

**Testimony of
United States Catholic Conference
on
Constitutional Amendments Protecting
Unborn Human Life
before the
Subcommittee on Civil and Constitutional Rights
of the
House Committee on the Judiciary**

March 24, 1976

Introduction

The National Conference of Catholic Bishops, at its annual meeting in November 1975, issued a Pastoral Plan for Pro-Life Activities. This Pastoral Plan summarized many of the specific statements of the NCCB during the past ten years, and it provides a specific context in which we situate our present testimony. The Pastoral Plan embraces a three-fold program of respect for human life that is, in effect, the working policy of our Conference, and which we summarize briefly here as the backdrop of this testimony.

1. Educational

The educational goals to which the American Bishops have committed themselves are multi-faceted, but a central purpose of the long-range, intensive educational effort is to emphasize that the life of an individual human being exists and develops in the womb throughout the entire course of pregnancy. We are persuaded that there is abundant scientific consensus that from conception on, an individual human life exists, and we believe that each individual human life merits acceptance and support by society and protection in law. Moreover, we are convinced that the law need not settle debates about the philosophic understanding of personhood, but that it can and should treat the human fetus as a legal person, thereby insuring legal protection of the fetus' continued right to life and development in the womb.

2. Pastoral Care

A second facet of our Pastoral Plan has to do with assisting the mother and child during and after pregnancy. The tasks of motherhood are not all accomplished with birth; and needs for maternal health and child care extend in varying degrees from

conception through infancy and childhood. Thus, a wide range of services and programs should be available in our society. Government has a legitimate role in authorizing and sponsoring such programs, and the Church also will continue to provide such services and programs to the fullest possible measure. Such programs and services include:

- Adequate education and material sustenance for women so that they may choose motherhood responsibly and freely in accord with a basic commitment to the sanctity of life.
- Nutritional, pre-natal, childbirth and post-natal care for the mother, and nutritional and pediatric care for the child, throughout the first year of life.
- Intensified scientific investigation into the causes and cures of maternal disease and/or fetal abnormality.
- Continued development of genetic counseling and gene therapy centers and neo-natal intensive care facilities.
- Extension of adoption and foster care facilities to those who need them.
- Pregnancy counseling centers that provide advice, encouragement and support for every woman who faces difficulties related to pregnancy.
- Counseling services and opportunities for continuation of education for unwed mothers.
- Special understanding, encouragement and support for victims of rape.
- Continued efforts to remove the social stigma that is visited on the woman who is pregnant out of wedlock and on her child.

3. Public Activity

The third aspect of the *Pastoral Plan* urges appropriate public activity to attain legislative and judicial goals. These goals are:

- Passage of a constitutional amendment providing protection for the unborn child to the maximum degree possible.
- Passage of federal and state laws and adoption of administrative policies that will restrict the practice of abortion as much as possible.
- Continual research into and refinement and precise interpretation of *Roe* and *Doe* and subsequent court decisions.
- Support for legislation that provides alternatives to abortion.

Consistent with these purposes, but as a specific effort in behalf of the public policy aspect of the *Pastoral Plan*, we have requested the opportunity to appear before this Subcommittee and testify in support of an amendment to the Constitution that will

provide the constitutional base for a legal structure that protects the life of the unborn child as he or she develops in the womb of his or her mother.

Other members of the National Conference of Catholic Bishops testified before the Senate Subcommittee on Constitutional Amendments on March 7, 1974. Our testimony today is based on and elaborates on that testimony. We herewith submit and ask that it be made a part of the Record of this hearing.

In the intervening two years since the testimony before the Senate Subcommittee, a number of events have taken place which heighten our moral responsibility to continue to oppose the current situation of abortion on request generated by the U.S. Supreme Court's opinions in *Roe v. Wade* and *Doe v. Bolton*, and to increase our efforts to help bring about an amendment to the Constitution that will provide for the protection of unborn human life.

Opposition to abortion is not an exclusively Catholic concern, and efforts to amend the Constitution, to be successful, depend on a widespread consensus and support throughout the society. We believe that that consensus and support are growing, and we are intent on providing every, reasonable assistance to its continued development and expansion. Among the reasons persuading us that a public consensus is developing is the fact that public opposition to abortion on request has been evident for over 15 years and has prevailed even after the U.S. Supreme Court opinions in *Roe* and *Doe*.¹ Moreover, in a poll taken by De Vries Associates and released in February, 1975, it was clear that the majority of Americans, given the choice, would choose another course of action than the one offered by *Roe* and *Doe*. This same poll indicated that the more that people learn about fetal development, the more cautious they become about legal policies, and thus they lean increasingly toward laws that restrict the practice of abortion.

A second reason persuading us of the reasonableness of amending the Constitution is that we find increasing opposition to the substance and the legal methodology of *Roe* and *Doe* among scholars of the law. This opposition by legal scholars, including some who would favor a permissive legal policy, correlates with the public perception that *Roe* and *Doe* remain an inadequate and unacceptable solution to abortion law in our country.²

Admittedly, though public attitudes and scholarly reflections correlate to some degree with our position on public policy, we do not appear here today as representatives of all the people nor as legal specialists. We appear on behalf of the United States Catholic Conference, representing the Catholic faith community. We also appear in fulfillment of our role as moral leaders in this society, articulating convictions regarding human dignity and human rights that are shared by other religious groups

and by persons of no particular religious persuasion. We are convinced that the traditional beliefs and commitments in behalf of human dignity and human rights, expressed in the United Nations Declaration of Human Rights and our own Declaration of Independence and Constitution, provide the basis for a widespread societal consensus in defense of the right to life of unborn human beings. Thus, in our testimony today, we wish to focus on the following points as evidence of the breakdown of commitment to human rights, particularly the right to life, and as reasons in favor of an amendment to the Constitution that will protect human life at every state of existence:

I. The Law and the Incidence of Abortion.

II. Social Implications of Permissive Abortion.

III. Threats to Children from the Existing Situation of Abortion on Request.

IV. The Impact of *Roe* and *Doe* on American Life.

V. The Right to Life and Religious Freedom.

I. The Law and the Incidence of Abortion

The process of granting increased legal approval to the practice of abortion began in 1967 when the states of California, Colorado and North Carolina enacted laws modeled on the American Law Institute (ALI) proposal (abortion is allowable if it is believed that there would be grave impairment to the physical or mental health of the mother, or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape or incest).³ In 1968 and 1969 seven more states enacted ALI type laws: Georgia, Maryland, Arkansas, Delaware, Kansas, New Mexico, and Oregon.⁴

As one would expect, legalization leads to an increased incidence of legally induced abortion, though the extent of the response varies from one cultural context to another.

It is estimated that prior to the legalization process that began in 1967, approximately 8,000 legal abortions were being performed each year in the United States.⁵ For 1969, the first year for which national figures are available, the HEW Center for Disease Control (CDC) in Atlanta reported that 22,670 legal abortions were performed.

Before the U.S. Supreme Court radically altered legal abortion policy for the states through its abortion decisions of January 22, 1973, an additional three states were to choose to enact laws based on the ALI model -- South Carolina and Virginia in 1970 and Florida in 1972. A total of thirteen states opted for this moderately restrictive policy.

In 1970, a new legal phenomenon appeared in the United States: abortion on request. The thrust of this new legal policy was to remove the practice of abortion from the specific contexts that are normally associated with law and medicine. Four states adopted laws of this type: Alaska, Hawaii, New York and Washington. In some jurisdictions the courts interpreted the traditional laws designed to safeguard the welfare of the mother in a permissive fashion⁷ or they declared such laws unconstitutional.⁸ Elsewhere, a permissive climate engendered by the new policy of non-regulation led to the de facto interpretation of moderate ALI type laws as allowing abortion on requests.

The legal fact of abortion on request and the permissive spirit that it represents became the primary factors in the massive increase in the incidence of legal abortion that began in 1970.

As the figures in Table 1 indicate, the increases for the years 1970 and 1971 represent the largest increases to date, both relatively and absolutely. The numbers jump from some 22,600 in 1969 to 485,600 in 1971.

Table 1
Incidence of Legal Abortion
1969-74*

	1969	1970	1971	1972	1973	1974	1975
Total No. of Abortions	22,670	193,491	485,816	586,760	615,831 ¹	764,476 ¹	NA
National Abortion Ratio (Abortions per 1,000 live births)	6.3	52.0	136.0	180.1	195.1	242.0	NA

* These figures are taken from Center for Disease Control: *Abortion Surveillance: 1973*, issued May, 1975, Table 1: Center for Disease Control: *Abortion Surveillance: 1974* (in press).

¹ A private survey determined that at least 745,000 legal abortions were performed in 1973. See Edward Weinstock, Christopher Tietze, Frederick S. Jaffe, and Joy D. Dryfoos, "Legal Abortion in the United States Since the 1973 Supreme Court Decisions," *Family Planning Perspectives*, Vol. 7 (Jan./ Feb., 1975), 23-31. In a follow-up study the underreporting range for this survey was eventually set at a possible 14% (originally it was set at 5 to 10%). On this basis the actual figure for 1973 would be closer to 850,000. Christopher Tietze,

Frederick S. Jaffe, Edward Weinstock, and Joy D. Dryfoos. *Provisional Estimates of Abortion Need and Services in the Year Following the 1973 Supreme Court Decisions: United States, Each State and Metropolitan Area* (NY: Planned Parenthood of America, 1975), 74-76. A Projected estimate for 1974 would be in excess of one million. The follow-up study set the national abortion ratio for 1973 at 238. (Table J).

The relatively small increase in the CDC figures from 1972 to 1973 may reflect the fact that the various state health departments were not prepared to perform the surveillance task created by the sudden entry of a non-restrictive abortion policy. "For this reason, the number of reported abortions (615,831) was probably far less than the actual number performed." Willard Cates, Jr. and Jack C. Smith, "Abortion Survey." *Family Planning Perspectives*, Vol. 7 (Mar./April, 1975), 50.

With the onset of abortion on request a full national debate was begun on the merits of such a policy. The general reaction of the American people was negative. After 1970 no further states enacted abortion on request laws, and only one state enacted a comparatively restrictive ALI type law. In 1972 the New York legislature repealed the abortion on request law that it had passed in 1970.¹⁰ The potential import of this action is highlighted by the fact that in 1971 and 1972 the state of New York accounted, respectively, for 55% and 51% of all abortions performed in the United States.¹¹

One of the events that helped launch the national abortion debate in 1970 was a referendum in the state of Washington. At that time, the Washington voters opted for an abortion on request law by the margin of 54% to 46%. In 1972 two additional referenda were planned in the states of Michigan and North Dakota as a way of resolving the now highly developed political debate. Pro-abortion advocates predicted a major victory in Michigan with 61% of the vote. It was conceded by abortion proponents that the Michigan vote had the potential of deciding the future of the abortion movement.¹²

The results were overwhelming. The referenda proposals were firmly rejected by the voters in each state, in Michigan by a margin of 61 % to 39%, and in North Dakota by the even higher margin of 77% to 23%.

The negative reaction of the American people to abortion on request was not unexpected. An analysis of the major public opinion polls of the preceding decade revealed that nearly 80% of the American people were opposed to the concept of permissive or elective abortion.¹³ In her 1971 analysis, Professor Judith Blake concluded that the Supreme Court was "the only road to rapid change" in legal policy.

On January 22, 1973, the U.S. Supreme Court issued its opinions holding the laws of Texas and Georgia unconstitutional, thereby effectively negating the laws of nearly all the other states. In general terms the Court determined the constitutionally

permissible elements of any state abortion law. The legislative policy envisioned by the Court was more permissive than any then in effect in any of the various states, and probably more permissive than any in the world.¹⁴ In so deciding, the Court removed from the people and the state legislatures the right to debate and resolve the basic issues inherent in the abortion controversy. As Justice White stated in his dissenting opinion: "the upshot (of the Court's action) is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus on the one hand against a spectrum of possible impacts on the mother on the other hand" (emphasis added).¹⁵ Subsequently, Justice Blackmun, who wrote the main opinion for the Court, publicly expressed the view that the Court may have decided its abortion rulings too precipitously and without sufficient thought.¹⁶

It is generally assumed that some one million legal abortions are now being performed each year in the United States.¹⁷ When a permissive abortion policy is introduced into a country, worldwide experience shows that the incidence of legal abortion climbs rapidly and after several years peaks out at a top figure (which generally declines slightly thereafter).¹⁸ One study postulates that in addition to the estimated 745,000-850,000 women who obtained abortions in 1973 there were another 500,000 to one million women who were potential abortion recipients.¹⁹ Specific predictions about future fertility trends are necessarily tentative and hypothetical. One study suggested that if legal restrictions were removed from abortion in the early 1970s, it would be expected that in five to ten years a peak ratio of 500 abortions per 1,000 live births would be reached in the United States (this ratio would yield approximately 2.4 million legal abortions in 1980).²⁰

The Occurrence of Illegal Abortion

By definition illegal abortion represents an unknown quantity. It cannot be objectively observed nor is it systematically recorded. Knowledge about the incidence of illegal abortion is generally derived by way of inference from other known facts.²¹

When the first efforts to relax United States abortion laws were being made, a committee of statistical experts reported that "a plausible estimate of the frequency of induced abortion in the United States could be as low as 200,000 and as high as 1,200,000 per year....There is no objective basis for the selection of a particular figure between these two estimates as an approximation of the actual frequency."²² Despite such warnings the figure of one million or more illegal abortions per year was often used in the public debate.

Since the practice of legal abortion has become widespread, some inferences have been made with respect to the incidence of illegal abortion, but the general assumption stands that personal opinion remains a significant factor in specific estimates.

Worldwide experience shows that legalization of abortion does not eliminate the practice of illegal abortion.²³ Septic abortion patients are still being admitted to U.S. hospitals.²⁴ A few studies exist on the admission of septic abortion patients to particular hospitals. The most carefully constructed study to date revealed that there was no decline in admissions of patients who had undergone illegal abortions until the abortion ratio for the hospital had climbed to a high of 227 abortions per 1,000 live births.²⁵ Nonetheless, when the abortion ratio had climbed even higher to 356, septic abortion patients who had undergone illegal abortions were still being admitted.²⁶ One authority commented: "The data indicate that at least among medically indigent groups legal abortion may not be used exclusively as a replacement for illegal abortion and that the availability of legal abortion must be very broad indeed to undercut the use of criminal means" (emphasis added).²⁷

It is generally assumed that a broadly permissive legal policy leads to an overall increase in the incidence of abortion. There is no agreement as to specific measure of increase, but the increase is significant.²⁸ When a permissive legal policy is adopted, there will be women who would not have obtained illegal abortions but will now obtain legal ones.²⁹

Despite the current high incidence of one million legal abortions per year, a recent study has carefully analyzed population groups and geographical areas that it considers in need of abortion. Retrospectively, the unmet "need" for 1973 was placed in the high/low range of 42/59%.³⁰ There is no reason why the percentage of "need" would not increase as the practice of abortion becomes more factually widespread.

Thus, the claim that legal abortions simply replace illegal ones is misleading. The legal approval of abortion encourages new people to obtain legal abortions, and perhaps illegal ones also.³¹

The suggestion is made that proper public education will remove the sense of shame that has been associated with abortion in the past. The incorrect assumption here is that the moral repugnance that people feel in the presence of abortion is simply the result of cultural conditioning. Abortion is a shameful act because it involves the ever present factual reality of agreeing to the destruction of one's own offspring. No amount of "education" can change this fact and the natural shame it evokes.

The extent to which septic abortion has risen or declined over the years is problematical. However, the associated phenomenon of abortion-related maternal

mortality has exhibited a steady dramatic decline for the last several decades (see Table 2).³² This decline occurred while a restrictive abortion policy was in effect and while the size of the population at risk was increasing.³³ The decline in abortion-related maternal mortality generally parallels the decline in maternal deaths from all other causes. For this reason it is assumed that improvements in health care and health care delivery are responsible for the decline. It is reasonable to assume, then, that the problem of septic abortion could also be substantially reduced by means of the direct, positive efforts involved in improved health care.

An abortion, whether induced legally or illegally, is an immoral act. The resulting losses in life to unborn children and the losses in life and health to mothers and the future children they may bear are evils that society should oppose. These losses should be reduced as much as possible.

First, legal restrictions should be placed on the practice of abortion. The overall incidence of abortion and the attendant losses would be significantly reduced. The law would then cease to teach and thus encourage individuals to seek abortions, whether legal or illegal.³⁴ On the contrary, the law would lay a foundation for a more positive and humane approach to the problems of pregnancy, including the dangers to the life and health of born and unborn that legal and illegal abortions represent.

Second, the legal approval of abortion on request clearly represents an overly broad response to the specific problem of illegally induced septic abortions. More study is needed on the phenomenon of illegal septic abortion. However, a moral, sane, and humanitarian response to this problem would include better education about health care for both the mother and her unborn child; improved medical and hospital care for the septic abortion patient; and the establishment of counseling and advisory centers for pregnant women, especially in areas identified as high risk for septic abortions.³⁵

II. Social Implications of Permissive Abortion

Legal Abortion as a Social Right

The freedom of no person, man or woman, can be absolute, or social life will not be possible. If the concept of a woman's freedom essentially requires that she have the right to destroy the life of her unborn child, then that concept of freedom is brutal and unworthy. A genuine personal freedom must begin by recognizing and respecting the natural human relationships that already exist.

Freedom cannot be freedom from responsibility and personal relationships. Freedom is impossible without personal relationships. Freedom flows from responsible action.

The middle class and the rich in our society have a greater freedom in their choices about health care than do the poor. The poor depend most heavily on the services that the government provides. It is a sad commentary on our society that the poor and minorities obtain a higher percentage of legal abortions than is appropriate to their representation in the general population. The poor and minorities are targeted as population groups that should receive more abortions than others.³⁶ An elitist attitude that is patronizing and sometimes punitive decides that abortion is good enough for the poor. The underlying concept is that abortions are cheaper than other health services associated with childbearing and child rearing. The factual result is that the poor and minorities, who necessarily depend on the government for health services, will be automatically subjected to a coercive pressure to accept abortion as a practical choice.

The poor and minorities possess human dignity equal to that of other human beings. Government funding of abortion as an alternative to normal health care constitutes a betrayal of the trust that should exist between a government and the people it was established to serve and protect. Poor women and their unborn children have done nothing to merit the destruction that government policy offers to them.

**Table 2. Maternal Mortality: Vital Statistics
Of the United States, 1942-1974***

Year	Total Abortion Deaths			Other Maternal Deaths			Total Maternal Deaths		
	White	Non-White	Total	White	Non-White	Total	White	Non-White	Total
1942	917	314	1,231	4,598	1,438	6,036	5,515	1,752	7,267
1943	853	312	1,165	4,610	1,422	6,032	5,463	1,734	7,197
1944	695	201	986	3,953	1,421	5,473	4,468	1,622	6,369
1945	602	286	888	3,520	1,260	4,780	4,122	1,546	5,668
1946	535	225	760	3,272	1,121	4,493	3,807	1,346	5,253
1947	385	200	585	3,170	1,223	4,393	3,555	1,423	4,978
1948	321	175	496	2,432	1,194	3,626	2,753	1,369	4,122
1949	236	158	394	1,863	959	2,822	2,099	1,117	3,216
1950	193	123	316	1,680	964	2,644	1,873	1,087	2,960
1951	170	133	303	1,608	901	2,509	1,778	1,034	2,812
1952	196	124	320	1,428	862	2,290	1,624	986	2,610
1953	162	132	294	1,317	774	2,091	1,479	906	2,385
1954	156	131	287	1,124	694	1,818	1,280	825	2,105
1955	150	116	266	984	651	1,635	1,134	767	1,901

1956	138	83	221	880	601	1,481	1,081	684	1,702
1957	126	134	260	871	615	1,486	997	749	1,746
1958	136	123	259	802	520	1,322	938	643	1,581
1959	138	146	284	789	515	1,304	927	661	1,588
1960	147	142	289	789	501	1,290	936	643	1,579
1961	163	161	324	734	515	1,249	897	676	1,573
1962 ¹	149	148	305	658	467	1,160	807	615	1,465
1963 ¹	161	107	280	636	512	1,186	797	619	1,466
1964	117	130	247	634	462	1,096	751	592	1,343
1965	106	129	235	550	404	954	656	533	1,189
1966	96	93	189	509	351	860	605	444	1,049
1967	76	84	160	495	332	827	571	416	987
1968	58	75	133	426	300	726	484	375	859
1969	65	67	132	398	271	669	463	338	801
1970	57	71	128	388	287	675	445	358	803
1971	43	56	99	337	232	569	380	288	668
1972	38	32	70(83) ²	342	200	542	380	232	612
1973	15	21	36(51) ²	259	182	441	274	203	477
1974	13	14	27(47) ²	244	191	435	257	205	462
1975	NOT	YET	AVAILABLE						

* Statistics in Table 2 are published by the National Center for Health Statistics (NCHS) of the Department of HEW in Vital Statistics of the United States, Part 11—Mortality. These figures are derived from death certificates.

¹ In 1962 and 1963 New Jersey did not report race classification. The white and non-white figures do not include the state of New Jersey, but the totals for each category do.

² Beginning in 1972 CDC in Atlanta has kept records on abortion-related maternal mortality (figures in parentheses). The CDC figures are slightly higher because of special investigative work into particular cases and causes. For the years 1972, 1973, and 1974 these figures are subdivided into legal at, respectively, 21, 24 and 23; illegal at 40, 19 and 6; and spontaneous at 22, 8, 18. See CDC Abortion Surveillance, 1973, Figure 6; CDC Abortion Surveillance, 1974 (in press).

The various arguments in favor of a permissive abortion policy generally begin with the assumption that abortion is not a morally significant occurrence. If the fact of abortion is not morally significant, then, it is argued, there is no reason why it should not be legally acceptable and, to some extent, legally regulated. Thus, prior to legalization, arguments were proposed why legalization would result in various and diverse social goods: the cause of women's rights would be advanced; health care for the poor would be improved; fertility rates would be reduced; the rates of infant mortality (after birth), maternal mortality, illegitimacy, and septic abortions could be reduced, etc.

If legalization occurs, there is then, a certain need to prove that these results have been effected. As a matter of fact, these results are not always effected.

Abortion, whether performed legally or illegally, is dangerous to a woman's life and health.³⁷

Not infrequently, the arguments advanced in defense of a permissive abortion policy are naive and uncritical. The short ranged and the superficial are extolled at the expense of the long ranged and the meaningful. There is a growing interest among some researchers as to whether the high incidence of abortion in teenagers does not represent a major public health problem in the future. There is evidence that subsequent pregnancies result in a significantly higher rate of prematurity. Prematurity is a leading cause of mental and physical retardation in newborns.³⁸

The various arguments in favor of a permissive abortion policy make a claim about what can or may result. However, they do not establish that a permissive abortion policy is necessary to bring about the various results.

We question the factual validity of many of the benefits that are claimed to result from permissive abortion. The pragmatic vision of these arguments is essentially flawed because the most basic fact of all is systematically denied: that each abortion kills an innocent unborn human being. Because of this essential fact, we argue that since there are better ways to achieve the various desired social goods, then our society should choose those ways. We submit that a general agreement is possible that there are other morally acceptable ways of achieving the desired results, even if there is no theoretical agreement as to whether these other ways are, morally speaking, the best ways.

Conclusion

An abortion is not a morally insignificant event. No amount of statistical calculation, moral protestation or subtle legal argumentation can change the fact that an abortion destroys a human life. What moral principle can equitably and justly balance the potential accomplishment of social goods with the direct and deliberate destruction of one million or more unborn human beings each year? There is no such principle.

Our society must answer this question. The refusal to answer this question only increases the need to deny that the question exists. What we see afoot today is the systematic effort to deny that unborn human beings possess any value. This destructive spiral must stop. No society that condones the destruction of innocent human lives as the means to the solution of perceived problems will call forth the positive and creative energies that are necessary for the solution of the real problems.

The destruction of unborn human life represents a violent and manipulative act that degrades the respect for life that is necessary for the well-being of the human spirit of all, men and women alike.

The violent solution attracts us because it promises the quick and sure solution. However, the cost in human lives is irreparable. It necessarily leads to a destruction of the human spirit. One cannot kill or condone the killing of a fellow human being without suffering in one's soul a humanly irreparable loss.

The abortion ethic entails a collapse in the moral tension that is a healthy part of the creative human spirit. Human problems are normal. Our maturity and growth are measured by a realistic approach to the problems that confront us. We should not allow the presence of difficulties to engulf us in despair or to cause us to yield to the temptation to accept the immoral solution because it appears easy and possible. Human problems must be faced with a sense of confidence and faith. Then, problems become challenges.

When a woman becomes pregnant, she is in need of support and care. Too often the father, family and friends and society in general abandon the woman and her child. A permissive abortion policy socially approves and encourages the irresponsibility of those who abandon the woman, and it betrays the woman and her child. A good and just society must do more.

III. Danger to the Lives of Children Resulting from the Existing Legal Situation of Abortion on Request

During the past decade, great advances have been made in the relatively new fields of fetology and perinatal medicine that have made it possible to save the lives of many infants who would otherwise have died of prematurity or specific weaknesses during the early weeks of extrauterine life. Many hospitals have developed highly proficient intensive care units that are quite successful in saving the lives of infants by providing a technological environment that takes the place of the mother's womb during the final trimester of pregnancy. Many of the physicians and technologists predict that with increased knowledge, technology and human skill, they will be able to save the lives of infants who are spontaneously aborted at even earlier stages of pregnancy. At the other end of the continuum, other scientists are convinced that we will soon develop the technology to accomplish in vitro fertilization and succeed in bringing the "test-tube baby" to term.

Paradoxically, during this same time frame we have moved from restrictive abortion laws to a legal situation of abortion on request, and this shift induces attitudes and mindsets that endanger the lives of infants who are spontaneously aborted, prematurely born, or born at term with a specific disease or weakness. Some examples may serve to illustrate the point.

Perhaps the classic example of the effect of permissive abortion on attitudes toward infant life comes from the reported remarks of Dr. Kenneth Edelin of Boston who was found guilty of manslaughter for allowing or causing an aborted infant to die. Dr. Edelin was convicted of manslaughter by a Boston jury for the death of a twenty to twenty-four week fetus following a legal abortion. In response to the jury verdict, Dr. Edelin maintained that everything he did in performing the abortion was in accordance with law and with good medical practice.³⁹ He reportedly protested the jury verdict on the grounds that in his view abortion presupposes the death of the fetus, and thus in light of the Court's 1973 abortion ruling, the implication is that abortion terminates any responsibility to maintain the life of a living aborted fetus.⁴⁰

In a New Jersey case in which a man shot a woman in the abdomen who was seven and a half months pregnant with twins, the bullet hit one of the fetuses, causing premature delivery of the twins who died some hours after birth. The man claimed that he could not be convicted of homicide because the fetuses were not persons in the legal sense when the shooting occurred.⁴¹

The debate about fetal experimentation has also surfaced the paradox of allowing unrestricted experiments on the fetus because it is not legally protectable, precisely to gain knowledge to save the lives of other fetuses of the same age and situation. Commenting on a specific type of experiment calculated to improve the chances of maintaining a future pregnancy among women who had a series of spontaneous abortions, Robert S. Morison pinpointed the paradox. Noting that the experiments

were to be carried out on women who wished to abort, Morison urged that as the experiments approached success, they would have to be discontinued. "It would clearly be unethical," writes Morison, "to employ extraordinary means actually to bring into the world of the living an infant whose parents had already rejected it."⁴²

In his book on fetal research, Paul Ramsey touches on a similar issue. Does the gaining of information about fetal disease justify experiments that endanger fetal life simply because the mother has already opted for abortion? The affirmative answer to this question depreciates the value of fetal life. As Ramsey observes:

"Experimentation with children (having no bearing on their treatment) is said to be justified if limited to research on uniquely pediatric diseases; and now experimentation with the fetus is deemed not only necessary but right if limited to the study of uniquely fetal or neonatal diseases

Significant to note, however, is that such a limitation upon morally permissible research is for other reasons held minimalist in the case of research using children, because the child might be injured and still live; while in the case of fetuses the very same limitation knows no bounds if abortion in prospect is taken to be crucial. The upshot of that would be to say in principle that no indignity, no injury, no harm that may be believed useful to other less fortunate fetuses need be morally prohibited ."⁴³

The implications of abortion practice in regard to respect for human life is also found in the experience of Dr. Bernard Nathanson. Dr. Nathanson began by considering abortion almost exclusively as a voluntary medical procedure for women. In setting up a clinic that provided 60,000 abortions in little over 18 months with no maternal deaths, Dr. Nathanson demonstrated that abortion could be performed safely and economically. But in resigning his directorship of the clinic, Dr. Nathanson explained that "I am increasingly troubled by my own increasing certainty that I had in fact presided over 60,000 deaths."⁴⁴

Dr. Nathanson's gradual negative reaction to abortion was intensified and crystallized into conviction when he became Chief of Obstetrical Services at St. Luke's Hospital in New York, where, among other duties, he was responsible for supervising the perinatal unit. That responsibility prompted the question: "If that thing in the uterus is nothing, why are we spending all this time and money on it?"

Reflecting on that question, Dr. Nathanson reached the following conclusion:

"The product of conception is a human being in a special time of its development, part of a continuum that begins in the uterus, passes through childhood, adolescence and adulthood, and ends in death. The fact that a fetus depends on the placenta for life

and can't survive independently doesn't nullify its existence as a human being. A diabetic is wholly dependent on insulin, but that doesn't make him less human. I had to face the fact that in an abortion human life of a special order is being taken”⁴⁵

Dr. Nathanson has partially solved his personal dilemma by giving up the special practice of abortion, and by utilizing his medical skills to save unborn human life. He admits that this does not perfectly settle the matter. In attempting to reach a societal solution that faces up honestly to the implications of abortion Dr. Nathanson notes:

“There has to be the premise that something of value exists in a pregnant uterus. In an abortion, it is removed and lost. I don't think we can pretend to a sense of decency or to a standard of respect for life unless we feel that sense of loss -- individually and collectively.”⁴⁶

Finally in an article in the *New England Journal of Medicine*, Drs. Raymond Duff and A. G. M. Campbell indicated that of 299 consecutive deaths in a special-care nursery in Yale-New Haven Hospital, 43 infants were allowed to die because medical treatment that might have preserved life was withheld.⁴⁷ The *Journal* article generated a widespread discussion about the ethical, legal and scientific propriety of withholding treatment and allowing infants to die, and the abortion decisions of the U.S. Supreme Court have conditioned the discussion. The Court held that prior to birth the fetus is not a person in the whole sense, and that the state has interest in protecting the fetus only when it "has the capability of meaningful life outside the mother's womb."⁴⁸ These designations, "persons in the whole sense" and "capability of meaningful life," were created by the Court and have no basis in science or law. They are fabrications that deny the legal personhood of the unborn, and they are increasingly applied to diminish the value of human life for infants, the terminally ill and those who are senile. Because of the genetic identity and developmental continuity of the fetus and premature or newborn infant, a denial of the fetus' humanity easily transfers to the newborn infant. Neither can talk, engage in abstract thinking, or survive, without support systems. Moreover, if unborn life can be bartered away for socioeconomic reasons or reasons of maternal convenience, why not apply the same calculus to the newborn, especially if he or she is limited in potentiality for life?

In fact, some doctors have justified withholding treatment rather than allowing the infants to survive and face lives devoid of "meaningful humanhood," and others have suggested that quality of life is a value that must be balanced against the sanctity of life.⁴⁹ The pernicious theorizing of *Roe* and *Doe* creates a prejudice against protecting the lives of newborn infants and sick children, and it provides the basis for a eugenic policy that endangers infants and children as well as the unborn.

IV. The Impact of *Roe* and *Doe* on American Life

In its opinions in *Roe v. Wade*⁵⁰ and *Doe v. Bolton*,⁵¹ the United States Supreme Court attempted to fashion a newly found constitutional right nowhere explicated, or even hinted at, in the Constitution itself. This new right, to abort at will, purportedly finds its validity in the penumbra of the Ninth Amendment. The enunciation of penumbral rights on the basis of the Ninth Amendment is not new.⁵² What is novel is the apparent willingness of the Supreme Court to embark upon the generally uncharted seas of the Ninth Amendment while refusing to answer the threshold question, whether an abortion destroys a live human being. This refusal is the crucial error of the Court.⁵³ The Supreme Court "simply fashion(ed) and announce(d) a new constitutional right for pregnant mothers . . . with scarcely any reason or authority for its action . . ."⁵⁴ These decisions are, quite simply, an arrogant display of "raw judicial power"⁵⁵ and an "improvident and extravagant exercise of the power of judicial review which the Constitution extends to this Court."⁵⁶

As Archibald Cox has noted in his recent work on the Supreme Court, the decision in *Wade* "fails even to consider what I would suppose to be the most important compelling interest of the State in prohibiting abortion: the interest in maintaining that respect for the paramount sanctity of human life which has always been at the centre of Western civilization, not merely by guarding life itself, however defined, but by safeguarding the penumbra, whether at the beginning, through some overwhelming disability of mind or body, or at death."⁵⁷ The Court's shocking failure to recognize the import of the protection of human life is matched only by the absence of any legal justification for the action. As Mr. Cox has stated: "Neither historian, laymen, nor lawyer will be persuaded that all the details prescribed in *Roe v. Wade* are part of either natural law or the Constitution. Constitutional rights ought not be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place."⁵⁸

Roe and *Doe* are fraught with seriously dangerous implications in themselves; with contradictions in the context of the American legal ethic; and with many conflicting and contradictory resultant threads.

The difficulty in the Supreme Court's reasoning itself is the willingness of the Court to base one's right to constitutional protections on one's ability to possess the "capacity of meaningful life."⁵⁹ Such a rationale is frightening, finds no support in our jurisprudential ethic and cannot go unchallenged.

The position of the Supreme Court further contradicts the traditional -- and expanding -- posture of the American legal system to view the unborn child as inherently possessing a full range of rights accorded only to human persons. It has been noted that:

"If the unborn can inherit by will and by intestacy, be the beneficiary of a trust, be tortiously injured, be represented by a guardian seeking support from the parents, be protected by criminal statutes on parental neglect -- to hold that, nevertheless, the unborn child may be deprived of its inalienable right to its very life at the direction of the mother, for any reason or no reason, is to make the law something of a schizophrenic."⁶⁰

The conflicting and contradictory threads of the Supreme Court's position threaten to unravel our societal and legal fabric. Mr. Justice Holmes once noted:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain."⁶¹

Nonetheless, we are told by both the Supreme Court and by lower courts which look to the Supreme Court for guidance, that the rights of the several states in this area are so tightly circumscribed as to be, in many cases, meaningless. What is more disturbing is the obligation imposed upon government by several courts to fund -- with tax dollars -- the provision of abortion services.⁶² The Supreme Court position has been viewed as proscribing the ability of anyone to restrain the decision of a woman to have an abortion, whether that person be parent or spouse.⁶³ It has been held that public hospitals must provide abortion services,⁶⁴ and it is even being suggested that all hospitals, private, public and religious, must make their facilities available for abortion.⁶⁵

It is clear that an *a priori* legal principle enunciated by the Supreme Court has become the norm whereby reality is to be defined: state legislatures possess only minimal power to legislate on matters pertaining to the health and welfare of its citizens; a right of privacy must be financed by public moneys; familial and marital relationships must cease to be; medical personnel and facilities must yield their professional judgment and moral will to the order of the state.

A monstrous system of conflicting rights is in the making. The pregnant woman has been given a new constitutional right whereby she is cut off from all social contact and support except that which has only one purpose: the destruction of her child.

Right is wrong, and wrong is right. All rational norms of conduct must yield to the absolute legal norm.

What the Court has created is a new legalism that is destructive of the human spirit.

There is present to every government the danger that it will make itself the originator of human rights. On the contrary, good government recognizes that rights are derived from a source that is prior to and transcends the government. Prior to *Roe* and *Doe* American law was engaged in the gradual and complex process of articulating the rights that naturally inhere in the unborn child. This process recognized that human rights derive first from nature and God, and on this basis a classic case of the evolution and recognition of basic human rights was in progress.

However, *Roe* and *Doe* broke off this evolutionary development. The rights of the unborn child could no longer be balanced along with the rights of others. Any rights that may exist in the unborn child equaled a legal zero, for their rights were now always secondary and expendable.

It is inconsistent with our tradition of human and civil rights that a class of human beings is expendable. Unless the Supreme Court's rulings in *Roe* and *Doe* are reversed, American law will have committed itself to a course in history in which the human rights of none of us are secure.

V. The Issue of Religious Freedom

In the current discussion of a constitutional amendment to protect human life, the issue of religious freedom has been given prominent attention. It has been argued for various reasons that the passage of a constitutional amendment, and the consequent passage of restrictive abortion laws, would violate, infringe upon or constrain the religious freedom protected under the First Amendment. We do not agree with such arguments, and we raise the question whether state support and endorsement of abortion on request, and government funding of abortion on request violate the rights of conscience of those who are opposed to abortion. We now take up a discussion of these issues in greater detail.

1. It has been argued that a constitutional amendment to prohibit abortion, or to return to the states the power to prohibit or regulate abortion, is based on the religious teaching of one church, and such amendments or laws if enacted, would constitute an establishment of religion. In point of fact, those who support the passage of a constitutional amendment are motivated to do so from their convictions concerning

human dignity, the right to life of the unborn, and the responsibility of the state to protect basic human rights, and not from a desire to impose the morality of any church on the overall society.

Human dignity and the right to life as a fundamental human right are proclaimed by the Declaration of Independence and the Constitution of the United States, as well as by the United Nations Declaration of Human Rights. The underlying basis of human dignity may be perceived in different ways. Catholics, as well as other Christians and Jews, believe that human dignity derives from God's creation of each individual. Humanists, and many people of no particular religious persuasion see human dignity as based on the inherent value of the individual person. This has resulted in a commonly held tradition that has long been enshrined in law. That tradition was asserted by our Founding Fathers, who explicitly stated in the Declaration of Independence: "We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness." Are we now willing to reject the principles on which this Republic is founded simply because they reflect beliefs that are rooted in religious as well as secular tradition?

The Supreme Court in *Roe* and *Doe* situated its deliberations on legally protecting unborn human life in the context of when human life begins. The Court argued that it could find no consensus in medicine, philosophy and theology on this point, and thus declined to take a position. For practical purposes, the Court did choose birth as the point at which personhood occurs, and the point from which constitutional protection accrues. Furthermore, in light of *Roe* and *Doe*, it is asserted that associating the beginning of life with conception is a religious belief of the Catholic Church, and thus to adopt that view point would be to establish Catholic theology in public law. But the beginning of human life is a point on which considerable scientific consensus does exist, and on which medical and scientific data is acknowledged by philosophy and theology. A careful reading of the data of genetics, biology and fetology, which we have summarized in our Senate testimony, indicates that scientists are in agreement that at fertilization, the union of sperm and ovum constitute the beginning of the developmental process of a new and unique human being, who -- given no interference or interruption -- will grow and develop in the womb and will ultimately begin at birth the state of human infancy.

Consensus may not exist as to what constitutes personhood in a philosophic sense. However, it is not the absence of consensus in "medicine, philosophy and theology" that allows the wanton destruction of unborn human life, but the Court's own interpretation of these sciences which led to the faulty conclusion that human life is absent any value and deserves no legal protection until possibly the sixth or seventh

month of gestation, and that even at that point, the state's protection of unborn human life is so qualified that such protection is actually meaningless.

Moreover, although the religious communities and ethical scholars may approach the morality of abortion in different ways, no religious body teaches that abortion is essentially good and a moral or ethical imperative in all cases. In fact, the preponderant witness of Catholic moralists, of Christian ethicists, and of spokespersons for the Orthodox Jewish community indicates that abortion on request is considered morally objectionable by each tradition. If anything, the opinions of the Supreme Court in *Roe* and *Doe* constitute a new morality of abortion on request asserted by the Court and unwaveringly propagated by those who profess belief that a woman has an absolute right to do as she wishes with her body, which includes destroying her unborn child at any point during pregnancy.

2. These arguments have led to the assertion that any amendment or law that does not proceed from wholly secular reasons is a direct assault on the freedom of conscience protected by the First Amendment.⁶⁶ However, in the last quarter century the nation has welcomed the moral suasion of the churches and religious communities on legal issues to inform the consciences of individuals and to motivate them to support social justice and human rights. In such instances, a moral principle is often held in common by the churches and by people of no particular religious persuasion. It may be supported by scientific data, constitutional or legal perspectives, or historical precedent. So for example, public moral consensus developed that racism is evil, that poverty endangers human dignity, that war, violence, and armed conflict threaten human life. Thus, with the assistance and motivation of religious groups, civil rights and poverty legislation resulted, as did Congressional initiatives to terminate the Vietnam war. The legislation was not and could not be described as an imposition of religious teaching, but neither was it "wholly secular." Most importantly, although the laws reflected commonly held religious beliefs, the primary role of the churches and religious groups was in motivating their people to accept, support and ultimately achieve the values that the laws sought to protect. The initial laws may have fallen short of the moral ideal, but their passage helped the public morality to crystallize.

A final point merits consideration. Some religious leaders, and some groups of religious organizations claim a right to reproductive freedom, based on religious belief, which requires absolutely free access to abortion.⁶⁷ If reproductive freedom is a religious tenet requiring abortion on request, then legislation effectuating abortion on request may be a violation of the First Amendment. In the past, however, ethical scholars who have defended abortion as morally permissible in certain cases have argued that it was acceptable only as an alternative to a more serious evil.

3. A third argument holds that while religious freedom demands that the state may not prohibit or restrict abortion, it is imperative that the state in its social policies and public assistance and health care programs, guarantee the availability of abortion on request to anyone who so desires it.⁶⁸ This involves the state in establishing policies that approve abortion and that in some cases may subtly coerce people toward using abortion to avoid bearing a child that others, including employees of the state, consider untimely, unplanned or undesirable. It also requires the state to fund abortion services for all who wish them.

We hold that the state has a serious obligation to protect the life of the unborn child, and that such protection is consistent with our traditional value of human life. Moreover, the state has a serious obligation to avoid and protect against any type of coercion, even if it requires restrictive abortion policies. This includes maintaining protection for the conscience of individuals who oppose abortion, and for those institutions that refuse to provide abortion services. Legislation to protect conscience, modeled on those sections of Georgia's abortion law that were found constitutionally acceptable by the Supreme Court, has been enacted by Congress, but it has been consistently attacked as unconstitutional. These attacks insist that all hospitals be required to perform an appropriate share of abortions, and this is clearly an attack on the religious principles of some hospitals. Moreover, when public funds are allocated for abortion on request, this constitutes a violation of the consciences of the vast majority of Americans who continue to oppose permissive abortion.

In summary, then, we reject any assertion or implication that the Catholic Church, in exercising its right to uphold and speak out in favor of the fundamental right to life, is in fact attempting to impose its morality on the nation. We further reject the assertion that unless a constitutional amendment or a restrictive abortion law proceeds from a wholly secular purpose, it must be rejected as an attack on the First Amendment.

Moreover, we oppose initiatives of the state to endorse and promote abortion on request in social policies and health care programs as an inappropriate exercise of state power and as a violation of the religious liberty of those who do not wish to support or pay for permissive abortion.

Finally, we believe that the right to amend the Constitution is in fact a right protected by the First and Ninth Amendments.

Abortion is a highly complex issue, embodying theological, philosophical, medical and legal perspectives. A free discussion of all facets of this problem is entirely consistent with the democratic process and with rights of religious liberty that have enjoyed constitutional protection. We consider it our right and prerogative to be a part of that discussion, and to speak out forcefully and continuously in support of

respect for human life, including that of the unborn. Indeed, we are convinced that we would be remiss in our duty if we were to refrain from speaking in behalf of human life, and in urging the development of a system of justice that provides legal protection for the right to life of all human beings, born and unborn.

Conclusion

There are presently before this Subcommittee a large number of proposed amendments to re-establish a system of justice that allows legal protection of the life of each unborn child. These amendments differ not only in their verbal formulation, but they express fundamentally different approaches to protecting unborn life. One category of amendments asserts personhood for the unborn, and provides the full protection of the Constitution for all human rights to the unborn. This type of amendment also provides for the enactment of state laws prohibiting or restricting abortion.

A second category of amendments essentially restores to the states the power to prohibit, restrict or regulate abortion. However, this so-called "states rights" approach does not require any state to enact a law, it does not create a model, and it is unlikely to achieve uniformity in the various states.

In the past year, a new formulation has been proposed that explicitly affirms that the state shall have the power to protect all human life, including that of the unborn. This formulation differs from the customary states' rights formulation in that it positively affirms the value of unborn human life, thereby creating a predisposition in favor of protecting such life.

On repeated occasions in recent years, the U.S. Catholic Conference has urged the passage of a human life amendment, and we restate that policy today.

We have refrained from endorsing any specific amendment before the Congress. Instead, in our testimony before the Senate Subcommittee, we suggested four principles that we believe should guide the legislative process in formulating an amendment that provides a constitutional base for legally protecting unborn human life. These principles, we believe, express the values consistently affirmed in our nation, and they respect the constitutional foundations and parameters of our legal tradition. We restate these four points as basic to the process of formulating a constitutional amendment:

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 "unalienable" 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.

We are aware that considerable controversy has raged concerning the moral, legal and political acceptability of the various proposals now under consideration by this Subcommittee. However, in the interest of protecting the fundamental human right of all human beings, the right to life, we offer our recommendations and strong urging that the Subcommittee approve and recommend passage of a constitutional amendment that embodies the values expressed by the four principles cited above.

By appearing before this Subcommittee, we also take responsibility for being part of the legislative process. We look upon this as a dialogue -- a dialogue based on fundamental principles of morality and law, a dialogue that must take into account the destruction of the lives of almost one million unborn children each year, a dialogue that carefully defines any possible conflict of fundamental human rights, a dialogue that admits and states the reasons for the limits of law in protecting fundamental human rights. We do not believe that the dialogue was well served by the action of the Senate Subcommittee in rejecting the proposed amendments submitted for its consideration. The effort of the Subcommittee Chairman to explain that action was deficient because it failed to deal with the substantive strengths and weaknesses of the various proposals, or to provide reasons for refusing to recommend any of those proposals to the attention of the full Committee.

We appear here today because we respect the democratic process. We submit the principles that we believe harmonize moral values on the one hand, and constitutional principles on the other. We urge the adoption of an amendment that provides universal constitutional protection for unborn human beings. In our society other viewpoints will seek consideration -- the viewpoints of constitutional and judicial experts, of members of Congress, and of those who hold a fundamentally different view on the value of unborn human life. In a variety of ways we have already heard these viewpoints expressed, and we remain unconvinced by the arguments against protecting unborn human life.

Thus, we urge this Subcommittee to take special note of the dehumanizing situation of abortion on request that has resulted from Roe and Doe, and to take steps toward correcting that situation by approving a constitutional amendment that restores the protections of the Constitution to the unborn, and provides for a legal structure that will specifically protect human life at every stage of its existence.

Notes

¹ One year after the Supreme Court's abortion rulings, in the March 4, 1974 issue of *U.S. News and World Report*, Dr. Judith Blake, who has analyzed public opinion on abortion since 1962, stated: "The country remains conservative. There has been no change at all on public opinion . . . If there was a referendum today asking people to approve abortion if the woman doesn't want a child, there is no way it could pass. People don't think women should have abortions just to get rid of a child." For more information see Professor Blake's more extensive studies: "Abortion and Public Opinion: The 1960-1970 Decade," *Science*, Vol. 171 (Feb. 12, 1971), 540-549; "Elective Abortion and Our Reluctant Citizenry: Research on Public Opinion in the United States," in *The Abortion Experience: Psychological and Medical Impact*, eds. Howard J. Osofsky and Joy D. Osofsky (Hagerstown, Md.: Medical Department, Harper & Row, Publishers, 1973), pp. 447-467.

² Cf. Ely, John H., "The Wages of Crying Wolf: A Comment on Roe v. Wade," *The Yale Law Journal*, April, 1973.

Bickel, Alexander, *The Morality of Consent*, (1975), New York, Yale University Press.

Byrn, Robert, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review*, (May, 1973).

Black, Charles L., Book Review of *The Role of the Supreme Court in American Government* by Archibald Cox, *The New York Times Book Review*, February 29, 1976.

³ *Model Penal Code* (Philadelphia: American Law Institute, 1962), pp. 189-191. The ALI code was first proposed in 1955. At that time the state laws generally prohibited abortion except to save the life of the mother. For a summary of these laws see, "Appendix A: *Abortion Laws in the United States*," *Abortion in the United States*, ed. Mary S. Calderone (NY: Hoeber-Harper, 1958), pp. 187-195; Eugene Quay, "Justifiable Abortion: Medical and Legal Foundations," *The Georgetown Law Journal*, Vol. 49, No. 3 (Spring, 1969), Appendix I, 447-520.

⁴ The Oregon law defined risk to the mother's health as including "the mother's total environment, actual or reasonably foreseeable" (Oregon Laws, 1969, Ch. 684, Sec. 3(2)).

⁵ Christopher Tietze, "Therapeutic Abortions in the United States," *American Journal of Obstetrics and Gynecology* (July 15, 1968), 784-787.

⁶ Center for Disease Control: *Abortion Surveillance: 1973*, issued May 1975, Table 1. The CDC figures are generally considered conservative, representing known minimums. From 1969 on the reporting methodology improved (more states reporting with greater accuracy), but this improvement also reflects the fact that in time the practice of abortion factually became more widespread and thus more susceptible to reporting.

⁷ *U.S. v. Vuitch*, 305 F. Supp. 1032, (District of Columbia, 1969). Judge Gesell's ruling that the law of the District of Columbia was unconstitutionally vague was appealed to the U.S. Supreme Court which, on April 21, 1971, reversed, but holding that health includes both physical and psychological well-being. *U.S. v. Vuitch*, 402 U.S. 62 (1971) (slip opinion, pp. 9-10).

⁸ The laws in the states of Georgia, Illinois, Texas and Wisconsin were declared unconstitutional. See Martin F. McKernan, Jr., "Recent Abortion Litigation," *The Catholic Lawyer*, Vol. 17, No. 1 (Winter, 1971).

⁹ The 1967 California law narrowly defined mental health to mean "mental illness to the extent that the woman is dangerous to herself or to the person or property of others and is in need of supervision or restraint" (California statutes, 1967, Ch. 327, Sec. 1). In 1968, the first full year in which the new law was in effect, 5,018 legal abortions were performed. In 1969 this figure reached 15,339, but in 1970 it jumped to 65,369, and in 1971 it jumped again, this time to 116,749. *Therapeutic Abortion in California: A Biennial Report Prepared for the 1974 Legislature*, State of California, Dept. of Health, Table 1. The overwhelming percentage of abortions were sought on grounds of mental health. Only a permissive interpretation of the law's definition of mental health can reasonably account for the major increase in numbers in 1970 and 1971.

The permissive interpretation of the California law is all the more important because the number of abortions performed in California in 1970 and 1971 represents, respectively, 33% and 24% of the national total.

¹⁰ Then Governor Rockefeller vetoed the repeal measure. "Governor Vetoes Abortion Repeal as Not Justified," *New York Times*, May 14, 1972.

¹¹ CDC, *Abortion Surveillance*, 1973, Table 3.

¹² "Bitterness Swaddles Unborn as Abortion Vote Nears," *National Observer*, Oct. 21, 1972.

¹³ Judith Blake, "Abortion and Public Opinion: the 1960-1970 Decade," *Science*, Vol. 171 (Feb. 12, 1971), 540-549.

¹⁴ A brief review of abortion legislation world-wide can be found in Christopher Tietze and Marjorie Cooper Murstein, *Induced Abortion: 1975 Factbook*, 2nd ed. (NY: The Population Council, 1975), Table 1.

¹⁵ White, J., Dissenting in *Doe v. Bolton*, 410 U.S. 179 at 222.

¹⁶ Statement to the Cedar Rapids, Iowa Chamber of Commerce, Jan. 24, 1973 (AP wire story).

¹⁷ See Table 1, note 1.

¹⁸ See Carl W. Tyler, Jr. and Jan Schneider, "The Logistics of Abortion Services in the Absence of Restrictive Criminal Legislation in the United States," *American Journal of Public Health*, Vol. 61 (March, 1971), 490-491, for a discussion of this matter. Japan reached a peak abortion ratio of 720 after nine years (unofficial figures are higher, see *Induced Abortion: Factbook 1975*, Table 2d). The average peak ratio for five Eastern European countries is 630 legally induced abortions per 1,000 live births. For the most current statistics world-wide on the yearly total figures, rates and ratios, see *Induced Abortion: Factbook 1975*, Tables 2a-2d.

¹⁹ *Provisional Estimates of Abortion Needs and Services* (NY: Planned Parenthood, 1975), pp. 31-36.

²⁰ Tyler and Schneider, p. 491. The Tyler and Schneider projection of 500 abortions per 1,000 live births is compatible with the Planned Parenthood estimates of the potential number of abortion recipients in 1973. Cates and Smith, "Abortion Survey," *Family Planning Perspectives*, Vol. 7 (Mar./April, 1975), 50, wonder if the U.S. as a whole would not peak early rather than late.

²¹ Post *Roe* and *Doe* the term illegal abortion generally refers to abortions that are not performed under the direction of a licensed physician. The abortion could be self-induced or it could be performed by someone else.

Prior to the advent of abortion on request, it was generally admitted that most illegal abortions were performed by licensed physicians. See Christopher Tietze, "The Effect of Legalization of Abortion on Population Growth and Public Health," *Family Planning Perspectives*, Vol. 7, No. 3 (May/June, 1975), 124.

²² "Ch. 10: Report of the Statistics Committee (May 29, 1957)," *Abortion in the United States*, ed. Mary S. Calderone, p. 180. The findings of this committee were reconfirmed by its chairman, Dr. Tietze, in 1969: "No new

data on which to base a more reliable estimate have become available since." Christopher Tietze, "Induced Abortion as a Method of Fertility Control," in *Fertility & Planning: A World View*, eds. S. J. Behrman, Leslie Corsa, Jr., Ronald Freedman (Ann Arbor: University of Michigan, 1969), p. 311.

The traditional estimates of the incidence of illegal abortion were generally derived from surveys. One study in the late 1960's employed a new survey technique, but its methodology is still experimental. *Induced Abortion: 1975 Factbook*, pp. 4-5. "No reliable method has yet been developed to estimate the numbers of illegal abortions" (*ibid*, p. 13).

²³ A discussion and listing of sources can be found in Fred E. Mecklenburg, M.D., "The Indications for Induced Abortion: A Physician's Perspective," in *Abortion and Social Justice*, eds. Thomas W. Hilgers and Dennis J. Horan (NY: Sheed & Ward, 1972), pp. 50-51.

²⁴ The Commission on Professional and Hospital Activities of Ann Arbor, Michigan, maintains records of such data from about one-third of all U.S. hospitals. These data have not been analyzed and studied in scholarly publications. The 1974 data projected for the whole United States show some 6,000 hospital admissions for abortions that were not performed under medical supervision. Code 642, Hospital Adaptation of ICDA (H-1 CDA), 2nd ed., Commission on Professional and Hospital Activities, 1973. The comparable category for 1969 shows some 2,000 admissions. Code 642, Hospital Adaptation of ICDA (H-ICDA), 1st ed., Commission on Professional and Hospital Activities, 1968. Spontaneous abortions, some of which may have resulted from illegally induced or attempted abortions, are classified separately.

And, thus, according to these data more patients were admitted into U.S. hospitals for treatment of septic abortions in 1974 than in 1969. This evidence confirms that illegal abortion activity continues. It also indicates that the problem of illegal septic abortions has increased.

²⁵ Ronald S. Kahan, Lawrence D. Baker, Malcolm G. Freeman, "The Effect of Legalized Abortion on Morbidity Resulting from Criminal Abortion," *American Journal of Obstet. & Gynecol.*, Vol. 121, No. 1 (Jan. 1, 1975), 115. This study was conducted at Grady Memorial Hospital in Atlanta, Ga. Grady Hospital serves the medically indigent of the two counties of Fulton and DeKalb.

Septic abortions of unknown or suspicious origins are presumed indicators of illegal activity. The Grady Hospital study reduced the area of presumption, and thus of interpretation by the investigator, by including only those septic abortion patients who admitted to having had an illegal abortion.

²⁶ The study was conducted from the beginning of 1969 to the first quarter of 1973. In the first quarter of 1969 sixteen septic abortion patients were admitted (the average for each quarter in 1969 was 16.5). In the first quarter of 1973-when the abortion to live birth ratio has climbed to 356/1,000-the number of septic abortion patients admitted was five.

The Georgia abortion law was successfully challenged in federal court in 1970. In 1970 Grady Hospital began performing more legal abortions, and, at the same time, the number of illegal septic abortion patients increased (an average of 24.2 for each quarter in 1970 and 23.0 for each quarter in 1971). This high ratio was maintained until the second quarter of 1972 when the figure suddenly dropped to nine. There was no corresponding sudden increase in the number of abortions that were being performed.

The authors of this study admit that they cannot be certain that the availability of legal abortion was the cause in the drop in illegally induced septic abortions (pp. 115-116).

²⁷ *CDC Abortion Surveillance*, 1973, p. 7.

²⁸ One study estimates the possible overall increase in the incidence of abortion in the 40% range. Christopher Tietze, "Two Years' Experience with a Liberal Abortion Law: Its Impact on Fertility Trends in New York City,"

Family Planning Perspectives, Vol. 5, No. 1 (Winter, 1973), 36-41. Also see, Christopher Tietze, "The Effect of Legalization of Abortion on Population Growth and Public Health," *Family Planning Perspectives*, Vol. 7, No. 3 (May/June, 1975), 123-124. Dr. Tietze's basic argument is that a decline in New York City births in 1970-72 was caused by the overall increase in the incidence of abortion.

There are many variables in the study that could affect the results. It cannot be ruled out that the permissive atmosphere accompanying the easy abortion policy brought about an increase in the total number of pregnancies that could be aborted.

It is questionable whether this analysis of births and abortions in New York City can be legitimately projected for the whole nation. As Dr. Tietze himself notes in the New York City study, "The extent to which legal abortions have replaced illegal procedures depends primarily on the number of illegal abortions in the community prior to legalization . . ." (p. 40). It is not impossible that the largest metropolitan area in the country had one of the highest illegal abortion rates prior to legalization. And thus, if the New York City resident abortion ratio is projected for the whole country, as is currently being done, *Provisional Estimates of Abortion Need and Services*, p. 21, the overall increase may be higher elsewhere.

A study of a projective nature places the potential overall increase in a range almost double that suggested by Tietze, Tyler and Schneider, pp. 489-491. The overall increase will be derived from the elimination of unwanted pregnancies. In addition to whatever number of illegal abortions were being performed each year, it has been estimated that one-fifth of all live births in the United States were the result of unwanted pregnancies. This study postulates that legalization will have a great influence on attitudes and thus on the demand for abortion (p. 489). In a subsequent publication Tyler expressed the view that the ongoing practice of legal abortion supported the high level of projected response. Carl W. Tyler, Jr., "Abortion Services and Abortion-Seeking Behavior in the United States," in *The Abortion Experience: Its Psychological & Medical Impact*, eds. Osofsky and Osofsky, pp. 43-44.

²⁹ In his New York City study Dr. Tietze notes six categories of pregnancies that can be expected to be legally terminated under a non-restrictive policy (p. 40). Also see the discussion by Tyler, "Abortion Services and Abortion-Seeking Behavior in the United States," p. 44.

³⁰ *Provisional Estimates of Abortion Need and Services*, pp. 31-36.

³¹ That is, individuals who would not have sought any abortions prior to legalization now obtain illegal ones. See notes 24 and 26 above for evidence of some kind of increase in illegal abortion activity.

³² As one authority has stated, "In terms of mortality, illegal abortion is no longer a major public health problem in the United States." Christopher Tietze, "Somatic Consequences of Abortion," in *Abortion, Obtained and Denied: Research Approaches*, ed. by Sidney H. Newman, et al. (NY: The Population Council, 1971), pp. 13-14. Even so, the claim that 5,000-10,000 women died each year from illegal abortions was often made in the public debate. A careful discussion of the literature on this problem can be found in Germaine Grisez, *Abortion: the Myths, the Realities, and the Arguments* (NY: Corpus Publications, 1970), pp. 67-72.

³³ One study shows that the decline in abortion-related maternal mortality decreased beginning in 1968. "More women are dying at the present time than what one would have expected if, in fact abortion had never been legalized." Thomas W. Hilgers, M.D., *Testimony Given Before the Royal Commission on Human Relationships*, (May 21, 1975, Sidney, Australia), pp. 31-32.

Legalization has not eliminated abortion-related maternal deaths. Maternal deaths resulting from legal abortion have remained relatively constant for the years 1972-74 at, respectively, 21, 24, and 23. Table 2, note 2. That is, there was no decline. Illegal abortion deaths also still occur, but for the years 1972-74 they have shown a decline, respectively, from 40, to 19, to 6. It would appear that deaths that may have resulted from illegal abortions are now resulting from legal abortions.

Also, it should be remembered that the Supreme Court rulings allow abortions to be performed up to birth itself. The number of abortions performed in the second and third trimesters, are proportionately less than those performed in the first trimester. However, when abortions are performed in the second and third trimesters, the procedures used, saline and hysterotomy/hysterectomy, are, respectively, ten to forty times more dangerous to the woman's life than procedures used in the first trimester. CDC, *Abortion Surveillance*, 1973, Table 19.

³⁴ ". . . [I]t is likely that many women who would undergo legal abortions *would not resort to criminal methods . . .*" (emphasis added). Kahan, et. al., "The Effect of Legalized Abortion on Morbidity Resulting from Criminal Abortion," p. 115.

³⁵ See discussion in Hilgers, *Testimony before the Royal Commission*, p. 55.

³⁶ See *Provisional Estimates of Abortion Need and Services*, pp. 21-24.

³⁷ An analysis of the extensive literature on this phenomenon can be found in Hilgers, *Testimony Given Before the Royal Commission*, pp. 20-51 and in his earlier work, "The Medical Hazards of Legally Induced Abortion," in *Abortion and Social Justice*, pp. 57-85.

³⁸ See J. K. Russell, "Sexual Activity and its Consequences in the Teenager," *Clinics in Obstetrics and Gynecology*, Vol. 1. No. 3 (Dec., 1974), 683-698; Andre E. Hellegers, M.D., *Testimony Submitted Before the Senate Judiciary Subcommittee on Constitutional Amendments*, April 25, 1974, and, "Medical and Ethical Problems in Adolescence," Washburn Memorial Lecture in Pediatrics, University of Colorado School of Medicine, Denver, Col., May 5, 1975; *Induced Abortion: 1975 Factbook*, p. 50.

³⁹ "Doctor Convicted in Fetus Death," *Washington Star*, Feb. 16, 1975.

⁴⁰ "Abortion-Homicide Defendant Testifies," *Washington Post*, Jan. 31, 1975.

⁴¹ "The Unborn Child and the Law: When Is It Murder?" *New York News*, July 20, 1975.

In *State v. Anderson*, 135 N.J. Super. 423 (Law Division, 1975) the Superior Court of New Jersey ruled that one could be charged with homicide for shooting a pregnant woman whose unborn child ultimately died as a result of such shooting although the mother herself lived. This decision is the inevitable result of the pronouncements of the Supreme Court in *Roe v. Wade* and *Doe v. Bolton* and it points out the ludicrous and anomalous position of what purports to be constitutional protections. No longer is the Fifth Amendment's protection of our right to life to be viewed in an objective sense. Rather, we have laid the groundwork for interpreting the Fifth Amendment on the basis of who is depriving whom of life - in cases where the deprivation is not the action of the state or its agents. This has placed the Fifth Amendment - which is the keystone of all that protects our lives, our liberty and our property - on the quicksand of judicial whim. Nothing could be more destructive of our fundamental liberties.

⁴² Morison, R. and Twiss, S., "The Human Fetus as Useful Research Material," *The Hastings Center Report*, April, 1973.

⁴³ Ramsey, P., *The Ethics of Fetal Research*, (1975) New York, Yale University Press.

⁴⁴ Nathanson, B., "Deeper Into Abortion," (Sounding Board) *New England Journal of Medicine*, Nov. 28, 1974.

⁴⁵ Remsberg, Charles and Bonnie, "Second Thoughts on Abortion From the Doctor Who Led the Crusade for It," *Good Housekeeping*, March, 1976.

⁴⁶ *Ibid.*

⁴⁷ Duff and Campbell, "Moral and Ethical Dilemmas in the Special Care Nursery," *New England Journal of Medicine*, Oct. 25, 1973.

⁴⁸ *Roe v. Wade*, 410 U.S. 113, at 163.

⁴⁹ "Letting Patients Die Called Common Place," *Washington Star-News*, Oct. 28, 1973.

"Management of the Infant with Unmanageable Disease," (Letters to the Editor) *New England Journal of Medicine*, Feb. 28, 1974.

"Doctors, Parents Let Deformed Babies Die," *The National Observer*, Nov. 10, 1973.

⁵⁰ 410 U.S. 113 (1973).

⁵¹ 410 U.S. 179 (1973).

⁵² See, for example, *Loving v. Virginia*, 388 U.S. 1 (1967) and *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁵³ Byrn, "An American Tragedy: The Supreme Court on Abortion," 41 *Fordham Law Review* 807, 813 (1973).

⁵⁴ White, J., Dissenting in *Doe v. Bolton*, 410 U.S. 179 at 221-222.

⁵⁵ *Ibid.* at 222.

⁵⁶ *Ibid.*

⁵⁷ Cox, Archibald, *The Role of the Supreme Court in American Government* (NY: Oxford University Press, 1976), p. 53.

⁵⁸ *Ibid.*, p. 114.

⁵⁹ 410 U.S. at 163.

⁶⁰ See, generally, Archibald "The Law as a Schizophrenic" 23 *Res Ipsa Loquitur* 12 (1970).

⁶¹ See, Ely, "The Wages of Crying Wolf: A Comment on *Roe v. Wade*," 82 *Yale Law Journal* 920, 938 (1973).

⁶² See, for example, *Doe v. Wohlgemuth*, 42 L.W. 2589 (W. D. Penn. 1974).

⁶³ *Poe v. Gerstein*, 517 F. 2d. 787 (5th Cir. 1975).

⁶⁴ See, for example, *Doe v. Hale Hospital*, 500 F. 2d, 144 (1st Cir. 1974).

⁶⁵ Statement of Judith Mears before the Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, United States House of Representatives, February 5, 1976.

⁶⁶ U.S. Civil Rights Commission, *Constitutional Aspects of the Right to Limit Childbearing*, 1975, Washington, D.C.

⁶⁷ Cf. Brief For Planned Parenthood of Central Missouri, A Missouri Corporation, David Hall, M.D., and Michael Freiman, M.D., Appellants and Cross-Appellees, in the Supreme Court of the United States, January Term, 1975, p. 36; Press Release of Religious Coalition for Abortion Rights, Washington, D.C., January 21, 1976.

⁶⁸ *Population and the American Future*, The Report of the Commission on Population Growth and the American Future, 1972, Washington, D.C., U.S. Government Printing Office.