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Critical Abortion Litigation

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CRITICAL ABORTION LITIGATION

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Abortion is a topic that never seems to leave us irrespective of how often or how long it is litigated. Moreover, the issues do not become simpler. Rather, the subject becomes more complex. The two cases argued last week before the U.S. Supreme Court by my colleague, Victor Rosenblum, were quite complex. They involved the Social Security Act, (Title XIX)[1] and no one seems to know much about what it means. In 1977, *Maher*,[2] *Beal*,[3] and *Poelker*[4] decided some very important issues with respect to federal funding of abortions as well as whether hospitals could be forced to provide abortion facilities under the fourteenth amendment. The *McRae*[5] and *Zbaraz*[6] cases, which I will discuss in a moment, will have impact in all of those areas.

I have not prepared a text today, but will gladly supply to anyone who wishes it, an update on all of these cases. Our organization, "Americans United for Life," is preparing a newsletter for circulation which will contain summations and citations of all of the funding cases. We also will supply copies of the briefs in the *McRae* and *Zbaraz* cases to anyone who requests them. Our office is at 230 N. Michigan Ave., Chicago, Illinois, 60601, and if you wish to request them by telephone, the number is (213) 263-5386. Just explain that you want the most recent newsletter or copies of the briefs in *McRae* and *Zbaraz* and we will be glad to supply them.

"Americans United for Life" (AUL) is an educational organization with activities divided into two areas. First, we do educational work, publishing a pamphlet entitled *Studies in Law and Medicine.* We also publish books such as *Death, Dying, and Euthanasia,* and hold educational conferences such as the recent psychological conference on abortion. The conference papers are published and are then available for citation. We

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[1] 42 U.S.C. § 1396(a) (1976 & Supp. III 1979).

[2] Maher v. Roe, 432 U.S. 464 (1977).

[3] Beal v. Doe, 432 U.S. 438 (1977).

[4] Poelker v. Doe, 432 U.S. 519 (1977).

[5] McRae v. Califano, 491 F. Supp. 630 (E.D.N.Y.), *rev'd sub nom.*, Harris v. McRae, 448 U.S. 297 (1980).

[6] Zbaraz v. Quern, 469 F. Supp. 1212 (N.D. Ill.), *stay denied,* 442 U.S. 1309 (1979).

publish a newsletter called *Lex Vitae,* which keeps everyone current on abortion and other life-related issues, not only in America, but around the world. We presently are publishing a new book on abortion, *New Perspectives on Human Abortion,* which will be available in January or February of 1981. We also are preparing a conference on the treatment of the defective child. Abortion has set the ground work for euthanasia—another battle in which we are engaged very heavily. That conference will be held in Chicago on December 6, 1980 and will feature world renowned scholars speaking on a subject of interest to every Pro-Lifer.

Legally, AUL acts as a resource center in abortion and other human life litigation. We collect all of the legislative material, all of the case reports from various parts of the country and keep people in the movement advised. We also have a very active legal defense fund. We maintain four full-time attorneys who do nothing except abortion litigation. Unfortunately, often we learn too late that an abortion case has begun and cannot in any way intervene. We file, perhaps, only *amicus* briefs which are effective only if federal judges read them. In any event, I just attended the European conference on abortion. *Europa Pro Vita* held a "world congress" on abortion and invited representatives of all European nations to discuss the European situation. There is great similarity between the situation in our country and the one in Europe. Although they are about 10 years behind us in terms of many legal developments, abortion is developing in the same way. For example, abortion was made legal in Italy by their Supreme Court upon certain conditions not dissimilar to those which our own Court imposed. The Italian Pro-Life groups are attempting to attack that case on the basis of a referendum, a means not available to us. As in the United States, however, they have different Pro-Life groups, each desiring different language in the referendum. These differences have stalled the completion of the referendum because its language is as essential as the language of a constitutional amendment under our system.

In 1967, England enacted a statute legalizing abortion under certain conditions. It developed into abortion on demand. Recently, Pro-Life proponents in England tried to limit some of the excesses that had developed by proposing a plan which limited abortions after 24 weeks. A private members bill was introduced, but as a result of parliamentary procedures the government prevented the bill from going to a vote in Parliament. I spoke to a lawyer from Holland who said that abortion is absolutely and unequivocally illegal there. Yet, it is absolutely and unequivocally available on demand everywhere. As he listened to the people discussing methods to remedy these situations, he became very frustrated. For example, he heard one person speak about electing Pro-Life members to the government. He noted that in Holland, however, members are not elected to the government, a party is elected. Consequently, members do not reveal

their personal positions on difficult subjects such as abortion. The public votes for a party platform, but none of the parties has anything in their platforms about abortion. He also discussed prosecution of abortionists. Since the law is clear in Holland and since abortion on demand is equally clear, the question was raised: why not have it prosecuted? He explained that only the minister can prosecute, and the minister will not prosecute for abortions. That depressing story can be repeated over and over again. The people in Europe are struggling in their attempt to solve these problems. It is difficult to deal with abortion here, but upon visiting Europe we realize that in America there are ways in which Pro-Life activities can be channeled to produce results. We can elect Pro-Life members to Congress; we can institute lawsuits to produce some kind of social change; we can be active in the courts. Most of those options seem to be unavailable in many of the European countries because of the nature of their governments. A referendum is a good, direct method and perhaps the people in Italy will enjoy success with it.

My topic is critical abortion litigation, and there is still a great deal of critical abortion litigation occurring. I will try to outline some of the cases and, as I said, if you will call our office, we will supply a detailed outline. In *McRae,* Judge Dooling held the Hyde Amendment unconstitutional. Similarly, in *Zbaraz,* Judge Grady declared the Hyde Amendment unconstitutional. These cases are very significant and go far beyond the abortion issue. They have become very significant for a large segment of the American population. In both, our organization, AUL, was involved as a litigant.

In *Zbaraz,* we became involved on behalf of two physicians who were granted standing by the court, and litigated as a party. In *McRae,* we became involved on behalf of two sets of intervenors—three members of the Congress and an individual who was appointed guardian of the unborn child. It was very significant in this litigation to be a party and therefore control the case. We have become expert in the social security and funding cases, having been involved in over thirty, with a record of no wins and over thirty losses. Even those cases where something was accomplished at the trial level were quickly reversed on appeal. It is extremely difficult to litigate within the parameters of *Roe v. Wade.*[7] We must be able to stand before a court and argue the following: given the fact that *Roe v. Wade* has made abortion a fundamental right for a woman, this case is distinguishable. We must try to persuade the court why such and such is not the case and why we should win. Although we sometimes are successful initially, we often fail in the federal courts of appeal.

We have been very successful intervenors, however, having litigated

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[7] 410 U.S. 113 (1973).

at least twelve cases in which courts have permitted us to intervene as parties. Thus, we have created our own precedents and can cite our own cases. Basically, it is simply a matter of convincing the federal judges that fairness requires both sides to be heard. That is as profound as the standing issue is in our courts. The federal judges usually sense at the outset what they will do in these cases, but they have learned (at least in the Midwest) that without us, they do not enjoy a good explication of the issues. To illustrate, the American Civil Liberties Union recently filed a suit against the new amendments of the 1975 Illinois Abortion Act. Initially, a temporary restraining order usually is granted before anyone has had a chance to learn that the case exists. We appeared early and the judge quickly announced that he was aware from seeing other reported abortion cases that without us there would not be a good explication of the issues. Frequently in these abortion cases, the attorney general or the state's attorney is completely lost. Therefore, we write the brief, provide them with it, and they adopt most of it as their own.

In 1977, the Supreme Court decided *Maher, Beal,* and *Poelker.* We considered these to be significant cases. The *Poelker* case allowed private institutions to determine whether they would perform abortions or provide facilities for the performance of abortions. The Court even went so far under *Poelker* as to allow public institutions the same right. *Beal* addressed itself to funding. It indicated that no fundamental right existed for anyone to secure federal money for an abortion or for any kind of medical treatment. What has happened since then?

In *Beal,* one Justice noted that the funding issue was decided on a statutory basis.[8] He said, however, that if the situation were such that a state was depriving women of medically necessary abortions, this whole statutory issue might be different.[9] That statement has given birth to at least thirty cases in state and federal courts and before administrative agencies which ultimately have reached the Supreme Court. Our clever opponents consistently have convinced the courts that the principles enunciated in *Maher, Beal,* and *Poelker* apply only to elective abortions. Any abortion that is medically necessary, they argue, falls outside the parameter of those cases. The issue now before the Court is: must the states fund medically necessary abortions?

The Court will face six issues in *McRae* and *Zbaraz.* Does Title XIX and the federal regulations that have been issued thereunder require all medically necessary abortions to be funded? If so, when the federal government does not reimburse as a result of the Hyde Amendment, are states still required to fund all medically necessary abortions through the

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[8] Beal v. Doe, 432 U.S. 438, 443 (1977).

[9] *Id.* at 444.

use of their own funds? Adjunctly, are states required to pay for all necessary medical procedures?

The last issue I have mentioned has surfaced in abortion cases but goes far beyond the abortion issue. In *Beal,* the Court indicated that a system of cooperative federalism exists between the states and the federal government with respect to Social Security. The states were free to devise a plan for the reimbursement of indigents' medical needs based upon reasonableness. The federal government or the Department of Health Education and Welfare (HEW) also could authorize such a plan. That plan would not require the federal government or the states to fund all medically necessary procedures. It is important to appreciate the difference between what Medicaid now pays and what it would be required to pay if it were to pay for all medically necessary procedures.

For example, one case dealt with the question whether trans-sexual surgery was medically necessary and thus covered by Medicaid. HEW had always maintained that a state or the federal government was not required to pay for all medically necessary procedures. It was only required that a reasonable plan be adopted and followed by the state. HEW changed its position in the trans-sexual surgery case and decided (as indicated in the famous footnote twenty-three in the *Zbaraz* case) that Title XIX contemplates that the state or the federal government, depending upon the reimbursement plan provided, must fund all medically necessary procedures. In the state of Illinois, our attorney general recognized that this requirement would double the cost of Medicaid in our state. Other attorneys general around the country have finally realized the significance of that issue. It is not just whether medically necessary abortions must be funded, but whether all medically necessary treatment must be funded.

The next issue is the statutory effect of the Hyde Amendment.[10] Is it a substantive amendment to the Social Security Act? That is difficult to determine. The Hyde Amendment altered the appropriations bill first passed in 1976. The courts are loathe to conclude that the substantive character of a statute can be changed by an amendment to an appropriations bill. The First, Third, Seventh, Eighth, and Tenth Circuits have all held that the Hyde Amendment is a substantive amendment to the Social Security Act. The reason is simple. There is a practical conclusion that one reaches when studying this issue. The federal courts have consistently decided that the states must fund all medically necessary abortions under Title XIX. Having done so, they then try to determine the effect of the Hyde Amendment because the federal government has determined that it will pay for only a small number of these abortions. This means that the

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[10] Pub. L. No. 94-439, 90 Stat. 1434 (1976).

costs incurred by a state will increase dramatically because it will now pay for most of the costs itself. Under the theory of cooperative federalism, the federal judges have said "it is not practical, it is not reasonable, we will do this instead: we will call the Hyde Amendment a substantive amendment to Title XIX and, therefore, the states need fund only up to the extent of the Hyde Amendment. If they want to do more, they are free to do so, but they are required to fund to the same extent that the Hyde Amendment funds." The cases are then sent back for consideration by the trial court as to whether the Hyde Amendment is constitutional.

The *Grady* ruling is significant to us as lawyers because we were in the anomalous position of appearing before the court and reminding it that the Hyde Amendment was not at issue in the case, that it was not in the pleadings, that there was no relief requested against it, and that there were no requests by the plaintiffs that its constitutionality be examined. Indeed, even the plaintiffs reminded the judge after the remand order that they were seeking no relief against the Hyde Amendment. Nonetheless, the government was notified that the Hyde Amendment or a federal statute was at issue. They intervened, and the court held that the Hyde Amendment was unconstitutional. One must realize how strange it feels to lose an issue which is not even in the case, which is not in the pleadings, and which the other side does not contest. They agreed because of a tactical decision. If they struck down the state statutes as unconstitutional, but convinced the court to agree that the statutory side of the question requires the states to fund, they win—because all abortions would be funded. They wanted to avoid a collision with the Hyde Amendment. Why? Because the Hyde Amendment involves Congress and most cases were being litigated for the plaintiffs by congressionally funded organizations. They are also prohibited from litigating abortion cases. Nonetheless, these federally funded organizations have brought about this result.

The last issue concerns Congress' power over the purse strings and whether the Hyde Amendment is constitutional. There must be thirty decisions in the lower federal courts and in the federal appellate courts in this area, but only one, *Doe v. Matthews,*[11] a New Jersey case, concerns this particular issue. In *Doe,* Judge Buinno referred to the issue of appropriations and the significance of an appropriations bill. Article I of the federal constitution states that "no money shall be drawn from the treasury but in consequence of appropriations made by law."[12] Even in cases where we inserted the appropriations issue in the briefs, it has never been examined by the courts. It was used and argued, however, very promi-

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[11] 420 F. Supp. 865 (D.N.J. 1976).

[12] U.S. CONST. art. I, § 9, cl. 7.

nently in the briefs before the United States Supreme Court. Basically the issue is this: during the history of our Republic, no appropriations bill has ever been held violative of any article of the Bill of Rights. The famous *Lovett* case[13] comes close but is clearly distinguishable because it involved an *ex post facto* bill. In addition, even in those cases where the courts have attacked the validity of an appropriations bill, they have never authorized a remedy.[14] These decisions have never said that Congress must appropriate money to correct what we think is wrong. That issue is now before the Court. So the Court must face a quandary: is the Hyde Amendment a substantive amendment to the Social Security Act or is it a "mere appropriations" act?

Our argument is that it is both. It is an appropriations bill because it states that it involves only appropriations. By its own terms it only lasts for a year and affects only the expenditure of funds. Therefore, it is governed by article I, section nine, clause seven of the Constitution. The question the Supreme Court has to face is whether we will go so far beyond the abortion issue as to radically change the relationship of these equal arms of the government. Will the Court attempt to compel Congress to appropriate funds? Is the appropriations power subject to equal protection? If so, what does that mean? We talk about the problems of opening a Pandora's box with all of the litigation in our country. What would happen if, for example, the appropriations power of Congress were subject to equal protection or substantive due process under the fifth amendment? Would that mean that everyone would be taxed at the same rate, or that Congress could not prefer one group over another? These are all questions the Court must wrestle with when it attempts to decide this case. The case has gone far beyond the abortion issue presented to the Court and involves issues of great magnitude as far as the country is concerned.

As a matter of fact, an *amicus* brief was filed by John Noonan, Bill Ball, and several other lawyers representing hundreds of members of Congress who took a very strong stand on appropriations. More than a majority, 238 members of the House of Representatives signed the *amicus curiae* brief. A direct confrontation is developing between the legislative and judicial branches in this case. In addition, there are not many cases in which members of Congress have appeared before the Court arguing in support of the constitutionality of legislation which they had enacted. The Hyde Amendment has even greater significance for the abortion issue. It has become the subject of great debate in the Congress since 1976. There is, however, a consensus developing with respect to the Hyde

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[13] United States v. Lovett, 328 U.S. 303 (1946).

[14] Allen v. Smith, 173 U.S. 389 (1899); United States v. Price, 116 U.S. 43 (1885).

Amendment. It is now being passed with less difficulty than in the past. What has also developed is a consciousness in the minds of those legislators about the issue and the nature of the Hyde Amendment. If the Court were to hold that the language of the Hyde Amendment, which prohibits the expenditure of federal funds for abortions, was unconstitutional under either the fifth or the fourteenth amendment, that would be a great blow to the development of a constitutional amendment in Congress. As a legal matter, this is not true because if an amendment is enacted changing the Constitution, it is changed. As a practical matter, if the language appears to be unfair, a fourteenth amendment analysis would be required. If it violates the fourteenth amendment, then supposedly it is "unfair." This would be a great blow to the movement itself and, consequently, to the handling of these cases. We have determined that the first issue of the Pro-Life movement is to win the Hyde Amendment. Thereafter, the issue is whether a state must pay for abortions. In our opinion, if the Court holds that the Hyde Amendment is constitutional, but finds that under Title XIX states still must fund the abortions that the federal government does not, it is still a tremendous victory. Title XIX can be changed because it is only a statutory enactment—you know how difficult it is to try to change the Constitution. Thus, the case has great significance in the Pro-Life movement.

There are pending issues before the Court concerning other aspects of abortion litigation. There are eighteen to twenty cases around the country now and I am going to discuss just a few. We have a case before the Seventh Circuit Court of Appeals and are awaiting a decision. It involves six basic issues, the most important of which is informed consent. We developed a new idea about informed consent in light of the older cases where we lost on this issue. Incidentally, the case is also interesting for those who have been litigating abortion cases because it is one of the few times that the American Civil Liberties Union has been an appellant in a case. The informed consent issue that we developed is this: every woman who is to have an abortion must be provided with a small publication which will provide her with information about alternatives to abortion. It will list all of the places where she can get public and private help. It also will provide developmental knowledge of the unborn. The bill, which has been preliminarily held constitutional by the trial court, requires the physician to present this document to the woman. That, coupled with a 24 hour waiting period, which was also upheld, gives some opportunity for counseling in the opposite direction. Another aspect of the bill which has been upheld is a provision involving fetal pain. The physician must advise the woman whether the unborn has proceeded far enough in its development to perceive pain through an abortion, and then must offer the woman analgesics for the child. Analgesics need not be taken, nor need they be sold—just offered. Additionally, the woman must

be told, if prescribed a contraceptive such as the pill or an IUD, whether it is an abortifacient and if so, what effect it has.

Another aspect of abortion development evolved in 1965 and 1966 when Planned Parenthood argued vociferously that the IUD, for example, was not an abortifacient. In this case we can argue that it certainly is and that is why this section of the statute should be declared unconstitutional.

A Nebraska case is pending in the Eighth Circuit which struck down a 48-hour waiting period. It is being appealed although we do not think it should be. Forty-eight hours probably will not stand scrutiny. Twenty-four hours has. The Fifth Circuit has two cases. One involves notice to spouses in all cases. Again, this is another parameter which has been decided by the courts. Spousal consent probably cannot be required, but what about spousal notice?

Spousal notice can be coupled with a 24-hour waiting period and therefore, provide reasonable grounds to require that the husband be notified. There is another case in which parental notice is being litigated, *H.L. v. Matheson.*[15] These are all issues which will be before the Supreme Court in very short order.

The *Mahoning Women's Center v. Hunter*[16] case is tremendously important for all of us. It is not on appeal, but the plaintiff has filed a writ of certiorari concerning his attorney's fees. Attorneys' fees are quite a problem in this kind of litigation for an organization such as ours, or, indeed, any organization that fights abortion through litigation. Take, for example, the *McRae* case from New York. The record was approximately 3,000 pages long—the case lasted 3 years at the trial level and involved many witnesses. If the plaintiffs are successful in having the Hyde Amendment declared unconstitutional they undoubtedly will be seeking attorneys' fees. One sees a potential for staggering fees being assessed against not only the state, but also against intervenors who have been held liable under 42 U.S.C. § 1988 for the payment of attorneys' fees in this kind of litigation. So the *Mahoning Women's Center* case is very important. Attorneys' fees were denied and there is now a writ of certiorari before the Supreme Court. We contend that we have a first amendment right to litigate these issues, and if we are going to be struck with the payment of very large attorneys' fees at the end of the case, our first amendment rights certainly are in jeopardy. Moreover, we will be prevented from litigating these cases because of the difficulty of winning within the parameters of *Roe v. Wade,* even without considering the issue of payment of attorneys' fees.

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[15] 604 P.2d 907 (Utah 1979), *prob. juris. noted,* 445 U.S. 903 (1980).

[16] 610 F.2d 456 (6th Cir. 1979), *vacated and remanded,* 447 U.S. 918 (1980).

Thus, section 1988 has had a tremendous impact on civil rights litigation. Five years ago, before the fee changes, a plaintiff who initiated a suit would conduct reasonable discovery and work hard to settle. Now, however, the opposite occurs. Because of these amendments, a typical civil rights case results in a 6-foot stack of discovery depositions. All kinds of discovery will be permitted because of the way the courts assess attorneys' fees and because many organizations around the country do nothing but litigate under these statutes.

Another very interesting case is the Virginia sit-in case. It is interesting because it shows where we are and where we are going. There were two or three Virginia sit-in cases where the local prosecutor decided to discontinue prosecuting the case or where the case was dismissed by the trial judge. The picketing of the abortion clinics continued and the American Civil Liberties Union went into federal court to enjoin the so-called harassment. It even went so far as to sue not only the prosecutor but also the judges to enjoin them from holding that the defendants had a defense of necessity and, therefore, could be found not guilty. Visualize the American Civil Liberties Union selecting between the civil liberties of one side versus the other, making a substantive judgment that the civil liberties of the physicians in the abortion clinics supersede the rights of anyone to have a first amendment right of association or demonstration. The district court granted an injunction against the demonstrators. Violation of the injunction, of course, could lead to contempt of court. There is another demonstration case going on in Fort Wayne. The abortion litigation goes on and on.

For us, of course, the *McRae* and *Zbaraz* cases have the most significance. They go far beyond the parameters of abortion litigation. They affect the very structure of Congress and the courts. I frequently am asked whether I think we will win those cases. The answer is this: in 1973 abortion was legalized, and anybody who is familiar with the issue is aware of its significance in terms of population policy, the retarded, and the mentally ill. If you can destroy whole, healthy, hearty citizens, you probably can destroy others. But, the implementation of abortion as a matter of public policy is another side of that coin. To make it legal and leave it in the private sphere is one thing, which is to say, it must be funded by private money. Declaring the Hyde Amendment constitutional would do two significant things. First, it would indicate that something is wrong with abortion. It would attach a certain amount of opprobrium to an otherwise legal act. Can those who need it as a form of public policy endure criticism by the very institution in our government which made it legal? Secondly, and even more significantly, those who want abortion legalized and were successful in having it legalized must have abortion as a form of public policy. To have it legal and let it remain in the private sphere is one thing, but certainly inadequate for the future as far as they

are concerned. What they need, and what they desire is to have abortion as a form of public policy, a form that the government can use when it needs to use it. If it cannot be funded publicly because it is interdicted by the Hyde Amendment or by state statutes which are constitutional, then the whole use of this tool as a form of public policy is defeated. So, from their point of view, these are very important cases, probably more important than *Roe v. Wade* and *Doe v. Bolton*.[17] Without this as a public policy tool, they feel they have accomplished very little. If we look at the cases that way, we begin to understand what is at issue, and we begin to understand the pressure that the Court is going to feel in deciding these two cases.

Thank you.

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[17] 410 U.S. 179 (1973).