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Special Committee on Federal and State Affairs

Hearing Date: October 30, 2019

Room: 346-S

Topic: Discussion of issues and legislative options relating to the legality of abortions

Good morning committee. Thank you Chairman Barker and committee members for this opportunity to testify. My name is Nancy Lusk, and I am a state representative from northern Overland Park, and I have had the honor of representing the 22<sup>nd</sup> Kansas House District for the past seven years.

Today I wish to share a point of view that I have not heard expressed previously in legislative debates on abortion, but which I believe is related to the stated purpose of the committee meeting today which is the "discussion of issues and possible options concerning the legality of abortion following the Kansas Supreme Court's ruling on the *Hodes & Nauser, MDs, P.A. v. Schmidt* case."

To my knowledge, at present there is only one constitutional amendment resolution proposal related to this issue which has been introduced this term, HCR 5004. The resolution's stated intent is to "guarantee the inalienable rights, equal protection and due process of law of every human being from the beginning of the biological development of that human being, including fertilization."

The fact that the resolution has the sponsorship of 21 House legislators alone makes it relevant to today's discussion. And I believe that a consideration of that resolution proposal can serve as a good springboard to the bigger discussion of things the legislature needs to think through concerning the abortion referendum. In my testimony today I wish to explain why I do not think an approach like HCR 5004 is merited or necessary.

**Exodus 21:22-24** During my time as a state representative I have wondered if my pro-life constituents and friends back home have ever thought, "How can she vote pro-choice and call herself a Christian?" And yet surprisingly, it is a religious argument that has left me in complete doubt that personhood or "life" begins at conception or fertilization. My doubt about when an individual, full-fledge life starts began some years ago in a conversation about abortion with a dear friend from church. She told me what the Bible says in Exodus 21:22-24:

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22 When people who are fighting injure a pregnant woman so that she has a miscarriage but no other injury occurs, then the guilty party will be fined what the woman's husband demands, as negotiated with the judges. (Common English Bible)

23 But if the woman herself is injured, the punishment shall be life for life, . . . (Good News Translation)

24 . . . an eye for an eye, a tooth for a tooth, a hand for a hand, a foot for a foot, a burn for a burn, a bruise for a bruise, a wound for a wound." (several translations)

This passage raises the question if personhood begins at conception with the creation of a 100% human life, then why isn't the punishment for causing a miscarriage the same as for the death of a woman – a life for a life? The whole point of the eye-for-an-eye verse of Exodus 21:24 is that the punishment should equal the loss that was caused, but in 36 translations I found at [www.Biblestudytools.com](http://www.Biblestudytools.com) the Bible apparently does not consider the fetus equal to a full-fledged life. Exodus 20:13 says, "*Thou shall not murder,*" but if an aborted fetus does not meet the "life for a life" standard, how can there be a murder?

It turns out that I am not alone in such a perspective. Through the writings of Rev. Scotty McLennan I have found that this point of view has a fair amount of Judeo-Christian company. For the early history of the Catholic Church, its early Popes and other leaders, such as Saint Augustine, Saint Jerome, and St. Thomas Aquinas held that the ensoulment happened well into the pregnancy, not before the point of the "quickening," when a woman first feels fetal movement. Many mainline Protestant denominations have issued pro-choice proclamations over the past forty years. And the mainstream Jewish position is that personhood begins at birth and is supportive of abortion with few limits.

First Lady Barbara Bush is another example. Notes from her personal diaries on the subject were recently discovered by her biographer. These are her words: "When does the soul enter the body is the #1 question. Not when does life begin, as life begins in a flower or an animal with the first cell. So, the question is does the life begin (soul entering the body) at conception or at the moment the first breath is taken? . . . What do I feel about abortion? Having decided that the first [independent] breath is when the soul enters the body, I believe in Federally funded abortion. Why should the rich be allowed to afford abortions and the poor not?"

**Genesis 2:7** Perhaps Barbara Bush was inspired in her belief by the beautiful imagery of the biblical passage Genesis 2:7: *And the LORD God formed man of the dust of the ground, and breathed into his nostrils the breath of life; and man became a living soul (King James Version)*. To me the verse sounds like a description of God delivering a soul into that body with His breath, and there are several other Bible verses that connect breath and human life. The implication of the verse is the existence of the body alone does not make up a person – it needs a soul.

**Jeremiah 1:5** I realize that there are pro-life critics online who suggest this interpretation of the Exodus verses is not correct. They counter with other Bible verses to defend their belief that scripture supports the idea that a fertilized egg is a human being. A good example of those verses is Jeremiah 1:5 (New International Version) – *Before I formed you in the womb I knew you, before you were born I set you apart; I appointed you as a prophet to the nations.*

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There is an undeniable beauty in the vision of verses like Jeremiah 1:5 which I respect, but the pro-life interpretation of Jeremiah 1:5 is different than mine own because I believe the “you” that God is speaking to in the verse is the immortal soul of one’s being, not the physical body of one’s being. “Before I [delivered your soul] in the womb, I knew [your soul].” Afterall, it is the gift of eternal life that will survive after death, not one’s physical body.

**Explanation of Rationale** I am not eager to set up a battle of dueling interpretations of these Bible verses (because it can be difficult, if not impossible, to deal with apparent inconsistencies in the meaning of Bible verses), but I feel a need to explain why the “I formed you in the womb” verses do not discredit the rationale I take from Exodus 21:22-24.

First, if one looks at the totality of the three dozen translations, and not just a single cherry-picked translation, of the Exodus 21:22-24 verses at [www.Biblestudytools.com](http://www.Biblestudytools.com), the predominate meaning of the verses in total is that they are speaking of a miscarried/aborted fetus, and that the fetus does not meet the “life for a life” standard.

Second, there are other Biblical scripture stakeholders in this debate – people whose faith is also based on the Old Testament – mainstream Jews. Many have a strong adverse reaction to the pro-life interpretations to verses like Jeremiah 1:5. As reported in a USA Today article<sup>i</sup> by Lindsay Schnell, a [Chicago rabbi, Danya Ruttenberg](#), finds such interpretations problematic and even insulting: “It makes me apoplectic. Most of the proof texts that they’re bringing in for this are ridiculous. They’re using sacred text to justify taking away my rights in a way that is just so calculated and craven. . . . It’s not just that the U.S. shouldn’t be deriving law from poetic language. It’s that the Jewish tradition has a distinctly different reading of the same texts. While conservative Christians use the Bible to argue that a fetus represents a human life, which makes abortion murder, Jews don’t believe that fetuses have souls and, therefore, terminating a pregnancy is no crime.” The view Ruttenberg expresses is the traditional viewpoint of Jewish law and is based on several key texts including Exodus 21:23 and Genesis 2:7.

It is of note that Israel has some of the most liberal abortion laws in the world. Each woman in the Israeli military is given at least one free abortion at tax-payer expense if she wants one. In deciding who may have the superior edge in interpreting the Bible, it is good to remember the Israelites are a people who have Hebrew as their national language.

A third reason is the following. At best, the apparent conflict between the two viewpoints – the Pro-life interpretation that the fetus is a “life” versus the alternative interpretation that a fetus is not yet a full human being – could be said to be a draw, but that draw that still leaves much reasonable doubt.

Typically when reasonable doubt exists in a case, the law in the U.S. weighs on the side of innocence for the accused. We have a high evidentiary criminal law standard in this country – for example, for a conviction in a jury trial to be decided all twelve jurists have to agree, not a majority or even 11 to one. Therefore, given the unknowns, the compromise of Roe V. Wade does not seem unreasonable because it leaves the individual with the freedom to decide rather than having that freedom taken away by the government.

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- First trimester: The choice is left to the woman (less than 10% of abortions happen after the first trimester).
- Second trimester: It is still a gray area, because the development of coordinated brain activity required for consciousness does not definitely occur until around 24-25 weeks in the third trimester, but the state has a right to regulate medical procedures in this trimester to protect the health of the mother.
- Third trimester: The potential life has become viable, and the state has a right to protect that potential life by prohibiting abortion except to preserve the life or health of the mother. In the current public debate it often gets forgotten that Roe V. Wade does NOT unconditionally sanction abortion in the third trimester. If two lives are at stake, it seems reasonable after doing everything possible to save both.

Before I can endorse government restrictions to take away reproductive choice away and deny a woman critical health care, I have to be convinced beyond a reasonable doubt that it is the right thing to do. No one knows with certainty when ensoulment takes place, and the inability to know the time when the soul will enter a fetus leaves enough reasonable doubt that it cannot definitely be said an embryo/fetus qualifies as a full legal entity.

When an issue falls into the unknowns, I favor of leaving power with the individual instead of allowing government to impose its will. The capacity to decide for oneself, to be self-governing without unnecessary interference from government, is an essential component of freedom.

And to me it does not seem contrary for a Christian to believe that the moment of full “personhood” happens is when the soul enters the sacred fetal body that has been forming to receive it. Fortunately, not knowing the “when” of ensoulment does not diminish the miracle of it.

**No consensus of the religious** I came across the following chart of American adult viewpoints on the legality of abortion by religious groups, and frankly it surprised me. The public debate in the media and on social media gives the impression that abortion is a settled question amongst those who are religious. This chart by the Pew Research Center shows, on balance, there is no definitive consensus among people of faith, not even Catholics.

I do not mean to suggest that we should solve this complicated and difficult moral and ethical issue by polling. But being on the side which is sometimes unfairly accused of being “evil” on the abortion issue, it was a good reality check that, despite the volume of the rhetoric, the pro-life position is not as dominate among religious people as it seems in the public discourse.

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## Americans' views on abortion, by religious group

% of U.S. adults in each religious group who say that in all or most cases, abortion should be ...

	Legal	Illegal	DK/ ref.	
Unitarian Universalist	90%	8%	2%	
Atheist	87	11	2	
Agnostic	87	11	2	
Jewish	83	15	2	
Buddhist	82	17	1	
Episcopal Church	79	18	2	Mainline
United Church of Christ	72	22	6	Mainline
Hindu	68	29	3	
"Nothing in particular"	67	29	5	
Presbyterian Church (U.S.A.)	65	30	4	Mainline
Evangelical Lutheran Church in America	65	32	2	Mainline
African Methodist Episcopal Church	64	30	7	HBP*
United Methodist Church	58	38	4	Mainline
<b>All U.S. adults</b>	<b>57</b>	<b>40</b>	<b>3</b>	
National Baptist Convention	57	37	6	HBP*
Anglican Church	56	38	5	Mainline
Muslim	55	37	9	
Presbyterian Church in America	54	39	7	Evangelical
Orthodox Christian	53	45	1	
Catholic	48	47	5	
American Baptist Churches USA	47	48	5	Mainline
Lutheran Church-Missouri Synod	46	51	3	Evangelical
Seventh-day Adventist	42	54	4	Evangelical
Church of God in Christ	41	53	6	HBP*
Churches of Christ	36	61	3	Evangelical
Southern Baptist Convention	30	66	4	Evangelical
Mormon	27	70	2	
Church of the Nazarene	27	70	3	Evangelical
Assemblies of God	26	71	3	Evangelical
Church of God (Cleveland, Tenn.)	20	77	4	Evangelical
Jehovah's Witness	18	75	7	

\*Historically black Protestant tradition

Note: Figures may not add to 100% due to rounding.

Source: Data for all U.S. adults from survey conducted June 8-18, 2017. Data from all religious groups from 2014 U.S. Religious Landscape Study, conducted June 4-Sept. 30, 2014.

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**Mother's life at risk** Some pro-life advocates seek to prohibit abortions in any and all circumstances like the founder of Live Action, Lila Rose. They are critical of the notion that any legitimate medical situations exist where the mother's life would be enough at risk to warrant an abortion. I disagree – serious emergencies during pregnancies do exist that endanger the life of the mother. Women have died when denied an abortion. Here is an example:

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[Savita Halappanavar<sup>iii</sup>](#) was a pregnant woman from India living in the Republic of Ireland in 2012. Seventeen weeks pregnant and experiencing back pain, she checked into a hospital for help. She was discharged without a diagnosis. Later she returned the same day complaining of vaginal pressure and was found to be having a miscarriage. She was admitted to the hospital. After midnight her water broke, but the fetus did not come out. She discussed the possibility of an abortion with the consulting physician, but the medical staff refused to perform an abortion, according to Irish law at the time. She then developed sepsis, had a cardiac arrest, and died at the age of 31. Her death became a focal point of public outrage against the abortion law in Ireland and was used as a rallying cry to repeal it with The Protection of Life During Pregnancy Act.

If ever there was a country thought to have settled the abortion question, it was the Republic of Ireland, a predominately Catholic nation. Yet in 2018 they voted to change their law to allow patients access to a free and legal termination if their pregnancy is no more than 12 weeks. No longer seen as a black and white issue of protecting the “unborn,” the vote was 66.4% to 33.6%.

There are other examples of real risks with pregnancy. Women with heart disorders like severe pulmonary hypertension, severe aortic stenosis and severe mitral stenosis. They are [advised by their physicians to terminate their pregnancies<sup>iv</sup>](#) as early as possible to avoid risk of death.

My own sister had a complication of concern. Norma had a C-section and the delivery of her child went fine but an area of Norma’s uterus wall had thinned out significantly. Her obstetrician had a great deal of difficulty when he sutured the uterine incision – think of trying to sew up tissue paper. He minced no words in saying that Norma must never get pregnant again because she was at a very high risk to experience a uterine rupture before she would be able to carry a future baby to term, and it would be seriously life-threatening to both her and a future fetus. Fortunately, my sister did not get pregnant again thanks to birth control, but if she had, the morning-after abortion pill would have been a live saving solution – but a solution that would be banned if HCR 5004 was in effect. In light of her situation and what can happen with other high-risk situations in other women’s pregnancies, the Kansas Supreme Court’s ruling on personal autonomy makes sense.

**Other questions: philosophical, biological and legal** I believe there are still many more philosophical and biological questions than what I have been able to cover in this testimony that should be discussed before the determining the illegality of abortion, such as the following list: the natural spontaneous abortions of 50% of zygotes, the timeline of zygotes that split to become identical twins, fertilized eggs that grow into tumors, the vanishing twin syndrome, conjoined twins – especially dicephalic parapagus twins and parasitic twins, organ transplants, and the overstated claim that there is scientific proof that human life starts with conception.

Locking in the definition of “life” at the stage of a fertilize egg sets up many ethical dilemmas. This link presents several ethical scenarios worth pondering on the question of when life begins and when it is permissible to sacrifice one for the benefit of another: [Conjoined Twins: Philosophical Problems and Ethical Challenges<sup>v</sup>](#)

Other relevant questions involve how the law will define the specifics of the crime of abortion. If this committee decides to make a recommendation to the legislature to take up writing an abortion



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amendment referendum next session, please recommend that they also think through the possible legal and budget ramifications. Here are some suggestions:

- Who will be held responsible? If an abortion is to be considered murder, then it makes sense to hold all responsible for the abortion accountable. Otherwise the judgement/claim that abortion is murder is minimized.
- If abortion is to be defined as murder, what legal category of criminal homicide would it be? Capital murder with malice? First-degree murder that is intentional and premeditated? Involuntary manslaughter which is reckless disregard for life but doesn't involve malice aforethought?
- What should the sentencing guidelines be for those convicted of abortion? A maximum punishment of life in prison without parole for the woman, the doctor and anyone directly involved in an abortion would probably be difficult to legislate, but anything less would seem to indicate that abortion is not murder after all.
- Looking forward, will changes to the legality of abortion affect the size of prison populations and the amount of revenue needed to fund corrections in the state?
- If a fetus has full legal rights from the time of conception or fertilization, will the fathers have to provide financial support for a fetus?
- Will the constitutional referendum of Kansas abortion include language dealing with exemptions in cases of rape, incest or to protect the life of the mother?

**Closing** As this committee considers your recommendations to the Legislature of its options in responding to the Court's decision, I want to discourage an extreme approach like HCR 5004. To assign the beginning stages of the biological development with the complete moral and legal status of a person would be an overreach of government. I fear we may get to a place where miscarriages will be criminalized. It is not a far-fetched idea – not long ago a bill<sup>vi</sup> was introduced in the Georgia which would have required that all miscarriages be investigated by law enforcement and women would become felons if they could not prove that there was “no human involvement whatsoever in the causation” of their miscarriage.

Abortion is a thorny issue because certain circumstances in a pregnancy can pit one life against another, and thus pit one set of rights against another set. I see a somewhat ironic parallel between advocates of 2<sup>nd</sup> Amendment gun rights and pro-choice women because both groups have a strong distrust of expanding government's authority over individual liberty and one's autonomy.

Please know that I have no animosity towards anyone who holds a different view on abortion from the one I have expressed here today. Quite the contrary, I would very much like to encourage further dialogue. The journey to clarity starts by sharing questions. Let's talk.

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<sup>i</sup> <https://www.usatoday.com/story/news/nation/2019/07/24/abortion-laws-jewish-faith-teaches-life-does-not-start-conception/1808776001/>

<sup>ii</sup> <https://www.pewresearch.org/fact-tank/2018/10/17/nearly-six-in-ten-americans-say-abortion-should-be-legal/>

<sup>iii</sup> [https://en.wikipedia.org/wiki/Death\\_of\\_Savita\\_Halappanavar](https://en.wikipedia.org/wiki/Death_of_Savita_Halappanavar)

<sup>iv</sup> <https://www.merckmanuals.com/home/women-s-health-issues/pregnancy-complicated-by-disease/heart-disorders-during-pregnancy>

<sup>v</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4882632/>

<sup>vi</sup> <https://www.motherjones.com/politics/2011/02/miscarriage-death-penalty-georgia/>