

HOW LAW STUDENTS AND ATTORNEYS CAN HELP THE PRO-LIFE MOVEMENT

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I. THE PRIORITY OF THE TASK

At their annual meeting in November of 1989, the United States Catholic Bishops unanimously adopted a Resolution on Abortion, which stated in part: “At this particular time, abortion has become the fundamental human rights issue for all men and women of good will.”¹ That statement remains true today and has been echoed in numerous subsequent statements from the bishops over the years. No act of violence claims more victims.² Moreover, no social policy more radically undermines our legal system, turning on its head the very purpose of law. In their 1998 document *Living the Gospel of Life*, the bishops made this striking statement: “When American political life becomes an experiment *on* people rather than *for* and *by* them, it will no longer be worth conducting. We are arguably moving closer to that day.”³

Pope John Paul II spoke in similarly strong language about the implications of the failure of the state to protect the right to life in his encyclical *The Gospel of Life*, which is a seminal document for the pro-life movement:

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1. U.S. Conference of Catholic Bishops, Resolution on Abortion, *in* 19 ORIGINS 395, 395 (1989).

2. Approximately 1,287,000 unborn children were killed by abortion in the United States in 2003. LAWRENCE B. FINER & STANLEY K. HENSHAW, GUTTMACHER INST., ESTIMATES OF U.S. ABORTION INCIDENCE, 2001–2003, at 2 (2006), http://www.guttmacher.org/pubs/2006/08/03/ab_incidence.pdf. By comparison, there were 17,732 homicides, 31,484 suicides, and 109,277 deaths by accident in the United States in the same year. Donna L. Hoyert et al., *Deaths: Final Data for 2003*, NAT'L VITAL STATS. REPS., April 19, 2006, at 1, 5 tbl.C.

3. U.S. Conference of Catholic Bishops, *Living the Gospel of Life: A Challenge to American Catholics* ¶ 4 (1998).

The appearance of the strictest respect for legality is maintained, at least when the laws permitting abortion and euthanasia are the result of a ballot in accordance with what are generally seen as the rules of democracy. Really, what we have here is only the tragic caricature of legality; the democratic ideal, which is only truly such when it acknowledges and safeguards the dignity of every human person, *is betrayed in its very foundations* When this happens, the process leading to the breakdown of a genuinely human co-existence and the disintegration of the state itself has already begun.

. . . This is the death of true freedom⁴

There can be no arena, therefore, in which the assistance of professionals—and in no small measure, *legal* professionals—is more urgently needed than in the pro-life movement. What is at stake is not merely a societal trend or an undesirable policy, but ultimately the survival of society.

II. THE SPECIAL CONTRIBUTION OF LEGAL PROFESSIONALS

The abortion issue, and therefore the pro-life movement, has many dimensions, and there are many professional organizations geared toward assisting people to use their professional skills to advance the culture of life.⁵ Whether as a member of such organizations or not, and whether doing pro-life work full-time or part-time, legal professionals are needed to meet many critical strategic and practical needs of the pro-life movement at the present time. Meeting these needs corresponds to the call of Pope John Paul II to transform culture with the help of law.⁶ This Article identifies eight of these areas: (1) assisting citizens to understand the nature of our government, and particularly the role of the judiciary; (2) assisting pro-lifers to understand and utilize their First Amendment right to freedom of speech; (3) exposing abortionists and their staff to the consequences of malpractice and other illegal activity in abortion clinics; (4) assisting women who have been injured physically and

4. Pope John Paul II, *Evangelium Vitae* [*Encyclical Letter on the Value and Inviolability of Human Life*] ¶ 20 (1995) [hereinafter *Evangelium Vitae*].

5. In his encyclical letter, *Evangelium Vitae*, Pope John Paul II challenged intellectuals and professionals to “promote a serious and indepth exchange about basic issues of human life . . . in the various professional spheres,” *id.* ¶ 95, and many have responded.

6. *Id.* ¶ 90.

emotionally from abortion; (5) gathering evidence from legal documents for pro-life activists to use; (6) assisting pastors and other Church leaders to understand and exercise their rights regarding political activity; (7) assisting pro-life organizations to create and strengthen their legal infrastructure; and (8) developing the “embryonic moment” in constitutional law.

A. *Understanding Our Republic and Our Judiciary*

Americans have never agreed with the current policy of abortion-on-demand, and most still do not understand what that policy is. Yet as people become informed about it and desire to change it, a basic understanding about how our Republic is structured and how the three branches of government interact is indispensable. Law students and attorneys exercise special influence here, because they can speak with a certain authority. Those who want to change the culture and the law are greatly encouraged when they understand these matters better.

“Remember, democracy never lasts long. It soon wastes, exhausts, and murders itself. There never was a democracy yet that did not commit suicide.”⁷ That quote is not from an anarchist or a totalitarian leader. It is, perhaps surprisingly, from John Adams, the second President of the United States and a signer of the Declaration of Independence. Similar quotes can be found in the writings of other Founding Fathers of our nation, because, although they had the opportunity to do so, *they did not establish a democracy*. What they established for the United States, instead, was a *republic*.⁸ Quotes like the one above from Adams speak of “democracy” in the strict sense of an absolute majority rule, with no recourse from the majority’s decisions unless the majority changes its mind. A republic, on the other hand, is based not simply on the rule of the majority but also on *the rule of law*.⁹ While elected representatives pass laws, they act

7. 6 CHARLES FRANCIS ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 484 (1851).

8. See generally Robert W. Shoemaker, “Democracy” and “Republic” as Understood in Late Eighteenth-Century America, 41 AM. SPEECH 83 (1966) (explaining the distinction between a pure democracy and a republic as understood by the Founding Fathers and evidencing their decision to found a republic).

9. See generally Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution’s Guarantee Clause*, 80 TEX. L. REV. 807, 822–23 (2002) (indicating that almost all of the men who ratified the Constitution agreed that the defining

within the existing system of laws. The rule of law means that even rulers must follow the law and that the law must be clear, widely known, and enforced fairly.¹⁰

In our republic, until recently, rulers were also thought to be *accountable to a higher law*,¹¹ and there is the key difference. There are certain laws that the majority *can never change*.¹² These laws flow from the fundamental rights of the human person and from God Himself.¹³ The Founding Fathers recognized this and expected all future generations of Americans to recognize it as well. In an essay on the American system of government, Alexander Hamilton, a signer of the Constitution, approvingly quoted William Blackstone to the effect that the law “dictated by God [H]imself, is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, and at all times. No human laws are of any validity, if contrary to this”¹⁴ James Wilson, another signer of the Constitution and a U.S. Supreme Court justice, wrote the following on the relationship of human law to God’s: “All [laws], however, may be arranged in two different classes. 1. Divine. 2. Human Human law must rest its authority, ultimately, upon the authority of that law, which is Divine.”¹⁵ The Founders of our nation believed in biblical law, and that was the standard for law and government in our country until the turn of this century.¹⁶ Now, instead, *legal*

elements of a republic were: (1) “[R]ule by the majority of participants,” (2) “absence of a monarch,” and (3) “the rule of law”).

10. See generally RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 1–22 (2001) (expounding on the classic rule of law concept as articulated in the American context).

11. CHARLES E. RICE, *50 QUESTIONS ON THE NATURAL LAW: WHAT IT IS AND WHY WE NEED IT* 33 (rev. ed. 1999).

12. *Id.* at 57–60.

13. *Id.* at 30.

14. 1 ALEXANDER HAMILTON, *THE PAPERS OF ALEXANDER HAMILTON* 87 (1961) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *41 (William S. Hein & Co. 1992) (1789)).

15. 1 JAMES WILSON, *Of the General Principle of the Law and Obligation*, in *THE WORKS OF JAMES WILSON* 49, 91–93 (James DeWitt Andrews ed., Chicago, Callaghan & Co. 1896).

16. See generally John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 BYU L. REV. 611, 619–625, 635 (2002) (detailing the explicit use of biblical law in the formation of early colonial American law).

*positivism*¹⁷ has become the standard, and that is the poisoned soil out of which *Roe v. Wade*¹⁸ and other abortion decisions have grown.

1. *The Courts*

If you take a tour of the Capitol building in Washington, D.C., you eventually reach a relatively small room in the basement. It is the old Supreme Court. Prior to getting its own building across the street, the Supreme Court was housed *under* the building in which our federal lawmakers gather, deliberate, and vote. The symbolic significance of this, of course, is that *we govern ourselves*. Our elected representatives, who are accountable to us, pass laws—judges do not. They simply *judge* whether an existing law has been violated in a particular case by particular parties.

Yet we live in an age of judicial activism, or as some have called it, *judicial tyranny*.¹⁹ Judges are striking down laws and writing new ones left and right, without precedent and without reason. For example, the Supreme Court decision *Engel v. Vitale* in 1962 attacked the longstanding tradition of school prayer, declaring that a voluntary, non-denominational prayer in a public school was unconstitutional.²⁰ The Court failed to cite a single precedent to justify its prohibition. “For 170 years following the ratification of the Constitution and Bill of Rights, no Court had ever struck down any prayer, in any form, in any location.”²¹ Things went downhill from there, in many different decisions. In 1973, the *Roe*²² and *Doe*²³ decisions unleashed the abortion holocaust. In his dissent, Justice Byron White issued the famous assertion that the Court delivered “an exercise of raw judicial power . . . an improvident and extravagant

17. “The theory that legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law.” BLACK’S LAW DICTIONARY 915 (8th ed. 2004).

18. 410 U.S. 113 (1973).

19. See, e.g., Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 127–28 (1998) (“Americans have often been concerned about judicial activism, judicial tyranny, evolutionary jurisprudence, rendering unconstitutional opinions, and the like.”).

20. *Engel v. Vitale*, 370 U.S. 421, 424, 430 (1962).

21. DAVID BARTON, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION 159 (3d ed. 2004); see also *Engel*, 370 U.S. at 449 (Stewart, J., dissenting) (discussing the historical use of “God” and prayer by Congress).

22. *Roe v. Wade*, 410 U.S. 113 (1973).

23. *Doe v. Bolton*, 410 U.S. 179 (1973).

exercise of the power of judicial review."²⁴ Now the courts are tampering with the very nature of marriage as a union between man and woman.²⁵

The Founding Fathers knew the dangers of a court system that would try to take control of the rest of the government. Thomas Jefferson wrote:

[T]he germ of dissolution of our federal government is in the constitution of the federal judiciary . . . working like gravity by night and by day, gaining a little to-day and a little to-morrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped . . .²⁶

In the minds of the Founders, the legislative, executive, and judicial branches all interpret the Constitution. "[E]ach of the three departments has equally the right to decide for itself what is its duty under the Constitution, without any regard to what the others may have decided for themselves under a similar question."²⁷ In other words, the President and the members of Congress pledge to uphold *the Constitution*, not *the Court's opinion* of the Constitution.²⁸ Little by little, Americans today are waking up to judicial tyranny, and are calling for a change. The legal profession plays a crucial function in assisting that awakening. The vital way that citizens can facilitate the change, of course, is to take an active and informed role in the elections of those who take part in appointing judges (that is, the President and the senators). Citizens should make the candidate's judicial philosophy a key element of consideration.

Citizens should also be informed that there exists a remedy precisely for judicial tyranny, found in the provisions of the

24. *Id.* at 222 (White, J., dissenting).

25. *See, e.g.,* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 968–69 (Mass. 2003) (redefining marriage in Massachusetts to include homosexual relationships); Baker v. State, 744 A.2d 864, 867 (Vt. 1999) (requiring the Vermont legislature to establish civil unions for homosexual couples); Lewis v. Harris, 908 A.2d 196, 221 (N.J. 2006) (ordering the legislature to amend the State's marriage statutes to include homosexual couples or to create a parallel statutory structure extending benefits and obligations afforded to marriage).

26. Letter from Thomas Jefferson to Charles Hammond (Aug. 18, 1821), *in* 15 THE WRITINGS OF THOMAS JEFFERSON 330, 331 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

27. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), *in* 15 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 26, at 212, 215.

28. *See* U.S. CONST. art VI, cl. 3.

Constitution. Article III of the Constitution outlines the structure of the federal judiciary. That article states: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”²⁹ Thus, even in the very making of the judiciary, the Founding Fathers put Congress in control of the courts. The Constitution also gives the conditions of continued employment for judges: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”³⁰ This sentence, giving judges job security during good behavior, implies the possibility of removing a judge from office for bad behavior (or should I say “un-judgelike” behavior). The judicial tyranny that we are familiar with today is certainly *not*, in my view, good behavior.

The second section of Article III describes the jurisdiction of the courts. The first clause describes the different types of cases that all federal courts have the power to hear, such as cases involving treaties or cases between two states.³¹ The second clause describes the jurisdiction of the Supreme Court in particular, stating that it has original jurisdiction in a certain small class of cases and “[i]n all the other Cases [mentioned in Clause 1], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”³² What is encouraging for people to know here is that there really is such a thing as self-governance. The sense that America is being governed by a small group of unelected and unaccountable people, while it may in fact correspond in some ways to reality, does not represent an unchangeable situation. Article III, Section 2 clearly gives Congress the right to limit the jurisdiction of the Court, and Congress has at times used that power.³³ More bills have been introduced in recent

29. *Id.* art. III, § 1.

30. *Id.*

31. *Id.* § 2, cl. 1.

32. *Id.* cl. 2.

33. *See* H.R. REP. NO. 108-614, at 2 (2004).

A remedy to abuses by Federal judges has long been understood to lie, among other places, in Congress’s authority to limit Federal court jurisdiction. . . .

....

years to continue to use that power, and the very possibility of it gives people hope.³⁴

2. *The Church and Democracy*

In June of 2003, the Congregation for the Doctrine of the Faith issued the document *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*. It stated in part:

There are absolutely no grounds for considering homosexual unions to be in any way similar or even remotely analogous to God's plan for marriage and family. Marriage is holy, while homosexual acts go against the natural moral law. Homosexual acts "close the sexual act to the gift of life. They do not proceed from a genuine affective and sexual complementarity. Under no circumstances can they be approved."

....

When legislation in favor of the recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic law-maker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favor of a law so harmful to the common good is gravely immoral.³⁵

Some political pundits responded that Pope John Paul II was impermissibly interfering with democracy.³⁶ On the contrary, the Pope was *promoting* democracy, understood as self-governance. As

Congress has always made clear that it can limit the jurisdiction of the Federal courts, starting with the very first Judiciary Act of 1789. . . .

The first Congress made clear that Federal court jurisdiction over constitutional claims was not unlimited.

Id. at 5, 7. See also *Gordon v. Caldcleugh*, 7 U.S. (3 Cranch) 268, 269–270 (1806) (dismissing the case for want of jurisdiction under section 25 of the Judiciary Act of 1789 because Congress did not provide for appellate jurisdiction in the Supreme Court in this instance).

34. See, e.g., H.R. REP. NO. 108-614, at 2 (the House Judiciary Committee's resolution that jurisdiction should be removed from any Article III court to decide questions pertaining to the interpretation of the Defense of Marriage Act); H.R. REP. NO. 109-350, at 3 (2005) (clarifying existing limits on federal courts' jurisdiction to review certain removal orders).

35. Congregation for the Doctrine of the Faith, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons* ¶¶ 4, 10 (2003) (footnote omitted).

36. Editorial, *Orders from Rome*, COMMONWEAL, Aug. 15, 2003, at 5, 6.

he wrote in *The Gospel of Life*, “the value of democracy stands or falls with the values which it embodies and promotes.”³⁷ Henry Hyde expressed the same truth this way: “To have a virtuous kingdom it is enough perhaps to have a virtuous king, but you cannot have a successful democracy without a virtuous people.”³⁸ We cannot govern ourselves if we cannot tell the difference between what is good for us and what can destroy us. What we need is *virtuous democracy*—a self-governing people free to strive for and to do what is right.

This is precisely where the mission of the Church intersects with efforts to restore both an understanding and an exercise of self-governance, free from judicial tyranny. The Church, in promoting the truth about the human person and the common good of society, promotes precisely one of the pre-conditions for the People of God to govern themselves in the civil sphere. When, on the other hand, moral agnosticism and relativism take over, self-governance is threatened and is left open to tyranny. The Congregation for the Doctrine of the Faith likewise addressed that point in 2002 with the document *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*, which reads in part:

It is, however, the church’s right and duty to provide a moral judgment on temporal matters when this is required by faith or the moral law. If Christians must “recognize the legitimacy of differing points of view about the organization of worldly affairs,” they are also called to reject as injurious to democratic life a conception of pluralism that reflects moral relativism. Democracy must be based on the true and solid foundation of non-negotiable ethical principles, which are the underpinning of life in society.³⁹

B. *Understanding and Exercising the First Amendment*

The call of the Church and the pro-life movement to transform culture requires a clear understanding and firm commitment to

37. *Evangelium Vitae*, *supra* note 4, ¶ 70.

38. Henry Hyde, Chairman, House Judiciary Comm., Russell Kirk Memorial Lecture: Virtue In Democracy (May 15, 2000), in HERITAGE LECTURES, July 19, 2000.

39. Congregation for the Doctrine of the Faith, *Doctrinal Note on Some Questions Regarding the Participation of Catholics in Political Life*, in 32 ORIGINS 537, 540 (2003) (footnotes omitted).

proclaim the truth. The legal framework of the right to freedom of speech as envisioned by the First Amendment to the Constitution provides an excellent context in which to carry out this mission.⁴⁰ The greatest service that legal professionals can provide to the pro-life movement today is to assist its activists to better understand how First Amendment law works.

Pope John Paul II summarized the need and call to speak the truth amidst a culture of death in *The Gospel of Life* by stating that, “[g]iven such a grave situation [of the acceptance of abortion in the popular mind and in law itself], we need now more than ever to have the courage to look the truth in the eye and to *call things by their proper name*, without yielding to convenient compromises or to the temptation of self-deception.”⁴¹

Using the traditional First Amendment public forum for this activity, as described below, was also very much the Holy Father’s thinking, as expressed in his call at World Youth Day in Denver on August 15, 1993:

Like the great Apostle Paul, you too must feel the full urgency of the task: “Woe to me if I do not evangelize.” *Woe to you if you do not succeed in defending life.* The Church needs your energies, your enthusiasm, your youthful ideals, in order to make the Gospel of Life penetrate the fabric of society, transforming people’s hearts and the structures of society *in order to create a civilization of true justice and love.* . . .

Do not be afraid to go out on the streets and into public places, like the first Apostles who preached Christ and the Good News of salvation in the squares of cities, towns and villages. . . . Do not be afraid to break out of comfortable and routine modes of living, in order to take up the challenge of making Christ known in the modern “metropolis.” It is you who must “go out into the byroads” and invite everyone you meet to the banquet that God has prepared for his people.⁴²

40. See U.S. CONST. amend. I.

41. *Evangelium Vitae*, *supra* note 4, ¶ 58.

42. Pope John Paul II, Place Your Talents at the Service of Life: Homily at World Youth Day Mass (Aug. 15, 1993), in MESSAGES OF POPE JOHN PAUL II TO THE YOUTH OF THE WORLD: WORLD YOUTH DAY '93, DENVER, COLORADO 39, 42–43 (1993) (citations omitted) (quoting 1 *Corinthians* 9:16; *Matthew* 22:9).

Pro-life people, young and old, often feel this call, but are quickly confused and intimidated when told that they might get into legal trouble for proclaiming unpopular messages to people who do not want to hear them. Many assume, for example, that if they are displaying a picture of an aborted baby in a public place and are approached by a police officer responding to complaints, they can be legally ordered to discontinue their demonstration. But under the constitutional framework provided by the First Amendment, the police officer is there to protect their unpopular speech, not to stop it. Despite this protection, however, groups like the Center for Bio-Ethical Reform that organize public displays of pictures of aborted children have found it necessary to compile legal memoranda to help those who organize such displays defend their First Amendment rights.⁴³

The First Amendment by its terms protects speech.⁴⁴ The Supreme Court has stated that “above all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁴⁵ To be sure, legitimate limitations on speech do exist, but the pro-life movement needs to understand the difference between reasonable restrictions on time, place, and manner of speech (content-neutral restrictions) and illegitimate regulation of the message, ideas, subject matter, or content of speech (content-based restrictions).

Content-based restrictions on speech are presumptively invalid.⁴⁶ That is, government regulation based on the content of speech must be “*necessary* to serve a *compelling* state interest and [be] *narrowly* drawn to achieve that end” in order to be deemed constitutional.⁴⁷ The Supreme Court has held that only regulations of “certain well-defined and narrowly limited classes of speech,” such as obscenity, defamation, and fighting words, satisfy this standard.⁴⁸

43. They have also had to defend their own First Amendment rights in court. *See, e.g.,* Ctr. for Bio-Ethical Reform, Inc. v. City & County of Honolulu, 455 F.3d 910, 915 (9th Cir. 2006).

44. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

45. *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

46. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

47. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (emphasis added) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

48. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

The standard for legitimate content-neutral restrictions, on the other hand, is that the regulation must be “*narrowly* tailored to serve a *significant* government interest, and leave open ample alternative channels of communication.”⁴⁹ Examples of “significant” governmental interests justifying regulation of speech on public property are safety and traffic flow on streets and sidewalks.⁵⁰ But any attempt by law enforcement to minimize controversy surrounding the abortion issue by relegating the pro-lifers’ presence to an obscure location is per se unconstitutional.⁵¹ Pro-lifers, like all Americans, have First Amendment rights to conduct their educational presentations in public forums because a “principal purpose of traditional public fora is the free exchange of ideas.”⁵² This is so because public places “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁵³ Therefore, while the police may ask a pro-life demonstrator not to impede sidewalk traffic, or to obtain a permit for a demonstration in a public forum, they cannot order a protestor to cease the display of images of aborted babies despite the offense such images may cause.

The Supreme Court has recognized that First Amendment protections are especially important when the speech is offensive to some, stating that, “under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.”⁵⁴ Therefore, the possibility that

49. Perry Educ. Ass’n v. Perry Local Educator’s Ass’n, 460 U.S. at 45 (emphasis added).

50. *E.g.*, Cox v. New Hampshire, 312 U.S. 569, 574 (1941).

51. *See* Hudgens v. NLRB, 424 U.S. 507, 520 (5th Cir. 1976).

[W]hile a municipality may constitutionally impose reasonable time, place, and manner regulations on the use of its streets and sidewalks for First Amendment purposes, and may even forbid altogether such use of some of its facilities, what a municipality may *not* do under the First and Fourteenth Amendments is to discriminate in the regulation of expression on the basis of the content of that expression

Id. (citations omitted).

52. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985).

53. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

54. Street v. New York, 394 U.S. 576, 592 (1969); *see also* Forsyth County v. Nationalist Movement, 505 U.S. 123, 134–35 (1992) (indicating that speech cannot be “punished or banned, simply because it might offend a hostile mob”); Cohen v. California, 403 U.S. 15, 21 (1971) (explaining that viewers who dislike a message have a responsibility to “avoid further bombardment of their sensibilities simply by averting their eyes”); Terminiello v. Chicago, 337

pro-life activists or anyone else might offend others by their speech is irrelevant and cannot properly be used as a basis for restricting that speech. In like manner, the handing out of leaflets to passersby has also been long protected under freedom of the press as provided by the First Amendment.⁵⁵

In all practicality, the average citizen will not have a thorough working understanding of this First Amendment jurisprudence. Attorneys are in a unique position to assist pro-life individuals and groups precisely because of their expertise in the law. In addition, this tremendous service would go a long way toward fulfilling the pro bono work already expected of an attorney.⁵⁶ For example, lawyers could hold informal teaching sessions at church or community gatherings designed to provide a layman's understanding of the First Amendment. A lawyer could also be in contact with the local town or county government to see what is expected of demonstrators. Also, there is always a need for representation of pro-life groups in litigation over protests.

When the Pope's call to take the pro-life message to the streets is strengthened by a thorough (and correct) legal understanding of the protections afforded by the First Amendment, and the expertise to defend this right when legal challenges arise, we have a powerful formula for change.

U.S. 1, 4 (1949) (explaining that free speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

55. See U.S. CONST. amend I (protecting freedom of the press); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938).

56. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2002).

A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

(a) provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:

....

(2) charitable, religious, . . . and educational organizations in matters that are designed primarily to address the needs of persons of limited means

C. *Exposing Illegal Activity in Abortion Clinics*

Abortion is, unfortunately, legal, but malpractice is not. Because it is difficult to practice vice virtuously, those who kill babies in abortion clinics often commit other immoral acts, many of which are also illegal. Attorneys can assist the pro-life movement in closing clinics, stopping abortionists, and turning public opinion even more strongly against the abortion industry by helping to identify, expose, and prosecute medical malpractice and other wrongdoing, and by helping clinic employees understand their legal liability.

Pope John Paul II points out the sad irony and inherent contradiction of medical personnel being involved with abortion:

A unique responsibility belongs to health-care personnel: doctors, pharmacists, nurses, chaplains, men and women religious, administrators and volunteers. Their profession calls for them to be guardians and servants of human life. In today's cultural and social context, in which science and the practice of medicine risk losing sight of their inherent ethical dimension, health-care professionals can be strongly tempted at times to become manipulators of life, or even agents of death. In the face of this temptation their responsibility today is greatly increased. Its deepest inspiration and strongest support lie in the intrinsic and undeniable ethical dimension of the health-care profession, something already recognized by the ancient and still relevant *Hippocratic Oath*, which requires every doctor to commit himself to absolute respect for human life and its sacredness.⁵⁷

One fairly prominent legal situation related to abortion clinics is the possibility of instances of statutory rapes going undetected (or rather, unreported by the clinic to the proper authorities) and therefore unpunished. When a young girl (under sixteen years of age, for example) enters a clinic to have an abortion, there is a startlingly high chance that she is the victim of statutory rape.⁵⁸ Actions by law

57. *Evangelium Vitae*, *supra* note 4, ¶ 89.

58. Studies indicate that, in America in 1994, the father of the aborted child was three or more years older than the mother in 35.9% of abortions obtained by girls between fifteen and seventeen years of age. Jacqueline E. Darroch et al., *Age Difference Between Sexual Partners in the United States*, 31 FAM. PLAN. PERSP. 160, 160, 166 tbl.4 (1999). Given that the vast majority of states set the age of consent at sixteen or older, see RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA'S SEX LAWS 45-64 (1996), many of these pregnancies were more than likely the result of statutory rape. Likewise, there is every reason to believe that a similar, if

enforcement agencies to find out information from abortion clinics in order to prosecute (or even investigate) these instances of statutory rape have been met with much difficulty.⁵⁹

The environment in which the healing profession has become a killing profession—that is, the legal abortion clinic—is, to put it mildly, highly dysfunctional. This is the weak point of the abortion industry. Instances of sexual assault and rape oftentimes accompany abortion procedures.⁶⁰ The pro-life movement, with the assistance of the legal profession, can bring the law to bear on these atrocious situations in order to close the clinics and to deter people from working in them. Life Dynamics, with whom Priests for Life collaborates closely, has developed a website that aims to promote awareness of the illegal activity occurring in the clinics, so that staff members can report these instances and likewise avoid working there.⁶¹ Many clinic employees have come forward and indicated that they have witnessed illegal or unethical acts. These activities include but are not limited to: sexual crimes such as rape, abuse, and harassment; financial crimes like tax fraud or money laundering; consumer fraud; and health and safety violations.⁶²

Life Dynamics explains to abortion clinic workers that oftentimes illegal activity goes on for a while without employees becoming aware of it or perhaps being able to pinpoint it exactly. The group cautions workers to protect themselves from possible prosecution for unwittingly being accomplices to the activities noted above.⁶³ Life Dynamics also takes special care to point out, along the same lines as the discussion above referring to the link between sexual assault and abortion, that abortionists are often unscrupulous people. Because of this, an abortionist may be knowingly luring employees to participate

not higher, percentage of girls under sixteen who abort their babies were also victims of statutory rape.

59. See Editorial, *Motives Questionable in Abortion Subpoenas*, IOWA STATE DAILY, Mar. 2, 2005, at 5; see also *The O'Reilly Factor: Using Doctors To Hide Sex Crimes?* (text of Fox News Network television broadcast for Feb. 25, 2005).

60. See MARK CRUTCHER, *LIFE 5: EXPLOITED BY CHOICE* 84–103 (1996) (detailing numerous occurrences of violence and sexual assault by abortionists towards patients and other women).

61. Life Dynamics, ClinicWorker.com Homepage, <http://www.clinicworker.com> (last visited Feb. 15, 2007).

62. See, e.g., Scott Marshall, *Former Employee Sues Planned Parenthood*, NORTH COUNTY TIMES, Sept. 4, 2002, at B1 (discussing Planned Parenthood's allowance of unlicensed people to assist in abortions and to diagnose and treat medical conditions).

63. Life Dynamics, ClinicWorker.com Homepage, <http://www.clinicworker.com> (last visited Feb. 15, 2007).

in crimes.⁶⁴ One possible explanation for this behavior is that it is a method of protection: an accomplice to illegal activity will be less likely to report it.⁶⁵ Knowing of a serious crime and not reporting it, however, could *itself* be a crime. While reporting a crime in which a person was involved does not itself absolve the person of criminal liability, law enforcement will generally excuse minimal involvement in exchange for more information and reporting.⁶⁶

Life Dynamics performed an investigation of abortion facilities to determine whether these types of activities were in fact taking place. Evidence of specific crimes was obtained when abortion clinic workers agreed to cover up (that is, not to report) instances of statutory rape.⁶⁷ Such a scenario would be almost overwhelming, were it not for the good work done by groups such as Life Dynamics. They hold themselves out as ready to provide assistance, without charge, to clinic workers who find themselves in these difficult situations.⁶⁸

D. *Assisting Women Injured by Abortion*

Pope John Paul II wrote in *Crossing the Threshold of Hope*: “Therefore, in firmly rejecting ‘pro choice’ it is necessary to become courageously ‘pro woman,’ promoting a choice that is truly in favor of women. . . . The only honest stance . . . is that of radical solidarity with the woman.”⁶⁹ Likewise, in *The Gospel of Life*, the Holy Father called for a “new feminism” whose purpose is “to acknowledge and affirm the true genius of women in every aspect of the life of society, and overcome all discrimination, violence and exploitation.”⁷⁰

The Silent No More Awareness Campaign is a great example of this kind of activity. The Campaign is a national network of organizations, counselors, and clergy trained to work with women and men suffering the effects of an abortion. It also provides an opportunity for these individuals to speak out about the harm they

64. Life Dynamics, Am I in Legal Trouble?, <http://www.clinicworker.com/LegalTrouble.html> (last visited Feb. 15, 2007).

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. POPE JOHN PAUL II, *CROSSING THE THRESHOLD OF HOPE* 206–07 (Vittorio Messori, ed., Jenny McPhee & Martha McPhee trans., 1994).

70. *Evangelium Vitae*, *supra* note 4, ¶ 99.

suffered from abortion.⁷¹ As books like *Lime 5: Exploited by Choice* relate in detail, the incidence of malpractice and exploitation of women in legal abortion clinics is beyond what anyone imagines.⁷² People who did not spend a day in medical school pose as doctors;⁷³ instruments are not sterilized;⁷⁴ women are sent home with the abortion procedure incomplete because they could not pay more money on the spot to complete the abortion of a baby whose gestational age was misdiagnosed;⁷⁵ people administer anesthesia without proper training.⁷⁶ The list could go on.

The more that pro-life groups dig for this information, the more they find. This has led Life Dynamics, and other groups like Physicians for Life, to offer emotional and legal assistance to women across the country.⁷⁷ The idea of legal assistance obviously requires the active collaboration of legal professionals. Life Dynamics, in particular, reaches out to victims of abortion-related violence or malpractice by offering “a network of over 700 attorneys who are ready to take abortion-related cases.”⁷⁸ In addition to offering help for the injured women and girls, these groups also have as their aim preventing further harm to new victims, and helping law enforcement authorities find violations of reporting laws and other requirements of medical clinics.⁷⁹

71. Silent No More Awareness Campaign Objectives, <http://www.silentnomoreawareness.org/about/> (last visited Feb. 15, 2007). The effects of abortion on women cannot possibly be overstated. See generally THERESA BURKE & DAVID C. REARDON, FORBIDDEN GRIEF: THE UNSPOKEN PAIN OF ABORTION (2002) (detailing the harmful and devastating effects of abortion on women through individual accounts); THE COST OF “CHOICE”: WOMEN EVALUATE THE IMPACT OF ABORTION (Erika Bachiochi ed., 2004) (discussing the social, medical, psychological, and cultural effects of abortion on women).

72. See CRUTCHER, *supra* note 60, at 13.

73. *Id.* at 14.

74. *Id.* at 17.

75. *Id.* at 76.

76. *Id.* at 17.

77. See LifeDynamics, Women Injured or Assaulted Page, http://www.lidi.org/Abortion_Prolife/Abortion_Injury/ (last visited Mar. 6, 2007); Physicians for Life Homepage, <http://www.physiciansforlife.org/content/view/full/635/26/> (last visited Mar. 17, 2007).

78. Life Dynamics, *supra* note 77.

79. *Id.*

E. *Gathering Evidence About Abortion from Legal Documents*

Legal professionals can assist local pro-life educators and activists in obtaining some of the best educational material available about abortion, namely, the sworn testimony of practicing abortionists. This material is available now in greater abundance than ever before, particularly because of all the legislative and judicial activity related to partial-birth abortion and the bans placed on this procedure on the state and federal levels. Let us turn to some examples.

In 2003, Congress passed the Partial-Birth Abortion Ban Act.⁸⁰ Because partial-birth abortion is such a controversial issue, there is a wealth of information in the legislative history of this law.⁸¹ Even the Supreme Court has recognized that Congress “is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions.”⁸² As an example of this, the findings of the congressional hearings on the issue are included in the very text of the Act.⁸³ But the legislative history itself contains much more information, including the testimony of medical personnel who appeared before the Senate and House of Representatives committees that considered the Act before its passage. For example, the Senate Committee on the Judiciary heard testimony from Brenda Pratt Shaffer, a registered nurse from Ohio.⁸⁴ She gave a detailed, first-hand account of partial-birth abortions that she witnessed while

80. Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003) (codified as amended at 18 U.S.C. § 1531 (Supp. 2005)). In 2007, this statute was upheld by the U.S. Supreme Court against constitutional challenges. *Gonzalez v. Carhart*, No. 05-380, 2007 U.S. LEXIS 4338, at *18 (S. Ct. Apr. 18, 2007).

81. The legislative history of a statute consists of, *inter alia*, different versions of the bill, committee hearings and reports, transcripts of floor debates, presidential statements, and histories of actions taken. These sources are available either from the government printing office or, if the sources are published, in libraries that are federal depositories. As a great tool for the pro-life movement, the legislative history of the Partial-Birth Abortion Ban Act has been compiled in a very thorough and compact three-volume set. See PARTIAL-BIRTH ABORTION BAN ACT OF 2003: A LEGISLATIVE HISTORY (William H. Manz ed., 2004) [hereinafter LEGISLATIVE HISTORY].

82. *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (internal quotation marks omitted) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)).

83. Partial-Birth Abortion Ban Act of 2003, § 2(1)–(2), (5), (14).

84. *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the S. Comm. on the Judiciary*, 104th Cong. 17–21 (1995) (statement of Brenda Pratt Shafer, R.N., Franklin, Ohio), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119.

working in an abortion clinic.⁸⁵ This same Senate hearing included a presentation by abortionist Dr. Martin Haskell that describes the partial-birth abortion procedure in gruesome detail.⁸⁶ Because documents such as these are not easily accessible to non-lawyers, it is up to the legal profession to make them available to assist the pro-life movement.

While much can be gleaned from the legislative history, trial transcripts are also a significant resource. Abortion supporters, in their effort to have bans on partial-birth abortion declared unconstitutional, have argued that the bans are vague and overbroad. They maintained, in other words, that the language in the ban describing the partial-birth abortion procedure could be understood to ban other abortion procedures as well and therefore subject abortion practitioners to prosecution, or fear of prosecution, for performing non-partial-birth abortions. To support this argument, they relied on the testimony of abortion practitioners that detailed various methods of abortion, including the partial-birth procedure. The Senate committee used some of this testimony in its hearings, and as such, it is included in the legislative history. One particularly frank description of the gruesome nature of this abortion technique was supplied by the trial testimony of abortionist Dr. Haskell, who was a witness for the party seeking to enjoin the enforcement of a ban on partial-birth abortion.⁸⁷ The doctor explained plainly, and coldly, that during non-partial-birth abortions scissors are used to “assist in dismemberment.”⁸⁸ He went on to acknowledge that the difference

85. *Id.* Ms. Shafer also testified before the House of Representatives in this matter. See *Effects of Anesthesia During a Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the H. Comm. of the Judiciary*, 104th Cong. 310–20 (1996) (testimony of Brenda Pratt Shafer, R.N., Franklin, Ohio), reprinted in 3 LEGISLATIVE HISTORY, *supra* note 81, pt. VIII, doc. no. 120. Ms. Shafer’s testimony also appeared in the very recent Supreme Court decision upholding the federal partial-birth abortion ban. *Carhart*, 2007 LEXIS 4338, at *27–28.

86. Martin Haskell, Presentation at the National Abortion Federation Risk Management Seminar: Dilation and Extraction for Late Second Trimester Abortion (Sept. 13, 1992), in *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the S. Comm. on the Judiciary*, 104th Cong. 5–12 (1995), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119.

87. Transcript of Proceedings, *Women’s Med. Prof’l Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995), in *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the S. Comm. on the Judiciary*, 104th Cong. 34 (1995), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119 (“Q. For whatever reason, [let’s assume the ban] never comes into existence A. It’s a desirable scenario. Q. Yes, I understand that. That’s why you filed your lawsuit.”).

88. *Id.* at 40, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119.

between dilation and evacuation abortions (“D&E abortions”) and partial-birth abortions is that the former are performed “without using scissors to make a hole at the base of the skull of the fetus and inserting a . . . suction catheter into that hole and into the brain cavity.”⁸⁹ Dr. Haskell also stated that a D&E abortion “is blind, that is, the surgeon cannot see the tip of the instrument and know precisely what it’s grabbing, [and] it’s not unusual for small fragments of the uterine wall itself to be removed in addition to the [baby]”⁹⁰

The record of the Senate hearing also includes a portion of another doctor’s sworn testimony, which appears to be from the same case.⁹¹ In this testimony, Dr. Harlan Raymond Giles, who stated that he performs abortions,⁹² testified in no uncertain terms to the non-necessity of partial-birth abortion:

Q. Doctor, with regard to fetuses which have reached the gestational age of twenty three to twenty four weeks, are there any circumstances in which termination of pregnancy for the necessary benefit of the mother need [sic] to be undertaken by ending the life of that fetus as opposed to trying to deliver the fetus in a live condition?

A. No, sir. I do not think there are any maternal conditions that I’m aware of that mandate ending the pregnancy that, also, require that the fetus be dead or that the fetal life be terminated.⁹³

89. *Id.*, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119.

90. *Id.* at 50, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119. See *id.* at 49–50, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119, for an extended narrative of the procedures.

91. See *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the S. Comm. on the Judiciary*, 104th Cong. 324–33 (1995), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119 (citation to U.S. District Court, Southern District Ohio handwritten on the reproduced transcript).

92. Transcript of Proceedings, *Women’s Med. Prof’l Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995), in *The Partial-Birth Abortion Ban Act of 1995: Hearing on H.R. 1833 Before the S. Comm. on the Judiciary*, 104th Cong. 329 (1995), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119.

93. *Id.* at 331, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119. The doctor continues: “In my experience for twenty years, one can deliver these fetuses either vaginally or by Cesarean section [T]here’s no reason these fetuses cannot be delivered intact vaginally after a miniature labor, if you will, and be . . . given the benefit of the doubt.” *Id.*, reprinted in 2 LEGISLATIVE HISTORY, *supra* note 81, pt. VII, doc. no. 119.

What is included in the Senate record is only a portion of the testimony from this case, and this case is only one of hundreds of others like it.

As a result of such litigation, the pro-life movement now has at its disposal a very large collection of sworn testimony by practicing abortionists documenting exactly what abortion is and what it does to a baby. Abortion supporters cannot argue with the source of this testimony, nor claim that it has been fabricated by pro-life activists. Pro-life writers, speakers, lobbyists, and educators need to begin using this material. They usually do not know how to obtain it, but legal professionals can obtain it for them, by gathering the court transcripts, briefs, and other testimony that is publicly available.

F. *Helping the Church Understand and Exercise Her Rights Regarding Politics and Elections*

The Church must speak up when human life is at stake, or else she is not true to her mission.⁹⁴ The Church must speak, even when this involves commenting upon matters of politics. Although politics is not our salvation, our response to the Savior demands that we be politically active. Pope John Paul II made the following appeal to political leaders as well as to citizens in *The Gospel of Life*:

If charity is to be realistic and effective, it demands that the *Gospel of life* be implemented also by means of certain *forms of social activity and commitment in the political field*, as a way of defending and promoting the value of life in our ever more complex and pluralistic societies.⁹⁵

94. See Second Vatican Council, *Gaudium et Spes* [*Pastoral Constitution on the Church in the Modern World*] ¶ 41–42 (1965), reprinted in THE SIXTEEN DOCUMENTS OF VATICAN II 513, 552–53 (Nat'l Catholic Welfare Conference trans., St. Paul ed. 1967) [hereinafter *Gaudium et Spes*].

95. *Evangelium Vitae*, *supra* note 4, ¶ 90. The Holy Father continues:

Individuals, families, groups and associations, albeit for different reasons and in different ways, all have a responsibility for shaping society and developing cultural, economic, political and legislative projects which . . . will contribute to the building of a society in which the dignity of each person is recognized and protected and the lives of all are defended and enhanced.

. . . Although laws are not the only means of protecting human life, nevertheless they do play a very important and sometimes decisive role in influencing patterns of thought and behavior.

Unlike the pro-abortion forces, pro-life people have a place to gather, namely, the churches. A dominant indicator of whether a person is likely to be pro-life is how frequently he or she attends church. Church congregations can become, therefore, the most fruitful place from which to call upon citizens to vote for pro-life candidates, to register them to vote, to educate them on the candidates and the issues, and to get them to the polls.⁹⁶

According to the guidelines of the Federal Election Commission ("FEC") and the Internal Revenue Service ("IRS"), some amount of this activity is permitted by organizations that are tax-exempt under section 501(c)(3) of the Internal Revenue Code.⁹⁷ The problem is, however, that the Church seems to have an over-abundance of overly cautious legal advisors who are leading bishops and pastors to believe that they are far more restricted than they actually are with respect to what they can say and do about elections.⁹⁸ Legal professionals need to help pastors understand the true meaning of separation of church and state, the rights that they have for issue advocacy, the limits on candidate advocacy, and the nature of non-partisan activity as opposed to partisan activity.⁹⁹ While the average lawyer may not have this information at his or her disposal, he or she is at least a step (a legal education) closer to understanding it than the average lay person.¹⁰⁰

There is, of course, a legitimate separation of church and state. The Church cannot decide that there are fifty-one states instead of fifty, any more than the state can decide that there are eight

Id.

96. See ROB KEITHAN & DAVID MAY, UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS, WASH. OFFICE FOR ADVOCACY, *THE REAL RULES: CONGREGATIONS AND IRS GUIDELINES ON ADVOCACY, LOBBYING, AND ELECTIONS* 4 (2005), http://www.uua.org/uuawo/pdf/the_real_rules.pdf (summarizing IRS guidelines for political activities of religious congregations to include educating and registering voters if done in a non-partisan manner).

97. See 26 C.F.R. § 1.501(c)(3) (2006). For further discussion of what section 501(c)(3) organizations can and cannot do, see *infra* pp. 124–26.

98. See, e.g., Brian C. Anderson, *The Plot to Shush Rush and O'Reilly*, CITY J., Winter 2006, at 16 (describing liberal efforts to heavily regulate speech touching on campaign issues with a view toward silencing conservative voices).

99. The Becket Fund, a Washington, D.C.-based law firm, is one example of a group serving this need. See The Becket Fund for Religious Liberty Homepage, <http://www.becketfund.org> (last visited Feb. 7, 2007).

100. In addition, secondary resources exist in this area of law for legal professionals. See, e.g., KEITHAN & MAY, *supra* note 96. This publication, in addition to giving its own guidance on, for lack of a better term, "political" activity by religious groups, also lists additional resources. See *id.* at 16.

Sacraments instead of seven. The mission of each is distinct, and as the Second Vatican Council teaches, Christ did not bequeath to the Church a mission in the political, economic, or social order: the purpose He assigned to her was a religious one.¹⁰¹ At the same time, however, the missions do overlap:

[A]t all times and in all places, the Church should have the true freedom to preach the faith, to teach her social doctrine, to exercise her role freely among men, and also to pass moral judgment in those matters which regard public order when the fundamental rights of a person or the salvation of souls require it.¹⁰²

This “true freedom” corresponds well to the vision of religious liberty on which America rests. The First Amendment forbids Congress from establishing a religion or hindering its free exercise.¹⁰³ The Supreme Court has often indicated that debate on public issues should be unhindered, robust, and wide open.¹⁰⁴

Under FEC and IRS guidelines, churches may address issues but may not participate or intervene, directly or indirectly, in any political campaign on behalf of, or in opposition to, any candidate for public office.¹⁰⁵ While there are some bright lines drawn by the FEC, namely, the “express advocacy” test,¹⁰⁶ the IRS takes a much vaguer “facts and circumstances” approach to determining what constitutes a violation.¹⁰⁷ In other words, a pastor may find out he is in violation only after the fact. This makes many pastors overly cautious. Because of the ambiguity in IRS guidelines and the apparent inconsistency with FEC rules, there is a lot to be done to alert pastors to what is clearly permitted and to counteract the overly cautious advice that hinders so much of what could be done in churches. One

101. *Gaudium et Spes*, *supra* note 94, ¶ 42.

102. *Id.* ¶ 76.

103. U.S. CONST. amend I.

104. *E.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

105. I.R.C. § 501(c)(3) (2000); 26 C.F.R. § 1.501(c)(3)-1 (2006).

106. *See Buckley v. Valeo*, 424 U.S. 1, 43–44 n.52 (1976) (interpreting the Federal Election Campaign Act, which places limits on contributions to candidates for political office, as applying only to communications containing express words of advocacy such as “elect” or “defeat”).

107. *See, e.g.*, 26 C.F.R. § 1.501(c)(3)-1(c)(3)(iv) (“In determining whether an organization has [characteristics that render its income taxable], all the surrounding facts and circumstances, including the articles and all activities of the organization, are to be considered.”).

particularly striking example of the exaggerated kind of advice coming to Catholic dioceses was a memo indicating that parish bulletins should avoid carrying a quotation in which President George W. Bush quoted Pope John Paul II about the “Culture of Life,” because at the time the President was running for re-election!¹⁰⁸

G. *Assisting Pro-Life Groups to Organize Effectively Under the Law*

The desire to defend life flows from our most fundamental human convictions of conscience. As a result, tens of thousands of pro-life groups spring up at all levels of society, organized by people of every imaginable background. The Church praises these many initiatives and associations.

These groups often need the assistance of legal professionals to organize themselves into the most effective legal structure for the activity they want to undertake. Should a group, for example, establish itself as a 501(c)(3) entity,¹⁰⁹ or a (c)(4),¹¹⁰ or a 527,¹¹¹ or should it establish all three? Many groups are not getting the proper advice in this area, or are not even aware of their options.

Section 501 describes certain tax-exempt organizations and how they must be constituted in order to qualify for this status.¹¹² Section 501(c)(3) exempts groups that are:

[O]rganized and operated exclusively for religious, charitable, . . . literary, or educational purposes, . . . no substantial part of the activities of which is . . . attempting[] to influence legislation . . . and which does not participate in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.¹¹³

Note that the statute requires the organization to be both “organized” and “operated” for the exempt purposes. The treasury regulation implementing section 501(c)(3) of the tax code thus has two tests to determine whether an organization satisfies the requirements of this section: the organizational test and the operational test.

108. Memorandum from the USCCB Secretariat for Pro-Life Activities to Diocesan Pro-Life Directors (June 10, 2004) (on file with the Ave Maria Law Review).

109. I.R.C. § 501(c)(3).

110. *Id.* § 501(c)(4).

111. *Id.* § 527.

112. *Id.* § 501.

113. *Id.* § 501(c)(3).

The organizational test states that a group is not *organized* for tax-exempt purposes “if its articles [of incorporation] expressly empower it: . . . (ii) Directly or indirectly to participate in, or intervene in (. . . publishing or distributing of statements), any political campaign on behalf of or in opposition to any candidate for public office.”¹¹⁴ Likewise, the operational test indicates that an organization can only be considered to *operate* for tax-exempt purposes if it “engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.”¹¹⁵ The treasury regulations go on to specify in section 501(c)(3) that education is one such tax-exempt purpose, where education is defined as the “instruction of the public on subjects useful to the individual and beneficial to the community.”¹¹⁶ So, if a pro-life group has the purpose of informing the public about the reality of abortion and explaining why people should not view it as a legitimate choice, it is operating within the definition of providing education. Obviously, educating people on the reality of abortion is “useful” insofar as people continue to make abortion-related decisions, and the protection of the youngest and most vulnerable among us is certainly beneficial to the community. Nor is it a problem that pro-life groups do not attempt a false neutrality in their presentation of the abortion issue. While an organization cannot be deemed educational if its “principal function is the mere presentation of unsupported opinion,” it may advocate “a particular position or viewpoint” and retain educational tax-exempt status “so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion.”¹¹⁷

The next part of section 501 lists another set of tax-exempt purposes. These are “[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare.”¹¹⁸ As in the case of section 501(c)(3) organizations, section 501(c)(4) organizations must refrain from “direct or indirect participation or intervention in political campaigns on behalf of or in

114. 26 C.F.R. § 1.501(c)(3)-1(b)(3) (2006).

115. *Id.* § 1.501(c)(3)-1(c)(1).

116. *Id.* § 1.501(c)(3)-1(d)(3)(i)(b).

117. *Id.*

118. I.R.C. § 501(c)(4) (2000).

opposition to any candidate for public office” because these aims are specifically excluded from the definition of promoting social welfare.¹¹⁹ An important difference between sections 501(c)(3) and 501(c)(4) must be pointed out, however. While the regulations explicitly exclude “action organizations” from tax-exempt status under section 501(c)(3), they remain exempt under section 501(c)(4).¹²⁰ An action organization has two characteristics. First, its “main or primary objective or objectives . . . may be attained only by legislation or a defeat of proposed legislation; and [second,] it advocates, or campaigns for, the attainment of such main or primary objective or objectives”¹²¹ This is important for pro-life groups who may meet the definition of “action organizations.” If a group, while refraining from lending support to a particular political campaign, has as its objective the passage or defeat of certain legislation and advocates for this goal, it need not give up its tax-exempt status merely because it does not qualify under section 501(c)(3). Clearly, the intricacies involved in these sections require the advice of a legal professional.

Aside from these types of “traditional” tax-exempt categories, some pro-life groups may be primarily interested in seeing certain candidates in (or out of) office. A group like this, which clearly would not qualify under the sections discussed above, should know that it too has tax options. For one example, section 527 of the tax code deals with “political organizations.”¹²² A political organization is a group that is “organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”¹²³ An “exempt function” is the act of “influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization . . . whether or not [successful].”¹²⁴ Thus, if a pro-life group wishes to lend its, and raise others’, support (both vocal and monetary) for a candidate, it

119. 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii).

120. If a group meets the criteria for an action organization, it cannot claim tax-exempt status under section 501(c)(3) of the tax code. However, under section 501(c)(4), a “social welfare organization that is not . . . exempt from taxation as an organization described in section 501(c)(3) may qualify under section 501(c)(4) even though it is an *action* organization.” *Id.*

121. *Id.* § 1.501(c)(3)-1(c)(3)(iv).

122. I.R.C. § 527.

123. *Id.* § 527(e)(1).

124. *Id.* § 527(e)(2).

ought to know about this or other similar provisions of the tax code in order to protect itself and maximize its financial ability to achieve its goals. Acquiring such knowledge always requires the help of a lawyer.

Obviously, this brief review of the tax code (from a non-lawyer) is meant only as an impetus for pro-life organizations to seek, and for legal professionals to provide, help in deciding the actual method of organization. The help should not stop here, however, because apart from its inception and its overall objectives, in the day-to-day operation of pro-life organizations, legal advice is needed on a multitude of matters.

H. *Developing the “Embryonic Moment”*

Study constitutional history, and you can conclude that the days of *Roe v. Wade*¹²⁵ are numbered. The reason is that in the foundation of the Constitution itself and the direction of its history, there is the recognition of the equal dignity of those who, at various times, were deprived of their rights and suffered violence that was given legal cover under a different name. This legal cover was often mistakenly recognized by the Supreme Court for a while, but then such decisions were overturned.

*Dred Scott v. Sandford*¹²⁶ is the most commonly cited instance of judicial mistake. The Supreme Court held that a slaveholder’s *right to property* eclipsed and subsumed the slave’s right to freedom.¹²⁷ But the Constitution was eventually amended to correct the error.¹²⁸ Decisions like *Lochner v. New York* show us another error: employers’ *right to contract* eclipsed and subsumed the workers’ rights to humane conditions and hours.¹²⁹ These abuses were corrected by subsequent Supreme Court decisions like *Muller v. Oregon*¹³⁰ and *Bunting v. Oregon*.¹³¹ Likewise, the “separate but

125. 410 U.S. 113 (1973).

126. 60 U.S. (19 How.) 393 (1856), *superseded by constitutional amendment*, U.S. CONST. amend. XIII, § 1.

127. *Id.* at 451–52.

128. U.S. CONST. amend. XIII, § 1.

129. *Lochner v. New York*, 198 U.S. 45, 64 (1905), *abrogated by Bunting v. Oregon*, 243 U.S. 426 (1916), and *Muller v. Oregon*, 208 U.S. 412 (1907).

130. *Muller*, 208 U.S. at 423 (permitting the restriction of hours worked by female employees).

equal” doctrine of *Plessy v. Ferguson*¹³² sanctioning segregation was overturned by *Brown v. Board of Education*¹³³ some fifty-eight years later. Erroneous decisions like *Hammer v. Dagenhart* rejected attempts to curtail child labor.¹³⁴ This decision, however, was overturned twenty-three years later by *United States v. Darby*.¹³⁵ Here, a new development—a “pedagogical moment” to protect our children—occurred in constitutional law.

Now it is time for the “embryonic moment”: the recognition that the rights of the Constitution apply also to the unborn child. Until *Roe*,¹³⁶ only state law addressed the unborn. Now their status has become a constitutional issue and must be developed by using constitutional principles. Once again, an act of violence is given legal cover by some other right, in this case, the “right to privacy.”

Constitutionally, there is no precedent on abortion. A concept could be used, however, from the law of bailments, which is defined as the divided dominion of personal property that contemplates custody in one part and ownership in another.¹³⁷ When you deposit your money in the bank, you retain absolute dominion over it, while the bank has a trust-dominion. Analogously, the child in utero has absolute dominion over his or her own person. The mother has a *trust-dominion* rather than an absolute dominion that would allow her to destroy the child.

Many reversals of Supreme Court decisions came about when new evidence was brought forward that made it clear that someone’s rights, not previously recognized, were being violated. For example, Louis Brandeis brought forward facts about how workers were being harmed, causing the Supreme Court to take judicial notice.¹³⁸ The evidence that some 200 embryological scientists bring us regarding the humanity of the unborn, and the mountains of evidence and

131. *Bunting*, 243 U.S. at 434, 438 (upholding a law requiring overtime workers to be paid at time and a half).

132. 163 U.S. 537, 551–52 (1896), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). The infamous phrase “separate but equal” comes from Justice Harlan’s dissent. *Id.* at 552 (Harlan, J., dissenting).

133. *Brown*, 347 U.S. at 494–95.

134. *Hammer v. Dagenhart*, 247 U.S. 251, 268, 277 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

135. *Darby*, 312 U.S. at 116–17.

136. 410 U.S. 113 (1973).

137. BLACK’S LAW DICTIONARY 151–52 (8th ed. 2004).

138. PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 115, 122 (1984).

testimony of how harmful abortion is to women, can be combined with new legal concepts and can challenge *Roe* in the same way its erroneous ancestral decisions were challenged.

Indeed, steps forward are already being taken. In 2004, Congress passed the Unborn Victims of Violence Act to protect the unborn.¹³⁹ Practically, the law allowed a homicide prosecution to be brought against someone who intentionally causes the death of an unborn child.¹⁴⁰ The law was a reaction to the then-existing common law born alive rule, which required that an injured child in utero be born alive and then die before a murder charge could be brought against the person causing his death. The majority report of the House Judiciary Committee notes that the born alive rule was simply a result of the inability at common law to know much about pregnancy: “[L]ive birth was the most reliable means of ensuring that a woman was with child and that the child was in fact a living being.”¹⁴¹ With medical and scientific advancements came the recognition that an unborn child is a human person worthy of protection through the application of homicide statutes. While the present discord between a law such as this and allowing abortion is glaringly obvious, this law is one giant step forward in the right direction.

Fr. Clifford Stevens, a priest of the Omaha Archdiocese, founded the National Organization for Embryonic Law to conduct the kind of research I have traced above, and to call for attorneys to seize the “embryonic moment” of constitutional history that we are now in.¹⁴² His research, as well as other valuable information concerning this issue, can be found on the Priests for Life website.¹⁴³ Judging from

139. Unborn Victims of Violence Act of 2004, Pub. L. No. 108-212, 118 Stat. 568 (codified at 18 U.S.C. § 1841 (Supp. 2006)).

140. Specifically, the Act makes it a separate offense if an unborn child is killed through conduct already prohibited otherwise. *Id.* § 1841(a)(1), (b).

141. H.R. REP. NO. 108-420, pt. 1, at 5 (2004) (citing Cari L. Leventhal, Comment, *The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law*, 103 DICK. L. REV. 173, 175–76 (1998)).

142. Clifford Stevens, *The Rights of the Unborn: The Constitutional Challenge to Roe v. Wade*, part II, NAT’L ORG. FOR EMBRYONIC LAW, http://swissnet.ai.mit.edu/%7Erauch/embryonic_law/challenge_roe_v_wade.html (last visited Jan. 21, 2007).

143. Priests for Life, New Perspectives on the Defense of the Unborn as a Constitutional Issue, <http://priestsforlife.org/government/intro.htm> (last visited Apr. 2, 2007). The mission of Priests for Life is to encourage and equip God’s people to respond to the tragedies of abortion and euthanasia. It is recognized as an Association of the Faithful under the Canon Law of the Catholic Church. Priests, deacons, and lay persons may join as members simply by contacting the main office. Priests for Life is also a 501(c)(3) tax-exempt organization. Contact Priests for

past constitutional history, *Roe*¹⁴⁴ will go the way of other discarded lies.

CONCLUSION: A CALL TO FULL-TIME COMMITMENT

Everyone who is called to the legal profession is, by definition, called to the defense of human dignity and is responding not only to a profession but to a vocation. In our day, moreover, there is a charism among the People of God for the defense of human life that calls people to make a total commitment of all their time, energy, and life itself to defending the lives of their youngest brothers and sisters. "No one has greater love than this, to lay down one's life for one's friends."¹⁴⁵

The battle to restore legal protection to the unborn in America will be won. Such a victory will be due in no small part to the dedication of pro-life legal professionals who were willing to use their skills to facilitate and accompany the cultural change that is equally necessary and in fact intertwined with the legal change. May God increase their number.

Life at: P.O. Box 141172; Staten Island, NY 10314; Tel. 888-PFL-3448; Fax 718-980-6515; Email mail@priestsforlife.org; Website www.priestsforlife.org.

144. 410 U.S. 113 (1973).

145. *John* 15:13.