burden upon society; etc.

Eight years later we see no sign that the brave new world predicted in 1973 has materialized. Nor is there any reason to expect that a few more years of the same policy will eventually bear the promised fruit. Some of the more obvious failures of the current policy are as follows.

1. Initial predictions that the annual number of abortions would level out within a few years have proved overly optimistic. The estimated number of abortions performed last year is 1.5 million, and groups such as Planned Parenthood still point to a great unmet abortion "need" in many parts of the country.³¹ At this point it seems clear that the "need" or "demand" for abortion is very flexible, growing every year as the current legal situation allows the "supply" to be openly and aggressively marketed to American women. As permissive attitudes toward abortion take hold, increasingly frivolous reasons are considered sufficient justification for abortion. Some genetic counselors who perform amniocentesis for the purpose of detecting genetic defects prenatally have complained about the growing number of women who wish to use amniocentesis simply to determine the sex of an unborn child, so that an abortion can be obtained if the child is not of the "right" sex.³²

2. Despite the annual increase in the number of legal abortions, women continue to die every year from illegal abortions — that is, from abortions performed by non-physicians. In addition, the huge number of legal abortions adds its own annual casualties to the maternal mortality statistics. It may be that the full story of this tragedy has not yet been told, since some findings suggest that the number of maternal deaths from legal abortion is underreported.³³ Although the number of abortion-

related maternal deaths has decreased since 1973, the rate of decrease is not significantly different from the annual rate at which it has dropped since 1942 due to general advances in obstetrical medicine.³⁴

In 1978 the noted obstetrician Denis Cavanaugh remarked that "there has been no major impact on the number of women dying in the United States since liberalized abortion was introduced," and indeed that "there has been less improvement in maternal mortality in the 1973-1975 period than in any other period since 1965. This suggests that approximately 1 million fetuses are being sacrificed each year with no evidence that it is contributing significantly to the reduction of maternal deaths in this country."³⁵ Since 1975 the annual number of abortion-related maternal deaths has leveled off, with the exception of 1977 when there was an increase in abortion-related maternal deaths; some legal abortions still result in the mother's death, and illegal abortions continue to be performed.³⁶

From the outset we have rejected the very premise on which this argument in favor of legalized abortion was based: Even if legalization did result indirectly in some preservation of life, it would be morally reprehensible to authorize the direct destruction of life in order to achieve this goal.³⁷ But it is now clear that this policy fails even when seen in its own callous and pragmatic terms. At this point the only way to reduce significantly the number of maternal deaths may be to restrict the actual number of abortions as much as possible, while offering comprehensive programs of care and support to women with problem pregnancies.

3. The claim that legalized abortion reduces the infant mortality rate rests on questionable reasoning. If one kills a child before birth, then obviously he or she will never appear in the official infant mortality statistics, but this can hardly be declared a social benefit. In any case, states which have shown remarkable reductions in infant mortality during the past few years have generally attributed their success to the development of better medical care for pregnant women and their children and not to abortion.³⁸ Some cities which have the highest abortion rates in the country, such as the District of Columbia, also have infant mortality rates which are a national scandal.³⁹ There may well be a cause-and-effect relationship at work here. The most reliable recent studies indicate that women who have had two or more abortions have a much higher chance than other women of having premature births in future pregnancies. In places like the District of Columbia, where a large percentage of the

abortions are obtained by women who have already had at least one previous abortion, the premature birth rate, which is a major cause of high infant mortality, may be aggravated by the high abortion rate.⁴⁰

4. The slogan of "every child a wanted child" seems empty in the face of a national epidemic of child abuse and neglect. Some psychologists have suggested that here too there may be a cause-and-effect relationship at work. Abortion may help to break down the protective instinct of mother for child which begins to form early in pregnancy. Once weakened, it tends to affect the behavior of the mother toward the other children.⁴¹ Whatever the truth may be with respect to this particular claim, it is clear that the ideology represented by "every child a wanted child" is destructive rather than supportive of the family as a haven for the acceptance and nurturing of life.⁴² When a child is seen primarily as the projection of parents' self-serving desires and needs rather than as a unique individual with intrinsic worth, the stage is set for parental disappointment and even uncontrollable anger whenever this child does not quite measure up to parents' plans or expectations. No clear link has been shown between an initially unplanned or "unwanted" pregnancy and the later "unwantedness" of the child after birth; in fact, almost every pregnant woman has ambivalent feelings about her pregnancy at one stage or another, and this is generally recognized as a perfectly normal event of pregnancy. Many of the children who end up being abused or neglected after birth are initially "wanted" and planned children who later have fallen short of their parents' standards of perfection.⁴³

5. At one time it was thought by abortion advocates that legalized abortion would enable physicians to practice medicine with greater freedom from external legal restrictions, and that this would help the medical profession to devote itself more singlemindedly to the care of human beings already born. Instead, the erosion of respect for life which is promoted by a policy of abortion on demand has spread to areas of medical practice dealing with the handicapped and the terminally ill. The Hippocratic oath is as opposed to infanticide and euthanasia as it is to abortion; but this oath is now seen as "an inadequate guide" for physicians, according to a recent weekly magazine, because "modern doctors, many of whom swore to uphold its principles when they graduated from medical school, now violate it every day."⁴⁴

Physicians' professional and ethical opposition to practices such as infanticide for handicapped newborns

and "assisted suicide" for the terminally ill thus becomes increasingly difficult to maintain.⁴⁵ A profound shift in the professional ethics of the physician can therefore be detected, in which the Hippocratic axiom "To help or at least to do no harm" is in danger of being replaced by the physician's role as technician, using his expertise either to kill or to cure as is demanded of him. As some physicians cease to consider themselves as involved in a sacred calling devoted to the nurturing of life, others have warned that such a trend may help to undermine public trust and respect for the medical profession as a whole.

According to an editorial by Dr. Seymour Glick in a recent issue of *The New England Journal of Medicine*, the most fundamental reason for modern medicine's growing crisis of respectability is its failure to stand up "for the sanctity of life and for the dignity of human beings" in an increasingly secularized society. "Our societies must come to grips with this problem," Dr. Glick concludes, "because the problem transcends medicine; it threatens the very fabric of Western societal structure and its future."⁴⁶

6. Attempts to stem the tide of what is sometimes called the teen-age pregnancy "epidemic" have been going on for many years. In 1963 Planned Parenthood pamphlets warned teen-agers that abortion "kills the life of a baby after it has begun" and recommended contraception as a way of ensuring that one need never face the prospect of abortion.⁴⁷

When this approach did not have the desired effect, Planned Parenthood and other groups turned to abortion as a backup to "contraceptive failure." The "epidemic" has continued, to the extent that Planned Parenthood Inc., refers to it as "the problem that hasn't gone away."⁴⁸ Yet the response of Planned Parenthood and other groups has been to claim that more of the same approach will lower the teen-age pregnancy rate, if only the government will help them to push contraception and abortion more aggressively and on a wider scale.⁴⁹ Some abortion advocates have called for mandatory abortion for teen-age girls under a certain age as a way to solve this problem.⁵⁰ Yet this approach seems doomed to failure even if it is allowed to become coercive, because it ignores the realities of teen-age pregnancy and childbearing as human problems.

Some teen-age girls look to pregnancy, either consciously or unconsciously, as a welcome relief from a difficult or unloving home environment. Teen-agers in general have little of the self-discipline required for consistent contraceptive

practice because of their romanticized attitudes toward the "spontaneity" of sex; and this lack of self-discipline is further encouraged by the offer of abortion as a quick and easy "backup" solution.⁵¹ Researchers are beginning to notice that many of the problems once seen as results of teen-age childbearing, such as low economic and educational achievement, may actually be factors in the social situation which contributed to the likelihood of pregnancy.⁵² In short, the use of abortion as a solution to problems such as teen-age pregnancy seems certain to fail even in its own pragmatic terms because it is based on a myopic view of the problem. Alternative solutions which are more complex but more respectful of human life and human dignity offer more promise in helping to solve this difficult problem.

While failing to solve the social problems once cited as justifications for the legalization of abortion, the Supreme Court's abortion decisions have created new problems in a number of legal areas. As the principles of these decisions have begun to work their way into American jurisprudence, they have provided ample evidence to support the claim that *Roe v. Wade* and its progeny constitute a threat to the rights and dignity of all Americans. Again, only some of the most obvious examples of this can be listed here.

1. The Supreme Court's dichotomy between human beings and "persons in the whole sense," and its innovations in referring to independent or "meaningful" life as the only life deserving of legal protection, have begun to affect court rulings dealing with the rights of those already born. In a 1979 abortion case the Supreme Court ruled that a child born alive during an abortion who may be capable of surviving with medical help has no legal right to that help, because the recognition of such a right would have a "chilling effect" on the woman's right to have a late-term abortion.⁵³ In 1980 a New York state court cited *Roe v. Wade* to claim that terminally ill comatose patients have "in the true sense, no life" for the state to protect. This court argued that "the state's interest in preservation of the life of the fetus would appear greater than any possible interest the state may have in maintaining continued life of a terminally ill comatose patient ... (whose) claim to personhood is certainly no greater than that of a fetus."⁵⁴ Recent court cases concerned with the right of handicapped children to medical treatment and with the new concept of "wrongful life" suggest that the 1973 abortion decisions pose a threat to all human beings who are especially helpless and dependent on

others.⁵⁵

2. As we noted above, the practice of abortion and its concomitant ideology of the "wanted child" constitute a threat to the family as a life-nurturing institution. The destructive effects of abortion on the family have been multiplied by the way in which the family is explicitly treated in recent court rulings on abortion. In *Planned Parenthood of Central Missouri v. Danforth*, for instance, the Supreme Court ruled that a father's rights and responsibilities with respect to his unborn child are his only by delegation of the state, instead of being grounded in the natural relationships of parenthood and the family.⁵⁶ Even in rulings which have sustained relatively weak legislation dealing with parental consent for abortions performed on minors, the courts have insisted that a court rather than parents shall have the final say as to whether an abortion will be performed, and perhaps even the final say as to whether parents will be notified at all.⁵⁷

The federal courts have thereby attacked that institution which the United Nations has called "the natural and fundamental unit of society...entitled to protection by society and the state."⁵⁸ In rulings such as these the family is seen primarily as a grouping of separate individuals or as the delegated agent of the state. In treating family structures merely as restrictions upon the rights of private individuals, the Supreme Court has ignored the family's vital role in promoting these rights. For most of us the family is that training ground where we are first educated to the very idea of inherent human dignity and rights, because it gives us our first experience of being accepted and loved simply because we are and not because we have earned acceptance through our own achievements. By intruding upon familial prerogatives and substituting their own values for the values of the family unit, courts weaken the ability of parents to provide this kind of community for their children; and when the values of the courts are themselves questionable with regard to the principle of inherent human rights, the result can only be a weakening of society's overall commitment to human dignity.

3. Some court cases dealing with abortion have provided an opportunity for attacks on the rights of individuals and groups who disagree with the current public policy on abortion. Although "conscience clauses" protecting health care personnel and privately owned hospitals have been enacted by state and federal legislatures, these clauses have been difficult to enforce.⁵⁹ Even

rulings which uphold the principle of the conscience clause have noted that the consciences of employees need not be respected if this could cause "undue hardship" to the employer wishing to provide elective abortions.⁶⁰ There have also been attempts to force church-affiliated institutions to violate the moral convictions of their sponsors by making them provide abortion services.⁶¹

4. In some cases courts have played an intrusive role by actually making life-and-death decisions on behalf of private individuals. This has been made possible by *Roe v. Wade's* ruling that the constitutional "right to privacy" can overrule any interest the state may have in preserving life that is not "meaningful." For instance, the right of a patient to refuse unwanted medical treatment has traditionally been seen as a common-law right to be exercised within the familial and doctor-patient relationship whenever possible. But some courts have begun to treat this area of law in terms of a constitutional right to privacy which is so personal and individual a right that it cannot be limited or exercised within those relationships, but must be adjudicated by the court itself. In cases where a patient is not competent to exercise this right on his or her own behalf, courts have attempted to make the decision by their own "substituted judgment."⁶² These cases have provided an opportunity to treat all private decision-making processes in such situations as mere delegations of a power which properly belongs to the court itself.⁶³

This judicial trend has even been applied back to the abortion issue itself, allowing courts to order abortions for mentally retarded or incompetent women and to demand that state legislatures provide public funding for elective abortions.⁶⁴ The general idea at work in all these cases is that, since the right to privacy is a constitutional right to be defined by the state and federal courts, the courts have broad powers to facilitate the exercise of that right and even to exercise it on behalf of others. By a curious twist of reasoning, a "right to privacy" originally formulated as an alleged defense of individualism has become a very public entity indeed and one which can be used to ignore the dignity of human individuals in the implementation of courts' value judgments on life and death. While pro-abortion groups continue to lobby against any constitutional amendment on abortion as a threat to individual freedom, we see a clear threat to freedom in this abuse of judicial power with regard to decisions concerning life and death.

When the decisions of the Supreme Court imposed an abortion

policy on this country in 1973, many thought this marked the end of the public controversy over legalized abortion. The court treated abortion simply as a medical procedure and as a matter of individual privacy, and by doing so seemed to have removed the issue from the public arena.

Eight years later, it is not possible realistically to hold such a view. While some maintain that abortion is now a private matter between a woman and her physician, the social and legal trends noted above indicate that the Supreme Court's decisions have had far-reaching effects on American society. This has happened, we believe, primarily because the court was tragically mistaken in thinking that abortion affects only a woman and her physician. Every abortion also involves the unborn child as an innocent third party. Every abortion involves the father of the child and in many cases abortion has profound effects on friends, parents and other members of the family. Every abortion also involves the future of the society in which it takes place, for it involves moral, psychological and emotional factors which play an important role in making up the character of that society. By ignoring the public dimension of the practice of abortion and failing to recognize it as the fundamental social problem that it is, we place ourselves among its passive victims.

In the United States this public dimension has been magnified by the Supreme Court's classification of abortion as a virtually absolute constitutional right and by its direct attack on the most fundamental of all rights, the right to life itself. The potential for destructiveness inherent in such action is almost unimaginable, for it reaches to the very roots of our legal system and turns its most basic principles upside down. The right to life is replaced by the right to kill, and the very concept of inherent rights is replaced by the concept of privileges bestowed by the state upon those it considers worthy of recognition.

We do not pretend to have all the solutions to the problems which abortion has been purported to solve. Indeed, the idea that there was one quick and easy solution to these problems has been at the root of some very misguided support for our current public policy on abortion. But we do know that abortion, in addition to being a moral evil, has failed to solve society's problems and has itself become a legal and social disaster, the consequences of which will be felt for many years to come. By reversing the current policy, we will clear the way to enable us to work together to promote the common good of all who live in

our country. Without such a reversal we fear that our society's commitment to that common good can only erode further.

The Issue of Law and Morality

The national debate on the relationship between law and morality has become closely associated with the debate on abortion in recent years. Some groups that support legalized abortion have claimed that any law protecting the unborn child would be an imposition of a particular morality on a pluralistic society; and some have even claimed that it would impose specifically Roman Catholic religious beliefs on this society, thereby violating the non-establishment clause of the First Amendment. We wish to conclude our testimony with some remarks on these charges.

Our response remains fundamentally the same as in 1974, when we gave the following testimony before the U.S. Senate subcommittee on constitutional amendments:

"We wish to make it clear we are not seeking to impose the Catholic moral teaching regarding abortion on the country. In our tradition moral teaching bases its claim on faith in a transcendent God and the pursuit of virtue and moral perfection. In fact, moral teaching may frequently call for more than civil law can dictate, but a just civil law cannot be opposed to moral teaching based on God's law. We do not ask the law to take up our responsibility of teaching morality, i.e., that abortion is morally wrong. However, we do ask the government and the law to be faithful to its own principle — that the right to life is an inalienable right given to everyone by the Creator....

"We appear here today in fulfillment of our considered responsibility to speak in behalf of human rights. The right to life — which finds resonance in the moral and legal tradition — is a principle we share with the society and the one that impels us to take an active role in the democratic process directed toward its clear and unequivocal articulation."⁶⁵

Since our testimony in 1976, several developments have helped to underscore the exact nature of the Catholic Church's moral concern in this area and the extent to which the abortion issue reaches beyond the bounds of any particular religion's moral teaching.

First of all, the increasingly visible involvement of other religious groups in the public debate on abortion has vividly demonstrated that this is not just a "Catholic issue." The news media have directed their attention primarily to new conservative political groups led by evangelical Protestants who were previously silent on most public policy issues. In addition,

however, the governing bodies of denominations such as the Lutheran Church-Missouri Synod and the Southern Baptist Convention have approved resolutions in support of a human life amendment during the last two years and other churches which had made statements in support of permissive abortion after 1973 have begun to qualify their stance.⁶⁶

Second, the fact that a convincing case can be made against abortion on wholly secular grounds has become increasingly obvious. This case has been ably defended by many respected scholars in the realm of political philosophy and constitutional law.⁶⁷ The author of *Aborting America*, Dr. Bernard Nathanson, has articulated his opposition to abortion in terms consistent with his own non-religious humanistic convictions. All one needs in order to support laws against abortion, he notes, is a recognition of some simple biological facts and a commitment to the Golden Rule which has been taught in every civilized society.⁶⁸ Secular groups of every conceivable social and political background have enriched the public debate with the variety of their perspectives on this issue.⁶⁹

Finally, the U.S. Supreme Court itself, in ruling upon the constitutionality of restrictions on the public funding of abortion, has reiterated the traditional judicial principle that a law with a "secular legislative purpose" does not violate the establishment clause of the First Amendment simply because it "happens to coincide or harmonize with the tenets of some or all religions." Noting that "laws prohibiting larceny" are not unconstitutional establishments of religion despite the fact that "the Judeo-Christian religions oppose stealing," the court concluded that a funding restriction on abortion is "as much a reflection of 'traditionalist' values toward abortion, as it is an embodiment of the views of any particular religion."⁷⁰

The Supreme Court's argument clearly can be applied to legislation restricting abortion in general. To its own statement on the matter we wish only to add that the word "traditionalist" is no more appropriate as a description of the Catholic Church's position on abortion than it is as a description of our position on stealing. As we have emphasized throughout this testimony, our position on abortion is perfectly consistent with modern scientific knowledge and the most progressive features of American policy on human rights in general. We do not support legal protection for the unborn child because it is "traditional" to do so, but because we totally reject the idea that

social "progress" lies in a retreat from the legal and ethical principles which have given the United States its reputation as a defender of the weak against the strong.

Pro-abortion groups have also claimed that opposition to abortion is a minority view and that we are seeking to "impose" this view on the majority of the citizens of the United States. This charge is false on two counts. First of all, every major public opinion poll taken in the last eight years has shown that most Americans are opposed to legalized abortion on demand. About half of those polled would like to see abortion made illegal except for certain rare circumstances; the other half is about equally divided between those who favor abortion on demand and those who either oppose all abortion or would make an exception only to prevent the death of the mother.⁷¹ Two-thirds of the people of our country think that abortion is morally wrong, and almost three-fourths seem to realize that the victim of even a first-trimester abortion is a living human being.

Contrary to a rather popular stereotype, women are more opposed to legalized abortion than men are, and Americans who are poor or who are members of racial minorities are more opposed to abortion than the white and affluent.⁷² The most recent analysis of public opinion on abortion by Judith Blake, who has researched this question since before the Supreme Court's 1973 decisions, indicates that popular support for the full extent of the Supreme Court's actions in this area is even more precarious than the above figures would seem to suggest. Her findings show that Americans who have "moderate" or ambivalent attitudes toward legalized abortion actually lean more toward the consistent anti-abortion position than toward the consistent pro-abortion position.⁷³ These figures do not even begin to address the point that the group whose rights are in question, that of unborn children, is totally without a voice of its own and therefore deserves the special concern of legislators who are sworn to defend the rights of minorities against the power of the majority.

Second, there is no effort afoot to "impose" a law on our country from the outside, but only a drive to return this issue to the American people's elected representatives. The legalization of abortion on demand was "imposed" on this country in 1973 by seven justices of the U.S. Supreme Court. In attempting to correct this unfair decision by constitutional amendment as provided for by our Constitution, we display our commitment to American democratic principles.

There are also some who admit that the majority view is against abortion on demand, but who defend its legalization on the basis of American "pluralism." Because no view of abortion will ever claim the minds and hearts of all Americans, they argue, we must continue to leave the abortion decision up to each individual woman. There are several important flaws in this argument as well.

1. This "pro-choice" argument would invalidate almost all civil rights legislation if it were applied consistently. In fact the same argument was used to defend slavery in the 19th century. Slave owners claimed that individuals or states that wished not to engage in the practice of slavery need not do so, but that they should respect the conscientious decisions of others in this controversial matter. President Abraham Lincoln's response was to point out that the law of the United States if it accepted such a situation, would in fact be taking the pro-slavery side by acting as though there were nothing wrong with slavery. The same response must be made today to the "pro-choice" rationale for legalized abortion.⁷⁴ To withdraw all legal protection from the unborn child in the name of "pluralism" is to say in practice that this child is not deserving of any public attention and his or her life is to be left to the whim of the mother. It means forgetting that we are dealing not with a purely "private" decision but with one which determines the fate of a defenseless and innocent party. As we have argued elsewhere in this testimony, the current legal situation with regard to abortion also has a number of devastating effects on government and society which call for a public response.

2. The "pro-choice" argument in one sense does not go far enough in its defense of pluralism. If pluralism means anything in American society, it means that we must defend the rights and freedoms of every class of human beings, regardless of age, race, sex or condition. A law which allows the killing of any class of human beings is therefore fundamentally anti-pluralistic and "anti-choice," for it allows those human beings to be deprived of any possibility of making their own choices and expressing their own opinions in the future. A pluralism which respects only those who are currently powerful and articulate enough to put their own beliefs into practice to the detriment of others is not in our opinion a genuine or complete pluralism.

3. The argument also ignores another important factor in what we have come to know as American pluralism. This factor was fully recognized by that great defender of religious freedom, John Courtney

Murray, when he wrote his classic work titled *We Hold These Truths*:

"One idea, rooted in the American tradition, has seemed to me to be central, and therefore it has been recurrent. Every proposition, if it is to be argued, supposes an epistemology of some sort. The epistemology of the American Proposition was, I think, made clear by the Declaration of Independence in the famous phrase: 'We hold these truths to be self-evident....'

"For the pragmatist there are, properly speaking, no truths; there are only results. But the American Proposition rests on the more traditional conviction that there are truths; that they can be known; that they must be held; for, if they are not held, assented to, consented to, worked into the texture of institutions, there can be no hope of founding a true City, in which men may dwell in dignity, peace, unity, justice, well-being, freedom."⁷⁵

Without this commitment to the grounding of law in an objective order of inherent rights, there is no pluralistic America; instead, there is a plurality of Americas, each committed to its own peculiar viewpoint concerning human rights. We see this destructive form of pluralism at work in the arguments of those who consider the beginning of human life as merely a matter of private opinion. Once one rejects the idea that human rights should be based on simple existence as a member of the human race, one is faced with an irreducible and chaotic pluralism of arbitrary opinions as to the beginnings of "personhood," "meaningful life" or "fully human" life. In this climate, as we have seen, the "personhood" of human beings already born becomes a matter of debate as well, since their membership in the human race is not sufficient reason for being granted the rights or privileges of legal "persons."⁷⁶ This will be a special threat to human beings such as handicapped infants or terminally ill patients, whose right to life is already being compromised by our legal system. We cannot allow this trend toward the elimination of the weak and defenseless to be pushed forward under the banner of American "pluralism" or "freedom of choice, any more than we would allow a re-institution of slavery under this banner. Some human choices are fundamentally destructive of the rights and dignity of other human beings and therefore should be forbidden by law.

In calling for legal protection for the unborn child, we have no intention of asking the government to take over our own task of teaching moral principles and forming consciences. But the law does have a teaching

function, exercised through legislation which forbids or discourages specific actions deemed to be destructive of the common good. In deciding whether abortion should be considered as among such actions, legislators inevitably make judgments as to the moral principles which will be reflected in the law. To some extent, the question before our legislatures is not whether they will "legislate morality" — it is whether the morality reflected in the law will be one which respects all human life or one which legitimates the destruction of particularly inconvenient and dependent human lives. In this controversy, to refuse to legislate is to allow the Supreme Court by its decisions to legislate the latter form of morality.

Conclusion

During this testimony we have touched upon many elements in the complex issue of legalized abortion. We have reaffirmed the relevance of fundamental moral principles to the debate on this issue, while pointing out the undeniable basis which our moral position has in modern biological and medical fact. We have explained the way in which our position is in harmony with the most respected principles of international and American law, as well as the ways in which the Supreme Court's abortion decisions rest upon an unjust denial of those principles. We have delineated what we see as some of the most devastating social and legal consequences of these decisions, emphasizing the point that their reversal should be an important and immediate priority for those who are committed to promoting the good of our society. Finally, we have discussed the controversial question of law and morality as it bears on this particular issue and responded to charges that our commitment to legal protection for the unborn child is inconsistent with a commitment to American freedom and pluralism. Our final remarks will deal with the specific legislative response which we think should be made to the situation we have described.

Our own comprehensive response to the Supreme Court's abortion decisions can be found in the Pastoral Plan for Pro-Life Activities, approved by the National Conference of Catholic Bishops Nov. 20, 1975, which we presented as part of our testimony before the House subcommittee on civil and constitutional rights in 1976. This response is three-pronged, including efforts in the spheres of education and pastoral care as well as in that of public policy. Within the area of legislation and public policy, we proposed a pro-life legislative program with the

following elements:

a) Passage of a constitutional amendment providing protection for the unborn child to the maximum degree possible.

b) Passage of federal and state laws and adoption of administrative policies that will restrict the practice of abortion as much as possible.

c) Continual research into and refinement and precise interpretation of *Roe* and *Doe* and subsequent court decisions.

d) Support for legislation that provides alternatives to abortion.

Although we have been active in all these areas, we have restated a number of times during the past eight years that our highest legislative priority is the passage of a constitutional amendment that will reverse the Supreme Court's abortion decisions and restore legal protection to the unborn. Today we again reaffirm our commitment to such an amendment.

We have generally refrained from endorsing a specific amendment before the Congress however. Instead we have suggested certain guidelines that we believe should be taken into account in formulating an amendment which gives a constitutional base for the protection of unborn human life. These guidelines state that a constitutional amendment should do four things:

1) Establish that the unborn child is a person under the law in terms of the Constitution from conception on.

2) The Constitution should express a commitment to the preservation of life to the maximum degree possible. The protection resulting therefrom should be universal.

3) The proposed amendment should give the states the power to enact enabling legislation and to provide for ancillary matters such as record keeping, etc.

4) The right to life is described in the Declaration of Independence as "inalienable" and as a right with which all men are endowed by the Creator. The amendment should restore the basic constitutional protection for this human right to the unborn child.

Now, as in 1976, considerable controversy has raged concerning the relative merits of various proposals for an amendment. In our 1976 testimony we recognized that not every proposal was equally consonant with all of our suggested guidelines; while arguing against a pure "states' rights" amendment as an ineffective measure for giving uniform protection to the unborn in the various states, we also recognized that some proposals granting legislative authority to Congress and the states to protect unborn human life were a significant improvement on the "states' rights" approach. Similarly, Sept. 22 of this year we expressed great interest in the new "human life federalism amendment" recently proposed by Sen. Hatch (R-Utah), which expressly overturns the right to abortion created by the Supreme Court in 1973 and gives concurrent power to Congress and the states to restrict and prohibit abortion.

As moral leaders we claim no special competence at legislative draftsmanship, and so we do not claim the expertise to comment at length on the advisability and effectiveness of specific formulations. Our own guidelines have always been offered as contributions to a dialogue in which the members of Congress were

considered as the appropriate agents for the actual drafting of an amendment to be presented to the state legislatures.

We take note of the fact that some recent testimony before this subcommittee indicates a possibility that the establishment of constitutional "personhood" may not be necessary at the present time for restoring effective legal protection to unborn children, and indeed that it could fail through judicial interpretation to provide effective protection. We expect that the members of the subcommittee will take expert testimony of this sort into account, and also that they will consider the political possibilities for ratification of the various proposals which confront them. Our own fundamental commitment, as stated in our 1975 pastoral plan, is to an amendment which will actually provide the maximum degree of protection for unborn human life that is possible.

Our appearance here today is an expression of our commitment to the American democratic process. We believe that this process was short-circuited in 1973, when the decisions of the Supreme Court overturned the abortion laws of every state in the union in its singleminded drive to promote its own policy on abortion. We urge our elected representatives in Congress to redress this injustice as soon as possible by restoring to our legal system the power to protect human life at every stage of its existence.

FOOTNOTES

¹ "The Status of Children, Youth and Families 1979," U.S. Department of Health and Human Services, DHHS Publication No. (OHDS) 80-30274, pp. 29-30.

² Bernard N. Nathanson, M.D., with Richard N. Ostling, *Aborting America* (Doubleday 1979). Especially see Chapters 16, 20 and 26.

³ Among the recent reports on such progress: "Successful Operation is Performed on Fetus," *The Washington Star*, July 27, 1981; "The Tiniest Patients: Surgery Before Birth," *San Francisco Examiner*, May 26-27, 1981; "Life of Baby Is Apparently Saved by Doses of Vitamin Before Birth," *The New York Times*, May 15, 1981; R.W. Smithells et al., "Possible Prevention of Neural-Tube Defects by Periconceptional Vitamin Supplementation," *The Lancet*, Feb. 16, 1980, pp. 339-340; Jason C. Birnholz, M.D., and Frederic D. Frigoletto, M.D., "Antenatal Treatment of Hydrocephalus," *The New England Journal of Medicine*, April 23, 1981, pp. 1021-23.

⁴ John C. Fletcher, Ph.D., "The Fetus as Patient: Ethical Issues," *The Journal of the American Medical Association*, Aug. 14, 1981, pp. 772-73.

⁵ This line of argument was proposed by Leon Rosenberg of Yale University in his April 24 testimony before the subcommittee on separation of powers of the

Senate Committee on the Judiciary. His approach has been embraced by Dr. George Ryan of the American College of Obstetricians and Gynecologists, whose remarks on the matter were given wide public circulation by syndicated Ann Landers columns for Sept. 7-8 of this year.

⁶ Editorial: "A New Ethic for Law and Society," *California Medicine*, Sept. 1970, p. 68.

⁷ *Gaudium et Spes*, 27.

⁸ *Ibid.*, 27.

⁹ Pope John Paul II, Homily at the Washington Mall, Oct. 7, 1979, in *Origins: NC Documentary Service*, Oct. 18, 1979.

¹⁰ Sacred Congregation for the Doctrine of the Faith, Declaration on Abortion (U.S. Catholic Conference 1975), 6-7 (pp. 3-4).

¹¹ See the references to Calvin, Thielicke, Barth, Bonhoeffer, etc., in John T. Noonan Jr., *A Private Choice: Abortion in America in the Seventies* (The Free Press 1979), pp. 59-61.

¹² See Dennis J. Horan et al., "The Legal Case for the Unborn Child," in Thomas W. Hilgers and Dennis J. Horan (eds.), *Abortion and Social Justice* (Sheed and Ward 1972), pp. 133-134.

¹³ See Noonan, *A Private Choice*, pp. 13-14, on the dichotomy between human beings and persons. On the

concept of "life devoid of value" and the Nazi euthanasia program: Robert A. Graham, S.J., "The 'Right to Kill' in the Third Reich: Prelude to Genocide," *The Catholic Historical Review*, January 1976, pp. 56-76; William Brennan, *Medical Holocausts, Volume I: Exterminative Medicine in Nazi Germany and Contemporary America* (Nordland Publishing International 1980), Chapter 3; Leo Alexander, M.D., "Medical Science Under Dictatorship," *The New England Journal of Medicine*, July 14, 1979, pp. 39-47.

¹⁴ See, *A Private Choice*, pp. 16-17.

¹⁵ *Roe v. Wade*, 410 U.S. 113 at 159 (1973).

¹⁶ *Doe v. Israel*, 358 F. Supp. 1197 (D.R.I., 1973). See *A Private Choice*, pp. 17-18.

¹⁷ In our 1976 testimony we cited criticisms of the abortion decisions by John Hart Ely, Alexander Bickel, Robert Byrn and Archibald Cox. In his new book, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1981), Professor Ely has restated his judgment that even a fairly "activist" viewpoint on judicial review fails to provide any warrant in the Constitution for *Roe v. Wade*. Liberal columnist Michael Kinsley recently voiced a growing consensus when he referred to the abortion decisions as "the one really indefensible case of judicial overreaching" in recent years (*The New Republic*, Oct. 18, 1980, p. 15).

On the Supreme Court's historical arguments, see: Joseph P. Witherspoon, "Impact of the Abortion Decisions Upon the Father's Role," *The Jurist* 1975, pp. 41-47; *idem.*, Testimony before the Senate subcommittee on separation of powers, June 10, 1981; Victor G. Rosenblum, Testimony before the Senate subcommittee on separation of powers, June 1, 1981. Professor Rosenblum's testimony has been reprinted by Americans United for Life as Number 11 of AUL Studies in Law and Medicine.

Recognition of the fact that the abortion decisions had no firm grounding in legal history began with the dissenting opinions of justices on the court itself. Referring to the majority opinion as "an exercise of raw judicial power," Justice White declared that "I find nothing in the language or history of the Constitution to support the court's judgment." Justice Rehnquist joined in this dissent and added his own, in which he noted that the court's imposing of specific limits on the states for each trimester of pregnancy "partakes more of judicial legislation than it does of a determination of the intent of the drafters of the 14th Amendment." See *Roe v. Wade* at 174; *Doe v. Bolton*, 410 U.S. 179 at 221-22 (1973).

¹⁸ *Roe v. Wade* at 136. See Dennis J. Horan and Thomas J. Marzen, "Abortion and Midwifery: A Footnote in Legal History," in Hilgers, Horan and Mall (eds.), *New Perspectives on Human Abortion* (University Publications of America 1981), pp. 199-204.

¹⁹ *Roe v. Wade* at 138.

²⁰ *Id.*, at 160-161. Philosophical speculations concerning "delayed ensoulment" have never been part of Catholic dogma. For a brief historical survey of the church's position, see John T. Noonan Jr., "An Almost Absolute Value in History," in Noonan (ed.), *The Morality of Abortion: Legal and Historical Perspectives* (Harvard University Press 1970), pp. 1-59. The most complete study on the history of Catholic thought on this subject up to 1950 can be found in John Connery, S.J., *Abortion: The Development of the Roman Catholic Perspective* (Loyola University Press 1977). Also see Declaration on Abortion, 7 (pp. 3-4).

²¹ *Roe v. Wade* at 141-142.

²² D.A. O'Donnell and W.L. Atlee, "Report on Criminal Abortion," *Transactions of the American Medical Association* 22 (1871), p. 250. A review of the AMA abortion statements of 1859 and 1871 can be found in Brennan, *Medical Holocausts*, pp. 25-34.

²³ The "treatment" in question, it should be noted, concerns only ecclesiastical penalties in canon law. The moral teaching of the church, as we have already noted above, has condemned abortion at every stage as a form of grave wrongdoing from the earliest years of the Christian era. The fiction that the church has changed its moral judgment of early abortions arises in part from a failure to understand the distinction between moral doctrine and canon law.

²⁴ *Roe v. Wade* at 160.

²⁵ *Id.*, at 157.

²⁶ See Witherspoon materials cited in note 17.

²⁷ See: Witherspoon, "Impact of the Abortion Decisions," pp. 42-45; James C. Mohr, *Abortion in America: The Origins and Evolution of National Policy, 1800-1900* (Oxford University Press 1978). Mohr notes on p. 200: "The anti-abortion policies sustained in the United States through the first two-thirds of the 20th century had their formal legislative origins, for the most part, in the wave of tough laws passed in the wake of the doctors' crusade and the public response their campaign evoked."

²⁸ Speech of Sen. Jacob Howard of Michigan, Congressional Globe, 39th Congress 1st Session (May 23, 1866), p. 2766. Cited in Witherspoon, "Impact of the Abortion Decisions," p. 47.

²⁹ See Declaration on Abortion, 10-14 (pp. 5-7).

³⁰ Pope John Paul II, Homily in Plaza del Campo, Siena, Sept. 14, 1980, cited in *L'Osservatore Romano* (English ed.), Sept. 22, 1980.

³¹ In 1978 researchers affiliated with the Alan Guttmacher Institute estimated that 1.3 million abortions had been performed in 1977 but that 550,000 women "in need" of abortions had been unable to obtain them ("Abortion in the United States, 1976-1977," *Family Planning Perspectives*, September-October 1978, p. 271). But early this year the same researchers reported that "although 1.5 million women obtained abortions in 1979, an estimated 641,000 in need were unable to do so, largely because of the problems of geographical and financial inaccessibility" ("Abortion in the United States, 1978-1979," *Family Planning Perspectives*, January-February 1981, p. 6).

According to the Washington Post Oct. 21, 1981, the current issue of *Family Planning Perspectives* reports that the women in "need" of an abortion would number about 450,000 even if every woman in the U.S. used the most effective but most dangerous contraceptive devices.

³² See Lynne McTaggart, "The Breakthrough That Backfired," *New York Sunday News Magazine*, Feb. 8, 1981.

³³ See Hadley Arkes, *The Philosopher in the City: The Moral Dimensions of Urban Politics* (Princeton University Press 1981), p. 437. Arkes observes that when investigative reporters from the Chicago Sun Times began to uncover abuses at several legal abortion clinics in Chicago, "the investigators brought in reports of 12 deaths that were attributable to four abortion clinics in their sample. Those deaths, which were uncovered in only four clinics, amounted to nearly half of the deaths that were reported officially for abortion in the nation as a whole. And if, as we suspect, the experience in Chicago can find a modest replication in New York, Detroit, Los Angeles and other cities, the total deaths due to legal abortion may now exceed the number of deaths that were thought to occur each year as a result of illegal abortions."

³⁴ See Documentation on Abortion and the Right to Life, Vol. II (Testimony of U.S. Catholic Conference before the House subcommittee on civil and Constitutional rights, March 24, 1976) (USCC 1976), p. 10.

³⁵ Denis Cavanaugh, letter in *American Journal of Obstetrics and Gynecology*, Feb. 1, 1978.

³⁶ "Abortion-Related Mortality — United States, 1977," *Morbidity and Mortality Weekly Report* (Center for Disease Control), July 6, 1979, pp. 301-4.

³⁷ See Declaration on Abortion, 19-20 (pp. 8-9).

³⁸ "Several States Showing Significant Decreases in Infant Mortality," *Ob.-Gyn. News*, Jan. 15, 1981. The remarkable advances reported here for the states of South Dakota, Florida and Alabama are attributed to better prenatal medical and nutritional care, educational programs for pregnant women and the development of regionalized care networks.

³⁹ The District of Columbia has a higher abortion rate than any state in the union, estimated at 173.4 per 1,000 women aged 15-44 in 1978. This is more than six times the national average. See "Abortion in the United States, 1978-1979," *op. cit.*, pp. 10-11. The mayor of the District of Columbia has called its high infant mortality rate its "Number One health problem." See "City Infant Mortality Rate Rises," *The Washington Post*, June 17, 1981.

⁴⁰ See Levin et al., "Association of Induced Abortion With Subsequent Pregnancy Loss," *The Journal of the American Medical Association*, June 27, 1980, pp. 2495-99. Thirty-four percent of the women who obtained abortions in the District of Columbia in 1978 had obtained one or more previous abortions. This is the highest repeat abortion rate in the country, the national average being 29 percent. *Abortion Surveillance: Annual Summary 1978* (Center for Disease Control, U.S. Dept. of Health and Human Services 1979), p. 4.

⁴¹ Philip G. Ney, M.D., "Infant Abortion and Child Abuse: Cause and Effect," in David Mall and Walter F. Watts, M.D. (eds.), *The Psychological Aspects of Abortion* (University Publications of America 1979), pp. 25-38.

⁴² See "The Impact of Abortion" (Intervention by Cardinal Terence Cooke of New York at the 1980 Synod of Bishops), *Origins*, Oct. 16, 1980, pp. 283-85.

⁴³ Our most eminent national authority on the problem of child abuse had already emphasized this eight years ago and predicted that the aborting of the "unwanted child" would fail to solve the problem. See Vincent J. Fontana, M.D., *Somewhere a Child Is Crying* (MacMillan 1973), pp. 239-43.

⁴⁴ Matt Clark et al., "When Doctors Play God," *Newsweek*, Aug. 31, 1981, p. 48.

⁴⁵ In our 1976 testimony we noted the scandal caused by reports that handicapped newborns had been deprived of life-saving surgery at some hospitals simply because they were mentally retarded. Now newspapers report that physicians at some intensive-care nurseries have actually been giving lethal drug overdoses to such newborns. See Diane Brozek, "Let My Baby Die," *The Pittsburgh Press*, June 29, 1981. The candor with which physicians are willing to discuss the advisability of voluntary euthanasia or "assisted suicide" seems to be increasing. See: Dan Cryer, "Suicide and Euthanasia: Christian Barnard tackles controversial subjects," *The Boston Globe*, April 16, 1981; editorial, "Overdose —

Will Psychiatrist Please See?" *The Lancet*, Jan. 24, 1981.

⁴⁶ Seymour M. Glick, "Humanistic Medicine in a Modern Age," *The New England Journal of Medicine*, April 23, 1981, pp. 1036-38.

⁴⁷ "Plan Your Children for Health and Happiness," *Planned Parenthood Federation of America pamphlet*, 1963.

⁴⁸ Alan Guttmacher Institute, *Teenage Pregnancy: The Problem That Hasn't Gone Away* (New York 1981).

⁴⁹ See the articles on government funding of family planning services in the May-June 1981 issue of *Family Planning Perspectives*, and articles on government funding of abortion in the May-June 1980 issue, as well as the conclusions of *Teenage Pregnancy: The Problem That Hasn't Gone Away*.

⁵⁰ At the fourth annual meeting of the National Abortion Federation, May 28-30, 1980, at the Hyatt Regency Hotel in Washington, D.C., a talk by Jane Hodgson included the rhetorical question: "Does freedom of choice really apply to the very young? Should we sit quietly by and allow our 12-year-olds, and our 11-year-olds, possibly 10-year-olds, to make a choice which is far more harmful to her, to society and to the ensuing generation? Shouldn't we...mandate against continuing pregnancy in the very young, say, those less than 14 years?" Her proposal was later endorsed by another speaker, Lonnie Meyers, who claimed that "it's time we had the guts to say that 14 is too young to have a baby." See Andrew Scholberg, "The Abortionists and Planned Parenthood: Familiar Bedfellows," *International Review of Natural Family Planning*, Winter 1980, p. 299.

⁵¹ See: Sister Paula Vandegaer, SSS, *Teenagers and Sexuality* (NCCB Committee for Pro-Life Activities 1981); "Abortion and Teenage Pregnancy," in *Respect Life!* (NCCB Committee for Pro-Life Activities 1977-78), pp. 16-21.

⁵² See: "Teens, Parents, Officials Don't Agree on Impact of Teen Motherhood," *Family Planning Perspectives*, March-April 1981, pp. 81-82; Jeanne Marecek and Eugenie Flaherty, "Correlates of Teenagers' Contraceptive Use" (Study presented at the American Psychological Association convention September 1980). The Marecek-Flaherty study was announced in *Ob.-Gyn. News* Jan. 1, 1981.

⁵³ Colautti v. Franklin, 439 U.S. 379 (1979). The court's finding puzzled many observers, who thought that *Roe v. Wade* had placed severe restrictions on abortions performed after the point of "viability"; but even in 1973 the court had ruled that a postviability abortion could be performed for "health" reasons, and had interpreted "health" so broadly that temporary financial or emotional distress was sufficiently serious justification for an abortion in the final stages of pregnancy. In their Philadelphia Inquirer article "Abortion: The Dreaded Complication" (Aug. 2, 1981), Liz Jeffries and Rick Edmonds report that the problem of dealing with a child born alive during an abortion now arises hundreds of times a year in the U.S.

⁵⁴ *In re Eichner*, AD 2d, 637E, March 28, 1980 (Supreme Court: Appellate Division Second Department) at 43.

⁵⁵ "Wrongful life" suits are predicated on the idea that a handicapped child's very existence is a "wrong" for which monetary damages can be assessed. In its 1980 ruling in *Curlender v. Bio-Science Laboratories* the California Supreme Court suggested that a handicapped child should be able to sue her own parents for not having aborted her. In the same state, however, the courts denied the right of Phillip Becker, a child with Down's syndrome, to have surgery which could save his life but which is opposed by his parents. The parents had argued that they do not wish Phillip to outlive them because they are afraid of the quality of life of which he would be capable. The Supreme Court has refused to hear an appeal from this decision (*Bothman v. Warren B.*, No. 79-698; denial of cert. March 31, 1980). Another family has tried to gain temporary custody of Phillip in order to allow him the medical care he needs, but his condition may already have advanced too far for the surgery to be of help. See: George F. Will, "A Trip Toward Death," *Newsweek*, Aug. 31, 1981, p. 72; Peter J. Riga, "Phillip Becker: Another Milestone," *America*, July 12, 1980, pp. 8-9.

⁵⁶ 428 U.S. 52 at 69 (1976).

⁵⁷ The most important cases dealing with this question are *Bellotti v. Baird*, 443 U.S. 622 (1979), and *H.L. v. Matheson*, 101 S. Ct. 1164 (1981). See the analysis by Noonan, *A Private Choice*, pp. 90-95.

⁵⁸ U.N. Declaration on Human Rights, cited by

Cardinal Terence Cooke in "The Impact of Abortion," p. 284.

⁵⁹ See the analysis by Noonan, *A Private Choice*, pp. 83-86. This problem was mentioned by the Sacred Congregation for the Doctrine of the Faith in 1974, when it declared inadmissible a situation in which doctors or nurses would have to choose between the law of God and their professional situation: Declaration on Abortion, 22 (p.9).

⁶⁰ This principle has recently been affirmed in *Kenny v. Ambulatory Centre of Miami*, 400 So. 2d 1262 (Fla. Ct. App. 1981). Here it was implied that the need to rearrange schedules substantially in order to respect a nurse's refusal to cooperate in abortions might have been considered as "undue hardship." The lower court had ruled against the nurse without seeing evidence of any hardships of this kind.

⁶¹ The NCCB has filed suit against federal guidelines which could force certain employers, including the U.S. Catholic Conference, to provide abortion benefits through employees' health insurance plans and fringe benefit programs: *NCCB v. Bell*, U.S. District Court for the District of Columbia (Filed 1980). For comments on the threat to First Amendment rights involved in such guidelines, see George F. Will, "Trivializing Abortion," *The Washington Post*, Aug. 19, 1979.

⁶² Paul Ramsey has discussed this aspect of the *Eichner* case in his article "Two-Step Fantastic: The Continuing Case of Brother Fox," *Theological Studies*, March 1981, pp. 122-34. Other cases of this sort include: *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728 (1977); *In re Earl Spring*, No. F-2030, Mass., May 13, 1980. In its ruling *In re Grady* (Feb. 18, 1981), the New Jersey Supreme Court cited the famed Karen Quinlan case to uphold a right to sterilization as an exercise of the constitutional right to privacy. The court suggested that this right can override the state's interest in preserving a patient's life, and that only the courts can exercise such a right on behalf of a mentally incompetent patient.

⁶³ In the *Spring* case, the lower courts (probate and appeals) had ordered that Spring's attending physician, along with his wife and son, should make the decision as to whether life-prolonging treatment would be continued. The state supreme court overruled these decisions, claiming that "we disapprove shifting of the ultimate decision-making responsibility away from the duly established courts of proper jurisdiction." The court argued that it would be forsaking its own responsibilities if it tried "to delegate its resolution to some private person or group."

⁶⁴ Both *Saikewicz* and *Spring* were cited as precedents by the Massachusetts Supreme Court Feb. 17, 1981, when it ruled that the state of Massachusetts is required to subsidize elective abortions with public funds (*Moe v. Secretary of Administration and Finance*). Interpreted through these cases, the state constitution was said to provide more stringent requirements for actively supporting the pregnant woman's right to an abortion

than are found in the U.S. Constitution. Similar chains of reasoning have been used by courts in California and Pennsylvania to mandate public funding of abortion in those states.

Court involvement in ordering abortions for mentally incompetent patients seems to be increasing. Justice Warren Burger recently refused to block an abortion ordered by the court-appointed guardian of a woman in a semicatatonic state, despite the fact that no evidence had been presented on a medical need for the abortion. The woman in question had been fully competent earlier in her pregnancy and had not sought an abortion (see "Justice Refuses to Bar Abortion for Sick Woman," NC News Service, March 19, 1981). In California, a court-appointed conservator almost succeeded in ordering an abortion for an unwilling 38-year-old mental patient, although all three of her sisters were adamantly opposed to the abortion and were all willing to adopt the child even if born with congenital defects. Superior Court Judge Bob Krug denied the petition for an abortion on the basis of medical risks involved in performing a second-trimester abortion, without denying that the conservator had the right to petition the court for an abortion against the wishes of the patient and her family (see Mary Sanchez, "Petition to Do Abortion on Mental Patient Denied," NC News Service, March 26, 1981).

⁶⁵ Documentation on the Right to Life and Abortion, Vol. I (Testimony of USCC before the Senate subcommittee on constitutional amendments, March 7, 1974) (USCC 1974), pp. 2-3.

⁶⁶ At its 1979 national convention, the Lutheran Church-Missouri Synod approved a resolution which condemns abortion, urges its members to help secure legal protection for the defenseless unborn child and supports efforts to enact a human life amendment to the U.S. Constitution. The American Lutheran Church, which issued a statement in support of legalized abortion in 1974, approved a statement of judgment and conviction at its 1980 national convention which rejects "the practice in which abortion is used for personally convenient or selfish reasons," recognizes that "an induced abortion ends a unique human life" and "deplores the alarming increase of induced abortions since the 1973 Supreme Court decisions." See the newsletter of Lutherans for Life, December 1980 and February 1981. The Southern Baptist Convention, the nation's largest Protestant body with 13.4 million members, approved a condemnation of abortion at its 1980 annual meeting which includes a call for a human life amendment banning abortion "except to save the life of the mother" (NC News Service, June 13, 1980).

⁶⁷ In addition to the works cited elsewhere in this testimony by Noonan, Witherspoon, Rosenblum, etc., see: Joseph M. Boyle, "That the Fetus Should Be Considered a Legal Person," *The American Journal of Jurisprudence* 1979, pp. 59-71; chapters on legal, social and philosophical aspects of abortion in Hilgers, Horan and Mall (eds.), *New Perspectives on Human Abortion*.

⁶⁸ Nathanson, *Aborting America*, Chapter 23.

⁶⁹ Groups such as Democrats for Life, Libertarians for Life, Feminists for Life and Pro-Lifers for Survival (a group opposed to abortion and nuclear arms) have helped to belie the stereotypes that opposition to abortion is only a "conservative" phenomenon. See Mary Meehan's brief survey of some of these groups in "The Other Right to Lifers," *America*, Jan. 18, 1980.

⁷⁰ *McRae v. Harris*, 100 S. Ct. 2671 at 2689 (1980).

⁷¹ This has been the consistent finding of four Gallup Polls taken over the last six years. See "Views on Abortion Show Little Change," *The Washington Post*, Aug. 27, 1980.

⁷² The most recent ABC News-Washington Post poll on abortion (Survey 34, aired June 8, 1981) shows 50 percent of men and only 42 percent of women favoring the goals of the "pro-choice" movement; 36 percent of women favored unrestricted abortion, compared with 45 percent of men. Nearly a third of the people strongly opposing legalized abortion make under \$12,000 a year, with only 10 percent making \$30,000 or more, and nearly one-quarter are black, whereas more than a quarter of those favoring legalized abortion make \$30,000 a year or more. Similar results were obtained by the Connecticut Mutual Life Insurance Company when it conducted a survey on American values in the '80s: 65 percent of all Americans considered abortion as morally wrong, but opposition was stronger among women, racial minorities and the poor. The ABC News-Washington Post poll showed 71 percent support for the idea that "a fetus becomes a human being" either at conception or at some point in the first trimester; only 11 percent of those polled thought that one "becomes a human being" at birth.

⁷³ Judith Blake and Jorge H. del Pinal, "Negativism, Equivocation, and Wobbly Assent: Public 'Support' for the Pro-choice Platform on Abortion," *Demography*, August 1981, pp. 309-320.

⁷⁴ See John T. Noonan Jr., "Abortion in Our Culture" (NCCB Committee for Pro-Life Activities 1980).

⁷⁵ John Courtney Murray, *We Hold These Truths* (Sheed and Ward 1960), pp. viii-ix.

⁷⁶ This has already been suggested by the testimony given by Dr. Leon Rosenberg before the Senate subcommittee on separation of powers earlier this year (see note 5). "Some say that life begins at conception," noted Dr. Rosenberg, "but others say that life begins when brain function appears, or when the heart beats, or when a recognizable human form exists in miniature, or when the fetus can survive outside the uterus, or when brain development is completed at two years of age." Any of these would be equally valid points for beginning to protect life, he claimed. Presumably, under the last-mentioned of these standards, some mentally retarded human beings would never become "persons" at all.