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December 18, 1973

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IN REPLY REFER TO FILE NO.

WRITER'S DIRECT DIAL NUMBER
630-4432

TO: ALL PRO-LIFE LAWYERS

Re: Selection of Constitutional Amendment

As Chairman of the Legal Advisory Committee of the NRLC, I am writing you concerning a most urgent matter.

It is now almost one year since the opinions of the U. S. Supreme Court in the Bolton and Wade decisions. The consternation brought on by these opinions has resulted in a proliferation of human life amendments, each with its own solution to the terrible problems created by the decisions of January 22, 1973.

As worthy as each of these amendments is in its own right, as a whole they are creating divisive problems for the movement by attracting adherents to camps which, while not opposing one another, in failing to unite under a single banner are rendering the movement ineffective.

We, therefore, think that the time has come when the movement must select the amendment behind which all people can unite in a common effort to save the unborn. Selection of this amendment must come through a process wherein all movement people will have an opportunity to be heard. The first phase of this process includes you as a pro-life lawyer.

We are asking that you review the enclosed material and give us your comments on each of the enclosed amendments and papers. We also ask that you complete the enclosed questionnaire and return it with your comments by January 5, 1974.

After receiving similar responses from other pro-life lawyers, we will correlate the material and determine whether a concensus exists. We will then narrow the proposed amendments and write papers explaining the amendments. These papers will be made available to the Board of Directors and other interested pro-lifers.

A hearing will be held at the January meeting of the Board, at which time all interested pro-lifers will have an opportunity to be heard on the problem of selecting the best amendment. This hearing will be conducted by a distinguished panel of pro-life lawyers, and is tentatively scheduled to be held at the Statler Hilton Hotel, Washington, D.C., January 18, 1974, 2:00 to 5:00 PM.

After this public session there will be a meeting of all lawyers and allied disciplines for the purpose of finalizing the amendment selection process. This is not to say that the lawyers will select the amendment, but merely that, given certain potential courses of action, the lawyers will recommend to the Board of Directors the language to fulfill the policy.

As a pro-life lawyer you are invited to attend the lawyers' meeting at the Statler Hilton Hotel, Washington, D.C., January 18, 1974, commencing at 8:00 PM. Unfortunately, we cannot reimburse you for the expenses you may incur. However, we cannot stress enough how important your presence will be, and we are sure that you will understand the historical significance of this meeting.

Please review the enclosed material and questionnaire, and give us the benefit of your thoughts in the most expeditious manner possible.

Very truly yours,

Dennis J. Horan

Dennis J. Horan

DJH:gs
Enc.

QUESTIONNAIRE

1. Should the Human Life Amendment prohibit private action?

   ✓ Yes ____ No

2. Or should it be limited to only those prohibitions included under the 14th Amendment? (State action)

   ____ Yes ✓ No

3. Should the Human Life Amendment contain an exception to save the life of the mother?

   ____ Yes ✓ No

4. Whether or not it should contain such an exception, and, if so, is the following the best wording for that exception?

   "unless medically necessary to prevent the death of the mother"

   ____ Yes ✓ No

5. Is there a better way of phrasing that exception? If so, what is it?

6. Should the Human Life Amendment define the word "person"?

   ✓ Yes ____ No

7. Whether or not it should, what is the best way to define that word?

8. Has Justice Blackman's statement defining "conception" as a process so diluted the meaning of that word so that it's use should be avoided?

_____ Yes ✓ No

9. Does this expression "including their unborn offspring at every stage of their biological development" mean the same as "from the moment of conception"?

_____ Yes ✓ No

10. If you answered No. 9 No, why?

11. Is there a better way of defining the commencement of an individual human life? If so, what is it?

12. Because of evidentiary proof problems, should the amendment attempt to protect life only from the time of implantation?

_____ Yes ✓ No

13. Should the Human Life Amendment merely return to the States the right to legislate in the area of abortion? (State Rights Type of Amendment)

_____ Yes ✓ No

14. Should the amendment attempt to also prohibit euthanasia?

_____ Yes _____ No

CONSTITUTIONAL AMENDMENTS

Following are the texts of the constitutional amendments before the Congress as of August 1, 1973. Although there are as many as 27 numerically different submissions, these can be reduced to about five basic models. It is to be expected that additional versions will be submitted to Congress during the Fall of 1973. The following breakdown identifies the various models by the name of the sponsor with whom it is most commonly associated. Strictly speaking, models IV and V (Denholm and Froehlich) are proposed laws, and not constitutional amendments. They are included as part of the general legislation because they are before the Congress.

I THE 'HOGAN' AMENDMENT

1. H.J. Res. 261. Jan. 30. Mr. Hogan (R.-5th, Md.). The proposed amendment reads:

> "SECTION 1. Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws.
>
> "SECTION 2. Neither the United States nor any State shall deprive any human being of life on account of illness, age, or incapacity.
>
> "SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation."

2. H.J. Res. 281. Jan. 31. Mr. Zwach (R.-6th, Minn.). Similar to H.J. Res. 261. Reads: "from conception."

3. H.J. Res. 290. Feb. 5. Mr. Delaney (D.-9th, N.Y.). Similar to H.J. Res. 261. Sec. 1 reads:

> "SECTION 1. No person, from the moment of conception, shall be deprived of life, liberty, or property without due process of law; nor shall any person, from the moment of conception, be denied equal protection of the laws.

4. H.J. Res. 298. Feb. 5. Mr. Zablocki (D.-4th, Wisc.). Identical to H.J. Res. 261 (Hogan).

5. H.J. Res. 364. Feb. 21. Mr. Erlenborn (R.-14th, Ill.). Similar to H.J. Res. 261 (Hogan). Reads: "from conception."

6. H.J. Res. 394. Feb. 28. Mr. Roncallo (R.-3rd, N.Y.). Similar to H.J. Res. 261 (Hogan). Reads: "from conception."

7. H.J. Res. 423. March 13. Mr. Dominick V. Daniels (D.-14th, N.J.). Identical to H.J. Res. 261 (Hogan).

8. H.J. Res. 473. April 2. Mr. Hogan (R.-5th, Md.); Mr. Bevill (D.-4th, Ala.), Mr. Camp (R.-6th, Okla.), Mr. Huber (R.-18th, Mich.), Mr. Keating (R.-1st, Ohio), Mr. Lujan (R.-1st, N.Mex.), Mr. Mazzoli (D.-3rd, Ky.), Mr. Won Pat (D.-Del, Guam). Identical to H.J. Res. 261 (Hogan).

9. H.J. Res. 500 April 16. Mr. Biaggi (D.-10th, N.Y.). Identical to H.J. Res. 261 (Hogan).

10. H.J. Res. 561. May 21. Mr. Gaydos (D.-20th, Pa.). Identical to H.J. Res. 261 (Hogan).

11. H.J. Res. 659. July 11. Mr. Sandman (R.-2nd, N.J.). Identical to H.J. Res. 261 (Hogan).

In the Senate:

12. S.J. Res. 130. June 29. Sen. Helms (R.-N.C.). Identical to H.J. Res. 261 (Hogan).

II THE 'BUCKLEY' AMENDMENT

1. S.J. Res. 119. May 31, 1973. Mr. Buckley (C.R.-N.Y.), Mr. Bartlett (R.-Okla.), Mr. Bennett (R.-Utah), Mr. Curtis (R.-Neb.), Mr. Hatfield (R.-Ore.), Mr. Hughes (D.-Iowa), Mr. Young (R.-N.D.). (Mr. Eastland (D.-Miss.) announced as co-sponsor some days later.)

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each house concurring therein), that the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution

when ratified by the legislatures of three-fourths of the several States within 7 years from the date of its submission by the Congress:

"ARTICLE_____

"SECTION 1. With respect to the right to life, the word 'person', as used in this Article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency.

"SECTION 2. This Article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

"SECTION 3. Congress and the several States shall have power to enforce this Article by appropriate legislation within their respective jurisdictions."

2. H.J. Res. 599. June 6. Mr. King (R.-29th, N.Y.). Identical to S.J. Res. 119 (Buckley).

3. H.J. Res. 603. June 7. Mr. Quie (R.-1st, Minn.). Identical to S.J. 119 (Buckley).

4. H.J. Res. 646. June 27. Mr. McEwen (R.-30th, N.Y.). Identical to S.J. Res. 119 (Buckley).

III STATES' RIGHTS AMENDMENT

1. H.J. Res. 427. March 13. Mr. Whitehurst (R.-2nd, Va.). The proposed amendment reads:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, to be valid only if ratified by the legislatures of three-fourths of the several States within seven years after the date of final passage of this joint resolution:

"ARTICLE_____

"SECTION 1. Nothing in this Constitution shall bar any State or territory or the District of Columbia, with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion."

2. H.J. Res. 468. March 28. Mr. Whitehurst (R.-2nd, Va.), along with Mr. Archer (R.-7th, Tex.), Mr. Bevill (D.-4th, Ala.), Mr. Joel T. Broyhill (R.-10th, Va.), Mr. Butler (R.-6th, Va.), Mr. Derwinski (R.-4th, Ill.), Mr. Gerald R. Ford (R.-5th, Mich.), Mr. Hastings (R.-39th, N.Y.), Mr. Huber (R.-18th, Mich.), Mr. Hunt (R.-1st, N.J.), Mr. Ketchum (R.-36th, Calif.), Mr. Mazzoli (D.-3rd, Ky.), Mr. Parris (R.-8th, Va.), Mr. Sikes (D.-1st, Fla.), Mr. Steiger of Arizona (R.-3rd, Ariz.), Mr. Won Pat (D.-Del. Guam), Mr. Zion (R.-8th, Ind.). Identical to H.J. Res. 427.

3. H.J. Res. 471. March 29. Mr. Whitehurst (R.-2nd, Va.); Mrs. Holt (R.-4th, Md.), Mr. Treen (R.-3rd, La.). Identical to H.R. 427.

4. H.J. Res. 476. April 3. Mr. O'Brien (R.-17th, Ill.). The proposed amendment reads:

"Nothing in this Constitution shall bar any State, or the Congress with regard to any area over which it is granted the power to exercise exclusive legislation, from enacting laws respecting the life of an unborn child from the time of conception."

5. H.J. Res. 488. April 4. Mr. Whitehurst (R.-2nd, Va.), along with Mr. Abdnor (D.-2nd, S.D.), Mr. Cleveland (R.-2nd, N.H.). Identical to H.J. Res. 427.

6. H.J. Res. 485. April 4. Mr. Ichord (D.-8th, Mo.). The proposed amendment reads:

"The State shall have the power to regulate or forbid the voluntary termination of human pregnancy."

7. H.J. Res. 520. April 18. Mr. Whitehurst (R.-2nd, Va.); Mr. Gunter (D.-5th, Fla.), Mr. Rarick (D.-6th, La.), Mr. Wampler (R.-9th, Va.), Mr. Wright (D.-12th, Tex.). Identical to H.J. Res. 427.

8. H.J. Res. 537. May 2. Mr. O'Brien (R.-17th, Ill.); Mr. Burgener (R.-42nd, Calif.), Mr. Hanrahan (R.-3rd, Ill.), Mr. Huber (R.-18th, Mich.), Mr. Mazzoli (D.-3rd, Ky.). Identical to H.J. Res. 476.

9. H.J. Res. 544. May 7. Mr. Whitehurst (R.-2nd, Va.); Mr. McCollister (R.-2nd, Neb.). Identical to H.J. Res. 427.

IV DEFINITION OF 'PERSON'

H.R. 7752. May 10. Mr. Denholm (D.-1st, S.D.).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That clause six of section 1, chapter 1, title 1 of the United States Code shall be amended to provide as follows:

"The words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals, and pursuant to and for the purposes of the 'due process' and 'equal protection' clauses of the Constitution of the United States shall mean any animate combination of viable human cells capable of becoming or being an actual independent living human (singular or plural) entity."

V DEFINITION OF FOURTEENTH AMENDMENT RIGHTS

H.R. 8682. June 14, 1973. Mr. Froehlich (R.-8th, Wisc.).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Congress enacts this legislation in the exercise of its power to enforce the fourteenth article of amendment to the Constitution by defining certain rights thereunder, and in the exercise of its power to establish courts inferior to the Supreme Court and to define the jurisdiction of the courts so established.

"SEC. 2. Nothing in the fourteenth article of amendment to the Constitution of the United States shall be construed to bar any State from exercising power to regulate or prohibit the practice of abortion, except that no State may prohibit an abortion that is necessary to save the life of the pregnant woman.

"SEC. 3. No court established by Act of Congress shall have jurisdiction in any case or controversy in which a right to abortion is maintained contrary to the law of a State."

Msgr. James T. McHugh
Director, Family Life Div., USCC
September, 1973

Life Amendment

Since the introduction of Senate Joint Resolution 119, proposing a constitutional amendment to restore legal protection to unborn children, there seems to have arisen a misimpression as to the amendment's intention ["James Buckley: Life Amendment," June 22]. I would like to take this opportunity to clarify as best I can what the amendment is designed to do.

The principal source of the misimpression would appear to be the attribution to me of a statement that appeared in the *New York Times* of June 1, 1973. The *Times* attribution was in the form of an indirect quotation and read as follows: "The key issue, Senator Buckley said, is that scientists are tending increasingly to believe that life begins not when fertilization takes place—that is, when the sperm penetrates the ovum—but when the fertilized ovum implants itself in the wall of the uterus." This was not what I said, and the attributed statement does not represent my own understanding of the question in issue.

I suspect that the reporter, with the best of intentions, ran together two separate statements made in different contexts during my press conference. The first had to do with the understanding of scientists that human life begins at the moment of conception—an understanding that I share. The second had to do with what I understand to be the limits of science to determine in any particular case when conception has in fact taken place.

Let me now state as precisely as I can the thinking that directs my intentions:

1. It is my belief and my intention in introducing my amendment that the word "person" will apply from the moment of conception.

2. In framing an amendment to accomplish this result, however, a close reading of the *Wade* decision convinced me that the term "conception" had been robbed of the legal meaning that those who invoke it to protect life intend it to have. I therefore looked for substitute language that would fulfill that intention. I believe that the language used in my amendment, to wit, "all human beings including their unborn offspring at every stage of their biological development," is well-suited to this purpose and is altogether consistent with the intentions of any amendment that uses the words "conception" or "moment of conception." By firmly establishing the identity between "person," within the meaning of the Constitution, and "human being," as a distinct biological entity, my amendment would extend the protection for human life back to the first moment that science can establish its existence. Given the perversity of the courts and the slipperiness of language, I feel this is the surest way of guaranteeing that the amendment will have its intended effect. Whether there are better or more precise ways to do this than the language contained in my amendment will be determined during the hearing process by scientists and lawyers having particular competence in their respective fields.

3. The problem that lies at the heart of the matter is not at all easy to resolve from a legal point of view: Assuming legal personhood to be conferred at conception, how is this protection to have operative legal effect upon a specific human being who may not as yet be either known or knowable? There seems to be no hard and fast answer to that question, and I know of no other way to resolve it than by relying on scientific expertise.

4. Lastly, I think it worth mentioning that this question and related questions are not peculiar to my amendment. They will arise also under Congressman Hogan's amendment and I believe that Congressman Hogan is well aware of that fact.

In short the mere specification of "moment of conception"—even if that term had not been rendered ambiguous by the *Wade* decision—does not, without more, solve the problem. The "more" of necessity will have to be left to the hearing process and to the implementing legislation necessary to give the amendment full force and effect. Hopefully, science will in the future shed greater light on the problem and enable us to make the kind of precise legal distinction on which the specific effect of the law so vitally depends.

Washington, D.C. JAMES L. BUCKLEY

THE WANDERER 7-12-73

Robert M. Byrn

It is not often that I find myself in disagreement with Charles Rice. On those infrequent occasions that I do, I hesitate to take him on. His scholarship and integrity are so self-evident that even via the printed word, he compels doubts in those who disagree with him. Besides, he has an intimidating way of demolishing his adversaries. But even Homer nods and so too, I suggest, did Prof. Rice in his June 14th Wanderer article on the Buckley and Hogan Human Life Amendments. Both amendments are directed against the Supreme Court's anti-life decision in Roe v. Wade. Both are intended to mandate the right to live for all human beings. Prof. Rice was critical of the Buckley amendment. I now prefer it. Prof. Rice raised specific points of objection. I disagree with them. Before addressing myself to these points, I would like to suggest several matters upon which there is no dispute:

A) We agree that the life of a human being begins at the moment of conception and is endowed at that moment with all the dignity and value that inhere in every human being. Any proposed amendment which posits a later point in gestation as the commencement of human life is unacceptable. In this respect, we must all remain alert to a significant danger. If Congress so mangles the Human Life Amendment, whether it be Hogan's or Buckley's, that the amendment ends up excluding younger unborn children, then we cannot support it.

B) Equally unacceptable is an amendment proposed by Rep. Whitehurst which reads: "Nothing in this Constitution shall bar any State or Territory or the District of Columbia with regard to any area over which it has jurisdiction, from allowing, regulating, or prohibiting the practice of abortion." Mr. Whitehurst's proposal affirmatively adopts the invidious twin propositions of Wade that an unborn child is neither a human being in fact nor a human person in law. Were Mr. Whitehurst's intent otherwise, he could not possibly ask us to place within the discretion of State legislatures — and perhaps the sole discretion of an intransigent governor exercising a veto — the decision whether to recognize the right to life of a whole class of human beings. Worst of all, the Whitehurst proposal does not guarantee the constitutional validity of State anti-abortion laws. I mean by this that if a State were to enact a restrictive abortion law, as it would seemingly be empowered to do, a court would still be free to declare the legislation unconstitutional under that State's constitution. For example, assume that the Whitehurst amendment has been proposed and ratified. State X has enacted a restrictive abortion law. A pregnant women has commenced a lawsuit in a court in State X claiming that X's anti-abortion law violates her right of privacy under the Due Process Clause in X's State constitution. The court casts about for some authoritative exposition of the meaning of due process in so far as it applies to the alleged right to abort, and it lights upon Roe v. Wade. (Remember that the Whitehurst amendment does not challenge the substantive holdings of Wade; it merely makes the Federal Constitution inoperative in the abortion area.) Citing Wade the court finds that the unborn child is not a legal person and proceeds to declare X's anti-abortion law violative of a woman's right of privacy under X's State constitution. Now there is a decision which can be used as precedent by other States. The whole ballgame is lost. Mr. Whitehurst and his co-sponsors may originally have meant well. But if they continue their sponsorship of this amendment now, they are perpetrating a fraud upon the American people and threatening the lives of millions of children.

C) I have dwelt at length on the Whitehurst proposal because it is relevant to the next point of agreement among pro-life people: we are out to win! The Whitehurst amendment includes the powerful Gerald Ford among its co-sponsors. It represents a substantial roadblock in the path of a Human Life Amendment. If a Human Life Amendment is to win, it must be backed by a congressional array of strength that can and will outmuscle the Whitehurst bloc.

D) Finally, we all agree that in the days immediately following the Wade decision, Rep. Hogan was the vanguard of the pro-life movement in Congress. Call him the conscience of Congress if you will. Understand too, however, that there are no heroes in this movement. Admiration of an individual cannot interfere with our primary obligation to the unborn child. In two letters and one nationally circulated memorandum, I supported the Hogan amendment in an effort to head off a move within the pro-life movement to espouse a Whitehurst-type amendment. I would like to think that I contributed something to the drafting of the Hogan amendment. But just as there can be no misplaced loyalties in our movement, neither is there room for pride of authorship. If we decide that an amendment is acceptable, and it seems to have a better chance of winning, then let's go with it. Personalities don't count.

So much for the matters upon which, I hope, we all agree. Now let us examine Prof. Rice's objections to the Buckley amendment. First, Prof. Rice is concerned that the Buckley amendment fails expressly to specify a right to the equal protection of the laws, a right implicit in the Fifth and explicit in the Fourteenth Amendments of the U.S. Constitution. He admits that because the Buckley amendment guarantees the unborn child's right to life, "there may be no practical detriment." I suggest there is no detriment at all. Consider this simple syllogism: (i) the Buckley amendment absorbs unborn children into the Fifth and Fourteenth Amendments with respect to their fundamental right to life;

(ii) the guarantee of equal protection of the laws contained in these amendments extends to all fundamental rights, Shapiro v. Thompson (1969); Schilb v. Kuebel (1971); Dunn v. Blumstein (1972); (iii) ergo, the guarantee of equal protection of the laws in these amendments will extend to the unborn child's right to live. The necessary nexus between the right to life and the right to equal protection of the laws is apparent in a landmark equal protection decision rendered in 1886: "For, the very idea that one man may be compelled to hold his life . . . at the mere will of another, seems intolerable in any country where freedom prevails, as being the essence of slavery itself" (Yick Wo v. Hopkins). Prof. Rice's fear that the Buckley amendment will not extend the equal protection guarantee to unborn children is groundless. Then too, he admitted that this objection was "probably of minor importance," since, in any event, the right to life is specifically guaranteed to unborn children by the Buckley amendment.

Second, Prof. Rice argues that the terminology of the Hogan amendment, "any human being, from the moment of conception," gives clearer protection to unborn children from the instant of fertilization than does the Buckley terminology, "all human beings, including their unborn offspring at every stage of biological development, irrespective of age. . . ." Just the opposite seems to be true. As one reads and rereads the Wade decision, he becomes more and more convinced that the Hogan formulation may be in trouble. The Supreme Court in Wade, ignoring the facts of life before birth, held, as an integral part of its decision and as a matter of law, that conception is a process, not a moment. In the next sentence, the Court mentioned menstrual extraction. Were the Hogan amendment to be ratified, then how, as a matter of law, will "moment of conception" be interpreted? Will it mean the moment when the process ends and thereby exclude all unborn children who are not yet one month old? (Menstrual extraction can be performed up to seventeen days after the missed period — thirty-one days after conception.) I am puzzled at why Prof. Rice is admittedly "perhaps over-cautious" in some of his criticisms of the Buckley amendment, but is willing to tolerate this ambiguity in the Hogan amendment. It is true that he challenges the Hogan critics to come up with better language. That is exactly what Sen. Buckley has done. Prof. Rice scoffs at the Buckley term "offspring" as though it had never been used to refer to unborn children. He is wrong. Depending on gestational age, modern science refers to the unborn child as "zygote," "embryo," or "fetus." Before these terms came into use, it was common to refer to the child from the beginning of his life to birth by the generic label "embryo." Webster's Third International Dictionary defines embryo in this original usage as "a human or other animal offspring at any stage of development prior to birth. . . ." Embryo has a different meaning today, as I have already indicated, but the term "offspring at any stage of development prior to birth" remains viable and current as a way of describing unborn children from conception to birth. Sen. Buckley's "all human beings, including their unborn offspring at every stage of their biological development" is a felicitous restatement of a familiar term with a well-settled meaning that is acceptable to all pro-life people. Add to all this the intent of the framer of the amendment. Prompted by a misquotation in the New York Times, subsequently repeated in other publications, Sen. Buckley has issued a statement to the New York State Right-to-Life Committee in which he reaffirms his "belief and intention" that "person" in his amendment "will apply from the moment of conception." He then explains that the word "conception" had been robbed of its natural meaning by Roe v. Wade, and it was necessary to find another term to express the idea. The term has been found. The words and the intent are clear. Months of rethinking and redrafting went into the Buckley amendment. It is co-sponsored by six prestigious Senators representing a religious, political, and geographic cross-section of America. Is this powerful pro-life bloc to be broken up and all this effort scrapped because of an objection which, with all due respect to Charlie Rice, is utterly without merit?

Third, Prof. Rice objects that the Buckley amendment does not provide sufficient protection against euthanasia. He does admit "that the Buckley affirmation of personhood (irrespective of age, health, function, or condition of dependency) may be sufficient protection," but he fails to tell us why it may not be, except to reiterate his objection that the amendment fails expressly to specify a right to the equal protection of the laws — an objection already dealt with above. The Buckley amendment provides as much protection against euthanasia as the Hogan amendment.

Fourth, Prof. Rice objects to the clause in the Buckley amendment which exempts from its application "an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother." He claims that this makes the unborn child a non-person. History is against him. For instance, in 1917 an Alabama court, in the course of expounding on the purpose of the Alabama abortion statute, asked rhetorically: "Does not the new being from the first day of his life acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extra-uterine life?" (Trent v. State) Even though the Alabama abortion statute exempted abortion necessary to preserve the life of the mother, the court viewed the unborn child as a person in law indistinguishable from his postnatal sibling. The personhood of the unborn and the exemption to prevent maternal death are fully compatible. Next Prof. Rice complains that the exemption will be abused. Yet he admits that the same exemption is implicit in the Hogan amendment.

Isn't the danger of abuse less if the exemption is enunciated in tightly and narrowly phrased language? Further, there are some who disagree with Prof. Rice and, with some basis in law, argue that the exemption is not implicit in the Hogan amendment — that the amendment would not allow a maternal lifesaving abortion. They point out that the anti-abortion statutes of this Country have always included such an exception. Ergo, they argue, the exception must be included in the amendment. Prof. Rice answers that maternal lifesaving abortions are medically obsolete so the exception isn't really necessary at all. This line of attack requires him to deny that the removal of an ectopic pregnancy is an abortion "even in Catholic teaching." But it is not the Catholic definition of abortion of which we speak. The question is: Does medicine consider the procedure an abortion? Rugh and Shettles in their book From Conception To Birth discuss ectopic pregnancies in their section on abortion. They define abortion as the interruption of pregnancy and then go on to state that "ectopic pregnancies must always be terminated by surgery." "Termination of pregnancy" and "interruption of pregnancy" are typically used interchangeably to denote an abortion in medical terminology. Termination of an ectopic prenancy is an abortion within the maternal lifesaving exemption. So it all boils down to this: Unless the exemption is explicitly stated in a narrowly circumscribed way, we risk losing the support of two different groups — those who disagree with Prof. Rice that the exemption is implied in the Hogan amendment and who fear that even an abortion of an ectopic pregnancy would be barred, and those who believe that the exemption is implied in the Hogan amendment, but who fear that the failure to encunciate it in precise language will lead to abuse by unscrupulous doctors. Prof. Rice has no objection to an exemption in se. Wouldn't it be better if the exemption were explicit in the amendment, in the way Sen. Buckley has dratted it, than if it were omitted and we lost all this support? Of course, those who object that there ought to be no exemption at all cannot support either amendment. The rest of us had better get it all together soon or the exemption will be the least of our worries.

Fifth, Prof. Rice asks: "Do you agree that the constitutional protection of life should apply unequivocally from 'the moment when the sperm combines with the egg?'" The answer is, Yes.

Sixth, Prof. Rice asserts that "the language of whatever amendment becomes the focus of the pro-life campaign will set the tone of the campaign." I would suggest rather that the pro-life campaign will establish the meaning of the amendment — except possibly if the amendment contains self-defeating language, as "moment of conception" may be. Should, for instance, the National Right-to-Life Committee back the Buckley amendment, it would do so under the mandate of a resolution that any amendment must apply from fertilization. The New York State Right-to-Life Committee is under a similar onus with respect to any amendment it may choose to back. Neither, as far as I know, has made a decision at this point.

The expressed intent of Sen. Buckley, the plain meaning of his language, and the long-standing, and still viable, understanding of his phraseology persuade me that his amendment is superior to Rep. Hogan's. Sen. Buckley has a powerful coalition of co-sponsors that is stronger than the dangerous Whitehurst bloc. At the time of this writing, after four and a half months, Rep. Hogan has not gathered a comparable of his own in Congress. I believe Buckley can win; I am far less sanguine about Hogan's chances. And provided the amendment is acceptable to the pro-life movement (which Buckley's ought to be), then winning is what it's all about. It is not enough to have fought the good fight. There are too many lives at stake.

Finally, in closing this article, I would echo Charlie Rice's plea, "We ought to pray." Our prayers are not for ourselves, but for the wisdom and energy to do the right thing by God's children.

(4)

Charles Rice

Bob Byrn is one of nature's noblemen. He is personally and professionally an outstanding man in every respect. There is no one in this Country who has worked more effectively and constructively in support of the right to live. I know him well and I have the highest admiration for him. And not least among his virtues is the fact that he comes from the Bronx. He is, incidentally, too, the principal author of the Hogan amendment, a fact he desired not to disclose until recently. Prof. Byrn and I conferred on the phone for hours on the weekend following the Roe v. Wade decision and, after consultation with other attorneys, I presented several possible formulations to Cong. Hogan, from among which the Congressman chose the version which had been initially suggested by Prof. Byrn. So when Bob Byrn says that pride of authorship should have no influence here, he means it. For he is now arguing against his own proposal. He was right then and I suggest he is wrong now.

The Hogan amendment has now been introduced in the Senate by Sen. Jesse Helms of North Carolina. The Hogan-Helms amendment carries a greater potential for success now that it has been introduced in both houses of Congress. I'm bothered less, however, by the fact that Prof. Byrn opposes the Hogan-Helms amendment than I am by the fact that he supports the dangerous Buckley amendment. If Hogan's language cannot gain general acceptance among opponents of abortion, we can find language that will. It may seem confusing to have pro-life lawyers arguing over the language of an amendment. But the situation is encouraging. For it is clear that the pro-life movement throughout the Country is now united on three essential points: a mandatory amendment is needed, rather than a "States' rights" version; the amendment must apply from the moment of the fertilization of the ovum by the sperm; and the amendment must prohibit euthanasia of the sick, aged, and disabled. We can agree on specific language to meet these requirements. I believe the Hogan-Helms language does the job, but we are not married to any particular formulation.

I am suggesting a way out of the impasse. But first, a couple of comments are in order on the Buckley amendment itself. I do not concede the validity of the other criticisms made by Prof. Byrn. But our disagreement centers on two major points: The adequacy of the Buckley "offspring" terminology; and the acceptability of the Buckley constitutionalization of abortion to save the life of the mother.

First, on the Buckley "offspring" language. Sen. Buckley says he intends his bill to apply "from the moment of conception." But that is not what the bill says or does. It is an ancient truism in statutory interpretation that the legislature does not enact the Senator's speech, it enacts his bill. That truism applies here and the Buckley proposal is inherently ambiguous. Indeed, its ambiguity was captured by Sen. Buckley's own commentary on the bill. I used this commentary in my analysis of the bill. Prof. Byrn does not mention it but instead talks of a New York Times misquotation which I did not use. Sen. Buckley's own commentary says:

> "It is a question of biological fact as to what constitutes 'human being' and as to when 'offspring' may be said to come into existence. While the facts concerning these matters are not in dispute among informed members of the scientific community, the ways in which these facts are to be applied in any particular case will depend on the specifications contained in implementing legislation passed consistent with the standard established by the amendment. Such legislation would have to consider, in the light of the best available scientific information, the establishment of reasonable standards for determining when a woman is in fact pregnant, and if so, what limitations are to be placed on the performance of certain medical procedures or the administering of certain drugs."

\+ + +

> Under the amendment, the test in each case will be a relatively simple one, i.e., whether an "unborn offspring" may be said to be in existence at the time when the abortion technique or medicine is applied. Particular standards on this point are to be worked out in implementing legislation.

This commentary is an accurate interpretation of the Buckley amendment. The amendment would clearly leave it up to the State legislatures to determine when life begins under the guise of deciding "whether an 'unborn offspring' may be said to be in existence."

The Buckley amendment is an oblique, partial version of the Whitehurst States' rights amendment, which Prof. Byrn properly condemns. The result is that the Buckley amendment would sanction early abortions and the licensing of abortifacient pills which, if they are licensed at any stage of pregnancy, will be used at every stage.

Prof. Byrn has misconstrued my objection to Section Two of the Buckley amendment. Contrary to his assertion, that section does make the child in the womb a non-person whenever "a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother." The usual statute permitting abortion to save the life of the mother, such as the Alabama statute mentioned by Prof. Byrn, does not make the child a non-person. But the Buckley amendment does. Why? Because Section Two says: "This Article shall not apply" when the mother's life is at stake. But the article that "shall not apply" in that situation is the Buckley amendment itself which makes the unborn offspring a "person." When the Buckley amendment conferral of personhood is made inapplicable by Section Two, the child reverts to the non-personhood decreed by Roe v. Wade.

The Buckley amendment would permanently constitutionalize abortions to save the life of the mother. And it would do so by making the child a non-person in that case. This is the worst possible approach, for it adopts the basic error of the Supreme Court's abortion decisions, that an innocent human being can legitimately be defined as a non-person. On the contrary, no innocent human being should ever be defined as a non-person. Instead of freezing "life of the mother" abortions, including psychiatric abortions, into the Constitution, a proper amendment could permit but not require the States to allow such abortions. This would leave the door open to eventual repeal of such statutes. I would prefer, as I believe would Prof. Byrn, that the law permit no abortions at all. Medically, however, there is no case today where abortion is necessary to save the life of the mother. And if the laws that allow such abortions were enforced, abortions would be practically eliminated. We could support an amendment that merely permitted, but did not require, the States to allow abortions to save the life of the mother, just as the Catholic Bishops of New York supported the 1972 repeal of that State's permissive abortion law although the repeal would have restored the pre-1970 allowance of abortion only to save the life of the mother. What we cannot do is support the Buckley proposal.

Finally, let us resolve the impasse. I believe the Hogan-Helms amendment is adequate and would be effective. But the Hogan-Helms amendment language was not written on tablets of stone on Mount Sinai even though Bob Byrn is its primary author. If better language is desired, let us work to devise it. Since we agree on the fundamental principles, we ought to be able to find language to effectuate them.

93D CONGRESS
1ST SESSION

H. J. RES. 769

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 12, 1973

Mr. BURKE of Massachusetts introduced the following joint resolution; which was referred to the Committee on the Judiciary

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States for the protection of unborn children and other persons.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"ARTICLE —

"SECTION 1. With respect to the right to life, the word 'person', as used in this article and in the fifth and four-

teenth articles of amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function, or condition of dependency.

"SEC. 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a reasonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring.

"SEC. 3. Congress and the several States shall have power to enforce this article by appropriate legislation within their respective jurisdictions.".

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

August 14, 1973

From: Joseph P. Witherspoon, Consultant to Public Policy Committee

To: Executive Committee, NRLC

Subj: Proposed Report of Public Policy Committee on Human Life Amendment to the Constitution of the United States

1. This memorandum submits in outline the contents for a proposed report by the Public Policy Committee to the Executive Committee, NRLC on a Human Life Amendment to the Constitution of the United States. The proposed report has been prepared by your consultant to this Committee and is currently being circulated to its members and to certain specialists who can be helpful to them for comment and any proposed modifications.

2. It is recommended that the Executive Committee adopt the following positions:

A. The Buckley Human Life Amendment, S.J. Res. 119 (May 31, 1973) and the Hogan Human Life Amendment, H.J. Res. 261 (January 30, 1973) are both worthy of support by all who are committed to restoring full protection for the life of unborn children under the Constitution of the United States.

B. The Buckley Amendment possesses a number of strong points, including an inbuilt capacity to meet certain difficulties that are likely to be presented in the administration of any human life amendment, that are not clearly possessed by the Hogan Amendment. For this reason, the Buckley Amendment is considered to be preferable to the Hogan Amendment.

C. The Buckley Amendment can and should be strengthened by modification of its Section 2. That section presently reads:

> "Section 2. This Article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother."

For reasons stated below this section should be modified to read as follows:

> "Section 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a rea-

sonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring."

3. Both the Buckley and Hogan Amendments should be supported by NRLC because although they differ in their expressed formulas, they are likely to produce in large measure the results desired by NRLC with respect to restoring protection under the Constitution for human life from and after conception.

4. The Buckley Amendment should be the Human Life Amendment preferred and promoted by NRLC because it has the following advantages over the Hogan Amendment:

a. because it more assuredly provides protection of the unborn child from the instant of fertilization than does the Hogan Amendment due to the possibility that the Supreme Court of the United States, as a result of its decision in Roe v. Wade, might construe the words of the Hogan Amendment "from the moment of conception" to refer to a process that covers a considerable period of time, perhaps as much as a month, and that would exclude from constitutional protection those unborn children who are not yet one month old. The Buckley Amendment avoids this possibility of construction by the Supreme Court by adopting language which precludes that Court from adopting a view of conception that ignores the facts of life before birth. The language adopted by the Buckley Amendment protects the unborn offspring of human beings as a person under the Fifth and Fourteenth Amendments "at every stage of their biological development." Thus, the unborn child at every stage of its process of biological development as a new, separate, individual, living being is protected by this form of amendment. There is no stage of any such process at which it is outside the protection of the Fifth and Fourteenth Amendments provided for the life of the person. The Supreme Court cannot take some period less than the whole period of biological development of the unborn offspring of human beings as the period, and only the period, in which they are to be recognized as human beings. Moreover, the measure established by the Buckley Amendment for determining the beginning and development of human life is biological science. This measure excludes the method of definition utilized by several members of the Court in defining a human being which would bring to bear on the matter so-called "value judgments".

b. because it utilizes the very language that has been utilized by physicians since at least the 1850's to describe the needed protection for foetal life and that still is in current use. See, e.g., Horatio R. Storer, M.D., Criminal Abortion in America (Philadelphia: J. B. Lippincott & Co., 1860) pp. 10, 100, 107: "... the foetus (is) already, and from the outset, a human being, alive, however early its stage of development and existing independently of its mother. . . .it is not rational to suppose . . . that life . . . dates from any other epoch than conception. . . . medical men, in all obstetric matters, are the physical guardians of women and their offspring. . . ." (Protection of the unborn child is required) at every stage of gestation." See, also, Henry Miller, M.D. "Address" (of President of American Medical Association at 1860 Annual Meeting), Transactions of the American Medical Association, Vol. XIII (June 1860) pp. 58-59: "from the moment of conception, a new being is engendered, in whose constitution, mi-

croscopic though its parts may be, lies unfolded the substratum in which inheres potentially all that pertains to man. . . . In every stage of its development, it is as much an independent being as are its parents. With such enlightenment as this, what virtuous woman . . . would be accessory to so foul a deed as the destruction of her offspring. . .?"

c. because it utilizes a formula that better strikes at the very roots of the Supreme Court's tragic error in Roe v. Wade. That Court separated the concept of the human being from the concept of the human person and held that although a being might be a human being, that fact did not entitle that being without more to the constitutional protection of the human person. In so holding, the Court destroyed the traditional common sense and scientific view equating the concept of the human being and the concept of the human person. And, indeed, it now can be clearly demonstrated that the Court destroyed, for the time being, the work of the framers of the Fourteenth Amendment's First Section. Those framers were very cognizant that these two concepts had been separated in the actual administration of the Constitution of the United States and it was their clear, demonstrable purpose to prevent for all time thereafter any such separation of the two concepts. The author of the first section of this Amendment, Congressman John A. Bingham of Ohio, stated how it was to operate: "Before that great law the only question to be asked of the creature claiming its protection is this: Is he a man?" And of the due process clause of the Fifth Amendment he stated: ". . . no person, no human being, no member of the family of man shall, by virtue of federal law or under the sanction of the federal authority . . . be deprived of his life, or his liberty, or his property, but by the law of the land." See, Alfred Avins, The Reconstruction Admendments' Debates (1967) pp. 274, 36-38.

The Buckley Amendment explictly restores this traditional equation of the two concepts of the human being and the human person by defining "person" as used in the Fifth and Fourteenth Amendments to apply "to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency." The Buckley Amendment thus specifically overturns the tragic underpinning of Roe v. Wade. The Hogan Amendment does not specifically overturn this underpinning. It accomplishes the needed rectification only by inference. The Hogan Amendment does not define the constitutional concept of the "person". While it accomplishes the necessary protection of a human being, from the moment of conception (providing the Supreme Court does not distort the proper meaning of the latter clause), the Hogan Amendment fails to correct the basic doctrinal error of that Court committed in Roe v. Wade in haec verba and to restore the Fourteenth Amendment to its original form of equating the human person and the human being. By virtue of this failure, the opportunity for asserting a great moral and legal truth is lost. The basic error of the Supreme Court in Roe v. Wade should be explicitly corrected. The Buckley Amendment does this.

d. The Buckley Amendment is more precise and full in its protection of human beings as persons, irrespective of their age, health, function, or condition of dependency, than is the Hogan Amendment. The latter Amendment explicitly protects a human being against deprivation of his life by the United States or a State only on account of illness, age, or incapacity. The Buckley Amendment fully encompasses a human being within the protection

of the Fifth and Fourteenth Amendments and all clauses thereof with respect to the right to life whatever the excuse that might be advanced for taking away that right by government and then adds, out of an abundance of caution, that that right may not be taken away on account of age, health, function, or condition of dependency. Perhaps, Section 2 of the Hogan Amendment will be read by the Supreme Court as not limiting Section 1 of that Amendment with respect to the protection of the life of a human being. But, at this stage, no stone should be left unturned to prevent the Supreme Court ever playing fast and loose again with the constitutional protection of life of the human person. The Buckley Amendment is not only better drawn to accomplish this result explicitly. It is also better in its draftsmanship by virtue of the fact that it covers the whole field of possible excuses or reasons government might give for taking a person's life, while specifying some such reasons particularly, and it does so in one comprehensive section, rather than in two sections.

e. The Buckley Amendment deals specifically with a problem that could undercut the effectiveness of any Human Life Amendment--the problem of an exception for an abortion for preserving the life of the mother. No Human Life Amendment will be adopted that does not permit state and federal laws to be enacted that permit such an abortion. The Hogan Amendment does not explicitly prohibit such an abortion and inevitably it must face an attack from two sides. One side will urge that the Hogan Amendment prohibits any abortion. Another side will urge that the Hogan Amendment permits abortions to be authorized by state and federal law that are performed to preserve the health of the mother and perhaps to preserve her mental health and to subserve socio-economic purposes. While I do not agree that the Hogan Amendment prohibits any abortion, it is a weakness of that Amendment that it can be subjected to such argumentation and that the latter will prove persuasive to many persons who are basically pro-life in their orientation. On the other hand, the greatest weakness of the Hogan Amendment is that it probably does not confine permissible abortions to those done for the purpose of preserving the life of the mother. Indeed, it would turn over to the very court that decided Roe v. Wade the function of deciding what abortions are permissible under the very fluid and flexible concept of "due process of law". I am unwilling to turn over to that Court such a function after its performance in Roe v. Wade and I think most pro-life people, when they understand this weakness of the Hogan Amendment, will be opposed to it for that reason.

It is essential that any Human Life Amendment clearly and narrowly draw a provision for the kind of an abortion that may be permitted under State and Federal Law. The Buckley Amendment has done this in light of the history of the administration of the exception in traditional anti-abortion laws for abortions for the purpose of saving the life of the mother. That history indicates that even this exception was given a wide and liberal interpretation in many states, such as California. For this reason, the Buckley Amendment would only permit an abortion for this purpose in the situation of an emergency when there is reasonable medical certainty that continuation of the pregnancy will cause the death of the mother. Such a phrasing of the exception will be efficacious in preventing authorization of an abortion, by judicial interpretation, that really involves no real danger to the mother's life from a continuation of her pregnancy.

The Buckley Amendment with respect to this matter of exception for an abortion to save the life of the mother does suffer from two kinds of weaknesses. These

will be examined below and a corrective recommended.

5. A major weakness of both the Buckley and Hogan Amendments is that neither proposal prohibits abortions directly. Thus if a State Legislature or the Congress fails to enact an anti-abortion law, neither the Buckley nor the Hogan Amendment will stop abortions without more. They will resemble, in their actual impact or application, the so-called States Rights Amendments. They are designed to prevent action by the United States or any State in denying due process of law or equal protection of law to any human being from and after the conception of that human being with respect to his or her enjoyment of life. They are not designed to operate upon the private action of physicians in performing or of parents in seeking abortions. Adoption of neither the Buckley nor the Hogan Amendment will stop private action in seeking and authorizing abortions or in performing abortions. They operate only through action that is public or official action. If a State Legislature or a Congress fails to enact an anti-abortion law, this will probably constitute official action that denies due process of law and equal protection of law to unborn children. In such event, court action will have to be instituted to compel a State Legislature or Congress to enact anti-abortion law to protect unborn children from abortions by private persons. This will take time. It will be done piece-meal. It must be done through the courts and this means that these Amendments put the Supreme Court back in the saddle again with many possibilities for delay and inadequate protection of the unborn child. It is entirely possible that adoption of either the Buckley or the Hogan Amendment will result in another fifty years of efforts to get appropriate anti-abortion laws on the statute books plus efforts in the courts to bring this about. This will be an intolerable situation and one which should be avoided at all costs.

What is needed is a Human Life Amendment that prohibits abortions by private persons much as the Thirteenth Amendment prohibits slavery and involuntary servitude by private persons. Indeed, there is a very close resemblance between killing human beings by abortion and submitting them to slavery and involuntary servitude. Slaves were also beaten and killed by their masters. When the people of the United States decided to be rid of slavery and involuntary servitude, they adopted an amendment to the Constitution that prohibited any private person or government itself from imposing slavery or involuntary servitude upon another person. That Amendment reads: "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

A provision similar to the Thirteenth Amendment applicable to abortion by private persons as well as officials can readily be inserted into the Buckley Amendment by modification of its Section 2 to read as follows:

> "Section 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother." (Underlined portion is substituted for the words "This Article shall not apply")

Another modification will be suggested of Section 2 of this Amendment shortly for another purpose. At the present moment will be discussed the point that this modification definitely creates from the moment of the adoption of the Amendment

a legal protection for every unborn child in the country from and after its conception with respect to its life. This law can be enforced in the courts without the necessity for state or federal legislation although, of course, it permits implementive legislation. Moreover, it preserves the excellent idea of the Buckley Amendment in dealing with the problem of an exception for an abortion performed for the purpose of saving the life of the mother and doing so in a narrow, precise manner. We definitely need this modification and should vigorously seek to get it adopted.

An excellent point about this modification is that it answers a basic criticism that has been directed against the Buckley Amendment. This criticism is that the Buckley Amendment compels recognition of an abortion for the purpose of saving the life of the mother. While I think this criticism is wrong, the Amendment is subject to having such a criticism made and credited. The criticism should be undercut by modifying Section 2 according to the suggestion just made. The modification clearly does not compel recognition of an abortion for the purpose of saving the life of the mother. It simply leaves it up to the State Legislatures and to Congress to enact a "law permitting an abortion to be performed only . . . etc." Until such law has been enacted "No abortion shall be performed by any person". When such a law is enacted "No abortion shall be performed by any person except under and in conformance" with such state or federal law. Moreover, such state or federal law can only "permit. . . an abortion to be performed . . . in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother." As suggested above, this completely undercuts the criticism that has been made by several prominent persons of the Buckley Amendment at the same time that it accomplishes the main objective under discussion of preventing abortion directly by private persons and thus providing immediate legal protection of unborn children even if state and federal legislatures fail to provide this protection.

6. Another major weakness of both the Buckley and Hogan Amendments is that, while both permit an exception to be made for abortions to save the life of the mother, and while the Hogan Amendment probably permits many other exceptions to be made in behalf of abortions, neither Amendment does anything about protecting the unborn child during and after the process of the excepted abortion. We are all familiar with the fact that babies are aborted live-born usually in hysterotomies and sometimes in saline injections. We are also familiar with the reports that these babies are usually permitted to die without adequate care or even destroyed. Whatever form of abortion is utilized with respect to an abortion that is permitted in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother under the Buckley Amendment, it should be permitted only under a law "requiring . . . every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring." For this reason, the modification of Section 2 of the Buckley Amendment should read as follows:

> Section 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an emergency when a reasonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring." (last under-

lined portion is the modification suggested in the instant discussion. The earlier underlined portion is the modification suggested in Point 5.)

7. I was the draftsman of a proposed constitutional amendment to overturn the Supreme Court decisions that came to the attention of Senator Buckley and with one major exception adopted by him. This proposal was drafted in my role as a member of the drafting committee of the Legal Advisory Committee of NRTL in late January and February of this year. Professor Walter Trinkaus of Loyola of Los Angeles made an extremely valuable contribution to this proposed amendment that is incorporated in Section 2 of the Buckley Amendment. As draftsman of the proposal, I was aware of the Hogan Amendment and sought to achieve its objectives by more certain measures and to add correctives to strengthen its protection for human life. The direct prohibition of abortions by private persons was eliminated by Senator Buckley, largely for political reasons. I have redrafted the direct prohibition of abortions by private persons that was submitted to him as described in this memorandum. I believe it is not only necessary in principle but also politically acceptable in its present form.

8. While the Public Policy Committee is performing its task of considering the form of a Human Life Amendment to be recommended by it for support by NRLC, this memorandum will serve, among other purposes, the purpose of informing the Executive Committee of the position of its consultant to that Committee and of stimulating any suggestions or criticisms that seem appropriate to members of the former. While lawyers are essential for the performance of the task of proposing the form of a Human Life Amendment for consideration by the Executive Committee, it is also just as essential that every pro-life person and group consider how any given proposal might operate in practice and what problems may not have been foreseen or considered.

APPENDIX

A. The Buckley Amendment (S.J. Res. 119, May 31, 1973):

"SECTION 1. With respect to the right to life, the word "person", as used in this Article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency.

"SECTION 2. This Article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother.

"SECTION 3. Congress and the several States shall have power to enforce this Article by appropriate legislation within their respective jurisdictions.

B. The Witherspoon proposal to the Executive Committee for a modification of the Buckley Amendment:

"SECTION 1. (same)

"SECTION 2. No abortion shall be performed by any person except under and in conformance with law permitting an abortion to be performed only in an

in an emergency when a reasonable medical certainty exists that continuation of pregnancy will cause the death of the mother and requiring that person to make every reasonable effort, in keeping with good medical practice, to preserve the life of her unborn offspring."

"SECTION 3. (same)

C. The Hogan Amendment (H. J. Res. 261, January 30, 1973):

"SECTION 1: Neither the United States nor any State shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws.

"SECTION 2. Neither the United States nor any State shall deprive any human being of life on account of illness, age, or incapacity.

"SECTION 3. Congress and the several States shall have the power to enforce this article by appropriate legislation."

D. Memoranda of June 1 and July 30, 1973, of Michael Taylor, Executive Secretary of NRLC entitled: "Federal Legislation - Constitutional Amendments . . ." and "Constitutional Amendment . . ." (I assume these are generally available)

E. Articles of Robert M. Byrn and Charles Rice in The Wanderer, July 12, 1973. (I assume these are generally available)

Rec'd from Bob Byrn 9/7/73

September 4, 1973

Prof. Joseph P. Witherspoon
University of Texas Law School
2500 Red River
Austin, Texas 78705

Dear Joe:

Thank you for sending me a copy of your excellent memorandum (8/14/73) on the Human Life Amendments. Herewith my comments:

First: I agree with paragraphs 2A, 2B, 3 and 4 of your memorandum (except, perhaps, so much of 4c as refers to the weaknesses in the Buckley Amendment). When I wrote the WANDERER article, it was not with the idea in mind that the Hogan Amendment was unworthy of support. I intended only (a) to indicate that Buckley Amendment was superior and (b) to answer Charlie Rice's argument that pro-life people ought to oppose the Buckley Amendment for reasons which I believed to be unsound. In his reply Charlie wrote that I was the principal author of the Hogan Amendment. Actually, the language was the product of several lengthy telephone conversations. How much of it is mine, I simply cannot recall at this moment. Even assuming the language to be all mine, nevertheless, I agree with your criticisms.

Second: Having confessed multiple egregious errors, I may have succeeded in destroying the credibility of the rest of this letter, but I will continue anyway.

Third: Paragraph 5 of your memorandum raises the thorny problem of private action. The following observations are intended more as questions than objections:

a) As a practical matter, can we expect to obtain more in the way of constitutional protection for the lives of unborn children than the protection afforded to the lives of other human beings? To put it another way, the Supreme Court in Roe and Doe might have accepted the arguments of the State of Texas that unborn children are Fourteenth Amendment persons. Such a finding is the most we could have hoped for. Still private action would not have specifically been forbidden since the Fourteenth Amendment does not bar private action. Will we muddy the waters and give additional ammunition to our adversaries if we seek more protection for the unborn than (1) they would have enjoyed had we won and (2) other human beings enjoy?

b) Would the proposed modification be self-executing? Or (in the absence of state prohibition) would it require the enactment by congress of appropriate criminal or other civil rights legislation? I suppose the answer to this question might be that even in the absence of such legislation, the modification would permit the appointment of a guardian for unborn children to bring a class action against hospitals and doctors performing abortions to enjoin their continued violation of the rights recognized by the Amendment. Or perhaps the wording of some existing civil rights statutes directed against private action might be broad enough to cover unborn children - although I have my doubts about this latter approach.

c) I gather, Joe, that you have concluded that all restrictive and A.L.I state abortion laws, presently remaining on the books, are a nullity and that ratification of the Buckley Amendment, at least in its unmodified form, would not revive them even though they have not been legislatively repealed. If this be so, then your proposal for a private action clause is considerably reinforced. Charlie Rice, on the other hand, has argued against a private action clause on the grounds that (1) existing, unrepealed, restrictive state anti-abortion laws would be enforceable after ratification of the amendment, (2) existing, unrepealed ALI type laws would be unconstitutional only to the extent that they permit abortion for reasons other than to save the mother's life, and would be otherwise enforceable, and (3) permissive state abortion laws (like New York's) would become unconstitutional thereby reviving the prior restrictive laws which were repealed or amended by the enactment of the permissive laws. If Charlie is correct, then a private action clause would not be necessary. He relies principally on cases deciding that after law A was declared unconstitutional, law B (which A repealed or amended) was revived. There is, of course, a significant difference in the present situation. Under Wade, New York's existing law is constitutional. In the hypothetical I presented law A never was constitutional. For this reason, Charlie's point may not be valid.

d) I gather that some Senators had objections to a private action clause. Perhaps the wording of the modification takes care of their objections (paragraph 7 of your memorandum).

As I said, the above are not objections but questions which I have heard raised and which I relay for your consideration. I have one suggestion which is purely semantic. It seems to me that "No pregnancy shall be terminated . . . except under and in conformance with law permitting termination of pregnancy . . ." may be preferable to the references to abortion. The word abortion, I am told, is appropriately used only up to the twentieth week.* Many definitions limit it to "expulsion of the fetus from the uterus." Because the meaning is somewhat ambiguous, I suggest the change in language. Admittedly this may be nit-picking. I recognize too that there is more public relations value in actually using the word abortion in the Amendment.

Fourth: In paragraph b of your memorandum, you suggest an additional modification about which I have some reservations:

a) I think it may open a Pandora's box of controversy regarding "ordinary means" vs "extraordinary means" in medical treatment, the meaning of "reasonable effort" and "good medical practice," etc. In short, I am concerned that our adversaries will use it to cloud the real issue - the fundamental right to life of unborn children - and thereby delay the Amendment.

*I am not aware to be redefining the operation but it is an more opportunity for our adversaries to cloud the issue

b) the modification guarantees to aborted children something which is not specifically guaranteed to newborn children - the constitutional right to good medical care from the physician involved. Can this be interpreted to mean that the newborn child does not have such a right (e.g., the mongoloid baby who was allowed to starve to death at Johns Hopkins)? On the other hand, if general principles of law protect the newborn in such a situation, won't they also protect the aborted child?

c) the thrust of the Amendment should be the restoration of the unborn child's right to live. The language of the modification is directed toward a particular criminal practice violative of that right. It is excellent statutory language, but, I suggest, not appropriate for an Amendment. The more specific ills the Amendment tries to cure, the more opposition we will encounter. I believe an Amendment ought to guarantee fundamental rights - not proscribe specific instances of violation of those rights.

d) how can this provision be enforced without enabling legislation? If such legislation is required, it can be enacted without the modification.

e) As much as I agree with the intent of the modification, there comes a period, I think, when we begin to ask for too much and thereby turn off borderline Senators and Congressman or give an easy out to those (like Senator Kennedy) who are caught in a squeeze.

f) as a practical matter, the modification comes into play only after the 19th or 20th week. If a doctor is in such bad faith that he will perform an abortion at this stage, under the pretext of saving the mother's life, then he won't have too many qualms about letting the baby die, regardless of the wording of the modification.

I must admit that I recognize two advantages to your modification no. 2 besides those mentioned in the memorandum. It anticipates the day when an artificial placenta will be available to continue the life of aborted babies. Also it provides a vehicle for calling to public attention, via congressional hearings, the unscrupulous practice of letting babies die after an abortion.

Fifth: In summary, I am in total agreement with the recommendation to support both Amendments, with a preference for Buckley's. I merely relay questions concerning modification no. 1, but I have reservations about modification no. 2. If NRLC decides to adopt either or both modifications, it is important, I think, that it be done in such a way that hearings on the Amendments are not delayed and an impression of disunity and confusion is not conveyed. It is also important that we close ranks. To this end, all pro-life people should be prepared to support NRLC's choice whether it be Hogan, Buckley, or Buckley with one or both of the modifications, which, as I read your excellent memo, Joe, is also your portion.

Sincerely,

RMB:am

Robert M. Byrn
Professor of Law

Notre Dame Law School
Notre Dame Indiana 46556

TELEPHONE 283-6626

September 5, 1973

Professor Joseph P. Witherspoon
2500 Red River Street
Austin, Texas 78705

Dear Joe:

I appreciate the opportunity to examine your memorandum of August 14th with reference to the Public Policy Committee. You have done a thoughtful and painstaking job and I believe that your revised section two is a clear improvement over the present section two in the Buckley amendment.

Some things occur to me that may be helpful in your further consideration of the subject. First, I suggest that it is essential not only that the amendment have the effect of extending the constitutional protections to all human life, but also that the amendment specify when human life begins. The Supreme Court left undecided the question of when human life begins. In order for the protection of the Buckley amendment to attach, one must first be a human being or, in terms of the unborn child, he must first be an "unborn offspring" for those protections to attach. As I see it, there is nothing in the Buckley amendment to prevent a state legislature from deciding, for example, that one becomes an "unborn offspring" only after implantation. Prior to that time, one does not enjoy the constitutional protections because, although he is in the process of "biological development," he is not yet an offspring and therefore he is not a "person." The Hogan Amendment attempts to specify the point at which human life constitutionally begins, i.e., at the "moment of conception." While I believe that the words "moment of" would operate to prevent the Court from regarding conception as a process, I would not hesitate to support any language which would do the job better. In any event, I fear the Buckley amendment is deficient in its failure to specify the point at which human life, offspringhood and personhood begin.

The second thing that occurs to me is that your revised section two seems to require a definition of "abortion." You might use,

"abortion, as used herein, means the intentional termination of unborn human life." But this might raise confusing arguments about the principle of double effect and such things as the removal of a cancerous uterus of a pregnant woman. As you have it in your version, the use of the term, "abortion," without definition and in tandem with the first section of the Buckley amendment, leaves the door open to a legislature to define abortion as the post-implantation termination of pregnancy.

Thirdly, the Supreme Court's discussion of its holding in Vuitch indicates to me that, if the entitlement of the unborn to constitutional protection were established, a state law which allowed abortion for any reason less than the preservation of the life (not health) of the mother would be unconstitutional. I therefore believe your fear that the Hogan amendment would allow abortions for health is unrealistic.

There is a tendency among some right-to-life attorneys to deplore any efforts to find a phrasing for the amendment that would improve on both Hogan and Buckley. I do not agree with that and I believe the sort of effort you are making is desirable although I disagree with certain of your conclusions. Keep up the good work. If I can be of any assistance to you, please do not hesitate to let me know.

With best wishes,

Sincerely,

Charles E. Rice
Professor of Law

CER/ae

Massachusetts Citizens For Life, Inc.

430 CENTRE STREET NEWTON MASS. 02158 (617) 965-5423

"In recognition of the fact that each human life is a continuum from conception to natural death, the objective of this organization is to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activity."

October 7, 1973

Prof. Joseph Witherspoon
5312 Shoal Creek Blvd.
Austin, Texas 78756

Roy R. Scarpato
Member of Public Policy Committee

Subject: Constitutional Amendment.

Your memorandum of August 14 has been reviewed in Massachusetts by the Massachusetts Citizens For Life Directors and other knowledgeable pro-lifers. Several comments resulted, followed by Dennis Horan's memo which generated yet more comments. This letter will attempt to summarize the concensus of our opinions.

1./ The desire to avoid divisions in the movement over Hogan vs. Buckley, as suggested by both you and Dennis is well received. We believe the pro-life movement should first formulate an optimal version of an amendment. Political realities may require some flexibility, but those considerations should not deter us from making a concerted effort to attain the ideal. This point has been well stated by both you and Dennis.

2./ Section 2 (Buckley): we agree that Buckley's formulation is inappropriate and urge the direct prohibition of abortion as opposed to a cancellation of Section 1's definition of person due to medical necessity. Either your new formulation of Section 2 or Horan's is acceptable to us. Horan's may be politically preferable since an argument against passage of the amendment would be made that in the interim, before state laws in conformance with your Section 2 would be passed, doctors would be prohibited from aborting even to save the mother's life. We do however prefer your more explicit requirement for reasonable efforts to preserve the child's life in the cases of medical emergency, since the amendment when passed will have a teaching power transcending its legal implications.

3./ Professor Smith's comments (attached) relate to your Section 1. Smith's comment #1 is that "with respect to the right to life" may be unduly restrictive. However, it may be justified as a device for focussing attention on the right most immediately threatened. We believe his comment has some validity and suggest it be considered.
Smith's comment #2 has been adequately addressed by Horan. We concur.
Smith's comment #3 raises a basic question as to strategy of the movement. Although a further section expressly prohibiting euthanasia would probably create difficult problems in drafting, the inclusion of "irrespective of age, health, function or condition of dependency" seems important to us, again for the teaching value, as regards euthanasia. We see this phrase as intending to illustrate rather than limit the scope of Section 1. Regarding Horan's example of mental health not being included, the word "health" has been most liberally interpreted by the courts in the abortion question; we see no reason why "health" would not include mental health in the amendment. We therefore prefer the retention of the phrase beginning with "irrespective..."

4./ The words "at every stage of biological development" lead to misgivings since they appear subject to interpretation. Is there a good reason for avoiding the more precise "at every stage from fertilization."? Within the movement, however, there exists in some quarters an aversion to the Buckley amendment under the assumption that his choice of words in some way would permit early abortions. While I do not support this conclusion I feel that inclusion of the word "fertilization" (but not "conception") would allay these fears without detracting from the scope or the SALABILITY of the amendment.

This letter is written as part of the dialogue we all wish to sponsor within the movement concerning the amendment. It is not intended to reflect an inflexible position but rather to pose some questions for further consideration. At the same time, we hope a generally acceptable formulation will be quickly arrived at. Horan's comment on possible frustration on the part of pro-life legislators ~~waiting~~ waiting for NRTL to act is well founded.

Roy R. Scarpato

MINNESOTA CATHOLIC CONFERENCE
145 UNIVERSITY AVENUE (at Rice)
SAINT PAUL, MINNESOTA 55103
Phone: 612/227-8777

JOHN F. MARKERT
Executive Director

September 19, 1973

Professor Joseph P. Witherspoon
313 Townes Hall
2500 Red River Street
Austin, Texas 78705

Dear Professor Witherspoon:

I have read with a great deal of interest your communications of August 14th and 21st concerning the Constitutional Amendments. I am essentially in agreement with your proposal concerning the Buckley proposal as you have suggested it be amended.

I believe, however, that both amendments pose another problem. Both are couched in terms specifically relating to abortion and thus may tacitly exclude other areas of concern to a pro life organization. I refer to the old latin phrase "Expressio unius est exclusio alterius". (The mention of one thing is the exclusion of another, i.e. when certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred.) Of course you realize that NRLC is concerned with broader life issues than just abortion.

In addition, specificity and the singling out of abortion in the proposed amendment smacks much more of legislation as distinguished from constitutional ingredients. It seems to me that the Constitution should cover the subject of "life" generically as against the specific subject abortion. I, therefore, have taken the liberty of rewriting your amended form of Section 2. of the Buckley proposal by substituting the general term of "life terminating procedure" in lieu of "abortion". Accordingly Section 2. might read as follows:

"No life terminating procedure shall ever be performed on any person except:

1. Under and in conformance with law permitting such procedures; and

2. Only in an emergency when a reasonable medical certainty exists that continuation of the life of the person subjected to said procedure will cause the death of another person who is directly affected; and

3. Requiring that said procedure incorporate every reasonable effort, in keeping with good medical practice, to preserve the life of the persons exposed to said terminating procedure."

I believe that my proposed amendment incorporates all of the strong points that you have built into Buckley's proposal while also covering the areas of euthanasia and its related subjects.

Respectfully submitted,

John F. Markert

JFM/mw

cc: Marjory Mecklenburg, NRLC
Edwin C. Becker, NDCC
William Hassing, Esq.
George Reed, USCC

28 Bosworth Road
Framingham, Mass. 01701
September 7, 1973

Mr. Roy Scarpato
30 Rolling Lane
Wayland, Massachusetts 01778

Dear Roy:

As regards the memorandum relative to the Hogan and Buckley Amendments, as I mentioned to you the other evening, I agree with Joseph Witherspoon that both are deficient in failing to directly prohibit abortion and for that reason I support Witherspoon's suggested change. There are however a few other matters which you might want to raise:

1. Why does Section 1 commence with the language "With respect to the right to life." While I appreciate that the amendment wishes to emphasize "life" does Section 1 by implication mean that the unborn does not enjoy the other rights provided by the Fifth and Fourteenth Articles of Amendment to the Constitution? Unless there is some purpose for this language which I have overlooked, I would recommend deletion of the words "With respect to the right to life".

2. Section 1 states "the word 'person' as used in this Article and in the. . . ." Yet the word "person" is not again used in the Article. Does this make sense?

3. Is the Buckley Amendment intended to also cover euthanasia? If so, do not the arguments advanced by Witherspoon relative to abortion apply also with respect to euthanasia? In other words, if the protection of the Fifth and Fourteenth Amendments do not relate to private action relative to abortions, I assume they do not apply to private action relative to euthanasia. Is there need for a direct prohibition on euthanasia? I am not sure I can take a position on this point so I will simply raise it.

Sincerely,

Jim Smith

JWS/jtc

MEMO TO: Public Policy Committee,
NRLC

FROM: D. J. Horan, Legal
Advisory Committee, NRLC

DATE: September 5, 1973

I think much of the concern that exists in the Right to Life movement at the present time over the content of the amendment arises from the misconception that the amendment will solve all of our problems. Approaching the technical question of drafting the amendment from that point of view leaves one with feelings of anxiety and uneasiness after reviewing each of the types of amendments. However, this exercise is not one of futility. It should become evident to any careful reader that the political climate being what it is, the technical legal problems being what they are, the amendment will solve only some, but not all, of our problems.

For example, neither the Buckley nor the Hogan amendment prohibit private action. As you are well aware, the bulk of abortions in America are done by private clinics, not through public hospitals. Unless the Hogan and Buckley amendments had the moral persuasive power to convince people that abortions should not be performed, or unless it was backed up by strong state legislation, neither of these amendments would affect the sphere of private action at all and thus, would not affect the bulk of the abortions that are being performed. This is not to say that these amendments are not important - quite the contrary.

If one decides that, based on prudential political wisdom, an amendment that prohibits private action is politically impossible at the present time, then the Hogan and Buckley amendments must be the next step. In my opinion, an amendment that reached only state action would need further state legislation. I understand from Bob Byrn, though, that asking a member of Congress to sign an amendment that prohibits private action is like asking a Senator to disavow apple pie.

The real lesson to be learned from this dialogue is that any constitutional amendment, no matter how carefully drafted, will need further state legislation in order to plug the loopholes. Not only that, we will continue to need the pro-life educational drive and the pro-life alternative drive, not only after the amendment is passed, but long after the new state statutes plugging the loopholes are passed.

In short, the constitutional amendment is only one prong of this attack. When one realizes this, one becomes less concerned about the technical problems in the amendments, although obviously the

best amendment possible should be the amendment pushed by the Right to Life.

As I have said before, looking at the movment as a whole helps put the amendment problem in better perspective. In that respect I see three overall approaches. The first is through a National political organization seeking the best amendment possible.

The second is through 501(c)(3) organizations, such as Birthright, Right to life Educational Organizations, Americans United for Life, and Alternatives to Abortion, providing the educational means and alternatives to women caught in this quandry.

The third is by a National Public Interest lawfirm, which would provide a spearhead for litigation toward the ultimate goal of reversing Roe v. Wade. This lawfirm could achieve 501(c)(3) status and thus, be the recipient of tax exempt funding.

To isolate anyone of those elements as though it were the total solution to the problem to me seems myopic. Even a constitutional amendment will not solve the problem if the hearts and minds of the people are not changed from the pro-abortion attitude that presently exists and, even if the attitudes changed, there would be little cessation in the number of abortions if organizations have not provided alternative means of handling the problem. Consequently, all these avenues must be pursued diligently until the final goal is achieved.

These comments, of course, do not solve the problems raised both by Professors Byrn and Rice as to the technical difficulties in each amendment. However, the dialogue is excellent and I think out of it will come an amendment acceptable to most.

I have sat down for many hours and attempted to draft a constitutional amendment considering all of the problems not only raised by Prof. Byrn and Prof. Rice, but by other people both in and outside of the movement. Having done this, I would add a few principles which I think should be considered in drafting the amendment:

1. Changing the definition of the word "person" is not enough, although it is a step in the right direction. There should be some actuating language prohibiting abortion under certain circumstances.

2. The definition of "person" should include the unborn child from the earliest stages of its biological development.

3. The first type of amendment should reach private as well as state action.

4. A second type of amendment should include most of the other points mentioned above, but should exclude private action.

5. Ambiguous phrases are to be avoided.

6. The amendment should be couched in language similary used in other amendments which have withstood the test of time.

7. The amendment should be selected by the movement. The movement should not have the amendment selected for it.

Both the Hogan and Buckley amendments are well drafted within the proscriptions that each accepted. I am sure that neither amendment attempts to prohibit private action based upon a prudential political judgment that such an amendment would never be accepted. However, if this is a necessary element, then prohibition of private action should at least be tested. I am advised that it was tested during the drafting stages of the Buckley amendment and found to be too hot a potato to handle in the Senate.

What makes the Buckley amendment so attractive is the prestigious list of sponsors, including Senator Eastland. However, I must agree with Prof. Rice that more technical problems with the Buckley amendment than with the Hogan amendment would be incurred. The basic problem that I have with the Buckley amendment is that it merely re-defines the word "person" and then attempts to omit the definition's applicability when the mother's life is in danger. I prefer stronger actuating language as is contained in the Hogan amendment. However, I agree that the Hogan amendment may lead us back to the old problem that state statutes passed under it might still contain enough exceptions to allow widespread abortion, yet be considered under the law to provide due process. <u>This is a most difficult problem</u>.

On the other hand, I disagree with both of them when they attempt to include and prohibit euthanasia. The euthanasia ballgame is so entirely different and rests on such different principles and applications from the abortion question that I think it is premature to include that concept in the abortion area. I think we unnecessarily divide the force of the amendment by including euthanasia as one of its concepts.

I should point out, though, that I do not consider any of my criticisms of either the Hogan or Buckley amendment substantial enough to deter my support of either amendment in the event that either amendment seems likely to succeed in Congress.

By that I mean that if either of these amendments pass they will do so in a flurry of activity which will perhaps carry the moral education necessary to persuade the country that abortion is evil. I'm sure that if the amendments pass Congress and the necessary

number of states adopt them, that in that climate we can pass state statutes that would plug the loopholes that either of these two amendments might still leave.

I hope that our own forces do not become divided through their support of either of these two amendments. I agree that both amendments seek to do the same thing as far as they seek to indicate when human life commences. I do not think that the Buckley amendment can properly be construed as one which allows early abortion and, as you know, I am one of those who will not accept early or microscopic abortion.

The greater danger is that Sentator Buckley and Congressman Hogan, two men who have committed themselves to our cause, will feel frustrated and trapped by the seemingly refusal of the NRTL to put its muscle behind their efforts. Unless corrected, greater harm can be done to the movement especially in the ennui that would be created in the minds of other potential banner carriers in Congress.

With these prefatory comments, I herewith submit for the Committee's consideration the attached amendment.

Dennis J. Horan

DENNIS J. HORAN

ms

att.

P.S. Please see Comment after Article.

ARTICLE

Sec. 1.

With respect to the Right to Life, the word "person" as used in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States, applies to all human beings, including their unborn offspring at every stage of their biological development.

Sec. 2.

The Right to Life being unalienable, the performance of abortions by any person within the United States and all territory, subject to the jurisdiction thereof, is hereby prohibited unless medically necessary to prevent the death of the mother.

Sec. 3.

The Congress and the several states shall have concurrent power to enforce this Article by appropriate legislation.

COMMENT

As you can see there is not a great deal of difference between this amendment and the amendment suggested by Prof. Witherspoon. I claim no pride of authorship.

It is essential that a complete dialogue be had on the substance of the amendment. Prof. Witherspoon correctly points out that this matter should not be left in the hands of the lawyers, just as war should not be left in the hands of the generals, nor life in the hands of doctors.

It is of the utmost importance that the movement select the amendment, or amendments, which best fit its plan of action. The movement cannot go shopping in the political forum and expect to find the cereal of its choice. The movement must bring its will and its choice of amendment to the Congress. It is one thing to say that the amendment must be "saleable" and quite another to preserve the ultimate goal of the movement.

I want to make several comments on the language of the amendment that I have enclosed, but I do not want to make a brief for its support.

The language of the Buckley amendment "... the word person as used in this article ..." was felt to be superfluous merely because the word person is, in fact, not used in the article.

Section 2 of the Buckley amendment presently reads:

> "... applies to all human beings, including their unborn offspring at every stage of their biological development, irrespective of age, health, function or condition of dependency".

It is not clear whether the draftsman intended the phrase beginning with the word irrespective to modify the words "unborn person" rather than "all human beings". I think the draftsman intended it to mean "... applies to all human beings irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development". As redrafted it clearly applies to the phrase "to all human beings". One wonders, however, why it is necessary to say "irrespective of age, health, function or condition of dependency" if one merely means "all human beings". The modifying phrase can create more problems than it solves. For example, it does not include mental health. I am also concerned that the words "function and condition of dependency" are too vague.

could again disregard the scientific information and rule that some other point in time, *e.g.*, viability, is the beginning of biological development for the unborn. Remember, the Court could have ruled that the unborn is a person; the Court has ruled that a corporation--an artificial person--is a "person" within the meaning of the equal protection and due process of law clauses. The Court chose not to dignify the unborn child with personhood, and it seems unwise to give the Court another opportunity to repeat its grievous error.

4. I have included the phrase "regardless of health or condition of dependency" in *Sec. 1* to assure that the mentally retarded, aged, and persons with defects or diseases would not be killed under some later interpretation of due process and equal protection clauses which would aim at favoring the state's police power over the person's right to life. I have not used the word "age" in order to assure that no unintended and perhaps ridiculous meaning would come about from the provisions in the Constitution setting a minimum age as qualification for certain office. I believe it is unnecessary to include the word "age" in order to protect the aged, if we use the phrase "condition of dependency." Certainly, this phrase is wide open for much interpretation by the Court, but at the moment I believe it is the best term available to express the principle that a human being does not have to meet a test of "self-sufficiency" in order to have each human being's right to life fully protected by the Constitution.

5. An important advantage of defining the word "person" as used anywhere in the Constitution is to assure that a human being, born or unborn, shall not be defined as a "non-person" for any purpose. A second advantage is to assure that an enforcement provision is built into the amendment. That is, the word "person" is used not only in the due process and equal protection provisions of the Constitution, but also in Article I, Sec. 2, Clause 3 -- the apportionment and census provision, which affords effective enforcement through a proper reporting system. Each decennial census, at least, would include a count of the unborn persons.

6. In additon, under *Sec. 2* of the proposed amendment, the life of the unborn child would become a vital statistic the moment it is detected. The mother, the attending physician or midwife or father, who must now report births and deaths of human beings would also have to report immediately the life of the unborn child. A *"LIFE CERTIFICATE"* would be officially issued identifying the unborn child, who would at the same time be issued a social security number. This is not an unusual procedure, because now an infant must have a social security number to report income, say from bonds received as a nativity gift. There would be a requirement to furnish follow-up information when the child is born so that an official birth certificate can be issued. In addition, there would be a requirement to issue a death certificate for a miscarriage, etc. Again, this would bring the first nine months of each human being's life within the benefit and protection of the laws applicable to all other times of the human being's life. Society would protect the unborn child as it is beginning to protect the battered child. (In the District of Columbia, the law on vital statistics requires reporting the stillbirth of a fetus which has passed the fifth month of life.)

I seem to recall reading somewhere that when it was first required that each birth be recorded, with a penalty imposed for failure to record, there were

objections that the child was a private concern of the parents and not subject to control by the Bureau of Vital Statistics. In addition, there were many administrative problems, such as the child being born in the fields or hinterlands. Such arguments were answered by saying that the state had an interest in each human being and vital statistics for a variety of reasons. And so it follows that the state has an interest in the unborn child not only as a person and member of society, but also as a measure for providing services adequately, such as health facilities, day care services, educational facilities, etc., for the benefit of the child, the parents, and society as a whole.

Reporting unborn human life raises some administrative problems, *e.g.*, the mother may move before the birth. However, such administrative problems are not insurmountable, particularly through use of the social security number, and, in any event, should not be used to deny a substantive right to life and a reporting system for easily enforcing that right.

Each state's statutes should be examined to determine how easily the provisions for vital statistics can be amended to include reporting the life of each unborn child. (The D.C. Code is easily adaptable.) No longer would it be possible for a woman to go to her doctor to determine whether she is pregnant, and if so, go across the street to the abortion clinic to have the child killed.

7. It is important that the amendment be not only self-enforcing, as detailed in subparagraphs 5 and 6, immediately above, but also self-implementing. Jim Crow laws, found by our Court at one time to be constitutional, largely negated the intent of the 13th, 14th, and 15th amendments for almost 100 years. It would be a hollow victory for the right-to-life movement if a Human Life Amendment could be emasculated by implementing legislation at the Federal, State, or local levels which would permit either governmental or private action to kill "unwanted" human beings.

Sec. 2 of my proposed amendment is designed to assure that when the amendment becomes effective, protection will be immediately available for all human life without further implementing legislation. *Sec. 2* simply provides that all Federal and State laws pertaining to human beings apply equally to all human beings, born and unborn. This would extend the benefit and protection of laws to the first nine months of a human being's life.

QUERY: In order to be self-implementing, should the amendment explicitly proscribe abortion? My view is that it should not. First, I believe that the word "abortion" should not be used in the amendment, because it is yet another word left for interpretation by the Court. For instance, it has been said that a hysterotomy is not an abortion; thus, what period of time is considered an abortion? Second, I agree that killing the unborn child by either state or private action must be prohibited. However, I believe that this is best accomplished by bringing the unborn child under the protection of the homicide laws, as I indicate below in paragraph VI, C, 1, page 10. Further, a provision in the amendment which specifically proscribed abortion would not be self-implementing, but contrariwise, would require enactment of legislation by the Congress and states, all of which could bring about a self-defeating type of statute.

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December 1, 1973

MEMORANDUM TO: Members of the Right-To-Life Movement

SUBJECT : A MANDATORY *"HUMAN LIFE AMENDMENT"*

For some time I have been concerned about the wording of a *HUMAN LIFE AMENDMENT*. Therefore, I have prepared for your consideration some comments on various provisions of ar amendment, plus proposed language for the amendment. These are provided in the attached paper with the following contents:

CONTENTS

(Contents, Cont'd)

* * * * * *

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December 1, 1973

A MANDATORY *"HUMAN LIFE AMENDMENT"*

I. INTRODUCTION.

A. "PROPER WORDING." The "proper wording" of a Constitutional amendment is essential to the RIGHT-TO-LIFE movement's forward thrust, unification of prolife organizations, and success in achieving its purposes. The amendment should include:

-- simple, clear, straightforward wording;
-- built-in enforcement provisions; and
-- self-implementing provisions.

As I perceive the tone of the right-to-life movement, members want to pour their energies and resources into a Constitutional amendment to be enacted as soon as possible. But, it must be the right amendment. Nothing else will do, and efforts to persuade prolifers toward alternatives appear to be counterproductive. Therefore, I believe that the right-to-life movement should try to structure an amendment, and take the language to the Congress, rather than request Congress to structure the language in hopes that something useful will come out through the hearing process in the Judiciary committees and on the floor of the House and the Senate. The realities of the legislative process demand that the movement knows specifically what it wants, and goes forth to persuade Congress of the merits of its position, with well-developed backup materials.

The courageous and dedicated Representatives and Senators who have already introduced amendments have done so from their own convictions and that of their dedicated staff members. They are to be commended for having been willing to speak out. However, the amendments which have been introduced have not sparked the wholehearted support of the right-to-life movement. Many of us are finding difficulty supporting amendments which we believe present difficulties and do not accomplish the task we have set for ourselves--namely, assuring that the worth and dignity of ALL human life is respected and protected.

B. RECOMMENDATION. Therefore, let the right-to-life movement turn the procedure around and

-- endorse none of the amendments which have already been introduced;
-- propose language for a mandatory *HUMAN LIFE AMENDMENT;* and
-- have each state prolife delegation work with its Representatives, Senators and State legislators to gain sponsors and committments for Congressional hearings and State ratification.

II. GENERAL PROVISIONS: WHAT DO WE WANT TO WORK FOR?

A. It seems to me that the amendment should provide that:

1. Each human life from fertilization through natural continuum of life has value and dignity, and that no one human life has a greater or lesser value than another. Thus, the unborn child should be brought under the benefit and protection of the laws for the family of human beings, with no more and no less benefits or liabilities.

2. Private individuals as well as the state shall account to the public for actions depriving a human being of life . Decision-making and action by a few people behind closed doors would no longer be permitted.

3. Right to life shall be re-mandated in the Constitution and shall not be left to each State to act as and if it sees fit.

4. A built-in enforcement mechanism shall be included to assure that the right to life is not a hollow right which can again easily be denied by evasion or non-enforcement of the laws.

5. The amendment shall be self-implementing, so that enabling legislation by the Congress or the states shall not be necessary for the benefits of the amendment to flow to the unborn human being.

In summary, the amendment should be drawn to the satisfaction of the proliers who must do the leg work to get the amendment through the Congress and ratified by the States. These same prolifers can make a significant contribution to the philosophy and tone of the Constitutional amendment.

B. Care should be taken to assure that the amendment is not designed merely:

1. To accommodate what is believed to be politically feasible among the Representatives and Senators before they have been contacted by their prolife constituents; or

2. To accommodate the arguments of the anti-life forces.

III. WHERE DO WE START?

A. STATE OF THE LAW. We begin by looking at the state of the law, and, thereby, recognizing that as of January 22, 1973, the slate has been wiped clean, particularly with respect to the right to life of the unborn child, and possibly for other human being who are relatively dependent in our society. Therefore, there is little benefit in trying to fashion a Constitutional amendment which attempts to accommodate or build upon what has traditionally been the law for the unborn. Furthermore, the traditional state of the law for the unborn grew like topsy as a little more was learned about the humanity of the unborn. Thus, attempting to take bits and pieces of the old law which served various purposes in the past will merely produce a patched up amendment, and nothing very strong for prolifers to rally round.

B. THE TASK. Since we are starting from a clean slate, it is our task to:

1. Fashion the "perfect" Constitutional amendment and work for it. Now is not the time, if ever there is a time, for compromises, and no good purpose

is served by indicating that we will be glad to take whatever we can get. I am not persuaded that any amendment is better than no amendment, because if a weak amendment is passed, there will be practically no opportunity to change it.

2. Write a series of "Federalist" papers explaining the merits of the provisions of the amendment. Such papers are extremely important to educate the Members of Congress and State legislatures, and to form the legislative history for interpretation of the provisions by the Court in the future. Further, many people who are apathetic or tend to support anti-life forces may be educated to the merits of the prolife cause.

3. Create the political climate in the Congress and in the States to get the right-to-life movement's amendment passed. Legislators can become more informed about the issue and the persuasions of their constituents, and, perhaps, can become persuaded of the merits of the prolife cause.

4. Litigate to change as much as possible of the existing law. Legal theories must be examined and re-examined and tested and re-tested.

IV. WHERE IS THE GUIDANCE FOR THE MANDATORY HUMAN LIFE AMENDMENT?

A. Look first to the Supreme Court's decisions of January 22, 1973 to see why the unborn child was handed such an unfavorable decision. The important issue in the decisions is: "Is the unborn child a 'person'?" Because the Court said that the unborn child is not a person, meet the issue head on, and structure an amendment which definitely brings the unborn child within the family of human beings, leaves no loopholes, and assures that all Federal and State law shall protect each person. Some of the best guidance for fashioning this amendment is in the Court's *Roe v. Wade* decision. For instance, the Court said:

> "The appellee and certain *amici* argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. In support of this they outline at length and in detail the well-known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment. The appellant conceded as much on reargument. On the other hand, the appellee conceded on reargument that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment." 410 U.S. 113, 156. (Underscoring added.)

In addition, the Court stated in footnote 54 (410 U.S. 113, 157):

> [54] When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?
>
> There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, *supra*, that in Texas the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

For additional detail concerning the word "person," see paragraph VI, A, page 6, below.

B. Also, please reread the *Vuitch* case (402 U.S. 62) to see why any exceptions written into the amendment are the loopholes through which the abortionists operate on a grand scale. For more detail, see paragraph VI, B, page 9, below.

V. A MANDATORY *HUMAN LIFE AMENDMENT* -- HOW WOULD IT READ?

"Sec. 1. The word 'person' and any other word meaning a human being used in the Constitution shall mean each human being born and unborn from the moment of fertilization regardless of health or condition of dependency.

"Sec. 2. The laws of the United States and of each of the several States heretofore and hereafter enacted which relate to the benefit, protection, vital statistics, and other provisions for human beings shall apply to each person from the date of enactment of this amendment.

"Sec. 3. This Article shall become effective when it has been ratified by the legislatures of three-fourths of the several States."

VI. WHAT IS THE EFFECT OF THIS LANGUAGE?

A. THE WORD "PERSON."

1. The word "person," according to my count, appears over 40 times in the Constitution, which includes using the word several times in one clause. Defining the word "person," wherever it appears, to include the unborn child achieves the purpose of bringing the child into the family of human beings as no more and no less a human being than the born person. It is self-defeating to say that the unborn child is a person for the Fifth and Fourteenth amendments, but is not a person for the rest of the Constitution. See paragraph IV, A, page 5, above.

There are other distinct advantages, as discussed in paragraph 5 and 6, below, and I do not see that there would be any ridiculous results by defining the word "person" to include the first nine months of the person's life. In various sections of the Constitution there are additional limiting qualifications. For instance, the unborn child--or the one-day old infant--could not be elected to the Presidency or other office because there are other qualification requirements stated in the Constitution, such as age.

2. I have included in *Sec. 1* the phrase "and any other word meaning human being," so that future amendments could not make the unborn child a non-person by using some synomyn for the word "person."

3. In the definition of person, I have used the phrase "unborn from the moment of fertilization." I realize that the word "fertilization" (or conception) is omitted from some proposed amendments because the physicians can prove scientifically that life begins at fertilization. Then let's say so, and not leave it up to an interpretation by the Supreme Court. The scientific information has been before the Court, and the Court was not persuaded. The Court

Section 2 of the Buckley amendment purports to make the Article inapplicable when there is a medical emergency. However, Section 1 merely defines the word "person". Therefore, Section 2 removes that definition when it is an emergency necessary to save the woman's life. Presumably then, the definition of "person" in the Texas and Georgia cases would be applicable and would create technical legal problems. It seems to me it does not get at the heart of the problem when one merely defines a word in one section of the Constitution and removes that definition in another. Consequently, the Witherspoon proposal or Section 2 as I have drafted it seems more appropriate.

As I have said, there are fewer of these technical drafting problems with the Hogan amendment, but the Hogan amendment leaves standing the problem of what constitutes due process in the abortion area. As Prof. Witherspoon indicates, one does not exactly trust this court in handling that problem.

It has been suggested that Section 2 of the enclosed Article can stand alone as an amendment. However, it seems to me that without Section 1 we have not reversed the effect of Roe v. Wade and, therefore, Section 1 is necessary. Although we know that the Fifth and Fourteenth Amendments already apply to all human beings, it seems to me that Section 1, as drafted in its present form as enclosed, is the most felicitous way of handling the phrase "including their unborn offspring at every stage of their biological development". Although Section 1 could be redrafted as follows:

Sec. 1.

> With respect to the Right to Life the word "person" as used in the Fifth and Fourteenth Articles of the Amendments to the Constitution of the United States applies to all unborn offspring of any human being at every stage of the unborn offspring's biological development.

I have omitted from my Section 2 the language of the Witherspoon proposal requiring every reasonable effort in keeping with good medical practice to preserve the life of the unborn offspring. I frankly do not understand the basis of the criticism that necessitated that response. Section 1 already defines the word person as applying to a human being and includes their unborn offspring. Obviously, therefore, Section 1 will require that every reasonable effort will be made to keep the unborn offspring alive. Also, state statutes could be drafted that would solve this problem and it seems to me that if we can pass a constitutional amendment through Congress and the necessary number of states, we can get the supporting state legislation.

I would, therefore, conclude that that phrase should be omitted.

Section 2, as I have enclosed, follows in form the prohibition amendment. The phrase "unless medically necessary" comes from the Roe v. Wade case.

The enclosed Article is sent for consideration and dialogue. Hopefully, the dialogue will produce the right amendment and the right spirit amongst our people.

Respectfully,

Dennis J. Horan

ms

B. NO "EXCEPTION CLAUSE." Please note that in this proposed mandatory *HUMAN LIFE AMENDMENT* there is no "exception clause" which provides that an abortion is legal to save the life of the mother. This is not omitted out of hard-heartedness, but because an exception is both detrimental and unnecessary to the prolife cause.

1. The exception clause is detrimental because of (a) the value system which it establishes, and (b) the legal loophole which it provides, as ruled by the Supreme Court.

a. The exception clause says that all human life is valuable and to be protected, but that some human life is not to be protected as much as other human life. Thus, a value system is established which I personally find highly objectionable, as well as incompatable with due process and equal protection. Further, once an exception is accepted, other exceptions, such as health, will be forced on us. The battle is lost before we begin.

b. The exception clause establishes a legal loophole through which the unborn child cannot be protected. This is what has happened in the District of Columbia under the Supreme Court's ruling in the *Vuitch* case, 402 U.S. 62. That case held not only that "health" meant mental and physical health, but also that because the statute did not outlaw ALL abortions--only those which did not preserve the life and health of the mother--some abortions were legal. The Court then said that it was insufficient for the prosecution to prove only that an abortion occurred, and then the physician prove his innocence by establishing that the abortion which he performed fell within the exception. Rather, the Court said, the prosecution must prove as part of its case that the abortion was NOT necessary to preserve life or health. The abortionists, news media, etc., simply said that this meant that abortions were legal in the District of Columbia. An oft-heard theory is that if a woman inquires about an abortion, she has a mental health problem, at least of stress, and therefore the abortion can be performed for the health of the mother. Abortion clinics were in full operation in no time, and the prosecutor seemed not anxious to challenge them, even though some prosecutors say that the case can be proved without too much difficulty.

As lawyers we can argue well and long that this case did not legalize abortions in the District of Columbia. But, the practical effect of the Court's ruling is otherwise. Therefore, inasmuch as we have a recent Supreme Court decision directly on point and directly against the unborn child's right to life, why put in an exception clause.

2. The exception clause is unnecessary from (a) the medical and (b) the legal standpoints.

a. From the medical standpoint, I understand that the danger to the life of the mother is minimal and in no way comparable with the medical problems in the 1800's when the provision for the life of the mother was generally put into the statutes. Therefore, if the exception clause is written into our amendment to accommodate a peculiar situation, we get a peculiar result--namely, a Constitutional amendment which cannot save the life of the unborn child.

b. From the legal standpoint, the exceptions written into the various proposed amendments are almost standard law on "excusable homicide," and therefore ably accommodated under the homicide laws. No such exception needs to be written into the Constitutional amendment in order to save the life of the mother under the language of the amendment which I have proposed.

The word "homicide" means the killing of one human being by another, and while it is an act which is accountable to society, is not a criminal offense until combined with criminal intent. Each homicide is reported to the police, who investigate any questionable circumstances surrounding the death of a human being. This same protection--no more and no less--would be provided for each human being during the first nine months of life, as well as during the remainder of life.

In the case of a tubal pregnancy, for instance, where the unborn child cannot survive in the current environment, the child could be removed, even though the removal means the child's death. Obviously, there is no criminal intent in causing this death. The death would be reported and explained by the physician, and no further action by the physician would be necessary any more than is necessary in filing other death certificates. However, my proposed amendment would assure that the death of the unborn child would be subject to examination by society, through its duly responsible officials, as is the death of any other human being. Questionable circumstances would be examined to assure that any appropriate or necessary official action would be taken. Killing a human being for convenience is not permitted under any homicide statute.

Please note that I have not cited the principle of "self-defense" as a provision of law whereby the baby could be killed to save the life of the mother, because I believe that the elements of self-defense are not usually present. For instance, I believe that the unborn child could not be called an "unjust aggressor."

C. APPLICABILITY OF FEDERAL AND STATE LAWS.

1. Mandatory. *Sec. 2* of this proposed amendment is not the "states' rights" amendment which no prolifer wants enacted. This section is indeed a mandatory provision, and again, puts the unborn child within the family of human beings. The section means that all laws relating to homicide, tort, inheritance, or any other benefit or protection, including reporting provisions as discussed in paragraph VI, A, 6, page 7, above, would apply to the unborn child. If the unborn child is killed, that would be a homicide and the type or degree of the homicide would depend on the facts of the case, but never on the sole fact that the child is unborn.

In order to have a mandatory human life amendment, I believe it is not only unnecessary but also disadvantageous to include in the amendment a prohibition against abortions, as I have discussed in paragraph VI, A, 7, page 8, above. My difficulty with language in an amendment to specifically prohibit abortions, in addition to the fact that words need interpreting and Federal and state laws need to be enacted, is that such language establishes the Federal crime of homicide for abortion only. Homicide is now a matter of State law, with the Federal law applicable, in more recent days, primarily to killing Federal officials. Up to this time, the crime of abortion has carried a lesser penalty than other acts of homicide, and I would not want to recommend that it now carry a greater penalty. Again, I go back to my theme that the unborn child should be brought into the family of human beings, with no more nor less benefits and liabilities. Thus, I have recommended an amendment which places the death of the unborn child within the homicide laws enacted to deal with the death of any human being.

A uniform Federal homicide statute could be proposed in this Constitutional amendment. However, I believe that such a provision is highly undesirable. It

overloads the amendment, and there is enough to do without getting into that subject. I believe that introducing a Federal homicide law against killing the unborn is also too heavy a burden to place on this amendment. It could well be the issue to bog down the amendment, and in trying to defend this provision, we could lose sight of the important provisions of bringing the unborn child into the family of human beings.

2. Actions of state officials and of private individuals would be covered by this provision. Laws on the books which prohibit one human being from killing another would automatically apply to the unborn child as soon as this amendment became effective. No new enabling legislation would be necessary. See paragraph VI, A, 7, page 8, above.

3. The proposed *Sec. 2* would be a good basis for enacting Federal and State laws prohibiting experimentation on human beings, and, in my judgment, would stop the experimenting on babies right away, simply because the unborn baby would be within the family of human beings, and could not be the object of the experimentation any more than any other human being.

4. Abortifacients could be ruled out. If the sole purpose of the manufactured item was to kill a baby, then the manufacture, distribution and sale of the tools of homicide could be proscribed by State law and also by Federal law under the Commerce clause, authority under the Food and Drug Administration, or other areas of Federal jurisdiction. The rule of privacy governing the <u>use</u> of a contraceptive in the bedroom would not apply, because the act--namely, killing the baby--which the abortifacient is designed to perform would be an illegal act.

5. I believe that under the due process provisions, a rape victim could be given immediate medical treatment. She should also be given necessary assistance through the very traumatic period which includes participating as a prosecution witness. However, if the rape victim did not complain of the attack until she learned that she was pregnant, the unborn child could not be killed on the allegation that it was conceived by rape.

It is very heartening that some jurisdictions, including the District of Columbia, are re-examining existing rape statutes with a view toward providing the rape victim with appropriate medical, legal, and social assistance.

VII. <u>WHY AMENDMENTS AS INTRODUCED ARE NOT PREFERRED</u>.

A. THE HOGAN AMENDMENT. The amendment is good because it states that life shall be protected from the moment of conception. While there are possibilities of misinterpretations, the concept is there. I believe the word "fertilization" is the better word, but I have no real difficulty with "conception."

However, omissions seem to be:

1. Human life is protected only by the due process and equal protection clauses, and, as I have indicated above (paragraph VI, A, 1, page 6), I believe the unborn child should be defined as a person for all provisions of the Constitution. Otherwise, we fall into the trap of saying that the unborn is a person for some purposes and a nonperson for others.

2. While I believe that Sec. 2 (Hogan amendment) could be interpreted to include prohibition of private action under the theory that private action is enforced or permitted by State action, it seems to me that the point needs to be made more explicitly, as I have suggested in *Sec. 2* of the language of the amendment which I propose in paragraph V, page 6, above.

Thus, my observation is that the Hogan amendment could be more inclusive.

B. THE BUCKLEY AMENDMENT. This amendment is good in using the phrase "every stage of biological development," in showing that the full span of human life is to be protected. However, the amendment has some omissions and words left for interpretation, all of which present some difficulties. For instance:

1. Sec. 1 applies only to due process and equal protection, and, as I have indicated above, I believe the unborn child should be defined as a person for all provisions of the Constitution (paragraph VI, A, 1, page 6, above.).

2. Sec. 1 does not include the words "from the moment of fertilization," which, as I have discussed above (paragraph VI, A, 3, page 6), I believe is essential.

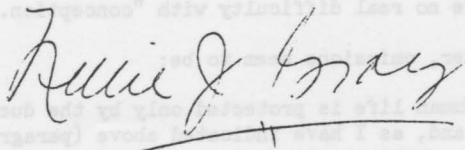
3. Sec. 2 provides an "exception clause" for the life of the mother, which, as I have indicated above (paragraph VI, B, page 9), I believe is very detrimental to our prolife cause.

4. Many words must be interpreted by the Court, such as: emergency, reasonable medical certainty, exists (does the emergency have to actually exist now or just some time in the future), and death of the mother (must the death be proximate or can it be remote). Even the phrase "every stage of biological development" has some problems of interpretation; "development" usually applies to an advancement toward a fulfillment, and therefore would it include the decline through senility toward death.

While it may seem that each of us knows what each of these words means literally and in intent, it must be remembered that the reason we are in the prolife work is because the Supreme Court has interpreted the easily understood words of "person" and "health" to permit unborn children to be killed. I think we should avoid as much as possible words which leave wide room for the Court's interpretation.

* * * * * *

Respectfully submitted for your consideration,



CONSTITUTIONAL AMENDMENTS - ABORTION

For several months the Committee has been considering the extremely important questions of (a) whether the United States Constitution should be amended as a result of the recent decision of the Supreme Court respecting abortion (b) if so, what that amendment should be.

At our March 30th meeting we addressed ourselves to the first question, carefully weighing whether amendment would be useful, or necessary - or for any reason inadvisable. It was our conclusion that an amendment should be presented:

1. There appears to be no other legal means of correcting the Supreme Court decision.

2. The very fact of presenting the amendment will serve to keep alive the issue of the sanctity of life and the evil of abortion, and it will provide focus to the continued anti-abortion campaign.

We were also emphatically of the view that only one amendment should be supported by the Bishops. The effort to secure adoption of an amendment will be fraught with great difficulty; that difficulty will be vastly increased if the "pro life" forces are fragmented, with one faction seeking one form of amendment, and another seeking another.

At the same meeting we then turned to consideration of the precise amendment to be adopted. This discussion continued, through exchange of views by correspondence and telephone, until the date of May 11th, when we assembled to conclude our work. We think it essential that the Bishops understand that, in coming to our conclusions, we have been content to call upon the resources of legal and scholarly background to be found among our Committee members, but were most anxious to evaluate proposals which had already been publicly made - some of these, indeed, by very distinguished legal scholars or political leaders. In fact, we were especially hopeful that one of these already publicized proposals could meet with our approval, since then the job of properly amending the Constitution would already have been launched. Unfortunately, it became clear to us (for reasons expressed later in this memorandum) that none of the current proposals are acceptable.

Into our final resolution went almost myriad considerations - some of these extremely abstract or technical points of constitutional law, others relating to certainty in phrasing - all being basically concerned with the root interest of the Bishops in having a truly effective amendment. We do not propose to burden this memorandum with the details of all of this deliberation, assuring them, instead, that it was exhaustive.

We have developed two amendments. We recommend the first of these. We have included the second as a choice to be resorted to only if, in spite of the strongest effort on behalf of the first of the amendments, it appears that the line cannot be held for it.

I. RECOMMENDED AMENDMENT:

ARTICLE

1. The right to life being unalienable, the taking of unborn life within the United States and all territory subject to the jurisdiction thereof is hereby prohibited.

2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Discussion

The opening phrase ("The right to life being unalienable") is intended as a positive declaration of the sacredness of life. The word, "unalienable" is taken from the Declaration of Independence (which speaks of certain rights as being "unalienable", as given by God).*

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* "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, Liberty and the pursuit of Happiness. - That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . ."

The proposed Article then prohibits "the taking of unborn life". This is a flat prohibition against any killing, whether by private persons or public authority, of a fetus in any state or in any place under federal jurisdiction. We did not modify the word, "life", with the adjective, "human," because we think it entirely clear that human life is the life intended to be protected herein, and because we fear that a court, in the future, might consider "human" as a word open to interpretation and rule that a five month old fetus, for example, is not yet fully "human".

The prohibition is not open to any exception. We rejected the limitation, "except to save the life of the mother", since the Church does not recognize that, for example, a woman may be aborted because her bad heart condition may render childbirth perilous to her. Nevertheless we believe that the removal of a cancerous uterus, which collaterally or indirectly resulted in the death of the fetus, would not come within the prohibition of a criminal statute which carried out the proposed constitutional amendment.

The amendment does not cover mercy killing. The Committee believes that to write a prohibition against that into the Constitution would be tantamount to a public admission that there is no present constitutional protection for the aged, the terminally ill, the physically or mentally handicapped or like weak members of our society. We feel that these groups today enjoy the protections of the Constitution and that there are strong groups in our society (e.g., the increasingly powerful lobby of the aged, the Easter Seal movement, etc.) who will help keep these protections - which the courts have so far not sought to disturb. We think it would be very dangerous to suggest that they have thrown them aside or are about to do so.

The proposal gives Congress and the states power to enact implementing legislation. (The Constitution cannot, of its nature, require that implementing legislation be passed.)

Finally, the form of this amendment is not novel in our constitutional history, as can be seen from three prior amendments whereby the federal constitution has been used as a vehicle for prohibiting private action:

- Amend. XIII: "Neither slavery nor involuntary servitude. . . shall exist within the United States, or any place subject to their jurisdiction."

- Amend. XVIII: ". . . the manufacture, sale. . . of intoxicating liquors within. . . the United States and all territory subject to the jurisdiction thereof . . . is hereby prohibited."

- Amend. XXI: "The transportation or importation into any State. . . of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

II. FALLBACK AMENDMENT

ARTICLE

Nothing in this Constitution shall bar the United States or the several States, within their respective jurisdictions, from making and enforcing laws to protect unborn life by restricting or prohibiting abortion at any time during pregnancy.*

Discussion

This amendment is aimed simply at lifting the restraints, imposed by the Supreme Court decision, on the power of the state and federal governments to make and enforce criminal laws punishing abortion. It therefore would restore to all of the states the power to prohibit abortion absolutely. By the same token, it would permit a state such as New York to have a statute which is very permissive with respect to abortion. Thus in each state the democratic processes would determine the kind of statute enacted. The will of the people would be unfettered by the present constitutional limitation.

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* The Committee has under consideration, as of May 22nd, the conforming of this text to that of the primary amendment, so that the concluding phrasing will read: "by prohibiting the taking thereof."

While the Committee initially (at its March 30 meeting) resolved that this would be its chosen form of amendment, by May 11 it had decided that this amendment would be its second choice. This conclusion was dictated by two reasons: (1) Our sincere doubt that the Bishops could back any amendment which, while permitting the banning of abortion, would also permit "liberal" abortion. (2) Our realization that no amendment stands a chance of adoption for which the Catholic Church and the Right to Life movement cannot wholeheartedly campaign.

It is therefore our thought that this second amendment would be resorted to only if, in the course of Congressional developments, an unacceptable substitute were advanced for the primary amendment.

We again stress the absolute necessity that there be but one amendment as the focus of the national effort. Therefore, if the Bishops decide to back the primary amendment (Number I above), the fallback amendment (Number II above) should be totally unpublicized.

RELATED MATTERS

The Hogan Amendment; Other Amendments. Questions will naturally be raised respecting a number of amendments which have been introduced in the Congress, various state legislatures, etc., and widely publicized. The Committee is prepared to submit memoranda of law to the Bishops with respect to the problems which we have encountered in the texts we have seen (and we believe that we have seen all of them). We limit ourselves here to the Hogan Amendment (copy attached) since that appears at this moment to be the front runner among amendment proposals. We speak with great respect for the proponents of that amendment and for certain attorneys and legal scholars who have endorsed it. The following are what we deem to be its deficiencies:

1. Paragraph 1 prohibits only governmental action ("Neither the United States nor any State shall deprive any human being, from the moment of conception, of life. . ."). This does not get at the problem. Abortion activities by governmental units is not the significant threat; it is the private activities of doctors and others which constitutes the great source of abortion in this country. The constitutional amendment must enable the state and federal governments to enact statutes penalizing private activity. It may be argued that one phrase of Paragraph 1 creates

such enablement ("nor deny to any human being, from the moment of conception, the equal protection of the laws"). This would be on the theory that a government which has no abortion statutes thereby denies equal protection to unborn human beings (since born human beings are protected by the homicide statutes). Even so read, Paragraph 1 does not do the job. A person complaining of the absence of an abortion statute would not have a legally cognizable claim; no court would be able to give him relief against the legislature.

2. Paragraph 2, which speaks of deprivation of life "on account of illness, age, or incapacity" is objectionable on several counts. First, it contains the same fault as Paragraph 1, in that it reaches only governmental activity - not private activity. Secondly, the term, "incapacity", appears to us to have no clear and certain meaning. Any such terminology in a constitutional amendment is certain to give fuel to attacks on the whole amendment. Third, for reasons stated above, we do not believe that the amendment should be aimed other than at abortion.

Therefore we are compelled emphatically to reject the Hogan Amendment.

The Amendment Process. The Constitution provides two routes for proposing amendments (1) through a convention called by Congress (2) through the Congress itself. We have heard of a number of moves to get Congress to call a convention. This would be an undesirable route to constitutional amendment. First, it would require applications from the legislatures of two-thirds of the states, and it would appear doubtful that the legislatures of thirty four states could be moved to make application. Second, a convention could consider the entire Constitution and amend it in any way it desired, and this, of itself, would provide our opponents with a handy argument for not making application. On the other hand, it is quite likely that anti-abortion political power in the Congress is (or can be made to be) sufficient to propose an amendment.

As to timetable, we note that the time it has taken, from ~~proposal~~ Congressional passage to ratification of the last ten amendments to the Constitution has been as follows:

25th Amendment (Presidential Succession): Feb. 19, 1965 - Feb. 23, 1967 (two years).

24th Amendment (Poll Tax): March 27, 1962 - Feb. 4, 1964 (one year, eleven months).

23rd Amendment (Electors, District of Columbia): June 16, 1960 - April 3, 1961 (ten months).

22nd Amendment (Limit to Presidential Term): March 24, 1947 - March 1, 1951 (four years).

21st Amendment (Repeal of Prohibition): Feb. 20, 1933 - Dec. 5, 1933 (ten months).

20th Amendment (Lame Duck): March 3, 1932 - Feb. 6, 1933 (eleven months).

19th Amendment (Woman Suffrage): June 5, 1919 - Aug. 26, 1920 (one year, two months).

18th Amendment (Prohibition): Dec. 19, 1917 - Jan. 29, 1919 (one year, one month).

17th Amendment (Popular Election of Senators): May 15, 1912 - May 31, 1913 (one year).

16th Amendment (Income Tax): July 31, 1909 - Feb. 25, 1913 (three years, seven months).

Most of the above amendments were not the subject of an intense national controversy. Only one of them was the direct consequence of a decision of the Supreme Court (the Income Tax Amendment, following Pollock v. Farmers' Loan & Trust Co.). The proposed 26th Amendment (equal rights for women), which has now become a subject of controversy, has been pending ratification since March 22, 1972, with apparently a long road ahead to adoption.

From the foregoing we get one message: that there will need to be an extremely strong effort made, first in the Congress, then in the states; but if a strong enough effort is made, it should be possible to achieve amendment within two years. Happily, in many "non-Catholic" states, there is plenty of anti-abortion sentiment (e.g., North Dakota).

Chances of Adoption. Some Catholics have expressed the view that there is no chance of securing a constitutional amendment against abortion. We do not concur. Certainly the task, if undertaken, will be one of extreme difficulty. The pro-abortion and allied forces will attack the effort from well entrenched positions in the media. The Church will be accused not only seeking to "impose its morality" on the country but of seeking, for the first

time in our history, to bend the American Constitution to its own will. Further, it may ultimately be revealed that the Supreme Court has well gauged the general outlook of our society - as one whose materialism and declining sense of morality render abortion acceptable or even welcome.

We of the Committee do not, however, believe that the Court, in its decision, has found the national vein. We have reason to hope that the sentiments of millions of Protestant people, unspoken in national councils, rejects abortion. Further, we believe that when the ugly realities of the growing carnage are brought more vividly home to people, a revulsion will set in, helpful to the amendment effort. Finally, however, is the continuing need for public witness against abortion, to which the struggle for an amendment will give focus.

WILLIAM B. BALL
Ball & Skelly
127 State Street
Harrisburg, PA 17101
717-233-7902

5/22/73

AMENDMENT

Section 1. Life shall not be taken by the United States or by any State on account of age, health or condition of dependency.

Section 2. Congress and the several States within their respective jurisdictions shall have power to prohibit the taking of life on account of age, health or condition of dependency.

/s/ J. Feldman
D. Louisell
J. Noonan

March 22, 1973.

To all Chapter Chairmen

From Alice Hartle, MCCL Legislative Liaison Chairman.

H.F. 479, the resolution memorializing Congress to pass a Constitutional amendment protecting the life of all humans from conception to natural death, was reported out (passed) the House Health and Welfare Committee yesterday. The vote was 20 to 7 in favor of recommending that the bill be passed.

The bill will now go to the House floor to be voted upon by that entire body. The first consideration and vote could possibly come as early as Monday, March 26, though it may not be that soon. It is urgent for every MCCL member to write or contact by telephone or in person your representative by Monday. Urge him to vote for H.F. 479, to vote against its referral to another committee, and to vote against any changes in the bill.

These people are being pressured unmercifully by the pro-abortionists, especially those declared in favor of the resolution for the amendment. We must show our support for them and for others who will be voting for it on the House floor. If your Representative was among those who voted for the resolution, please express your appreciation. His (or her) seat has been threatened by the pro-abortionists, who are saying they will run someone against them in the next election.

Regretfully, we have been so busy at the Capitol all during March, and the situation keeps changing so rapidly that we are unable to get a Newsletter out to the whole membership at this time. We feel it is more necessary to work at the Legislature just now. You can help now by getting your telephone committee to contact every member in your chapter and pass this request on to them. Convey the urgency of this letter-writing request.

Voting for the bill were: James Swanson, 37B, committee chairman; James Rice, 54B, vice chairman; Lynn Becklin, 18A; Art Braun, 1A; Lyndon Carlson, 44A; Harold Dahl, 22B; Gary Flakne, 61A; Mary Forsythe, 39A; Joel Jacobs, 47A; Adolph Kvam, 22A; Gary Laidig, 51A; Ernee McArthur, 45B; Joseph Niehaus, 16A; Michas Ohnstad, 19A; Norman Prahl, 3B; Doug St. Onge, 4A; John Salchert, 54A; Howard Smith, 13B; John Spanish, 5B; and Richard Wigley, 29B. Richard Lemke, 34A, had to be absent because of an important conflict, but would have voted for the resolution. He was an author of one of them.

Against the amendment bill: Tom Berg, 56B; Linda Berglin, 59A; Bill Clifford, 44B; Lon Heinitz, 43A; Donald Moe, 65B; William Ojala, 6A; James Ulland, 8B. Helen McMillan, 31B, was hospitalized at the time. She had voted against the amendment in sub-committee.

Letters need not be long, but PLEASE keep them on a high level of courtesy, even if you write to a legislator who has voted against us. Assure our friends of your support in the future.

An interesting sidelight of yesterday's committee meeting. After opponents of the resolution had attacked the Catholic church, Lutherans Michas Ohnstad, Gary Flakne, and Norman Prahl and Methodist Gary Laidig identified themselves as such and spoke in favor of the amendment. Art Braun, a member of a sub-committee which was supposed to be out of town Wednesday afternoon, stayed at the Capitol to vote with us. These people have gone out of their way to help us!

Special commendation should go to Tad Jude, 42A, who, as author of the bill, defended it beautifully against some vicious attacks. He was great! Also, Ray Kempe, 53A, contributed very significantly by rebutting some of the arguments raised by our opponents on the committee. Several committee members, including but not limited to

(over)

Joel Jacobs, Joe Niehaus, and Ernee McArthur, gave important help in rounding up the vote.

We are happy to be able to report that yesterday we also received word that the Senate Judiciary committee has now scheduled a hearing on the resolutions for the Constitutional Amendment and other bills relating to abortion. The hearing is set for Thursday, April 5, from 2 to 4 p.m., in Room 118.

Letters to your Senators are also in order, particularly if he is a member of the Judiciary committee. By all means, Judiciary committee members should receive letters before April 5. Members of the whole Senate should receive mail not more than two days after that at the latest.

Members of the Judiciary committee are: Jack Davies, 60, chairman; Robert Tennessen, 56, vice chairman; Jerald C. Anderson, 19; Jerome Blatz, 38; Ralph Doty, 8; Hubert Humphrey III, 44; Carl Jensen, 28; John Keefe, 40; Howard Knutson, 53; James Lord, 36; Bill McCutcheon, 67; Edward Novak, 64; Joseph O'Neill, 63; George Perpich, 5; George Pillsbury, 42; David Schaaf, 46; and Stanley Thorup, 47.

O'Neill, Novak, McCutcheon, and Thorup are among the authors of the three bills for the Constitutional amendment. S.F. 479 (Olhoft, O'Neill, Novak) is the one most likely to be considered, as it has the lowest number. It also has the identical wording to the one passed by the House Health and Welfare Committee.

H.F. 617 (LaVoy) as amended was voted down in sub-committee, and LaVoy's original bill was tabled. H.F. 613 (Faricy) also was tabled by the sub-committee. The ultimate fate of these bills is not known at this time. We are working on the problem. After hearings on these bills, it is fairly obvious that we have a clear responsibility to try to pass legislation embodying the provisions of these bills. Without our involvement it seems that negligible effort will be made to place even the permissible restrictions in the law which appear to be allowed under the Supreme Court decision. It also seems clear that we are the only people even concerned about health measures to protect the women who may undergo abortions, let alone the possibility of saving the lives of any babies. We will do our best to keep you informed.

We also are working hard to give additional protection to hospitals which do not wish to permit abortions, etc. We have had an unfavorable situation in the House sub-committee, but we haven't given up hope on these things.

Please explain to your chapter members that as Newsletter editor and chief lobbyist, I have no time at the moment to get out a Newsletter. We'll get one out as soon as things cool down at the Legislature,

One final reminder: please write to Governor Wendell Anderson in support of the resolution for a Constitutional amendment. It would be well for him to get the message loud and clear as to the strength of MCCL.

We are counting on you and all of your chapter members! We can't do the job alone.

Address all letters to the State Capitol, St. Paul, MN 55101.

National Right To Life Committee, inc.

1200 15th Street NW SUITE 500 Washington, D.C. 20005

PROGRESS

News On the Pro-Life Amendments in Congress

The Buckley Amendment recently received the endorsement of Senator James Eastland, who has agreed to become a co-sponsor. This is most encouraging since Se. Eastland is the chairman of the Judiciary Committee.

Meanwhile, in the House, Rep. Hogan announced that he would file a discharge petition to remove this constitutional amendment from the House Judiciary Committee and bring it directly to the House floor for a vote. In a letter to the Judiciary Chairman, Hogan explained that despite his frequent inquiries he had received no encouragment that hearings would be held on his amendment. "I have hesitated to file such a petition," Hogan said, "but it is clear to me that this is the only way that my amendment will ever reach the House for a vote." Since he needs a House majority of 218 to succeed with his discharge petition, Hogan appealed to pro-life people to write their congressmen immediately in support of the discharge effort.

Position on Whitehurst

A number of bills have been filed - the most prominent of which is called the "Whitehurst Bill" which uses the states' rights approach. These bills would permit a state to do anything it wanted on abortion.

Many of the sponsors of Whitehurst-type bills are pro-life Congressmen, who see this as the best strategy. Nevertheless, National Right to Life is committed to "mandatory" Human Life Amendment - one which specifically protects the unborn baby - not one which simply leaves the decision to the states.

For that reason, we are not supporting Whitehurst. However, we want to avoid implying that the Whitehurst people are our opponents. There is a danger that the pro-abortion Congressmen will try to use Whitehurst to defeat us and us to defeat Whitehurst - in other words, to set pro-life people against each other.

To avoid this, keep stressing the merits of the mandatory pro-life amendments that we favor. Say little or nothing about Whitehurst (although, if asked specifically, indicate that we are supporting only the mandatory amendments). In this way - by making our position clear while avoiding falling into the trap of fighting with the Whitehurst people - it will be relatively easy for the Whitehurst supporters to come over to our side when they see the mandatory pro-life amendments picking up momentum.

Copies of various amendments are enclosed for your information.

National Catholic Reporter 6/22/73

Three abortion amendments in Congress

From NCR's Washington Bureau

WASHINGTON — Three major types of bills for constitutional amendments on abortion have been introduced into Congress, but it is too early to predict how any of them will fare.

Here is the wording of the three:

— Representative Lawrence Hogan (R-Md.): "Sec. 1. Neither the United States nor any state shall deprive any human being, from the moment of conception, of life without due process of law; nor deny to any human being, from the moment of conception, within its jurisdiction, the equal protection of the laws. Sec. 2. Neither the United States nor any state shall deprive any human being of life on account of illness, age or incapacity. Sec. 3. Congress and the several states shall have the power to enforce this article by appropriate legislation."

— Senator James Buckley (Conservative-N.Y.): "Sec. 1. With respect to the right to life, the word 'person,' as used in this article and in the 5th and 14th articles of amendments to the constitution of the United States, applies to all human beings, including their unborn offspring at every state of their biological development, irrespective of age, health, function or condition of dependency. Sec. 2. This article shall not apply in an emergency when a reasonable medical certainty exists that continuation of the pregnancy will cause the death of the mother. Sec. 3. Congress and the several states shall have the power to enforce this article by legislation in their appropriate jurisdictions."

— Representative G. William Whitehurst (R-Va.): "Nothing in this constitution shall bar any state or territory or the District of Columbia, with regard to any area over which it has jurisdiction from allowing, regulating, or prohibiting the practice of abortion."

Hogan's bill is considered the strictist, because it contains the words "from the moment of conception." The bill has seven cosponsors and about six identical or nearly identical bills have been introduced into the House. Backers of the bill say it is the only one that assures protection of the fetus from conception on by allowing no room for interpretation by the courts.

Backers of Buckley's bill, while conceding that it isn't as precise, argue that it is more feasible politically, especially since it contains a specific exception for a woman in danger of death. A Buckley aide said it is better to leave the question of the beginning of life to science "since conception is now defined as a continuing process." Buckley has six cosponsors, including Senators Mark Hatfield (R-Ore.) and Harold Hughes (D-Ia.)

Whitehurst's bill is considered a compromise bill. It would send the issue back to the states for legislation. It has 15 cosponsors, but is considered unacceptable by both "right to life" groups and feminist organizations which applauded the recent Supreme Court decision striking down nearly all state abortion laws.

Staff aides to Buckley and Hogan expressed confidence last week that their bills would eventually pass after support has been built up around the country and Congress has been "educated." A Whitehurst aide said that although he expects "tough sledding" for the bill, "If any resolution passes which would have the effect of nullifying the Supreme Court decision, this will be the one."

The earliest committee hearings on any of the bills would not be until this fall, and probably won't come until next year.

9-21-73

VOICE FOR PRO LIFE RECOMMENDATIONS AS A RESULT OF THE NATIONAL POLL

(1) It is overwhelmingly apparent that the Pro Life groups strongly desire an amendment that protects life from conception (fertilization). Therefore, we wish to present the following points which concern the Buckley Amendment:

(a) Those who propose the Buckley Amendment infer that it protects life from fertilization. Since the word "fertilization" is obviously not included in the Buckley Amendment, we feel that Senator Buckley should change his amendment to include the word "fertilization." This could easily be done by making such a proposal from the Senate floor. This would once and for all end all confusion about what it will or will not cover.[1] Senator Buckley in a recent clarification statement concerning a New York Times article about his amendment, stated: "My amendment would extend the protection for human life back to the first moment that science can establish its existence." Since scientists do not all agree on this point, this is hardly a solid basis for an effective amendment.[2]

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1. The NRLC, in a working paper of August 14, 1973, presented by Prof. Witherspoon, has proposed changes in the wording of the Buckley Amendment, yet only in Section 2, which concerns the life of the mother. Section 1 which could include the word "fertilization" remains unchanged! even after the unanimous approval to include the word "fertilization" (in Resolution #8) at the Detroit NRLC.

2. Note the consequences of similar thought in the Supreme Court decision: "We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." THE SUPREME COURT REPORTER (Supreme Court decision), Vol. 93, No. 8, February 15, 1973, Pg. 730.

(b) The use of abortifacients will undoubtedly be the abortion of the future. If a strong law is not enacted at the present time in which it is clearly expressed that all abortifacients are illegal, all of our present efforts will be fruitless. The Buckley Amendment without the actual word "fertilization" does not include abortifacients.

(c) In the Buckley Amendment there is mention of the mother when no mention is needed, thus opening the door to many a loophole. Before the present abortion laws came into being, this was an obvious right and still will be.

(2) The opinion of VOICE FOR PRO LIFE, following the opinion of the vast majority of groups, is that we should maintain the national unity that already exists (reflected in the national poll) and continue to support the Hogan (Helms) Amendment. It is apparent that there is need for effective political action to implement this. Since Rep. Edwards is still delaying the constitutional amendments in the House of Representatives, urge your Congressman to sign the Discharge Petition. If he refuses, let him know that you are looking for a primary candidate for next year.

Supporting other amendments which are in the process of being rewritten, and constantly being re-explained, could be very divisive and delay the passage of the hoped-for legislation. The Hogan (Helms) Amendment is adequate. It protects life from the moment of conception[3]. It excludes abortifacients. And, finally, it protects the aged and disabled.

3. Some proponents of the Buckley Amendment claim that the Supreme Court has determined conception to be a "process." But it should be noted that (a) the Supreme Court never decided on the question of the beginning of life (see previous footnote 2.); (b) the Supreme Court decision considers and presents all the different theories about the beginning of life; (c) only once does it specifically consider it as a process (Pg. 731); and (d) repeatedly, the Supreme Court considers and presents the position of those who understand it to be a momentary occurrence. There follows three such uses of the words "moment of conception" taken from the Supreme Court decision:

> "For the Pythagoreans, however, it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being." (Pg. 716)
>
> "The third reason is the State's interest - some phrase it in terms of duty - in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception." (Pg. 725)
>
> "The Aristotelian theory of 'mediate animation,' that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this 'ensoulment' theory from those in the Church who would recognize the existence of life from the moment of conception. The latter is now, of course, the official belief of the Catholic Church. As one of the briefs amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians." (Pg. 730)
>
> THE SUPREME COURT REPORTER (Supreme Court decision), Vol. 93, No. 8, February 15, 1973.

That the words "moment of conception" are good English as well as good medical vocabulary can be established by referring to the same medical dictionary (Dorland's Illustrated Medical Dictionary, 24th ed., 1965) that the Supreme Court refers to on Page 730. If one looks up the word conception in this same dictionary, the definition is given as "the fecundation of the ovum." - (Pg. 333) Fecundation is then defined as "impregnation or fertilization." - (Pg. 544) Fertilization is then defined as: "The act of rendering fertile; fecundation. It consists of the fusion of a spermatozoon with an ovum, this being the natural stimulus which starts the development of the zygote thus formed. It results in the restoration of the diploid number of chromosomes, the paternal participation in inheritance, the determination of sex, and the initiation of cleavage." - (Pg. 546)

The phrase "moment of conception" in the Hogan Amendment is a proper explanation of the beginning of life, and with the adoption of the amendment it will be the basis for law in the U.S.A.

BY: Fr. Robert Bush, S. J.
Mrs. Marian Banducci

VOICE FOR PRO LIFE

9/21/73

APPENDIX E

(The following is the complete text of a Constitutional Amendment proposed by Dr. John T. Noonan Jr., along with his commentary on what he expects the amendment would accomplish.)

AMENDMENT XXVIII

The Congress within federal jurisdictions and the several States within their respective jurisdictions shall have power to protect life from the beginning of new life and at every stage of biological development irrespective of age, health, or condition of physical dependency

What the Amendment Accomplishes

1. The Amendment negates the holdings of the Supreme Court of the United States in *Roe v. Wade* and *Doe v. Bolton* that the Constitution of the United States is violated by law which penalizes the killing of unborn life. Under the Amendment, Congress in all places particularly governed by federal law, and the States within their own borders, are empowered by the Constitution to protect life, born or unborn.

2. The Amendment negates the teaching of the Supreme Court in *Roe v. Wade* that life in the womb, prior to viability, is no more than "a theory of life," incapable of protection of law. Under the Amendment, Congress and the States within their respective jurisdictions may protect life from the beginning of new life.

3. The Amendment negates the teaching of the Supreme Court in *Doe v. Bolton* that the law must always prefer a physician's prescription for the well-being of a mother to the life itself of her child. Under the Amendment, the law may protect the child, although he or she is within the womb and physically dependent on the mother.

4. The Amendment negates the teaching of the Supreme Court in *Roe v. Wade* that "capability of meaningful life" is a criterion by which the protectability of life is to be determined. The Amendment assures that federal or state legislation protecting the life of the aged, the mentally-afflicted, or the chronically ill cannot be declared unconstitutional by application of such a criterion. Under the Amendment, life may be protected irrespective of the health, physical or psychological, of the life being protected

Why the Amendment does not Attempt More

1. The Amendment does not make abortion murder. In Anglo-American legal tradition, discrimination has always been made between the crime of murder and the crime of abortion. No good reason exists to end the traditional distinction.

2. The Amendment does not outlaw any particular acts of abortion. In the federal structure of the United States, it has been the responsibility of the States to design the protection of life within their borders, and the responsibility of Congress to protect life in federal areas. No good reason exists to alter the traditional allocation of responsibilities.

3. The Amendment does not mandate a particular or uniform degree, level, or kind of protection. A Constitution is not a criminal statute. If an Amendment is to act at a Constitutional level, it is not the appropriate place to incorporate the detail and qualifications of a specific criminal law.

4. The Amendment does not make contraception an act which Congress or the States may prohibit under the Amendment: it does not overturn *Griswold v. Connecticut*. Contraception is directed to the prevention of life. The Amendment authorizes the law to act from the beginning of new life.

The Advantages of the Amendment

The Amendment is modeled on the Sixteenth Amendment, overturning the decision of the Supreme Court in *Pollock v. Farmers' Loan and Trust Company*. The Amendment, therefore, conforms to an established pattern in which a decision of the Supreme Court is negated by Constitutional correction.

The Amendment is pro-life. Empowering the law to protect new life from the beginning, it creates the expectation that life will be protected.

The Amendment is pro States' Rights. Restoring to the States the power taken from them by the Supreme Court, it gives the state legislatures the opportunity to shape the protection of life.

The Amendment is pro-People. Returning to the People what was taken from them by the decision of the Supreme Court, it gives the People power to safeguard the lives of future generations.

The Amendment is general enough to have the breadth, dignity, and freedom of detail appropriate for the Constitution.

The Amendment is specific enough to restore the protectability of life within the womb.

The Amendment is moderate enough not to permit *ad terrorem* arguments by advocates of abortion who will try to stretch the language of any proposed Amendment to make it appear mischievous or monstrous.

The Amendment is strong enough to withstand interpretation by a judiciary likely to be initially unsympathetic to its purpose.

The Amendment is conservative enough to satisfy not only the defenders of life but the proponents of States' rights and the critics of judicial radicalism.

The Amendment is bold enough to win the enthusiasm of everyone dedicated to the elimination of the holdings and teachings of *Roe v. Wade* and *Doe v. Bolton*.

Paul Haring

93 rd CONGRESS S. J. Res. _____

1 st Session In the Senate

Mr. _____

Submitted the following Resolution
which was _____

Unborn Child Amendment

RESOLUTION

RESOLVED by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), that the following article is proposed as an amendment to the Constitution of the United States which shall to all intents and purposes be a part of the Constitution upon ratification by the legislatures of three-fourths of the several States:

Section 1. No person shall be deprived of his life from the moment of conception until birth; nor shall any such person be deprived of his property without due process of law; nor denied the equal protection of the laws, provided that this article shall not prevent medical operations necessary to save the life of a mother which indirectly result in the death of an unborn child.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

David Louisell

CONCEPTION
LIFE
PERSON
BEING
Joe Feldman

Or add to 14th

Preamble.

Human Life Legislative Authority —

D.L.

Nothing in this Constitution shall be construed to infringe the power of Congress or of the several States to protect ~~the~~ life of unborn, sick, aged or physically ~~dependent~~ handicapped human beings.

existence

regulation just reasonable (no state rights)

Don't allow —

Outside my competence

b. control abortion.

to protect all human existence from moment of conception.

(over dest.

.... all human(s)(existence) despite ~~its~~ their age ~~stage~~ or condition

(Cover fetal experimentation)

DRAFT November 1973

MEMORANDUM ON THE LEGAL IMPACT OF THE HOGAN CONSTITUTIONAL AMENDMENT

The Hogan Amendment--already submitted to Congress for approval as an Amendment to the Federal Constitution which would be binding on all states provides that "neither the United States nor any state shall deprive any human being from the moment of conception of life without due process of law nor deny to any human being from the moment of conception within its jurisdiction the equal protection of the laws..." It must be viewed not only in terms of its expressed intended effect on abortion but in terms of what other effects it will have on our whole legal system. On the basis of the observation below it appears that, if adopted, the Hogan Amendment would dislocate and make chaotic whole areas of well-established law--some related and some totally unrelated to abortion.

Let us assume for the purpose of making clear its other effects, that the Hogan Amendment will prevent abortion (presumably even to save the life of the woman), an assumption that is contrary to fact since in the past abortion laws have not prevented abortions--they have served only to make abortion clandestine and dangerous. At what price would this assumed effect have been purchased?

Under the Hogan Amendment, every zygote, fetus and embryo from "the moment of conception" (a moment which no one and no instrument can ascertain) would be a "human being" in the eyes of the law, i.e. a person entitled to due process of law and the equal protection of the laws. The Hogan Amendment would overcome the United States Supreme Court holdings

in the Texas and Georgia abortion cases, "that the word 'person' as used in the Fourteenth Amendment does not include the unborn." (It is clear that the Court viewed the word "person" as meaning the same as "human being" since in footnote 55 in the Texas case it referred to the Wisconsisn statute "defining 'unborn child' to mean 'a human being from the time of conception until it is born alive"' and the Connecticut statute "'to protect and preserve human life from the moment of conception.'") We are setting forth in what follows some of the legal problems which would result if by reason of the adoption of the Hogan Amendment every fertilized ovum had to be regarded as a "human being" or "person" within the contemplation of the Constitution and the law.

1. Constitutional Law

As the United States Supreme Court pointed out in the Texas abortion case, "the Constitution does not define 'person' in so many words." The Hogan Amendment, while not otherwise defining "person" would include in that definition the unborn from the moment of conception." This new inclusion would presumably apply at every point in the Constitution where there is reference to "persons." The United States Supreme Court in the Texas case set forth all the constitutional provisions which would be affected:

> "Section 1 of the Fourteenth Amendment contains three references to 'person.' The first, in defining 'citizens' speaks of 'persons born or naturalized in the United States.' The word also appears both in the Due Process Clause and in the Equal Protection Clause. 'Person' is used in other places in the Constitution: in the listing of qualifications for representatives and senators.

> Art. 1. §2, cl. 2, and §3, cl. 3; in the Apportionment Clause, Art. I, §2, cl. 3; 53 in the Migration and Importation provision, Art. 1, §9, cl. 1; in the Emolument Clause, Art. I, §9, cl. 8; in the Electors provisions, Art. II, §1, cl. 2, and the superseded cl. 3, in the provision outlining qualifications for the office of President, Art. II, §1, cl. 5; in the Extradition provisions, Art. IV, §2, cl. 2, and the superseded Fugitive Slave cl. 3; and in the Fifth, Twelfth and Twenty-second Amendments as well as in §§2 and 3 of the Fourteenth Amendment."

The Court concluded that at the present time, i.e. in the absence of the Hogan Amendment, "in nearly all these instances, the use of the word is such that it has application only postnatally" and that "none indicates, with any assurance, that it has any possible pre-natal application." The Hogan Amendment would change all that. It is difficult to overstate the degree of confusion in all these constitutional contexts that would result. In line with the United States Supreme Court reasoning in the Texas case, if by reason of the Hogan Amendment all unborn fertilized zygotes were to be recognized as "human beings", abortion could not be constitutionally permitted even to save the life of the woman without violation of the constitutional rights of the unborn:

> "When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?
>
> There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, n. 49, supra, that in Texas the woman is not a principal or an accomplice with respect to an abortion

upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?"

The insoluble problems which would exist with reference to the other sections of the Constitution where the word "person" appears in addition to the Fourteenth Amendment are equally insoluble. For example, as the Court points out, "we are not aware that in the taking of any census under this clause [Art. 1, §2, cl.2] a fetus has ever been counted."

2. Representation and Allocation of Governmental Resources

Not only would our census taking have to be totally reorganized, the very basis of representation in our Congress and other representative bodies would be drastically changed. This would apply to voting, for example: how would it affect the "one man-one vote" principle? Would the inclusion of fertilized ova have an impact on revenue sharing? On other kinds of federal grants to states such as formula grants which are based on population? Or on state grants to localities? Who would decide and how? And what would happen in the meantime?

3. Criminal Law

If the fetus is a "human being," anyone committing a lesser crime which incidentally results in the miscarriage of a woman would ipso facto be guilty of murder under the so-called felony-murder rule which classifies as murder the killing of a person in the course of a lesser crime. Yet at no time in the history of Anglo-American law even at its strictest has abortion been considered the equivalent of murder. Compare Keeler v. Superior Court, 2 Cal. (3d.) 619, 470 P 2d (1970) and State v. Dickinson,

23 Ohio App. 2d. 259, 275 N.E. 2d 599 (1970). Similarly anyone charged with criminal recklessness which resulted in a miscarriage could be guilty at least of the crime of manslaughter.

Would prosecutors be under a duty to investigate every miscarriage to see if it resulted from fetus abuse or carelessness or recklessness? (It is estimated that something like 30% of all conceptions result in a spontaneous miscarriage.) Could every fertile female in the United States be required to have a pregnancy test every month to ascertain if she is harboring a "person" within her? Could a pregnant woman be held in prison in the absence of a reason to incarcerate the fetus-person? How could crimes against the fetus-person be detected, especially when the life of the fetus, if any, is two weeks or four weeks or even eight or ten weeks? Would a pregnant woman who took a medicine which caused the expulsion of the fetus be guilty of murder? Would the answer to that question depend on proof of intent, i.e. that she intended the medicine to have that effect? Would she be equally guilty if she didn't intend any such result but should have known it would follow (under the well known axiom that a person is deemed to have "intended" the natural consequences of his acts). Suppose a pregnant woman goes skiing or fails in some other way to take proper and appropriate care of herself? Since it is believed by many that IUD's cause the dislodging of a fertilized egg, could a class action be brought in court on behalf of fetuses against women using IUD's? Or against the doctors or clinics who prescribe them?

One thing is clear. If the fetus were a person entitled to due process and equal protection (and perhaps to other constitutional

guarantees as well) from the moment of conception, every pregnant woman would constantly be acting at her peril. Presumably the state could enjoin a safety regimen on every woman from the moment she conceived (again assuming anyone could determine exactly what that moment was) and could hold her accountable criminally and civilly for any injury the fetus suffered which she could have avoided by what? Reasonable and due care? By not engaging in certain types of behavior? What types of behavior? It seems hardly necessary to add that the right of privacy so recently declared applicable by the United States Supreme Court in the birth control and abortion cases would, if the Hogan Amendment were passed, cease to exist for every pregnant woman "from the moment of conception." Perhaps in addition to a monthly pregnancy test, every woman could be required to register the fact of her pregnancy with an appropriate fetus-protective state authority. Every aspect of her life would be the potential subject of state inspection, regulation and control.

4. General Tort Law

In tort law--the law of civil as opposed to criminal wrongs--equal chaos would result. As the law now stands, tort recovery for injury to the fetus is permitted, if at all, only if the alleged tort occurs at a time when the fetus is mature and viable. Under the Hogan Amendment, which would apply to weeks-old fetuses (even a week-old fetus) proof of causation would be difficult if not impossible. Moreover, recovery could not be made contingent on the birth of a child which is now the rule in New York and many other states. See 15 A.L.R. 3d. 992.

Equally difficult questions would arise under the automobile guest statutes: What are the rights of a fetus which is a guest in an automobile? Does the standard of care change? What if the driver has no knowledge that the woman is pregnant? Could the estate of a fetus sue an airline on the ground that miscarriage was caused by an especially turbulent flight? Or that the airline should have turned away its pregnant mother?

And what of intra-family immunities: This area of law is opening up today so that live children, i.e. children who have been born alive and are alive when they are hurt, by, for example, a negligent act of their parents, can sue the parents for tortious injury which was not formerly the law. Would the Hogan Amendment allow the fetus also to sue the pregnant woman in tort? What if the woman negligently contracted German measles, or takes a drug that has harmful effect on the child? A whole new group of tort lawyers would no doubt come into being, specializing in the bringing of negligence and other suits on behalf of the fetus.

Could the proposed Amendment be interpreted to give anyone with an interest in the birth of a child the right to sue after an abortion? Could this idea be extended if the woman had been clearly negligent with reference to maintaining her pregnancy? And in view of the fact, pointed out above, that a substantial percentage of fetuses miscarry spontaneously, how could it be proved in any case that a miscarriage (or spontaneous abortion) was the result of negligence rather than "just one of those things" which no one can anticipate or explain?

Liability insurance rates in general would almost surely go up because of the added risk of suits in situations where accidents or other

events could give rise to damage claims on behalf of the fetus. There would be all kinds of new causes for legal action and constant litigation.

5. Medical Practice and Malpractice

If the fetus were a human person, it is likely that there would come into being a new variety of malpractice actions against doctors charged with negligence in connection with pregnancy. In addition to a claim on behalf of the woman there would also be a claim on behalf of the dead or injured fetus. Moreover in a situation where a life-saving medical procedure for the woman had the ancillary effect of possibly forcing a miscarriage the doctor would always be at risk of being charged with a violation of the fetus' rights. Thus his medical judgment with respect to the medical steps he thought necessary to protect the woman might be restrained to the point where he would not feel free to prescribe the treatment he considered appropriate for the woman. This danger presumably would also inhibit hospitals and related medical personnel and would probably tend to substantially increase the already staggering cost of malpractice insurance.

6. Property and Inheritance

If the fetus were a human being from the moment of conception and it "died""from natural causes" before it was born as a not inconsiderable number of fetuses do, wouldn't its estate have to be probated? As a human being it might have inherited substantial property at the moment of its conception. Under the Hogan Amendment unborn fetuses would presumably be able to inherit property, regardless of whether they are ever born alive. In fact one of the most startling things about the Hogan Amendment is that birth would be no longer a significant legal event.

Presumably, we would celebrate not our birth days but our conception days. Would we therefore be regarded as nine months older than we are today? Would we therefore be able to vote nine months before we reached the age presently specified for voting? And suppose there is a premature birth? Would only seven months be added, for example, instead of nine?

If property belongs to an unborn fetus, it should in the event of fetal death go to the heirs of that fetus as specified in the intestacy laws or as provided in a will. But what if the will specified male heirs or female heirs and the fetus ceased to be before its sex could be determined? In any event, the many questions that would inevitably arise would seem to call for registration of all pregnancies and miscarriages.

As a consequence of the above, the Hogan Amendment would also probably result in heavier estate taxes, since property which passed through the fetal estate would presumably be taxable twice--once on the transfer to the fetus and once when it goes from the fetus to the next in the line of succession. And in any probate of a will under which a child inherits, a special guardian would have to be appointed to represent the interests of the fetus, if by any chance there is one. The same would be true in intestacy proceedings, i.e. in the absence of a will since under intestacy laws one's children are always specified as heirs. The need for special guardians of the fetuses' interests would add to the ever increasing high costs of judicial proceedings.

7. Tax Law

Tax questions would also proliferate under the Hogan Amendment. Would the fetus be counted as a dependent for tax purposes? If there is to

be a tax deduction for a fetus, how far would the Internal Revenue Service have to go in verifying the fact of pregnancy? What would be the effect of such verification on the "mother's" and the "father's" right of privacy? Presumably, medical expenses for fetus care would be deductible for income tax purposes but on what basis and how ascertained, and how divided with the medical expenses for the woman?

We assume that estate tax returns would have to be filed on behalf of the fetuses "from the moment of their conception" and regardless of whether they are born alive if they have inherited property while a fetus. (See 6 above).

8. Immigration and Naturalization

The Fourteenth Amendment states in part that "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside." What, then, would be the status of the unborn fetus? Under the Fourteenth Amendment it would not be a citizen even though it would be a person and it would therefore not be entitled to the privileges or immunities of citizens of the United States. Thus, a fetus would not have the right, for example, to demand protection of the Federal Government on the high seas, or abroad. Slaughter House Cases, 16 Wall. 36, 79 (1873).

Since the proposed amendment is concerned with the fetus from the moment of conception, however, problems might arise with regard to a fetus conceived in the United States by parents who are not citizens. As the law stands now children born in the United States to aliens, even temporary sojourners, are citizens. Would this have to be extended to include all children who the parents claim were conceived in the United

States? (Note that Montana v. Rogers, 278 F. 2d 68 (7th Cir. 1960), affirmed on other grounds in Montana v. Kennedy, 366 U.S. 308 (1961) held that conception in the United States does not give citizenship.)

Similar problems would ultimately arise with regard to deportation. Would a pregnant woman be subject to deportation without violation of the rights of the "human being" within her womb? To the extent there are or will be immigration quotas in the future, will the fetus-human being "count" as being a person within the quota?

9. Child Neglect

Many of the same questions arise with respect to child neglect laws under the Hogan Amendment as were asked above with respect to criminal law and tort law, e.g. should the state be able to intervene on behalf of the unborn child and compel the mother to conform to a standard of care to ensure the health of the unborn fetus? The mother's right to do what she wishes with her own body (diet, sports, rest, other activities, etc.) would have to be weighed against society's interest in protecting the fetus. Could strenuous sports, for example, be prohibited for all women who are pregnant on the grounds that such involvement is potentially dangerous to the fetus? Who decides whether or not a woman can undergo radiation treatments which are dangerous to the fetus but necessary or even desirable for her health and even continued life?

What about mothers "addicted" to alcohol or tobacco? Can the state presume that a woman is unfit as a mother if she indulges heavily in these? The law in many situations gives the state the power to take a "neglected" child away from its mother. See e.g. N.Y. Family Court Act,

Article 10. Could this extend to pre-natal dangers and allow the state to confine the mother so that alcohol and cigarettes can be kept away from her until the child is born?

Again the same question arises: How far could the state intrude into the privacy of a pregnant woman in order to protect the constitutional and other rights of the fetus?

10. Conclusion

The foregoing represent only a few of the problems and ambiguities which would plague our entire legal system if the Hogan Amendment were adopted. The protection of the fetus "from the moment of conception" by a constitutional amendment would have such sweeping effects that the rights of all non-fetus persons in the United States would be thrown into chaos and confusion on just about every level of our legal system. It would create a kind of new and virtually insoluble problems which would deprive us to a considerable extent of what certaintius we now have in the law as a result of centuries of painstaking legal evolution.

Signed

DRAFT MEMORANDUM

ON THE POSSIBLE IMPACT OF THE HOGAN CONSTITUTIONAL AMENDMENT

ON SELECTED, NONABORTION RELATED AREAS OF THE LAW

Prepared by: George N. Lindsay, Esq.
Francis T. Plimpton, Esq.
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John T. Noonan

All human beings born or unborn are persons ... etc.

XXVIII
THE HUMAN LIFE AMENDMENT

affirmation

No human being, born or unborn, shall be

denied protection of law or deprived of life on account of

stage or condition
age, sickness or condition of physical dependency. Congress

but lose support

and the several States shall have power to enforce this

article by appropriate legislation.

Congress and the several States —

JNoonan

(biological) human existence

Martin

Memorialize Congress.

BUCKLEY NEWS BUCKLEY NEWS BUCKLEY NEWS

FROM THE OFFICE OF SENATOR JAMES L. BUCKLEY, NEW YORK • LEONARD SAFFIR
PRESS SECRETARY
(202) 225-4451

COMMENTARY ON PROPOSED AMENDMENT

The central purpose of the amendment is to create, or rather, as will be made clear below, to restore a constitutionally compelling identity between the biological category "human being" and the legal category "person". This has been made necessary by two factors: the more or less conscious dissemblance on the part of abortion proponents, by virtue of which the universally agreed upon facts of biology are made to appear as questions of value -- a false argument that the Supreme Court adopted wholesale; and (b) the holding of the Court in Wade and Bolton that the test of personhood is one of legal rather than of biological definition. The amendment addresses these difficulties by making the biological test constitutionally binding, on the ground that only such a test will restrain the tendency of certain courts and legislatures to arrogate to themselves the power to determine who is or who is not human and, therefore, who is or is not entitled to constitutional protections. The amendment is founded on the belief that the ultimate safeguard of all persons, born or unborn, "normal" or defective, is to compel courts and legislatures to rest their decisions on scientific fact rather than on political, sociological, or other opinion.

Such a test will return the law to a position compatible with the original understanding of the 14th Amendment. As

the debates in Congress during consideration of that Amendment make clear, it was precisely the intention of Congress to make "legal person" and "human being" synonymous categories. By so doing, Congress wrote into the Constitution that understanding of the Declaration of Independence best articulated by Abraham Lincoln, namely, that to be human is to possess certain rights by nature, rights that no court and no legislature can legitimately remove. Chief among these, of course, is the right to life. On the specific subject of abortion, it is notable that the same men who passed the 14th Amendment also enacted an expanded Assimilative Crimes Statute (April, 1866), which adopted recently passed state anti-abortion statutes. These statutes, in turn, had been enacted as a result of a concerted effort by medical societies to bring to legislators' attention the recently discovered facts of human conception. The Court's opinion in Wade totally misreads (if the Court was aware of it at all) the fascinating medico-legal history of the enactment of 19th Century anti-abortion statutes, and ignores altogether the fundamental intention which animated the framers of the 14th Amendment.

Section 1 of the proposed amendment would restore and make explicit the biological test for legal protection of human life. The generic category is "human being", which includes, but is not limited to,"unborn offspring". It is

a question of biological fact as to what constitutes "human being" and as to when "offspring" may be said to come into existence. While the facts concerning these matters are not in dispute among informed members of the scientific community, the ways in which these facts are to be applied in any particular case will depend on the specifications contained in implementing legislation passed consistent with the standard established by the amendment. Such legislation would have to consider, in the light of the best available scientific information, the establishment of reasonable standards for determining when a woman is in fact pregnant, and if so, what limitations are to be placed on the performance of certain medical procedures or the administering of certain drugs.

Some proponents of abortion will seek to characterize the amendment as prohibiting accepted methods of contraception. To such charges, the answer is threefold:

(a) there is nothing in the amendment which would, directly or indirectly, expressly or impliedly, proscribe any mode of contraception;

(b) under the amendment, the test in each case will be a relatively simple one, i.e., whether an "unborn offspring" may be said to be in existence at the time when the abortion technique or medicine is applied. Particular standards on this point are to be worked out in implementing legislation.

Section 1, it will also be noted, reaches the more general case of euthanasia. This is made necessary because of the widespread and growing talk of "death with dignity" and similar statutory schemes, and because of the alarming dicta in the Wade opinion by which legal protection seems to be conditioned on whether one has the "capability of sustaining meaningful life" or whether one is a "person in the whole sense." Such language in the Court's opinion, when combined with the Court's frequent references to the state's "compelling interest" in matters of "health", is pointedly brought to our attention by the revival in Wade of the notorious 1927 case of Buck v. Bell (which upheld the right of the state to sterilize a mentally defective woman without her consent). The Wade and Bolton opinions taken as a whole seem to suggest that unborn children are not the only ones whose right to life is now legally unprotected. Thus, the proposed amendment explicitly extends its protections to all those whose physical or mental condition might make them especially vulnerable victims of the "new medical ethic".

Regarding the specific subject of abortion, Section 2 makes an explicit exception for the life of the pregnant woman. There seems to be a widespread misimpression that pregnancy is a medically dangerous condition, when the truth of the matter is that under normal circumstances a pregnant woman can deliver her child with minimal risk to her own life and health. There is, however, an exceedingly small class of pregnancies where continuation of pregnancy will cause the death of the woman. (The most common example is the ectopic or tubal pregnancy.) It is our intention to exempt this unique class of pregnancies, without opening the door to spurious claims of risk of death.

Under the amendment, there must be (a) an emergency in which (b) reasonable medical certainty exists that (c) continuation of pregnancy will (d) cause the (e) death of the woman. This is designed to cover the legitimate emergency cases, such as the ectopic pregnancy, while closing the door to unethical physicians who in the past have been willing to sign statements attesting to risk of death when in fact none exists or when the prospect is so remote in time or circumstance as to be unrelated to the pregnancy. Contrary to the opinion of the Supreme Court, which assumes that pregnancy is a pathological state, modern obstetrical advances have succeeded in removing virtually every major medical risk once associated with pregnancy. As Dr. Alan Guttmacher

himself remarked nearly a decade ago, modern obstetrical practice has eliminated almost all medical indications for abortion. In certain limited instances, however, a genuine threat to the woman's life remains, and it is felt that excepting such situations is compatible with long-standing moral custom and legal tradition.

ARTICLE

Sec. 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to the Constitution of the United States applies to all human beings irrespective of age, health, function or condition of dependency, including their unborn offspring at every stage of their biological development.

Sec. 2. No unborn person shall be deprived of life by any person; Provided, however, that nothing in this article shall prohibit ~~a law permitting only~~ those medical procedures required to prevent the death of the mother.

Sec. 3. The Congress and the several states shall have power to enforce this article by appropriate legislation.

DECLARATION OF INDEPENDENCE
In Congress, July 4, 1776

THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their fu... security. — Such has been the pa... sufferance of these Colonies; and ... is now the necessity which constra... them to alter their former Syste... Government. The history of ... present King of Great Britain ... history of repeated injuries ... usurpations, all having in direct ... ject the establishment of an abso... Tyranny over these States. To p... this, let Facts be submitted to a ... did world.

He has refused his Assent to La... the most wholesome and necessar... the public good.

He has forbidden his Governors ... pass Laws of immediate and press... importance, unless suspended in th... operation till his Assent should ... obtained; and when so suspended ... has utterly neglected to attend ... them.

He has refused to pass other La... for the accommodation of large d... tricts of people, unless those peop... would relinquish the right of Rep... sentation in the Legislature, a ri... inestimable to them and formida... to tyrants only.

He has called together legisla... bodies at places unusual, uncomf... able, and distant from the deposi... of their Public Records, for the ... purpose of fatiguing them into c... pliance with his measures.

He has dissolved Representati... Houses repeatedly, for opposing w... manly firmness his invasions on t... rights of the people.

He has refused for a long ti... after such dissolutions, to cause oth... to be elected; whereby the Legisla... Powers, incapable of Annihilati... have returned to the People a... [illegible]

examined in any Court of the United States than according to the rules of the common law.

Article VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Article IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article XI (1798)

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Article XII (1804)

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate; — The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted; — The person having the greatest number of votes for President, shall be the President, if such a number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following,[21] then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Article XIII (1865)

SECTION 1

Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2

Congress shall have power to enforce this article by appropriate legislation.

Article XIV (1868)

SECTION 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of per-

[21] The Twentieth Amendment changed this date from March 4 to January 20.

Ford M.

Mayer

To their Excellencies, The Bishops of Pennsylvania.

Subject: The Right To Life Amendment

From: James J. Diamond, M.D.

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Phone (215) 374-0938

In the course of preparing the wording of the proposed amendments to the Constitution of the United States, the purpose of which is to protect the life of the unborn, several jurisprudential and medical considerations have emerged which are of concern to the spiritual leaders of the people of the Pennsylvania Catholic community. It is the purpose of this letter to discuss these considerations so that neither misunderstanding nor scandal be caused by the failure of anyone to appreciate the dimensions of the problems involved.

1.) At the present time, there is no legal way to overthrow the Griswold v. Connecticut decision regarding the right of an American to practice contraception according to his private moral concepts. A corollary to this is the fact that in the eyes of the federal government, the providing of contraceptive information and devices qua health measures has become the legitimate province of the civil authorities. For this reason, many activities by federally sponsored family-planning organizations cannot be legally assaulted by the National Right To Life Committee or by any lesser pro-Life group in the state. Coercive activity against the poor, the minorities and the illiterates by federally funded agencies can be assaulted, but this is not the province of the R.T.L. Committee, but represents a <u>civil liberties</u> cause. In the recent South Carolina case where young black girls were surreptitiously sterilized, it was the A.C.L.U. which sponsored the appropriate law suits against the government. There appears to be at present adequate grounds

within the constitution for declaring such sterilizations to be unconstitutional. However, Buck v. Bell still holds some value as precedent in the Court, and Planned Parenthood has recently called upon the federal government to convoke a group-think on this matter of sterilizing against their will those functional illiterates who "would probably want to be sterilized" if they were capable of making a judgment on the matter. The R.T.L. committee is interested in such matters and will seek an active role in any deliberations in this field at the federal level, yet it will be under a "civil liberty" thesis rather than a "right to life" thesis. All of this should be clear without any further explanation here.

2) The matter which will cause the most concern to the Bishops is this. At the present time, approximately two to three million women of reproductive age in the United States employ some type of intra-uterine device as a contraceptive measure. Many have employed the morning-after pill, which is a hormone taken after sexual contact to prevent the fertile zygote from implanting on the uterine wall. Some rape victims can avoid a pregnancy ensuing from the forceful sexual exposure by promptly submitting to a dilatation and curettage of the uterine lining, the net result of which is not to remove the fertile zygote but to render the wall of the uterus incapable of providing an implantation site to the zygote when it subsequently descends from the tube into the lumen of the uterus.

(Use of the term "contraceptive" vs. "abortifacient" in describing the I.U.D. refers only to the mindset of the woman using the device. Which term is morally accurate is the subject of the debate centering on whether or not a Homo exists prior to implantation.)

3) The intra-uterine devices present a varied pattern of effects. There is evidence to suggest that they act in several ways; they can so irritate the lining of the womb that implantation is impossible; they can excite a proliferation of white blood cells which destroy the zygote; they may exert an ionic effect hostile to the zygote. They may (this is hard to prove) by their presence dislodge an implanted zygote from the wall. In a number of cases, they have failed completely to prevent a pregnancy, but when they do succeed in preventing pregnancy they do so by means which are proscribed by Catholic moral philosophy.

4) There are two considerations of interest here. One concerns itself with the precise content (morally) of the intended act intrinsic to using the I.U.D. Does this constitute the taking of the life of a Homo? As is well known to the readers, Catholic moral theologians are not in agreement as to whether the Thomistic definition of the soul can be met at this stage of human existence. This is not to resurrect the old theory of mediate animation, but to pay heed to the advances in biology which seem to be zeroing in on the completion of implantation as the beginning of human life. Conception is viewed as a maternal act biologically, a catching onto the child or a taking to oneself of a child (zygote). It is not the purpose of this paper to attempt to resolve this age old argument, but to convey to all interested parties some of the jurisprudential matters involved. The National Right To Life Committee is not qualified to make moral philosophical observations with any expertise; it can, however, throw some light upon the legal and medical parameters of the use of the I.U.D. which will be

discussed with various levels of expertise by Catholics at all levels. Before entering this matter, mention should be made of several other medical matters involved here.

5) An increasingly popular procedure, which started on the West Coast and which is gaining popularity, is the minor surgical procedure known as "menstrual extraction" - a euphemism. It consists of this: every 28 days a woman goes to her doctor who with a tiny syringe and tube sucks out the lining of the uterus. Reports indicate that this is so simple that even now it is being done by women upon one another without seeking the help of a doctor. Several reports indicate that coeds in university sororities now do this on one another, and that women's Liberation leaders are touring the ladies organizations with a demonstration of the technic. It has several appealing things about it. It seems adequately safe to satisfy those doing it. It is quick; it is simple; it is inexpensive. It saves the chore of taking the birth-control pill each day, and avoids the known medical hazards and side effects of the pill. For some women it considerably shortens the duration of the menstrual period and is thus welcome. The medical profession has as yet no accurate data on this technic, and the technic conceivably could become one which for reasons of privacy and economics is removed from medical practice much as scrubbing ones teeth can be done with no help from a dentist.

6) The final matter is the prostaglandins. From time to time the medical researchers have come up with drugs which promise to be effective abortifacients. An early one, methotrexate, was abandoned because it sometimes caused the development of a monstrosity instead of aborting the fetus. Other drugs seeking to cause an adverse effect on the corpus luteum (the part of the ovary which produces the hormones essential to the support of

the early conceptus) are termed luteolytic drugs and are still in the research stage. Of great importance is a class of new drugs termed the prostaglandins. Pregnancy can be interrupted by the administration of this drug intravenously, vaginally or by the intra-uterine (intra-amniotic) route. The Upjohn Company in Kalamazoo, Michigan is the leading researcher in this area and several hospitals in the United States are already using the prostaglandins to induce abortions in clinical trials. The drug seems to be one laden with many adverse problems and it has not yet been cleared by the Food and Drug Administration for public use. Practically no one in the field doubts that it is only a matter of time until vaginal tampons impregnated with prostaglandin will be available as an abortifacient. There is as yet no oral form of the drug, but work is being done to develope an abortifacient which can be taken by mouth.

7) So much for the facts. Now for their implications. First of all, it is apparent that there is no way except by moral suasion that the life of the unborn child can be protected from the mother who wants to rid herself of her unborn child. If the abortive act is simple, cheap, safe, private and quite undetectible, there exists no impediment to her aborting her child with civil immunity.

8) As a corollary, it is apparent that there is also no way by which civil authorities can demonstrate with objective evidence that a given woman's abortion was not spontaneous. There is no criminological method possible by which any prosecuting attorney could prove that a woman who employed one of these methods in the very early weeks of pregnancy did actually kill a real unborn child, a corpus delicti.

9) Furthermore, even if the woman aborted her child after the stage where a recognizable corpus delicti was expelled, it would still be impossible for a prosecutor to show that the abortion resulted directly from the woman's actions. There are no tell-tale traces after these various means have been employed. There is no conceivable prosecutable case except that case where a militant woman confesses to using the abortifacient and then produces the aborted conceptus to the court of her own free will, a not very likely occurence in the ordinary course of events.

10) In another direction, it should be noted that there is no way in which the manufacture and distribution of abortifacient drugs or "extraction" instruments can be regulated so as to make them unavailable to the public. A black market would quickly spring up should the drugs or instruments be made illegal. For example, we are currently completely unable to encompass the use of illegal narcotics in any sector of our society; what makes us think that we could possibly restrict the availability of abortifacient drugs and instruments on a given college campus. The problem lies in the fact that there are perfectly valid non-abortional uses for every abortional drug and instrument, and there is no way that any law could successfully be written to restrict the distribution and use of these materials. To imagine otherwise is naive.

11) The I.U.D. is still another matter. There is not possible any law forbidding manufacturers from making a 35 cent piece of copper coiled in a certain fashion. There is no possible law which can keep women or doctors from buying these coils. There is possible no law which can keep a doctor from placing this coil in a woman's uterus if she requests it, anymore than a law can keep a doctor from piercing a woman's ears for

earrings if she requests it. There is possible no law which can identify the woman wearing one of these coils as a woman who took a human life by preventing the implantation of a zygote. In fact, there is not even possible a way for a skilled physician to demonstrate either to himself ot to a court that the woman is guilty of killing a zygote. The I.U.D., whether moral or immoral, is de facto immune to legal proscription. For anyone to pretend otherwise is to manifest naivete about evidentiary law.

12) Where does this leave us? Quite candidly, the thrust of the Right To Life Amendment is anti-homicidal. As a legal and constitutional matter, its borders are necessarily those of evidence. We cannot escape this in jurisprudence. Because of evidentiary limitations, the Right To Life Amendment cannot protect the unborn from private abortifacient drugs or mechanical instrumentations, no matter how anxious one might be to write a law attempting to protect these privately abortable unborn children.

13) Still another dimension exists. No one in the medical profession entertains any delusions about the future availability of either drug or mechanical measures employed every 28 days by those women who do not want any more children. Of unusual psychological importance is the fact that these measures, if employed faithfully every 28 days, cannot be known even by the woman to be abortifacient for they will be employed prior to that date on which a woman's next menstrual period will have occured (or failed to occur). A woman in her conscience will never have the occasion to know directly and certainly that she did in fact abort a conceived zygote (or blastocyst) and thus it may become a procedure that commends itself to women who would not knowingly employ

an abortifacient had they certain knowledge (as from a missed menstrual period) that they were pregnant. The same can be said of a monthly dose of prostaglandin, and it already can be seen in the use of the morning-after pill. If the woman is still evidentiarily free to consider herself as not being pregnant, she will likely be more prone to consider herself not pregnant than potentially pregnant. While the norms of moral theology might disagree with this type of thinking, nevertheless it has no little appeal to the average woman desperately anxious not to bear another child. This needs no elaboration.

14) What then is the purpose of the Right To Life Amendment? In its broadest scope, the amendment lays down constitutional precedent and principle against public abortion, governmental participation in abortion services, infanticide, euthanasia, senicide and fetal experimentation. It will restrict genetic engineering to therapeutic measures and rule out homicidal selective measures. It will deny public funds to any agency which employs abortifacients as a part of family-planning services, but careful supervision will be needed here; indeed, policing will probably be needed here. These are the most obvious effects of the Right To Life Amendment, and it is not difficult to visualize the penumbra that it will cast protecting all human life. It is not by default of either the framers' intent or of the framers' philosophy that many unborn children will continue to be privately aborted; this results solely from evidentiary considerations as outlined above. If an effective measure could conceivably be drawn up to protect even the life of the privately abortable unborn child, the framers would do so; but facts are facts, and the amendment must seek to do the maximum possible rather than fail to gain passage because it asked the legally impossible, the medically impossible and the constitutionally

impossible.

15) It is of consummate interest to the ordinaries that neither scandal nor misrepresentation of the Church be permitted to occur. While sophisticated Catholics, lay and clerical, can comprehend the intricacies hinted at above, it is quite possible - indeed, already apparent - that not all of the people understand these intricacies. Hence they may be driven to read hypocricy or compromise into what cannot escape being labelled as a "Catholic" amendment by the press and by the pro-abortion forces in the United States. While it is perhaps unavoidable that this occur, it seems to the writer that it might be highly desirable that a meeting be convened in the near future, such meeting to include the Board of Directors of Pennsylvanians For Human Life, Howard Fetterhoff from P.C.C., moral theologians or equivalent representatives from the eight dioceses (if not the ordinaries themselves) and someone familiar with the medical parameters involved. I believe that a fruitful outcome of such a meeting would be a uniformity of understanding concerning the borders of the amendment and an understanding why the borders are where they are. P.H.L. is planning a state-wide seminar on 10-27-73 at Reading, and it would be extremely useful if the meeting could be held prior to that date and a report made available to describe for the faithful the position of the ordinaries toward the amendment. In analysis, neither scandal nor an appearance of compromise can be read into the amendment by the faithful if this meeting does its job completely. The convening of so many fine minds would seem to have a built-in protection from overlooking any occult sources of danger either to the Church or its people.

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