Letter to Catholic politicians on abortion and the law

continued from page 2B

rights, or the right of personal autonomy. In every case, it is the strong demanding power over the weak, and it is this demand and this claim that brought about the social and juridic revolution at the turn of the 20th century, when Louis Brandeis realized that economic power had become the new tyranny and that the economically weak had to be protected from the economically strong. The result was the Supreme Court's decision in Muller v. Oregon (14) and the famous Brandeis Brief (15) that inaugurated the revolution.

Tyranny always flourishes under cover of the law, and the law in the case of abortion is a three-pronged constitutional claim: the physician's right to medical practice, the woman's right to privacy, and the woman's right of dominion over her own body. All three are valid claims: there is a physician's right to practice medicine; there is a right to privacy protected by the Constitution; and there is a right of dominion that every human person has over his or her body. But it is also clear, to anyone who has examined the issue honestly, that in the case of abortion, these claims of legality are mere legal fictions, legal covers for something unlawful and malicious: the surgical destruction of unborn life under the shield of "standard medical practice."

Two questions ought to be asked: What is the root constitutional principle and the basic constitutional right imbedded in the issue of abortion and how can it reveal itself in the light of the intense controversy surrounding it? The Dred Scott (16), Plessy v. Ferguson, (17) Lochner v. New York (18), and Hammer v. Dagenhart (19) decisions remind us that the judicial process can be flawed, and bring great harm to countless human beings and tragic social consequences.

The legal and constitutional question facing us today is: has Roe v. Wade isolated and identified the constitutional right involved, the Right to Privacy (20), as the majority opinion affirmed?

The Supreme Court cases that parallel Roe v. Wade are not those concerned with privacy, but rather those that were concerned with providing a legal cover for acts of violence. The closest parallels in time are Brown v. Board of Education, (21) which outlawed segregation, United States v. Darby, (22) which ended child labor, and Muller v. Oregon (23) which banned the exploitation of workers by industry.

> *"It is a strange fact of history that human rights become a matter of law only after their savage violation. Law develops from lawlessness. In the case of the unborn, the violence done to them, the dismembering of their bodies in the womb, the violent snuffing out of their precarious hold on life, the surgical and sanitary and methodical destruction of their developing powers of life and locomotion, is simply another form of lawlessness given the sanction of the law."*

With Roe v. Wade, the time was ripe for bringing to a close the unlawful use of power as the cover for other acts that the law had always considered inhuman and barbaric. Instead, a legal cover was provided for yet another act of violence, this time in the name of medical science, thus joining slavery, segregation, child labor and the exploitation of workers in the long list of violent acts given the legal sanction of the court.

Roe v. Wade has a distinguished ancestry – but a bloody past. It is the history of oppression, genocide, chattel slavery, segregation, child labor. Abortion is simply one more form of violence done in the name of someone's else's right under the law. The fact that the victim is the unborn and has no status under the law makes the case no different from its predecessors. The fact that the doers of the violence are women and doctors does not change the character of the violence. Slavery was the work of respectable families and distinguished landowners and the most vocal advocate of segregation was a distinguished statesman and jurist, John W. Davis. (24) Those who supported child labor were successful businessmen and fathers of families and even members of the clergy.

The legal argument accepted in the Roe v. Wade decision was in articles published in the New York Law Forum by Cyril Means, (25) a lawyer for the NARAL, the National Association for the Repeal of the Abortion Law. Professor Means argued, falsely, that the sole reason for the abortion laws of the past was to protect a woman from dangerous and unsafe surgery.

Under consideration was the surgical procedure itself, as safe or unsafe to the health of a woman, with the conclusion that, with the advance of medical science and the improvement of surgical techniques, all danger to a woman's health had been removed. Using a well-known principle of Common Law, cessante ratione legis, cessat et ipsa lex: when the reason for a law no longer exists, the law itself ceases to exist, (26) he argued that abortion laws had become obsolete and the majority opinion of the Court accepted his reasoning.

What the arguments of Professor Means failed to point out was the real intent of the abortion laws of the past: they were fashioned, not only to protect a woman from unsafe and life-threatening surgery, although this was certainly a major concern, but primarily to protect the life of the unborn from being destroyed. And that was because those laws recognized the unborn child, not merely as a potential human being, but as an actual human subject.

It is a strange fact of history that human rights become a matter of law only after their savage violation. Law develops from lawlessness. In the case of the unborn, the violence done to them, the dismembering of their bodies in the womb, the violent snuffing out of their precarious hold on life, the surgical and sanitary and methodical destruction of their developing powers of life and locomotion, is simply another form of lawlessness given the sanction of the law.

What is needed in this legal battle for the rights of the unborn is, first of all, a detailed and graphic account of the medical and surgical methods used in terminating unborn life, supported by the latest research in genetics, embryology, gynecology and related sciences: anatomy, bio-chemistry, cytology, obstetrics, radiology, uterography and amniology. The work in these areas is extensive at centers such as the Jackson Laboratory in Bar Harbor, Maine, and at bio-genetic centers at several leading universities.

The sciences are growing in number and it is not untrue to say that there are at least 200 individual sciences that could be consulted on exactly what happens when an abortion is performed.

It is not enough, legally, to abhor the destruction of unborn life. The scientific details of that destruction must support the allegation that it is unlawful.

These sciences can demonstrate, with detailed empirical data that the womb is the temporary habitation of a developing human being, with embryonic and extraembryonic support systems designed specifically for the preservation of a human life. How many who advocate abortion as a harmless procedure know the scientific structure of the amnion and chorion, the inner and outer fetal membranes and how, as the unborn child begins to experience the epiphany of its powers, it casts off the thin layer of the amnion to form the amnichorionic sac? How much of this is instinctive, or merely neurobiotaxical, is not clearly discernible, but it does lay the basis for a new scientific and legal description of gestation: "A human subject in a state of somatic organizational and developmental repose, with an integrating and organizational principle distinct from and separate from the body of the mother." And there is a body of evidence supporting the claim that "the integrating principle is a human person in the unfolding of its innate human potential, gradually experiencing and revealing the blossoming of its distinctive human powers." (27)

In 1908, Louis Brandeis, a corporation lawyer from Boston, appeared before the Supreme Court with empirical data and legal arguments for a new development in American law that had its beginnings in the industrial revolution, when industry replaced agriculture as the economic base of society.

Until that time, the Supreme Court had fostered what has been called "court-protected capitalism," a legal doctrine based on property rights, with all the rights attached to the ownership of property applied to business and industry.

It was a classical case of empirical data underpinning a new development in law, and the extension of the Constitution into a totally new area of American society: the rights of workers, ushering in a new era of individual and personal rights.

A similar development is taking place in the wake of the Roe v. Wade decision, and the empirical underpinning of this development is being drawn from the medical and biological sciences, which have grown in sophistication and number since the dawn of modern medicine. What is being brought under the scalpel of American Law are the facts of unborn life, and the extension of constitutional rights to the unborn.

Roe v. Wade itself heralded a new watershed in constitutional history: the emergence of the non-enumerated right as the basis for a Supreme Court decision. The non-enumerated rights recognized by Roe v. Wade were the right to privacy and a woman's dominion over her own body. There is no doubt that these are genuine rights, but they were not clearly enunciated, and made part of constitutional law until the Roe v. Wade decision and another landmark Supreme Court decision, Griswold v. Connecticut.

Now there is another legal principle emerging from the Roe v. Wade decision, one that could not have emerged until the question of the unborn was brought into the legal arena. In the case of the unborn, we are faced with the question of divided dominion, something unique in human life and unique in constitutional law. It is the definition and application of this concept of divided dominion that will bring about a further application of the right of dominion, recognizing that while, in law, a woman does have absolute dominion over her own body, she does not have absolute dominion over the body of her unborn child. In the case of the unborn, there is a double dominion, unique in human life and unique in American law, because of the very nature of embryonic life.

Catholic politicians and public officials should be aware that the question of the unborn is not just a religious issue, and far less just a Catholic issue. It is an issue of law, of human rights, and of American Law in particular, as was true in the case of slavery, segregation, workers rights, and child labor. And this battle for rights is firmly imbedded in American Law and people of outstanding religious principles have never hesitated to carry on this battle for human rights, since it is most especially in matters of justice and human rights that religion and law come together.

The challenge to Roe v. Wade in the courts, (and there will be

continued on page 4B