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Testimony Before the Subcommittee of the Senate Judiciary Committee

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I am here as a private individual who on January 22, 1973, was robbed of his right as a citizen to participate in the public processes by which we as a people determine the outer limits of the human community — the limit at the first of life and soon it may also be the limit at the end of life — within which boundaries an equal justice and equal protectability should prevail for all who bear the agreed "signs of life."

These are judgments about the best factual evidence. Physicians are our deputies in applying the criteria for stating that a man has died; but they alone do not set the criteria. In the unlikely event

that physicians began to allow people to die all the way through to the end of cellular life (until hair and nails stopped growing) we would find ways of telling them that that is not what we mean by the difference between a still living human being and a corpse. I hope we would do the same in the (more likely) event that physicians began to declare people dead not on the basis of brain-stem death (the current "up-dating"), but when there is only cessation or destruction of the higher cortical functions of the brain (thus certifying as corpses for burial or for organ donation bodies whose hearts still are beating spontaneously and naturally without any external support-systems).

So we have legislation or case-law based on it, wise or unwise, traditional or novel, defining death. This legitimates or deputizes physician declarations of death. Professor Alexander M. Capron of the University of Pennsylvania Law School has recently summarized the need for and the propriety of a societal function in regard to new proposals for updating the criteria for death which physicians apply.¹

Now suppose the Supreme Court were to rule that determining the outer limit of the human community short of which there exists a right to life still resident in the dying is a matter falling strictly within the privacy of the doctor-patient relation, or is even to be decided by physician and family members. On this supposition the state legislatures could limit what physicians do in making life and death decisions only by licensure. Would that Court decision not be deemed an exercise of "raw judicial power?" Would there not be need for a constitutional amendment to restore the setting of criteria to our public and legislative processes? The deputyship of physicians or of any single individual or group of individuals does not extend to fixing the criteria for determining who shall or shall not be deemed a subject of rights. That surely is the people's business. While saying it did not settle that issue, the Supreme Court did just that — all the while proclaiming that when individual human life begins is a murky theological question. For all practical purposes the Court pronounced that no one enters the human community nor has any rights due him until viability. Questionable as that may be, it at least has the virtue of being based on an implicit claim to possess the best factual evidence in the light of modern knowledge. But behind that is, for me, the monstrous claim that the Court decides such matters.

To restore to political and legislative decision-making processes the power to draw an agreed limit as to the first entrance of a human being into the human community is, of course, to load us the people again with a fearsome responsibility. I see no escaping that, since I know of no revelation of such factual judgments. The only thing more fearful would, however, be for such verdicts to be placed in the hands of private individuals, or to be determined by a 7-2 decision of the Court.

Such have always been among the human, all too human decisions silently taken by mankind in the course of our torturous history. Christian teachings about abortion, for example, have varied over the centuries. But these have varied according to changing judgments about the evidence for believing there is a new life on the human scene. Fancies about 40 and 80 days of gestational life, reliance on quickening, etc. have been grounds in times past for drawing the line between unprotectable and protectable human life. Only in the nineteenth century after the discovery of the ovum did there come to be a credible rational *basis* for either Catholics or the A. M. A. (see q. in *Wade*) to believe that life begins with conception.

The Worth of Human Life

What has generally been invariant in Western civilization has been the rights and dignity and protection to be accorded to the individual life deemed to be hu-

man. Our religious faiths, our philosophies of life, our humanistic visions have to do with justifying and upholding the worth we recognize in or impute to human life. "Subsuming cases" under the value of life — to say, *This* is a human life that has now put in his claim upon the human community to be accorded equal justice and protection — that is a different sort of judgment, and one to be made with fear and trembling. Yet we collectively must decide such matters, and shall continue to do so as long as we have the courage to accept the necessity for together setting the criteria for finding a life to be human life at either end of the scale. It is only the pretense that we can remain civilized after such decisions are left up to the vagaries of private judgment that has to be denied.

I candidly state to you that I am not very hopeful over what people generally through their representatives will decide about these life and death issues — in a technologically medical era when "quality of life" is judged to override being alive, and "Choose" has replaced "Choose life" as our moral maxim.

Some comfort may be taken from the fact that over ten years ago the demographer Judith Blake took a look at the anti-permissive abortion sentiment in this country and advised that the only way to accomplish an arbitrary liberty to choose between one life and another in its early stages was to go to the Supreme

Court to see whether it would take from the legislatures their power to determine and represent the social compact. I take it, however, that any so-called "pro-lifer" had rather be out-voted than overruled and deprived of voice concerning the limits and the life-and-death terms of our social compact. This, not winning, is what is at stake in the profound alienation of millions and millions of people brought about by the Court's decision in January 1973. I am very sorry that (as reported in the press) Justice Blackmun has received a good deal of "hate mail" since the decision he wrote for the Court. But I pray that he can fathom even in that the moral outrage over being deprived as a people of one of the most important aspects of our together being a people over the course of time. Everyone knows along the pulses that for whom the bell tolls in these arbitrary life-and-death decisions, now surfaced to consciousness and made "safe" by modern medicine, it could have tolled for him long ago and may yet toll for him at the end of life's span.

With power restored to the people to determine agreed criteria for including anyone in or excluding anyone from the human community, we still may go on our way toward some technological version of the definitional solution practiced by the Nuer tribe in Africa who treat infants born with grave deformities or suffering from genetic anomalies as ba-

by hippopotamuses, accidentally born to humans and, with this labeling, the appropriate action is clear: they gently lay them in the river where they belong.² A shudder along the spine of every American is surely a fitting reaction to the Court's account of why Western medicine has always been concerned to protect unborn lives. This is to be accounted for, we are told, because Christianity happened to take up the views of the Pythagoreans, a small sect in the Graeco-Roman world, with its Hippocratic oath pledging physicians never to give abortifacients. In now overcoming that limitation, we are asked to recall that pagan outlooks in general and medicine in particular in pre-Christian ages opposed neither abortion nor suicide. Passed over in silence is the fact that approval of abortion was associated with approval of infanticide.

A Prophecy Fulfilled?

In this there is retrospective prophecy well on the way toward fulfillment today! A doctor at Yale-New Haven Hospital, explaining on national television the newly announced policy of benign neglect of defective infants in that medical center, says that to have a life worth living a baby must be "lovable." Millard S. Everett in his book *Ideals of Life* writes that "no child should be admitted into the society of the living" who suffers "any physical or mental defect that would prevent marriage or would make others tolerate his company only from a

sense of mercy . . ." Who is there among us who need not reply to that, "Mercy, me!?" Michael Tooley, Professor of philosophy at Stanford University, concludes that while it would be reprehensible to *torture* kittens, infants or other sentient creatures for an hour, it would not be wrong and *no denial of rights to kill* babies in the hospital nursery during the first two weeks after medically checking their acceptability, since human babies are no more than kittens and cannot be bearers of rights until they have *self-consciousness* of themselves as persons.³ A physician at the University of Virginia writes that he believes a woman's decision to allow a defective baby to die is "her second chance to have an abortion." A fellow theologian, I regret to say, always replies when I use the term "infanticide": I prefer to call it "neo-naticide"! I myself am surprised by none of these views, nor for that matter do I consider them illogical extensions of what we are doing in the matter of abortion, nor are they without some backing. The legal and moral chaos they bespeak stems rather from letting decisions about the criteria for acceptable life and rightful death decisions fall under the arbitration of private individuals.

To say the least, the Court started these retrogressions into technological medical barbarism from which we shall not soon recover, when it exercised no judicial restraint, when it refused to

trust the people's moral sensibility and legislative deliberation to achieve rough agreement about who belongs with us in the community of equal rights bearers. That decision must somehow be reversed and life-and-death standard-setting must be de-privatized. In doing this, the Court itself rolled back by one stroke of the pen steadily increasing respect for the unborn child in the law itself — propelled onward and upward for decades by our increased knowledge of the humanity of unborn life in the modern period. That knowledge had all but opened a "new age of human childhood." Yet the Court declared that "the unborn have never been recognized in the law *as persons in the whole sense*." That, I believe, is demonstrably erroneous. Perhaps the Court meant to say that *the whole law* has never recognized the unborn as legal persons. That I think is true, e.g. "perfection" of standing and of the right to sue for pre-natal injury only comes with birth. But "entitlement" to property conveyed to someone *in utero* is *as to right* perfect at that time; further "perfection" here can only mean collecting the cash to which right was fully established at the time of conveyal.

The Fitkin Case

Then there is the N. J. case *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 201 A2d 537, 42 N. J. 421 (1964), perhaps the crest of legal acknowledgment of the unborn as full

legal persons in one part of our law. Here in the case of a Jehovah Witness mother who refused a blood transfusion *and who was pregnant*, the court confronted the alternative of whether to bring this case under (1) the line of cases of *adult* Witnesses which generally respects their First Amendment right of religious liberty and does not compel transfusion even to save physical life, or under (2) the line of cases dealing with infants or minors of Jehovah Witnesses whose parents refuse to authorize blood transfusions: here generally the courts have taken jurisdiction of the children and authorized the recommended or necessary medical treatment even against the religious conscience of the parents.

Which sort of case was *Fitkin*? Both child and mother would die unless the state intervened. Chief Justice Weintraub wrote for a unanimous court: "We are satisfied that the unborn child is entitled to the law's protection and that an appropriate order should be made to insure blood transfusions to the mother. . . . We have no difficulty in so deciding with respect to the infant child. . . . It is unnecessary to decide the question (of compelling the adult against her conscience) because the welfare of the child and the mother are so intertwined and inseparable that it would be impractical to distinguish between them. . . ." Notably in this case the humanity and rights of the unborn child prevailed over the

First Amendment rights of the mother, which is a near-absolute in American law, when these were inseparably intertwined. There can scarcely be stronger evidence than that of recognition in our law of the unborn as a person in the whole sense, granting that this does not hold for the whole of our law.

In this instance the issues in the case were decided after Mrs. Anderson had left the hospital. Following *Wade*, we can imagine another escape: she could request an elective abortion, thereby prevent our law from successfully treating her child as a legally protectable person, and from her point of view deliver both him and herself intact of soul ("the blood is the life") until the day of the general resurrection! Such is by comparison the measure of the far more trivial reasons conscientious persons may now use to disregard the rightful claims of the unborn, if indeed these exist any longer at all following *Wade*. The privatization of abortion decisions means that no one need reach for a First Amendment right to consider overriding the right of the unborn to his or her life. No parity or balancing judgment need now be made, not even one favoring the mother's conscience. Instead, states are now expressly forbidden to bring the rights of the unborn *as such* into consideration. The minimum of regulations that are allowed indirectly expressive of some interest in "the potentiality of life"

must every one be reasonably related directly only to the life and health of the mother. She is the one life to be treated as a person in the whole sense; or, I should say, even partially so in the face of the law.

The fetus is not *fully* protectable (not fully a legal person), even after viability! Even *after* viability, the unborn child's right to *life* is not treated as needing to be in parity with the mother's life before being killed. Her health also may outweigh the child's life. The Court said hypothetically: "*If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.*" I suppose most procedures directed toward trying to save a viable baby may have *some* adverse affect on the "health" of the mother, especially as that term is now too broadly interpreted by the medical profession. In an article generally favorable to permissive abortion and the Court's decision, Sissela Bok, lecturer in Medical Ethics at Radcliffe College (the President of Harvard is her consort) pleads: "Every effort must be made by physicians and others to construe the Supreme Court's statement (the foregoing statement) to concern, in effect, *only the life or threat to life* of the mother."⁴ In a civilized society, why would Sissela Bok have so to plead? Why should the deci-

sion to what extent a *viable* baby should be valued be privatized? Why should physicians be endowed with such arbitrary power over young life that they need to be enjoined not to use it? In this, as well as in its reference to the unborn's capacity for "meaningful" life outside the uterus, the Court steps across the line into "neo-naticide" of *viable* babies.

The Ambiguity Remains

Still the rightful claims of the unborn are manifest in the ambiguity that remains. There are taxpayers' or other sorts of suits going forward in the courts asking that, following *Wade*, jurisdictions that interpreted the Aid to Dependent Children Act to include *pregnant* welfare women be prohibited from doing so — on the ground, I suppose, that these women are not yet "with child" in the law's meaning. Other lower court decisions have held to the contrary that these women cannot constitutionally be refused listing as welfare *mothers*. These latter cases raise the question: how can the state make payments in support of a person who does not exist? to her on account of no human being within? They raise the even more crucial moral question: if ADC payments are made to a woman for one or two months after her pregnancy is affirmed, and she then decides to elect an abortion under other laws that now treat her as the only person involved in that issue, has she not to say the least frustrated the purpose of the ADC pay-

ments to her? Surely there now is an intolerable contradiction between the legal personhood and the legal non-personhood ascribed to the unborn.

Such are the perplexities that flow from violating ordinary language in speaking of the unborn, especially in an era in which this usage has the backing of our modern knowledge of the independent, individual humanity of unborn life. We do not ordinarily say a woman is "with embryo" or that she is "carrying a fetus." The attempt to say "fetus" rather than "child" is always an effort at first. We can become habituated to it, of course, just as we now customarily say "interrupt a pregnancy" when we mean abortion, although that expression was once the way doctors spoke of Caesarian sections to save an unborn life that could not be brought to natural birth!

So too my own church has schooled itself to speak in its statement of Social Principles (adopted by General Conference in Atlanta, 1972) of "the sanctity of unborn human life," of "the sacredness of the life and well-being of the mother (sic)" and in the same breath to call for the "removal of abortion from the criminal code, placing it instead under laws relating to other procedures of standard medical practice." If there is unborn human life and if there indeed is a "mother," then abortion is not like any other "standard medical practice." Not until euthanasia

or "neo-naticide" becomes "standard." And life-and-death decisions involving lives possessing sanctity have never before in the history of our civil community been believed to be a proper subject for purely privatized choices.⁵

An Amendment As Possible Remedy

I urge this Committee and the U. S. Senate as a body to move an amendment to the Constitution that would return to the states their legislative power to protect the unborn child from privatized physician-patient decisions about its life or death. Such an amendment would in no way bind in advance the decisions subsequently to be taken by the states. Liberalization of abortion, perhaps its entire decriminalization would still be options open to the states. This would be a minimum remedy, and the Senate may view it as optimal. The thrust of my testimony, however, is to leave the content of an amendment up to the wisdom of the Senate; and for my own part simply to say that almost any remedy at this point in time would be better than no remedy at all. For the thrust of my testimony has been to the point of reversing the privatization by the Court of decisions concerning protectable humanity, and toward the right of the people to decide matters of such crucial importance to our social compact through ongoing public debate and the political and legislative processes of this nation. I am willing to have my own

views on abortion, and those who agree with them, kept within the public forum; and not enshrine them in the Constitution or in Court-made law — a restraint the pro-permissive abortion advocates were not willing to exercise.

It may be that we have passed the point of no return to that remedy; and that this Committee and the U. S. Senate will judge it wiser to frame an amendment in some fashion substantively protecting the unborn from arbitrary choices. Here there may be an analogy with what followed in the wake of the Dred Scott decision. That decision took from the free states and territories the right and the power to recognize the humanity and protect rights of black people and ex-slaves. We all know the sequel: a tragic civil war, a more perfect union wrought out through carnage and sacrifice, the Fourteenth Amendment imposed on the former slave states. Perhaps that direct approach and substantive constitutional protection of the rights and liberties of black ex-slaves was the better way — instead of trusting the far slower process of political and legislative deliberation in the free states and the gradual erosion of slavery where it existed. Perhaps, then, some form of substantive constitutional protection of unborn human life is needed to overturn the "substantive due process" of a judicial decision that has the effect of turning every question both as to the wisdom and as to the morality of abortion

over to private decision-makers.

One must at the least insist on the strong analogy between these two constitutional crises. This nation is in a state of civil and moral strife. Not because "pro-life" people are generally speaking unwilling to be outvoted; but because they now have no voice to cast about the extent of the human community in which we are to live. The right to life is so basic to our civil compact that one can imagine the divisions among us leading to open conflict, but for two differences: (1) Because of the more perfect union wrought by the Civil War there now exist no states claiming or actually exercising the sovereignty they once did: another loss of rights and powers formerly reserved to the states cannot now be resisted, and of course ought not to be. (2) In our present case no one has a "property" self-interest to assert or to deny in the case of the unborn child as in the case of the slaves. (The claim that a woman has a right to do what she will "with her own body" comes close to a property-claim over the fetus; but perhaps that language ought not to be taken seriously.) For these reasons, our present constitutional crisis is apt to expend itself in moral passion; and, unless there is remedy, further steps privatizing life-and-death decisions and massive alienation from the body politic that has given over to private choices the determination of who belongs with us as a people each counting for one and no one for more than one.

There will be others testifying before you who will object to my placing confidence in the people through their representatives to judge who counts as a human life. This confidence may seem like the Court's touching faith in physicians to make independent medical decisions and not to perform abortions on request, or its privatizing of these decisions and regulating the wisdom and justice of such decisions only by licensure as if they are matters of standard medical practice and not *also political or societal decisions* about the boundary of the human community of an equal justice to all. My point is simply that physicians are society's deputies in applying the criteria for stating that a new human being has put in his appearance or has passed from among us. My point thereafter is simply that decisions as to the criteria are necessarily human decisions, too; that such decisions as to *the extent* of our social compact must rest with the people and our deliberative processes; that "the buck stops here" and cannot be appealed to anyone's private "revelation" nor ought it to be taken from us and then handed over to a pair of other human beings to decide or to any group less than the total body politic.

Returning the Issue to the States

Perhaps my confidence that returning the abortion issue to the states may be a sufficient remedy rests back upon my belief that the factual evidence (that is all it can

be: a set of factual "good reasons") for the individuated humanity of the unborn child is now quite as clear as the evidence for the human countenance of any black, or of any Senator or of anyone who testifies before you. Before we were so rudely interrupted on January 22, 1973, the weight of the evidence had opened a new era of human childhood, as I have said, and this weight was making its imprint on our law itself. The Court might have taken judicial notice of that evidence, instead of facing away from it. It is certainly the business of state legislatures and now of the Congress to take notice of facts concerning the unborn. There is *reason* enough in our modern knowledge for a Constitutional amendment substantively protecting the unborn in some fashion and from some stage in their achievement of individuated humanity.

That would be a maximal remedy; my tentative proposal is a minimal one; Congress should say which is optimal and/or feasible. Taken alone, Senator Mondale's "family impact" test would, I suspect, have led us long ago in the direction of federal marriage and divorce legislation, as now maybe that test should lead us to see the need for some substantive decision-making at the constitutional level or at the federal legislative level on the matter of abortion. But our system is built upon the 50 state jurisdictions; and, because of this, and in spite of some clear disadvantages that has, I

incline toward a constitutional solution limited to returning to the states and the people within each of those jurisdictions the question of what we mean by the social compact of life with life.

Professor Paul Freund, the distinguished authority on constitutional law at Harvard University, has said that our system of division of powers — executive, legislative, and judicial — ultimately must rest upon the exercise of what he calls "constitutional morality." The staff of the House Judiciary Committee must have had "constitutional morality" in mind when in its memorandum on the meaning of an impeachable offense it said that a President has the duty "not to abuse his powers or transgress their limits — . . . not to act in derogation of powers vested elsewhere by the Constitution;" and again in its reference to "adverse impact on the system of government."⁶ If that is correct, then impeachment of a President is a remedy for any derogation of powers vested elsewhere by the Constitution; it is a way to insure "constitutional morality."

The fact is, however, that impeachment is no remedy for an exercise of judicial power in derogation of powers vested elsewhere or for decisions of the Court that have an adverse effect on our system of government. It is no remedy for decisions "beyond the call of Constitutional duty." That remedy is Constitutional amendment; that is the way to insure

that "constitutional morality" shall continue constantly to be a restraint upon judicial activism. To our founding fathers in Constitutional Convention, Professor Edward Corwin has pointed out in his book *The President, Office and Powers*, "the executive magistracy was the natural enemy, the legislative assembly the natural friend of liberty." The members of the Constitutional Convention, of course, knew nothing of the judicial review that was later to become established. They could not have imagined that the judicial magistracy might become the natural enemy of liberty or of the legislative power in its direction of an ordered liberty. It would be ironical if the natural friend of liberty, our national legislature, should now be aroused to institute impeachment procedures against an "imperial Presidency" for acts in derogation of powers vested elsewhere by the Constitution or for acts having adverse impact on our system of government, and if then the Congress does not bestir itself to use the remedy of Constitutional amendment to correct a decision of an imperial Court that likewise has effects in derogation of powers vested elsewhere by the Constitution and adverse impact on the division between the judicial and the legislative power.

It would be undefendable if impeachment may be used to chasten the executive magistracy and not an amendment to chasten the judicial magistracy; if against the one but not the other "Constitu-

tional morality" can be sustained. In this regard, the extent to which a Supreme Court decision is popularly and automatically believed to be the last word on *what the law is* is also a measure of how legislative and amendatory authority has slipped from "the legislative assembly." The Court, of course, in *Bolton* (issued, I suppose, one minute after *Wade*) ceremonially refers to *Wade* in the matter of *what the law is*. There can be no objection to that manner of speaking when the Court does it. But if the people, the state legislatures and the Congress join the chant, that is a certain sign that we wish to crown the judicial magistracy and legitimate its word as our final law. The amendatory procedure is more legitimate still; and it is our chief recourse for insuring that what Freund called "Constitutional morality" shall be a force in the interplay of the separate powers in our government. In any case, anyone who believes that there was need to submit to the states an "equal rights" amendment, going beyond the Fourteenth in guaranteeing equal rights for women, cannot with any consistency object to an amendment going beyond the Fourteenth, and correcting the Court's interpretation of it in *Wade* and *Bolton*, now being submitted to the states for possible adoption into our fundamental law. Object they surely will, with inconsistency and distrust of the people and of their right to amend in this instance. Unhesitatingly,

the call should go forth for the Congress to move an amendment that at the least restores to the states legislative power to decide whether and how human life-and-death questions shall be dealt with in the criminal law and in regulation of the fateful actions of physicians.

The opponents of a Life Amendment may finally be correct. The issue is the right of choice or decision. But that must be rightly understood. The issue is the right of a people through the legislative process to set the "credentials," the criteria, the signs of humanity to be used in making life-and-death decisions. Setting the outer limits of the human community should not be allowed to pass into the hands of private individuals, one, two, or many.

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Pritchard, E. E., *Nuer Religion*. Oxford University Press, 1956, p. 84.

3. "Abortion and Infanticide," *Philosophy and Public Affairs*, Vol. 2, No. 1, Fall, 1972.

4. "Ethical Problems of Abortion," *Hastings Center Studies*, Vol. 2, No. 1, January, 1974, p. 44, n. 18. Italics added.

5. The stark contradiction in the Methodist statement — calling for further inquiry — was pointed out by another Methodist theologian, J. Robert Nelson, Dean of the Boston University School of Theology, in "Abortion: What Was Said and Unsaid at Atlanta," *Response*, July-August, 1972, pp. 23-25. The "legislative history" of that statement was that the call for removing abortion from the criminal code was an amendment hurriedly introduced in too brief debate in Atlanta. Hence the contradiction of moral outlooks between that call and the meaning of the language according human life to the unborn, with all that implies. I suggest — if church statements are admitted here — that it would be reasonable for any Senator to find no legislative direction to be discernable in the Methodist statement, unless and until the *Christian* and the *contemporary* modes of thought at war in it are resolved one way or the other.

6. *New York Times*, February 22, 1974.