

REMARKS OF HAROLD J. CASSIDY
GIVEN AT THE UNIVERSITY OF NOTRE DAME
APRIL 5, 2009
INTRODUCTION

I would like to thank the students of Notre Dame for inviting me to share some of my thoughts today about the greatest human rights violation of our time. I would especially like to thank you for your introduction and your kindness in refraining from telling any lawyer jokes.

I enjoy opportunities to speak, though I can rarely accept them. But I am not partial to the lawyer jokes.

I was once invited to speak at a convention in Rome, Italy, and I made that trip thinking I was secure in the belief that the lawyer jokes were a uniquely American phenomena.

The person who introduced me started by saying that the Pope and a lawyer arrived at the Gates of Heaven at the same time. He went on to explain that Saint Peter was at the Gates to greet them. Saint Peter said "We have been expecting both of you" and he started to walk them down a lane, when Saint Peter pointed to a large mansion in the distance. Turning to the lawyer, St. Peter said "That is the house that has been prepared for you." He then turned to the Pope, pointed to a modest house off to his right and told the Pope "That is the house we prepared for you."

The lawyer stopped and exclaimed "There must be a mistake! I'm just a lawyer! This is the Pope." St. Peter assured him there had been no mistake, adding "We don't make mistakes here."

After a few more steps, the lawyer insisted "This has got to be a mistake!"

St. Peter, losing his patience a bit, responded rather firmly. "Look, we have lots of Popes here."

I gave the talk anyway.

Today we come together to talk about the human rights violation of abortion, the role of religion in our discussion of legal abortion, Notre Dame, and the role of Catholic institutions.

When one speaks of Notre Dame and religion, we think of Notre Dame football. Once Lou Holtz was asked, at a post game press conference, "Do you pray to God for Notre Dame to

win?" Coach Holtz responded: "That's ridiculous. God has too many important things to worry about for him to be concerned with the outcome of a Notre Dame football game. God doesn't care about football, and He doesn't care if Notre Dame wins or loses." After a short pause, he added "However, Our Blessed Mother does."

L GOVERNOR MARIO CUOMO'S SPEECH AT THE UNIVERSITY OF NOTRE DAME, SEPTEMBER, 1984

In September of 1984, Governor Mario Cuomo gave a speech on the campus of the University of Notre Dame that he titled "Religious Belief and Public Morality." In some ways it was a watershed moment in the Catholic, and even national, dialogue about legalized abortion in America.

As one of twelve students in the last law school seminar class ever taught by Professor Cuomo, I can attest that he is a keen intellect. He is far more. He is a man with a good heart who wants to do what is right. He was a powerful orator and the combination of his intellect, wit, sincerity, and soaring oratory power made him an effective and forceful advocate. Before he was a politician, he was an accomplished lawyer and law professor. These very qualities are also enjoyed by our President, whose up-coming speaking engagement at Notre Dame has inspired your gathering here today.

It is for that reason that a bit of discussion about Professor Cuomo's 1984 speech, at your institution, is both timely and necessary. Professor Cuomo himself invited comment and disagreement about the contents of his 1984 speech at Notre Dame, even in the very text of his remarks given that day. In fact, I think he would be disappointed if he were left unengaged.

Unfortunately, we are not addressing an academic debate, or engaging in sport. We are dealing with the tragedy of the worst human rights violation of our time.

Professor Cuomo's speech addressed religion and the role of religious beliefs in the discourse on legal abortion. Today, I will talk about what is not a religious belief, and when our faith is relevant. He made a number of assumptions upon which he built his argument why he, and other Catholic politicians, should not take a stand against legal abortion. I address only two of the express assumptions made by Professor Cuomo, and one underlying assumption that was implied which formed the foundation that drove his entire argument.

A. Governor Cuomo's Express Assumptions

1.

First, he assumes, without discussion on what it is based, that the conclusion that an unborn child is a human being whose life should be given the same legal protection as that of other human beings, is a purely religious belief. In fact, he suggested that it is a Catholic belief, one that he can't force on non-Catholics.

The problem, of course, is that it is not a religious belief. The question of whether an embryo or fetus is an entire, separate, unique, irreplaceable human being, is a purely scientific question. Whether that human being should enjoy protection is a policy issue based upon universally accepted moral precepts. Yet, Governor Cuomo's assumption that it is a religious belief gained great traction and caused great harm. It has been used to undermine the credibility of Catholics who attempt to engage in a serious discussion about the injustices of legalized abortion. I have litigated the question of whether an abortion kills a human being, as a matter of biological fact, for ten years, and it is Governor Cuomo's argument that has been used in the courts in an effort to suggest that any scientific inquiry is, by necessity, just statements about religious values and ideology. Eight months ago, an *en banc* panel of the United States Court of Appeals ruled, in one of our cases, that the statement that an abortion terminates the life of a whole, separate, unique, living human being, is a statement of biological fact, not a statement of ideology or religious belief.

Just three weeks ago, an expert for an abortion clinic, in another of our cases, who is on the Board of Directors of Planned Parenthood, admitted that an abortion kills a human being. This undeniable fact is critical to the pregnant mothers considering an abortion, not just to policy makers considering the mother's child.

On this point, Governor Cuomo argued that although he and his wife personally felt that abortion was morally reprehensible, he could not support law that compelled others to adhere to what he claimed was a religious belief. Thus, in effect, he says "I myself would never have an abortion because it is morally wrong. But I must use the force of the law to protect my neighbors' right to have one." In doing so, he created the blue print for Catholic lawmakers everywhere to justify their participation in what is a grave human rights injustice, not just for the child, but for the pregnant mothers themselves.

Can you conceive of an elected official ever arguing that he himself would not own a person as a slave, because it is immoral to do so; but he must support a law that protects his neighbor's right to own slaves?

It is an argument that, by necessity, suggests that whether conduct is recognized as immoral is irrelevant to the law. Such a proposition defies reason, and ignores our historical realities. All law, in one way or another, to one degree or another, implicates a moral imperative.

In his famous Harvard Law Review article entitled "The Path of the Law," Justice Oliver Wendell Holmes wrote:

"The law is a witness and external deposit of our moral life. Its history is the history of the moral development of the race."

Counted among Governor Cuomo's errors was his suggestion that the promotion of respect and protection of the lives of every human being, including those who are immature at young ages in the womb, is a uniquely Catholic one. To the contrary, it is a conclusion shared by our Jewish friends, our Muslim friends, Christians of every denomination, and those of independent churches, as well as persons who consider themselves Atheists. It is not a religious belief, and the moral values that underlie the conclusion that all human beings enjoy intrinsic rights, transcends any one religion, and transcends religion itself.

To say otherwise, is the equivalent of saying that the state cannot, and should not, outlaw murder because those of the Judeo-Christian tradition believe that God cast in stone the Commandment that "Thou Shalt Not Kill;" and thus, the belief that the immorality of murder compels us to outlaw it is only a religious belief.

A truly Catholic religious belief is a belief in the immaculate conception; or the presence of Christ in the Eucharist. It is not a shared moral conclusion based upon facts and application of certain principles to those facts, principles shared across all religious groups and those of no religion at all.

Secular expressions about the "Sanctity of Life," including the sanctity of life of the unborn child, are everywhere. I cite to three published statements made in three different reported cases, over a period of twenty-three years, in reference to the sacred value of the life of the unborn child made by the Supreme Court in my own state, a court never mistaken for a religious organization.

"The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor... (that) it may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human *life*..."*Gleitman v. Cosgrove*, 49 N.J. 22, 30, 31 (1967).

Twelve years later, the New Jersey Supreme Court again speaking of the "sanctity" of the life of an unborn child, stated:

"One of the most deeply held beliefs of our society is that life...is more precious than nonlife (citation omitted)...concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the sanctity of life. The Federal Constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law...our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), ART.1, SEC.1. The declaration of independence states that the primacy of man's 'inalienable' right to life is a 'self-evident truth.' Nowhere in these documents is there to be found an indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped beings. *Berman v. Allan*, 80 N.J. 420, 429 (1979) (emphasis added).

That same court stated in a case decided after *Casey v. Planned Parenthood*:

"In *Gleitman* the Court observed that '[a] child need not be perfect to have a worthwhile life,' (citation omitted) and found that '[e]ugenic considerations are not controlling,' *ibid.*, noting that considerations of financial burden to the father and convenience of the mother did not outweigh the child's right to live, albeit imperfectly." *Hummel v. Reiss*, 129 N.J. at 126 (1992).

2.

The second false express assumption made by Professor Cuomo at Notre Dame, was his assumption that there was a consensus among Americans, that abortion must be legal and that that consensus had been voluntarily arrived at by the people.

Nothing could be further from the truth.

The majority of Americans thought, in 1973, and still think today, that abortion should be illegal because it is an immoral act.

In 1973, when the people of virtually every state outlawed abortion, seven elderly men declared that the will of the people could not be exercised. In the tragically flawed legal reasoning of *Roe v. Wade* and *Doe v. Bolton*, the United States Supreme Court forced legalized abortion on everyone, without debate or consultation with the people.

The most powerful force in the modern debate about abortion is the reality that the Supreme Court of the United States has taken much of the practical value of the debate out of it, while forcing the idea on the nation that there is something sacred about legal protection of abortion.

Contrary to Governor Cuomo's belief, most Americans do not believe abortion should be legal. If *Roe v. Wade* was overturned tomorrow, that fact would be clearly evident and the desires of the people could then be expressed.

Last year, in South Dakota, every poll showed that between 58% and 65% of the voting public thought that abortion should be prohibited. Yet only 45% of the voting public voted for a law on the ballot that would prohibit most abortions. The reason many voters, who wanted abortion prohibited, didn't vote for the law were many and complicated. Some voted against it simply because the law didn't prohibit every abortion.

But it was the fact that voters believed that the law wouldn't matter and could not be enforced because *Roe v. Wade* would cause it to be declared unenforceable, was the issue that dominated the discussions at the beginning of the debate and at the end of it. If *Roe v. Wade* did not stand in the way, it would be immediately evident that a significant majority of Americans want abortion prohibited based upon universally accepted moral precepts and sound public policy.

Remove *Roe*, and the responsible debate and discussions this nation deserves can be and will be achieved.

B. The Implied Assumption

Underlying Governor Cuomo's argument is his assumption that abortion is good for women; that women cannot be happy in life and cannot participate in the social and economic life of our nation without legalized abortion. In fact, this assumption is at the core of the entire pro-abortion movement. This assumption underlies a promise of some form of liberation and self destiny. If anything, our experimentation with legalized abortion, over the past thirty-six years, has demonstrated that instead of liberation for women, abortion has brought enslavement; instead of self determination, it has subjected women to the demands of others, whether it be a boyfriend, a parent or a culture at large that expresses a preference and finds it more convenient that a pregnant mother in need, dispose of her child rather than the culture coming to her assistance in her time of need.

It is the fact that abortion, as it is practiced in this nation, destroys the intrinsic rights, interests and health of pregnant mothers, more than any other, that has inspired my own work. The injustice of abortion as it relates to the child, is all too palpable and is widely appreciated. The injustice to the mothers, themselves, is only now being publicly discussed and understood. It is far more subtle.

The irony of abortion is that its forceful pull derives from this false assumption that abortion is good for women. The corollary to that premise is that, therefore, anyone who is anti-abortion is anti-women.

Yet there is a new women's movement in this country that has arisen from coast to coast. A movement started by women who have had abortions who have found their voice and who tell us that abortion is an exploitation of women. Let us pause briefly today to speak of the issues they raise.

H. THE CASEY DECISION AND THE WOMEN'S INTERESTS DISCUSSION

By June of 1992, when our Supreme Court reaffirmed its *Roe* decision in *Casey v. Planned Parenthood of Southeast Pennsylvania*, that Court essentially dispensed with its contention that proper application of principles of Constitutional Law supported the conclusion that the

Fourteenth Amendment protected the act of a doctor to terminate the life of the child as a liberty under the Due Process Clause.

By that time, a majority of the Court had twice voted in conference to overturn *Roe* precisely because *Roe* was incorrectly decided. The *Casey* decision, reaffirming *Roe*, was decided by a Court that had two thirds of its members vote either that day, or in a prior conference, to overturn *Roe* because it was wrongly decided.

The *Casey* Court held that principles of *stare decisis* — a doctrine that precedent must be preserved to maintain consistency and predictability — was more important than having a decision that was correctly decided.

In its analysis, the Court claimed that Americans have come to rely upon abortion, and the act of abortion is a private matter.

Do you rely on abortion?

Do you think, that when it comes to the lives of human beings, that it is more important to be consistent than it is to be right?

Do you think that the killing of innocent children and the destruction of the rights of their mothers is none of YOUR BUSINESS?

THE BUSINESS OF JUSTICE IS EVERYBODY'S BUSINESS.

A. *Casey* and the Women's Liberty

In *Casey*, the Court said that it did not have to decide the issues presented there as they would if they were deciding those issues for the first time.

Implying that *Roe* may have been wrongly decided, the plurality decision stated that the error of *Roe* only goes to the weight to be given the "State's interest in fetal life," not to the women's liberty. Not to diminish the error of failing to properly weigh and value the life of the child, it is with the profoundly misguided assumption that abortion does not negatively impact the liberty, rights, interests and health of women that we have taken issue.

Abortion is anti-women precisely because it is an institution that destroys the true rights, interests and health of women.

Women have at least seven identifiable interests, many of which are protectable under the United States Constitution, which are adversely affected by laws which protect the act of a doctor who terminates her child's life. The first three of these, although distinct, are closely related. First, she has a constitutionally protected fundamental liberty interest in her relationship with her child. Second, she has a personal interest in the child's life. Third, she has an interest in defending and protecting her child's rights and interests.

A mother's unique relationship with her child during pregnancy is the most intimate, most important, and one most worthy of protection. Although the mother and child are two separate persons their relationship is so intimate that the unique bond between them, beginning as it does in utero, creates a human relationship which may be the most rewarding in all of the human experience.

The fourth interest is the woman's interest in her own health. This nation's experimentation with abortion has revealed impressive evidence of profound risk of physical and psychological harms to which a mother is subjected when her child's life is terminated by abortion.

Fifth, she has an interest in preserving her personal dignity in her role as mother, a role that does not simply ennoble her, or merely enrich her life, but one which distinguishes her as unique as the mother of the unique person she carries. To establish a formal policy which chooses to protect the destruction of her relationship with her child instead of a policy which clearly protects it is a denigration of women, because a policy which infers it is a distressing experience to be a mother is a statement that it is bad to be a woman.

Sixth, she has an interest in not being exploited. Abortion embodies societal pressures which destroy her interests as a mother to satisfy the interests of third parties, including the State, the father, abortion clinics and others, who may have personal interests inconsistent with those of mother and child. Abortion exploits women by treating the mother as if she is not a whole woman. It assumes she can be sexually exploited and act as though she is not, in fact, a mother. It demands that she detach herself from her experience and her bond, love, and sense of duty to herself and her child. It expects a mother to prevent the bonding process despite the fact that this natural process is both psychological and physiological. It *uses* the mother as a sexual object without regard for the harm abortion can cause her. It allocates all of the risk, guilt, physiological

and physical pain to her and further isolates her in her distress in circumstance of an unplanned or imprudent pregnancy by placing the responsibility of killing her child entirely upon her.

Seventh, a woman has an interest in having the law extend to her dignity and respect by recognizing that she is capable of living with dignity in the family, and the commercial and professional life of this nation without being denigrated by specially and artificially crafted "principles of law" which ingrain the belief that she is inherently inferior because she cannot be happy in life without an exclusive "right" to terminate the life of her own child.

We must listen to the experiences of women who have had abortions. In 2004, the South Dakota Legislature held public hearings when it was considering a law that regulated abortion. The packed hearing room was totally silent, as one by one, women who had had abortions stepped to the witness table. The first woman started her testimony by stating:

"I was violently raped by a man who, when he was done with me, spit upon me. When I learned that I was pregnant as a result of the rape, everyone told me I had to have an abortion. It was legal. It would help me. So, I had an abortion. I am here to testify that the abortion was a second rape that was far worse than the first one."

And she then told of how it ruined her life.

The second woman sat at the table and started her testimony by stating:

"I am here for those women who can't be here because they are no longer with us. Like them, I had an abortion, and like them, I attempted suicide. Many of them did not survive as I did, so I am here for them."

She then rolled up her sleeves, stuck her arms out over the table with her wrists turned upwards. The scars from gashes across both of her wrists could be seen from across the room. We could see the legislators lean forward. One burly legislator stood up and went into a private room adjoining the hearing chamber. There, in private, he openly wept.

One could hear a pin drop in the hearing room, and few listeners that evening could ever forget the testimony of those women as they came to the witness table one by one.

This kind of pain should not seem to be much of a mystery to us. To think that a woman can implicate herself in killing her own child and be happy in life is ignorant. To demand she do so is cruel.

The right and duty to preserve life cannot co-exist with a right or duty to destroy it. The right and duty to preserve and protect the cherished relationship between mother and child cannot co-exist with a right and duty to destroy it. It is the law, as it represents the collective interests of the individuals for whom it exists, that must choose which set of interests it must protect, and long ago our law was required to choose life over death; the mother's beautiful interest in her child's life over its destruction; the protection of innocent children over the misguided philosophies and trends in social thought which come and go. If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: that life has intrinsic value; that each individual human being is unique and irreplaceable; that the cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty; that the intrinsic beauty of womanhood is inseparable from the beauty of motherhood; and that this relationship, its unselfish nature and its role in the survival of the race is the touchstone and core of all civilized society. Its denigration is the denigration of the human race. This relationship, its beauty, its survival, its benefits to the mother and child, its benefits to society, all rest in the self-evident truth that a mother is not the owner of her child's life - she is the trustee of it.

III. OUR FAITH, PRESIDENT OBAMA AND MOTHER TERESA

This brings us to our faith and how our religion is relevant for us on this issue. I am not a theologian. I leave matters pertaining to the teachings of the Church to the clergy, and I defer to Cardinal George and the other bishops who have spoken about Notre Dame's current situation, to advise us about the Church's perspective.

But I have witnessed how the practice of our religion has given many Catholics the strength, the will, and the courage to stand up to fight against the injustice of abortion. While that injustice is recognized by people of all faiths and no faith at all, it takes a rare dedication for people to devote themselves selflessly in an effort to end this worst human rights violation of our

time. We see that dedication and courage each day all across our nation: women getting up every morning to open their pregnancy help centers to extend a hand to pregnant women in need of help, receiving nothing in return for themselves; we see Americans giving of their limited financial resources so all of that work can go forward, and these women can receive the support they need.

We see courageous women, who had abortions themselves, sacrifice their anonymity and privacy, at great personal expense, in order to warn our nation of the harm caused by abortion. We see brilliant and talented people give up lives of ease and the comfort of approval of their professional peers in their chosen careers, in order to be counted among those who stand up and say "Stop the Killing."

This will, and this courage, comes from an inner strength that arises out of a sense of duty grounded in our faith. A belief that what each of us does matters, not just to others here and now, but to God. A belief that we have a duty to others around us, and to the human community. A belief that we will be judged on what we do and what we fail to do. That what we do for the least of us, we do for all of us.

That is the greatest relevance of our religion: that without it, we would leave the hard work for others. We would adopt the position that it is not our job to correct this injustice.

Yet it is these sacrifices of those courageous Catholics — people who act without regard for their own benefit — that leaves them feeling betrayed when our Catholic institutions do not live up to the mission and principles on which they were founded. It is why they feel abandoned by Catholic elected officials who make irrational arguments to justify their own lack of courage for failing to stand up and fight this great human rights violation.

B.

It is President Obama's visit to Notre Dame next month that inspired your gathering today, so we cannot ignore the fact that there are differences we have with those who promote pro-abortion orthodoxy which advances the human rights violation of abortion.

President Obama, like Governor Cuomo, has many fine qualities. Aside from his intellect, wit, apparent good heart, desire to do what is right, and his unquestionable oratorical skills, he is

a strong family man. We respect him as a devoted husband and loving father, which makes him a role model on that score for all of America.

But our differences are not about a disagreement on how to best deliver health care, or education or even how to best bring us out of a major recession, as important as all of these matters may be.

Our disagreement is over an issue that is far, far more important. It's magnitude outweighs that of any other issue, and all other issues combined. It is a disagreement about the injustice of the killing of tens of millions of human beings, and the destruction of the rights, interests and health of their mothers.

Dialogue or discussion on this issue is meaningless without there first being a devotion to the discovery of truth. One side or the other is tragically wrong here. The injustice of abortion to the child should be obvious to all. Those who profess the pro-abortion orthodoxy, justify the termination of the lives of the children on the belief that it is necessary to advance the interests of women. While most Americans do not believe that anyone has the right to kill any innocent human being in order to advance their own perceived interests, we challenge the validity and the truth of this underlying assumption of the pro-abortion orthodoxy, that the injustice of abortion to the child is necessary to advance the interests of women. We find it to be just the opposite. The injustice of abortion is an injustice to the women and destroys their rights, interests and health.

A dialogue on this issue best begins with listening to post abortive women who actively run pregnancy help centers which have as their mission, helping women keep their babies. Without a deep understanding of the experience of these women, dialogue exists in a vacuum.

C.

I would like to end by contrasting the views of the pro-abortion orthodoxy with the views and teachings of Mother Teresa, who fought against the injustice of abortion.

I end my remarks by reading a small part of a Friend of the Court Brief Mother Teresa once submitted to the United States Supreme Court.

It is a short statement of Mother Teresa speaking from the heart to our highest Court:

"In (one) sense no one in the world who prizes liberty and human rights can feel anything but a strong kinship with America. Yours is the one great nation in all of history which was founded on the precept of equal rights and respect for all humankind, for the poorest and weakest of us as well as the richest and strongest. As your Declaration of Independence put it in words which have never lost their power to stir the heart:

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness....

A nation founded on these principles holds a sacred trust: to stand as an example to the rest of the world, to climb ever higher in its practical realization of the ideals of human dignity, brotherhood, and mutual respect. It has been your constant efforts in fulfillment of that mission, far more than your size or your wealth or your military might, that have made America an inspiration to all mankind.

It must be recognized that your model was never one of realized perfection, but of ceaseless aspiration...

Yours has ever been an inclusive, not an exclusive society. And your steps, though they may have paused or faltered now and then, have been pointed in the right direction and have trod the right path. The task has not always been an easy one, and each new generation has faced its own challenges and temptations. But, in a uniquely courageous and inspiring way, America has kept faith.

Yet there has been one infinitely tragic and destructive departure from those American ideals in recent memory. It was this Court's own decision in 1973 to exclude the unborn child from the human family. Roe v. Wade, 410 U.S. 113 (1973)...Your opinion stated that you did not need to "resolve the difficult question of when life begins." 410 U.S. at 159. That question is inescapable. If the right to life is an inherent and inalienable right, it must surely obtain wherever human life exists...

America needs no words from me to see how your decision in Roe v. Wade has deformed a great nation...

Human rights are not a privilege conferred by government. They are every human being's entitlement by virtue of his humanity. The right to life does not depend, and must not be declared to be contingent, on the pleasure of anyone else, not even a parent or a sovereign...

I have no new teaching for America. I seek only to recall you to faithfulness to what you once taught the world. Your nation was founded on the proposition — very old as a moral precept, but startling and innovative as a political insight — that human life is a gift of immeasurable worth, and that it deserves, always and everywhere, to be treated with the utmost dignity and respect."