



Office of Policy Development
United States Department of Justice
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Washington, D. C. 20530

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FROM: **Lisa R. Graves**
Counsel

FAX: **202.353.9164**
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PAGES:

RE: *Unborn Victim's Act*

MESSAGE:

Draft for Bfbs 4:30 PM.

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Henry Hyde
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 2436, the "Unborn Victims of Violence Act of 1999."

Section 2 of H.R. 2436 would make it a separate federal offense to cause "death or bodily injury" to "a child in utero" in the course of committing any one of 68 enumerated federal crimes.¹ The punishment for the new crime under H.R. 2436 is the same as if the harm had been inflicted upon the "unborn child's mother," except that the death penalty is not permitted. Section 3 of H.R. 2436 would make substantively identical amendments to the Uniform Code of Military Justice.

The Justice Department strongly objects to H.R. 2436 as a matter of public policy and also believes that in specific circumstances, illustrated below, the bill may raise a constitutional concern. The Administration has made the fight against domestic violence a top priority. The Violence Against Women Act (VAWA), which passed with the bipartisan support of Congress in 1994, has been a critical turning point in our national effort to break the cycle of domestic violence and sexual assault. H.R. 2436, however, is a poorly tailored response to violence against pregnant women. Indeed, 66 of the 68 crimes enumerated in the bill have nothing to do with domestic violence. Our three main objections are described below.

¹ The enumerated crimes cover a broad range of activities -- from assault or murder within United States jurisdiction, 18 U.S.C. §§ 113-115, 1111-1119, to damaging religious property, 18 U.S.C. § 247, and animal enterprise terrorism, 18 U.S.C. § 43.

First, H.R. 2436 provides that punishment for a violation shall be the same as the punishment that would have been imposed had the pregnant woman herself suffered the injury inflicted upon her fetus. While the Department agrees that some additional punishment may be warranted for injury to pregnant women, H.R. 2436 would subject a defendant who caused the miscarriage of a three-week old embryo to the same punishment he would face if he had killed a 30-year old woman. H.R. 2436 can therefore trigger a substantial increase in sentence as compared with the sentence that could otherwise be imposed for injury to a woman who is not pregnant.

Second, H.R. 2436 expressly provides that the defendant need not know or have reason to know that the victim is pregnant. The bill thus makes a potentially dramatic increase in penalty turn on an element for which liability is strict. As a consequence, a police officer who, with a slight amount of excessive force, places a female suspect in a police car and thereby causes her to miscarry -- without knowing or having any reason to believe that she was pregnant -- could be subject to mandatory life imprisonment without possibility of parole, even though the maximum sentence for such use of force on a non-pregnant woman would be 10 years. This approach is an unwarranted departure from the ordinary rule that punishment should correspond to culpability, as evidenced by the defendant's mental state.²

Third, H.R. 2436's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of federal statute. **To the extent such an approach might be taken as a declaration of federal "policy" that life begins at conception, it would gratuitously plunge the federal government into one of the most--if not the most -- difficult and complex issues of religious and scientific consideration and debate. Any doubt as to that point should be resolved by looking at the variety of different positions taken by States on this issue. Such an approach is unnecessary to the drafting of legislation that would punish knowing or intentional violence that could harm a pregnant woman and her fetus. [Not yet approved].**

² H.R. 2436 also could be read to impose two punishments for the same injury. Under the newly created § 1841(a)(2)(C), intentional injury to the "child in utero" is to be treated as murder or manslaughter, but the bill does not specify whether this treatment supplants or supplements H.R. 2436's default punishment - the punishment the defendant would receive had he injured the pregnant woman.

Our policy concerns with H.R. 2436 are exacerbated by the likelihood that the bill will yield little practical benefit. Because the criminal conduct that would be addressed by H.R. 2436 is already the subject of federal law (since any assault on an "unborn child" cannot occur without an assault on the pregnant woman), H.R. 2436 would not provide for the prosecution of any additional criminals. At the same time, prosecutors proceeding under H.R. 2436 would be likely to encounter difficulty collecting evidence to support their prosecutions. For instance, the prosecutor would have to establish that the defendant's conduct "cause[d]" the injury -- given the inherent risk of miscarriage and birth defects that occur absent any human intervention, causation may be very difficult to establish.

Finally and critically, the drafters of H.R. 2436 are careful to recognize that abortion-related conduct is constitutionally protected.³ The bill accordingly prohibits prosecution for conduct relating to a consensual abortion or an abortion where consent "is implied by law in a medical emergency."⁴ Without this exception, the bill would be plainly unconstitutional. Including the exception does not, however, remove all doubt about the bill's constitutionality. The bill's exception for abortion-related conduct does not, on its face, encompass situations in which consent to an abortion may be implied by law (if, for example, the pregnant woman is incapacitated) even though there is no medical emergency. In this situation, the bill may unduly infringe on constitutionally protected conduct.

For these reasons, we strongly oppose H.R. 2436. Thank you for this opportunity to present our views. The Office of Management and Budget has advised us that from the standpoint of the Administration, there is no objection to submission of this letter. Please do not hesitate to call upon us if we may be of further assistance.

Sincerely,

³ See Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood v. Casey, 505 U.S. 833 (1992).

⁴ The bill also prohibits prosecution of any persons for medical treatment of the pregnant woman or her unborn child or any woman with respect to her "unborn child."

Jon P. Jennings
Acting Assistant Attorney General

cc: Honorable John Conyers, Jr.
Ranking Minority Member

for
VOWA
what we wd sup.

6/6/68

bill does not appear
to be designed
to address real life
violence against poor
women

→ If Cong. is
serious
about
JAWA
which is

impractical & poorly tailored

part of
Crimin Bill. x y z

TONY

tan

repeatedly

This bill does none of that
serious concerns.

substitute —
old VOWA.

street liability issue.

public knowing & culpable violence.

collective

* Adverse 53496

* Brod.

fax
51005

9/8/99 Conf call

expectation - valuing sub for person on corner &
floor

sub: ap offense strict liability offense
no intent requirement - liability issue.
no victim status for fetus

intent to cause harm to woman nec.
if caused.

2 Iowa 2261, 2261(a)

Compens - environ, health care crimes add'l

we would be able to support substitute

— couldn't align w/ NARAL



declaration that life begins at conception - not
- state interest in life or post.

crim

life is defined

*



implied in the 2261a def
of crime is a
fact notion about
when life begins
this notion causes
problems

and causes numerous
policy considerations
which demand careful review

9/7/99 Conf

Lofgreen -

staff with -
Jind.

substitute - don't have it yet. - when progress

focusing
on
women

provide fed crime where there is an
~~interruption~~ ^{interruption} ~~exception~~ ^{for interruption} penalties
up to 25 ~~years~~

life for termination

VAWA

known or shd have known. *

not more than 1
nearly full Dem support.

Veto:

Whip's - shd enough to sustain a veto

Branth.

Lisa Gray, OPD

616 2004

353-9164

Patti

ph 514-4810

fax 514-9149

Adrienne

51005

Amson, NARAZ

Whip's -
Veto
for

custom
child out

From: Robert J. Pellicci on 09/07/99 10:37:14 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: James J. Jukes/OMB/EOP@EOP, Janet R. Forsgren/OMB/EOP@EOP

Subject: Justice letter on Unborn Victims Bill

On Friday I circulated to you for review and comment Justice's letter strongly opposing HR 2436 the "Unborn Victims of Violence Act of 1999." Justice had advised that full House Judiciary Committee action would not occur until the week of September 13th. **Justice now advises that the Committee has moved the markup to this Thursday, September 9th.**

Accordingly, please provide your comments to me by **NOON TOMORROW, September 8th.** In reviewing the Justice letter, the Department has requested guidance regarding a senior advisers or Presidential veto threat. As written, the letter strongly opposes the bill.

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Sandra Yamin/OMB/EOP@EOP

Patti Fencer
Brook
Candice
Jenny L
Sylvia M
Shelly P

7/22/99 conf. call

subcommittee markup - 7/30 (postponed)
dev Admin. views - policy analysis
Jen asst on substitute
NOT a rule in subcommittee

Ofc of Pol Dev - working on issues
• views letters
• draft not for distribution to us.

INTERNAL Q&A ON ABORTION
July 21, 1999

Q: Air Force Lt. Colonel Keith Roberts is testifying today before the House Judiciary Subcommittee on the Constitution about a terrible incident of domestic violence, in which a pregnant woman was badly beaten by her husband, an Air Force serviceman, and miscarried as a result. The hearing will focus the Unborn Victims of Violence Act, sponsored by Representative Lindsay Graham, which would make it a separate federal offense to cause a pregnant women to miscarry or to cause other injury to the fetus during the commission of a pre-existing federal offense. What is the Administration's position on this legislation?

A: The Administration has not yet had a chance to review this legislation. Lt. Colonel Roberts is testifying only to the facts of a particular case, not representing our position. We intend to review the proposed legislation carefully.

SUBCOMMITTEE ON THE CONSTITUTION
Committee on the Judiciary
U.S. House of Representatives
Hearing on H.R. 2436, the "Unborn Victims of Violence Act of 1999"
Wednesday, July 21, 1999
1:30 p.m.; 2237 Rayburn House Office Building

WITNESS LIST

PANEL 1

Michael Lenz, Choctaw, OK

Lt. Colonel Keith Roberts, Deputy Chief, Military Justice Division, Air Force Legal Services Agency, Bolling Air Force Base, Washington, D.C.

Pamela B. Stuart, Attorney at Law

Ronald H. Weich, Partner, Zuckerman, Spaeder, Goldstein, Taylor & Kolker

The Honorable Terry M. Dempsey, Judge, District Court, 5th Judicial District, St. James, Minnesota

PANEL 2

Hadley Arkes, Edward Ney Professor of Jurisprudence and American Institutions, Amherst College

Juley Anna Fulcher, Public Policy Director, National Coalition Against Domestic Violence

Peter N. Rubin, Visiting Professor of Law, Georgetown University Law Center

Gerard V. Bradley, Professor, Notre Dame Law School

Statement of Michael Lenz
Before the Subcommittee on the Constitution
Hearing on H.R. 2436, the "Unborn Victims of Violence Act of 1999"
Wednesday, July 21, 1999

Committee members, I would like to give you some background on myself and my late wife Carrie Lenz.

We met in the spring of 1986. I had recently moved from the City of Tulsa to Oklahoma City. Carrie was a high school senior at Moore, OK. We began dating, she graduated high school and went on to College, and I took a job back in Tulsa and then in Ponca City. All the while, we maintained our relationship. I eventually took a job that required extensive travel around the country, and although it was difficult at times, our long distance relationship worked because we were both committed to the same ideas and goals. (Our plan) First, she would graduate from college. I would get promoted over the State of Oklahoma. Then we would get married, and when we thought we were mentally and financially prepared, we would have children.

While Carrie was attending college, she took a part time position with the Alcohol, Tobacco and Firearms under the "Stay in School" program. As the Oklahoma City ATF office grew, their need for a full time position grew as well. Carrie then transferred to a position with the U.S. Secret Service Administration under the same program until she graduated from college. After graduation, she accepted a position with the Drug Enforcement Administration through EBON, a company contracted with the Department of Justice to assist in the Asset Forfeiture

program. Since her first job with Federal Law Enforcement, Carrie and I were always extremely proud to be a part, albeit a small part, of our government.

Our plans all came together in the fall of 1991 (September 14) when we were finally married. Married...Yes. Financially ready to raise a family? Not Yet. That didn't come until 1993. Seven years after we first met, we believed we were finally ready to start our family.

I'm telling you all of this to give you some background on our relationship and our goals, and maybe to give you some insight on what it might be like to have a seven-year plan blown up in your face.

We began trying to have children 1993. After several months with no success, we sought assistance from a fertility doctor who put Carrie on some medication, and we continued our efforts at beginning a family. With no success, in early 1994 the doctor recommended exploratory surgery, which she underwent. A few months later, she informed me that she was pregnant. We were so thrilled, but our excitement would not last long. With weekly monitoring, the doctor discovered Carrie had an ectopic pregnancy and that the fetus had died. In November of that same year, Carrie again informed me that she was pregnant, and we both prayed that this would prove a better pregnancy than the first. The doctor confirmed our hopes by telling us everything appeared to be healthy and normal at our first ultrasound.

In the months that followed, we prepared our home for the new baby. We purchased a

changing table and baby bed, and Carrie was trying to get the nursery ready when we decided it would be easier if we knew the sex of our child. We didn't have a set name if the child was a girl, but if we were having a boy, we had both agreed his name would be Michael James Lenz, III. So on the afternoon of April 18, 1995, we met at the hospital for an additional ultrasound to determine the sex of our baby. Carrie was so nervous. As I held her hand, the pictures on the monitor came into view. The heart beat, a little hand and arm, and then you could see the face of our child. Finally the baby moved a little, and the nurse said "Congratulations! You're having a boy!" We looked at each other and said simultaneously, "Michael James Lenz, III." He had his name. Then, with a kiss and "I Love You," I left the room. We were so happy we even paid for extra ultrasound pictures to show off. When we arrived home that evening, we called all of our friends and relatives to tell them the news. We didn't know it at the time, but that would be the last time Carrie spoke to the people she loved most.

The next the morning Carrie, who was usually 15 to 20 minutes late to work, left the house early to show everyone at work the pictures of our son, Michael. I left for work at about 8:30 that morning, a happy, expectant father of my first child . . . my son . . . Michael. At 9:02 A.M. on April 19, 1995, it all shattered, when the Alfred P. Murrah Federal Building was blown up. A seven-year plan, gone. Just Blown up. At 9:03 A.M. that morning I was no longer an expecting father or husband. At 28 years old, I was a widower.

I don't care to go into the details of what happened to me in the months followings the bombing, but please ask yourself, "Would having a part of your loved one in the form of a child

would make your grieving easier?" I think it would. Therefore, the loss of that potential life is worth an immeasurable amount to me. Let's say for the sake of argument that Carrie was not killed by that act of violence, but that shrapnel entered the womb and killed Michael. Is it safe to assume that would have an ill effect on her child bearing capacity, not only physically, but emotionally, for the rest of her life? I am no doctor, but I would have to think it would. In this scenario, a seven-year plan is still gone and possibly any future plans. Should we as people allow that act of violence to remain a victimless crime? No Michael the 3rd ever mentioned? I don't think that would be right. In any case, I lost the two people I loved most that day, and the official death toll for the Murrah Bombing remains at 168. In addition to Carrie, there were two other expecting mothers in the building that day that died. Three babies.

Passing this bill won't bring my wife and son back to me, but it would go along way toward at least recognizing Michael's life and the loss of seven years of responsible actions to gain that life. Violent criminal acts that result in the death of a potential life is worth prosecution on its own merits, regardless of the other counts against the defendant. As the only survivor of a family of three, in my case, it would only be right. Regardless of your vote on this, in my mind 171 people lost their lives that day, and three "Daddies to be" became widowers.

Thank You for your time. Michael James Lenz, Jr

Apr - 2878

amendments

• Watts - child in uterus - violence vs war.

• Congress

1. Rep. bill won't take effect until 1992

2. Whistleblower prov. - HMO fraud (if you say you'll pay

3. criminal justice

4 OSHA violation

• 5. gun amend - Brady law violation

substitute → sep of fence, no intent
penalties life -
↳ termination

Lowey
Baldwin
Nader

STATEMENT OF
LIEUTENANT COLONEL KEITH L. ROBERTS
UNITED STATES AIR FORCE

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ON THE "UNBORN VICTIMS OF VIOLENCE ACT OF 1999"

21 JULY 1999

Biography

UNITED STATES AIR FORCE

Air Force Legal Services Agency, Bolling AFB, DC 20332

LIEUTENANT COLONEL KEITH L. ROBERTS

Lieutenant Colonel Keith L. Roberts is Deputy Chief, Military Justice Division, Air Force Legal Services Agency, Bolling Air Force Base, Washington D.C. Colonel Roberts was born in Syracuse, Kansas, and graduated from Syracuse High School, with honors. He then attended Washburn University, Topeka, Kansas, and graduated *cum laude* with a BA in Sociology-Anthropology. He attended Washburn University School of Law and received a Juris Doctor degree. Colonel Roberts received his Air Force commission through the Air Force Reserve Officer Training Corps program at Washburn University and in May 1981 was assigned to the Office of the Staff Judge Advocate, 347th Combat Support Group, Moody Air Force Base, Georgia. In May 1983 he was reassigned to the Office of the Staff Judge Advocate, 86th Tactical Fighter Wing, Ramstein Air Base, Germany. From June 1986 to August 1989, Colonel Roberts served as the Staff Judge Advocate, Headquarters, Air Force Reserve Officer Training Corps, Maxwell Air Force Base, Alabama. He then attended the Air Force Air Command and Staff College, Maxwell Air Force Base, Alabama, from August 1989 to June 1990. In June 1990 Colonel Roberts became the Staff Judge Advocate, 384th Bombardment Wing (H), McConnell Air Force Base, Kansas. From July 1993 to August 1996 he served as Deputy Chief, Military Justice Division, Air Force Legal Services Agency, Bolling Air Force Base, Washington, D.C. During that assignment he also served as Staff Judge Advocate, Joint Task Force 160, Guantanamo Bay, Cuba, from February to July 1995. Colonel Roberts served as a Military Judge, assigned to the Air Force Legal Services Agency, Eastern Judicial Circuit, Bolling Air Force Base, from August 1996 to August 1998. He assumed his current position in August 1998.

Colonel Roberts is admitted to practice law before the Kansas Supreme Court, the U.S. Federal District Court for the District of Kansas, and the U.S. Court of Appeals for the Armed Forces.

Awards and decorations include the Defense Meritorious Service Medal, the Meritorious Service Medal with four Oak Leaf Clusters, the Air Force Commendation Medal, the Air Force Achievement Medal, the Joint Meritorious Unit Award, the Air Force Outstanding Unit Award with one Oak Leaf cluster, the Air Force Organizational Excellence Award with two Oak Leaf Clusters, the National Defense Service Medal, and the Humanitarian Service Medal. He was the Air Training Command Outstanding Judge Advocate for 1988.

Colonel Roberts is married to the former Jennifer O'Brate of Syracuse, Kansas. They have two sons, Jason and Michael.

My name is Lieutenant Colonel Keith Roberts and I am an active duty Air Force Judge Advocate currently serving as the Acting Chief of the Air Force Military Justice Division of the United States Air Force Judiciary at Bolling Air Force Base, Washington, D.C. The Military Justice Division is responsible for all military justice policy matters in the Air Force. I have been the Deputy Chief of the Division approximately four years, and my previous assignments included duty as a military judge, three assignments as a Staff Judge Advocate and two other base-level assignments.

I am appearing today at the request of the Subcommittee for the purpose of presenting the facts in the court-martial case of *United States v. Airman Gregory A. Robbins*, and the application of the Assimilative Crimes Act to that case. Neither my testimony or appearance here today should be construed as an endorsement of H.R. 2436 by me, the Air Force, the Department of Defense or the Executive Branch. It is my understanding that neither DoD nor the Executive Branch have completed their review of this legislation.

While I had no personal involvement in this case, in preparation for these hearings I reviewed the court-martial record of Airman Gregory A. Robbins. My statement includes a brief summary of the case that I took primarily from a Stipulation of Fact signed by Airman Robbins and his guilty plea discussion with the military judge conducted under oath at his trial. My

statement also includes a discussion of one particular charge that assimilated an Ohio statute.

STATEMENT OF FACTS

Airman Robbins and his wife, Karlene, were married on 28 December 1995. In February 1996, Airman Robbins arrived at Wright-Patterson Air Force Base, Ohio, his first permanent duty assignment, and the couple began living together as husband and wife. The same month, Mrs. Robbins became pregnant. In mid-March 1996, they moved into military base housing located at 137 Trunk Drive, an area of exclusive federal jurisdiction on Wright-Patterson Air Force Base, Ohio. Mrs. Robbins' anticipated delivery date was 26 October 1996.

Shortly after the couple moved into base housing, Airman Robbins began beating his wife. The abuse always occurred within the confines of the house. It began with pushing, then escalated to open-handed hitting, then punching, and finally kicking. During these episodes, Airman Robbins struck Mrs. Robbins on various parts of her body, including her legs, her side, her back, her head, and her face. Sometimes, he hit her with enough force to drop her to her knees.

A variety of factors reportedly motivated Airman Robbins' assaults. At times, he was angry with his wife for not cleaning the house or not letting the couple's two dogs out. At other times, he was angry about her care of

their pet birds. Sometimes he was angry about his wife's long-distance phone calls to her mother in Chicago and the expenses incurred from them. There is no evidence that Mrs. Robbins brought any of these instances of physical abuse to the attention of military authorities, prior to the September incident.

After the episodes described above, Mrs. Robbins periodically packed her bags with the thought of leaving her husband and returning to Chicago. However, she always changed her mind and stayed.

On 12 September 1996, Mrs. Robbins was approximately 34 weeks pregnant. The fetus had no known abnormalities. Airman Robbins came home that evening, noticed one of the dogs had defecated on the floor near the bathroom door, and became enraged. Airman Robbins then began yelling at his wife as she tried to defend the dog. Next, he pushed her, causing her to fall to her knees. When she tried to escape, he pursued her down the stairs, and cornered her against a wall. He then wrapped his fist in a uniform tee shirt and began repeatedly punching Mrs. Robbins in the face with a closed fist, breaking her nose and battering her eye. He then began punching her in the abdomen, while she attempted to shield herself with one hand on her back and the other on her stomach. The blows to Mrs. Robbins' abdomen were so severe that they ruptured her uterus and caused the placenta to separate from the uterus. Mrs. Robbins was

eventually able to escape to a neighbor's house. The neighbors immediately called for an ambulance and Mrs. Robbins was taken to the base medical center.

On her arrival, Mrs. Robbins' face was swollen and bruised, her right eye was swollen shut, and she was losing blood internally in the abdominal area. An ultrasound detected no amniotic fluid and no fetal heart tones. The doctors determined that immediate surgery was needed. Mrs. Robbins had lost two liters of blood from the rupture, and the placenta was entirely torn from her uterine wall. Doctors estimated that, had she not reported the assault, Mrs. Robbins would have died of blood loss within hours. After eight days of inpatient care, Mrs. Robbins was flown by medical aeromedical evacuation to her home in Chicago for further recovery. A forensic pathologist performed an autopsy on the fetus and the local Deputy Coroner opined that the cause of fetal demise was placental abruption and uterine rupture, due to maternal blunt abdominal trauma.

PROSECUTION OF THE CASE

I will now discuss the prosecution of Airman Robbins for the attacks on his wife. Any time a commander becomes aware of possible misconduct by a member under his or her command, the commander has the responsibility to review available evidence and decide whether any type of disciplinary action is appropriate. As is typical in cases such as the

Robbins case, Special Agents from the Air Force Office of Special Investigations investigated the incident. After the investigators completed their report they forwarded it to Airman Robbins' commander who reviewed the report and consulted with his Staff Judge Advocate, who is the senior legal advisor to the commander. As part of this process, a Judge Advocate reviews the report, determines whether any of Airman Robbins' actions violated the Uniform Code of Military Justice (UCMJ), and makes recommendations on how Airman Robbins' commander should handle the matter. The Judge Advocate's recommendations are strictly recommendations and the commander has the final say in what action, if any, to take.

His commander decided that the incident was serious enough to warrant criminal charges. A Judge Advocate prepared the Charge Sheet, which the commander signed to initiate the criminal prosecution. This step is known as preferral of charges. The convening authority, a commander senior to the commander who preferred charges, determined additional investigation was appropriate. He appointed a Judge Advocate to conduct a pretrial investigation of the charges then pending against Airman Robbins. This Judge Advocate had nothing to do with the case previously, and could not be further involved in the case after the investigation was completed.

The Charge Sheet listed all the offenses that Airman Robbins' commander had reason to believe he had committed. Offenses under the UCMJ are codified in Title 10 U.S.C., Chapter 47. The offenses are either listed in Articles 80 through 132, commonly referred to as the enumerated Articles, or contained in Articles 133 or 134. Article 133 applies to conduct unbecoming an officer, and is not more specifically defined. Article 134 is the general article and includes "disorders and neglects to the prejudice of good order and discipline in the armed forces" (clause 1 offenses), "conduct of a nature to bring discredit upon the armed forces" (clause 2 offenses) and "crimes and offenses not capital" (clause 3 offenses). Clause 3 encompasses the Federal Assimilative Crimes Act (18 U.S.C. Section 13). In this Act, Congress incorporated "state criminal laws for areas of exclusive or concurrent federal jurisdiction, provided federal criminal law, including the UCMJ, has not defined an applicable offense for the misconduct committed" as offenses under the UCMJ.

Airman Robbins was initially charged with two specifications (counts) of assault against Mrs. Robbins under Article 128 of the UCMJ; maiming under Article 124 by rupturing her uterus with repeated punches to her abdomen with his fist; and with murder and involuntary manslaughter under the Assimilative Crimes Act provision of Article 134. The murder and involuntary manslaughter offenses were charged by assimilating an Ohio

statute, the Amended Substitute Senate Bill No. 239, codified in §§2903.02 and 2903.04 of the Ohio Revised Code, that went into effect on 6 September 1996. As this Committee may be aware, this state law created a series of criminal offenses for causing the “unlawful termination of another’s pregnancy.” The term “unlawful termination of another’s pregnancy” was defined as “causing the death of an unborn member of the species homo sapiens, who is or was carried in the womb of another, as a result of injuries inflicted during the period that begins with fertilization and that continues unless and until live birth occurs.” Ohio Revised Code §2903.09(A).

The court determined that, since there is no comparable UCMJ offense, the state law could be assimilated into the federal law and could be prosecuted under Article 134 of the UCMJ.

After the pretrial investigation the Investigating Officer prepared a report that was forwarded through command channels, and the charges were ultimately referred to a general court-martial on 16 October 1996. A general court-martial is the highest court-martial forum in the military. It can adjudge any authorized punishment up to and including death. The trial was held on 9 December 1996, and Airman Robbins asked to be tried by military judge alone. At trial, the maiming charge was merged with one of the assault charges and Airman Robbins pled guilty to assaulting his

wife. He also pled guilty to involuntary manslaughter by causing the unlawful termination of his wife's pregnancy. The murder charge was dismissed, pursuant to a pretrial agreement, the military equivalent of a plea bargain. The military judge sentenced Airman Robbins to be dishonorably discharged from the Air Force, to be reduced to the grade of E-1 (the lowest enlisted grade from his previous grade of E-2) and to be confined for 8 years.

Airman Robbins' conviction has been reviewed and upheld on appeal by the Air Force Court of Criminal Appeals. We are awaiting a decision by the U.S. Court of Appeals for the Armed Forces on his appeal to that court.

July 21, 1999

TESTIMONY OF

**PAMELA B. STUART, ATTORNEY & COUNSELLOR AT LAW
FORMER FEDERAL PROSECUTOR**

**concerning H.R. 2436
The Unborn Victims of Violence Act of 1999**

**Pamela B. Stuart
Attorney & Counsellor at Law
888 Sixteenth St., NW
Washington, DC 20006
202-835-2200
202-835-2202 (fax)**

I. Introduction

Good Afternoon. I am Pamela Bruce Stuart. I am an attorney in private law practice but I am here today to speak from the perspective of a former federal prosecutor. I am a member of the bar in New York, the District of Columbia, Florida, Maryland and Virginia. I appreciate the opportunity to assist the Constitution Subcommittee as it considers H.R. 2436, the Unborn Victims of Violence Act of 1999.

I have been asked to appear this afternoon because I served as

an Assistant United States Attorney and later as a trial attorney in the Office of International Affairs of the Criminal Division of the United States Department of Justice for eight and a half years. Since the object of this bill would be to amend the federal criminal laws to add a new separate offense for criminal acts that cause the death of or bodily injury to fetuses, I hope to be able to impart the "real world" perspective of a working prosecutor who might be called upon to indict a case under this proposed law and try to win a conviction before a jury.

We in the current and former prosecutor community are well aware of the problem of violence, particularly domestic violence, that is perpetrated against women. Most of these criminal acts do not involve interstate activity or other concerns that typically invoke the interest of federal authorities, other than the use of a firearm. The criminal activities that would be addressed by this bill are already the subject of either state or federal criminal laws, or both, so that no additional criminals would be prosecuted as a result of the enactment of this legislation. By definition, if you kill or assault the mother of a fetus, you have committed a criminal act that is punishable under state and/or federal law. So, the question then is what, if anything, would this legislation add to the enforcement scheme that presently exists and what damage, if any, might it do to the ability of prosecutors to secure convictions on the underlying charges against the person charged?

I am very sympathetic to the goal of trying to curb violence against women through the use of the criminal laws, but I fear that this bill as currently drafted will hurt the ability of federal prosecutors to secure convictions against those who perpetrate

violence against women who happen to be pregnant at the time that they become victims of crime. Obviously, such an outcome would be exactly the opposite of the intended result.

II. Personal Background

I think it would be helpful in assessing my comments for you to know something about my background. I graduated from Mount Holyoke College in 1970 and the University of Michigan Law School in 1973. I arrived in Washington during the summer of the Watergate hearings and then spent 5-1/2 years prosecuting consumer fraud cases at the Federal Trade Commission. From 1979 to 1985, I served as an Assistant United States Attorney for the District of Columbia. I appeared daily in the local and federal courts of the Nation's Capital. I prosecuted everything from misdemeanor thefts up through complex federal fraud cases. I tried approximately 50 jury trials and, with the concurrence of grand juries, obtained indictments in hundreds of felony cases. I argued appeals of criminal cases before the District of Columbia Court of Appeals and the US Court of Appeals for the District of Columbia Circuit. In 1985, I joined the Office of International Affairs of the Criminal Division of the US Department of Justice where I assisted prosecutors all over the United States and abroad in prosecuting cases that required international extradition or sharing of evidence. In 1987, I entered private practice and have been primarily a civil and white collar criminal defense attorney ever since. I have represented some clients in Congressional investigations. For example, I helped represent Senator Packwood before the Senate Ethics Committee.

In all of my years as a prosecutor, I do not recall handling a case in which the victim of the crime was pregnant at the time of the commission of the offense. I may have done so, but I do not recall any such cases. From my personal experience, I would extrapolate that such cases are rare.

Yesterday, when I learned that I was to testify on this topic, I searched for any relevant cases in Lexis. I discovered that this issue arises primarily in the context of vehicular homicide cases in which the victim of a fatal car collision is pregnant. This was of interest to me as I tried a precedent-setting case of murder while armed with a car here in the District of Columbia.

In that connection, I should note that while I served last year as the president of the Assistant United States Attorneys Association of the District of Columbia, an organization of current and former federal prosecutors, and am currently a member of the Board of Directors of the Bar Association of the District of Columbia, the views I express here today are entirely my own. I do not represent any organization or special interest.

III. The Unborn Victims of Violence Act of 1999

I would like to turn now to the proposed legislation that I have been asked to review. H.R. 2436 would amend various sections of Title 18 of the United States Code and the Uniform Code of Military Justice to make it a separate offense to engage in conduct violating the statute which thereby causes the death of or bodily injury to "a child, who is in utero at the time the conduct takes place." It would prohibit the prosecution of any person for conduct relating to a consensual abortion, for medical

treatment, and would prohibit prosecution of conduct by the mother with respect to her unborn child.

As I indicated, by definition, this legislation would not apprehend one additional criminal because, in order to be guilty of an offense under this proposed bill, one would already have to have committed an act that violates Title 18. What appears to be the intent of the drafters of the bill is to enhance the punishment that would be given to one who, in the commission of another criminal act, causes the death or injury of a fetus.

In thinking about this possibility, I am mindful of the concern that has been raised often in the current and former prosecutor community as well as among criminal defense attorneys that the Congress is "federalizing" the criminal law. By that I mean that the Congress has legislated into the federal criminal code many criminal offenses that normally would be covered by state criminal laws. The problem with this trend is that it has a tendency to overburden the federal courts with cases that could be efficiently and effectively handled by the state courts. By adding federal offenses that might otherwise be legislated by the states, the judges and prosecutors, probation officers, US Marshals, courtroom clerks and others who work in the federal courts must take time away from other criminal cases in which the federal interest is more apparent -- such as interstate kidnapping or cases against organized crime -- to handle what are essentially domestic violence cases or cases involving violent crimes that have traditionally been the province of state courts. The result of this trend has been, among other things, to delay civil cases as well as other criminal cases. Because of

the federal Speedy Trial Act, criminal cases take priority on the calendar of every federal judge. To the extent that they are getting cases that could otherwise be handled in state courts, this is a waste of precious federal resources and delays justice for other litigants.

In the case of this particular bill, we are not dealing with a positive enhancement of the ability of federal prosecutors to fight crime such as the money laundering statutes or those that target organized crime. Rather, this bill would merely create a second offense for punishment purposes. More importantly, from my point of view, the bill might have the unintended consequence of making it more difficult to convict the very perpetrators that the members of the Subcommittee wishes to punish more severely!

IV. The Practical Implications of the Bill -- will prosecutors be assisted or thwarted in their efforts to convict criminal wrongdoers

While it is definitely the prerogative of the Congress to enact legislation, ultimately the prosecution of the proposed criminal statute will be left to the Assistant United States Attorneys all across the country. Will this bill help them or hamstring them? My concern is that the proposed bill would be a prosecutor's nightmare. I am concerned that this proposed statute is open to attack on several fronts.

A. Proof problems

As worded, a prosecutor trying to persuade a grand jury to indict a case under this statute would have to allege and prove by a preponderance of the evidence to the satisfaction of a majority of the 23 member grand jury and later beyond a reasonable

doubt at trial that:

(1) the defendant engaged in conduct that violated the specified sections of Title 18 that was directed at a woman who was pregnant at the time of the offense;

(2) that the criminal conduct (whatever it was) caused the death of or bodily injury to the fetus beyond a reasonable doubt;

(3) that the defendant had a culpable mental state (he knowingly and intentionally caused the death or bodily injury to the fetus)

(4) that the defendant was not at the time of the offense engaged in conduct relating to an abortion for which the pregnant woman had given or impliedly given consent;

(5) that the defendant was not at the time of the offense engaged in providing any medical treatment to the woman or her unborn child; and

(6) that the defendant was not engaged in conduct directed at her own unborn child at the time of the offense.

Unlike the civil justice system, the criminal law demands a culpable state of mind (*mens rea*) as well as an act in violation of the law. There is no strict liability in crime. One cannot be put in jail for committing a crime unless he or she intended that the crime occur -- or at least acted knowingly and willfully. Thus, it would be possible that a perfectly good criminal case against a defendant who, for example, assaulted a woman on a federal reservation, and was charged with the offense of also injuring her unborn fetus, would degenerate into a heated debate among jurors as to whether

the perpetrator knew the victim was pregnant and intended to harm the fetus.¹

Beyond a debate over the defendant's knowledge or lack thereof of the victim's condition (pregnancy), the requirement of proving that the criminal conduct caused the death or bodily injury of the fetus beyond a reasonable doubt would be an evidentiary nightmare. First, the prosecutor would have to prove that the fetus was alive and well prior to the criminal conduct. That would require expert testimony, probably from the mother's gynecologist or an emergency room physician. Unlike forensic pathologists who often work for the government, physicians in private practice are difficult to schedule for testimony. If, as may be the case with assaultive conduct in a remote location, the victim is not found and treated within a few minutes after the event, a perfectly good prosecution for assaultive conduct against the woman would be sidetracked into a raging debate as to whether the assault caused the death of the fetus or whether the child was stillborn.²

Secondly, the prosecutor would have to show, to the exclusion of all other reasonable causes, that the criminal conduct was the proximate cause of the death or bodily injury to the fetus. With all of the other things that can go wrong in utero (placental abruption, hypoxia, etc. -- to name just a few) and in the birth process, it may be difficult to establish, beyond a reasonable doubt, that the criminal conduct

¹ There is a possible "transferred intent" that would assist in these circumstances.

² I have represented a number of plaintiffs in brain-damaged baby cases stemming from medical malpractice at birth and it is astonishing the number of theories defense experts can come up with to explain the death of a newborn due to pre-natal injuries rather than the negligence of health professionals.

caused the injury. Needlessly complex medical testimony would be required and jurors might become overwhelmed and confused.

Moreover I can easily imagine that if the case ever got to the jury room that well-intentioned jurors might endlessly debate the issue of whether the fetus was an "unborn child" -- that is, whether the fetus had reached the stage where it was viable.

Because of the raging national debate on what legal rights a fetus has, a jury might be sidetracked into a debate as to what is an unborn child and whether it has to be viable and whether a child created in a petri dish would count. Such a possibility would, to say the least, detract from the ability of a prosecutor to try a clean case and achieve a conviction. It would also result in needlessly protracting jury deliberations which would use up court time.

I can also foresee endless opportunities for defense attorneys to challenge the constitutionality of the statute and thus delay the swift and sure conviction that is the desired end of the prosecutor. All of this would merely detract from what, by definition, was already a viable criminal prosecution under existing federal law.

So, in my opinion, this bill would not add anything to existing law and would detract from the ability of federal prosecutors to fight crime.

V. Other, More Viable, Options

Since the major objective of this bill is to enhance the punishment of persons who commit crimes against pregnant women, the Subcommittee might wish to focus on amending the criminal laws with respect to punishment in order to permit the

enhancement of a sentence based upon injury to the fetus carried by a pregnant victim of crime. An amendment to 18 U.S.C. § 3558(d) which provides for death or imprisonment for certain crimes against children to provide courts with the authority to impose additional punishment for the death or injury of fetuses resulting from crimes against their mothers might be appropriate. I would suggest that it would be easier for a prosecutor to prove causation in the context of sentencing rather than having to prove it to the satisfaction of a jury beyond a reasonable doubt. By putting the issue in the sentencing phase of a case, it would also remove the possibility that civil liability of others involved in the death or injury of the fetus might be precluded by a finding beyond a reasonable doubt that a particular criminal caused the death.

In addition, Congress might wish to make known to the U.S. Sentencing Commission, which has already provided for enhancement of punishment ("adjustment" in their vernacular) for a vulnerable victim that Congress specifically wishes pregnant women included within the category of "vulnerable" victims. The federal sentencing guidelines in § 3A1.1 provide that if the finder of fact at trial or, in the case of a plea, the court finds at sentencing beyond a reasonable doubt that the defendant selected his victim as the object of the offense because of gender (actual or perceived), the sentencing calculation may be increased by 3 levels. If the court or jury finds that the defendant knew or should have known the victim of the offense was a vulnerable victim, the calculation is to increase by two levels. This enhancement is not applied in the case of a sexual offense because that factor is taken account in determining the base offense level of the applicable guideline. The current

definition of a vulnerable victim is (a) a person who is a victim of the offense of conviction and any conduct for which the defendant is accountable under § 1B1.3 (relevant conduct) and (b) who is unusually vulnerable due to age, physical or mental condition, or who is otherwise particularly susceptible to the criminal conduct.

Also, as a result of the Victim Witness Protection Act of 1982, prosecutors and probation officers solicit statements by or on behalf of victims of crime detailing their financial and emotional losses for consideration at sentencing. In this way, the loss of a pregnant woman's fetus may be brought to the attention of the sentencing court.

IV. Legal History

Not only are there available means for Congress to accomplish the goals of this legislation short of injuring the ability of prosecutors to obtain convictions, but the Congress should bear in mind that the weight of legal authority in history would not support a finding that an unborn child can be a separate victim of a criminal offense. The common law, as far back as 1648, held that an unborn fetus, viable or otherwise, could not be the subject of homicide. State of Connecticut v. Anonymous, 40 Conn. Supp. 498, 516 A.2d 156 (Super. Ct. CT. 1986), citing 3 Coke, Institutes (1648) ("If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprison [i.e., misdemeanor], and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive"). In the 18th century, Coke's requirement that the infant be born alive in order to be the

subject of a homicide was reiterated and expanded by both Blackstone in his Commentaries (1765) and Hale, Pleas of the Crown (1778), p. 433; see also, 1 Hawkins, Pleas of the Crown (1762), ch. 31 @ 16. In the mid 19th century, a series of prosecutions in the English courts against women accused of murdering a newborn were brought in which the court instructed that a child had to be "actually wholly in the world in the living state to be the subject of a charge of murder." See Keeler v. Superior Court of Amador County, 2 Cal.3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

By 1850, this rule had been long accepted in the United States. As early as 1797, proof that the child was born alive was ruled to be necessary to support an indictment for murder. However, some state legislatures enacted feticide statutes beginning with New York in 1829 which said that the wilful killing of an "unborn quick child" by any injury to the mother of such child, which would be murder if it resulted in the death of the mother, would be deemed manslaughter in the first degree. Five other states (Missouri, Arkansas, Michigan, Mississippi, and Wisconsin) enacted statutes declaring feticide to be a crime punishable as manslaughter. The New York Court of Appeal in Evans v. People, 49 N.Y. 86 (1872) restricted the statute to its terms and said that death cannot be caused when there is no life. Almost every state court that has had a homicide statute that did not define "human being" as explicitly including a fetus have held that the words "person" or "human being" would not include the unborn child or fetus. In two state court decisions, the courts recognized that the pre-existing common law did not recognize the killing of an unborn child as

"homicide" but felt they had the authority to change the law prospectively to recognize modern medical technology. See Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984); State v. Horne, 282 S.C. 444, 319 S.E.2d 703 (1984). Some states have imposed criminal liability by statute for causing the death of a fetus.

In Roe v. Wade, 410 U.S. 113, 35 L.Ed.2d 147, 93 S.Ct. 705 (1973), the Supreme Court held that a nonviable fetus was not a "person" for purposes of the Fourteenth Amendment. The overwhelming majority view in the United States is that a nonviable fetus has no right to bring an action for wrongful death. Miccolis v. AMICA Mutual Insurance Co., 587 A.2d 67, 71 (R.I. 1991). It has no property rights until it is born alive.

Conclusion

For reasons both practical and legal, the Congress should not enact H.R. 2436. It would have the unintended consequence of taking a clean and neat prosecution of a criminal act and turning it into an opportunity for defense attorneys to inject the national debate over what legal status an unborn child should have into the deliberations of lay jurors with disastrous consequences for a federal prosecutor. Otherwise guilty defendants might go free as a result. I ask you not to favorably report out this bill in its present form.

Testimony of

RONALD WEICH

Zuckerman, Spaeder, Goldstein, Taylor & Kolker, L.L.P.

Former Special Counsel, U.S. Sentencing Commission

**before the
Subcommittee on the Constitution
of the House Committee on the Judiciary**

on H.R. 2436, the “Unborn Victims of Violence Act”

July 21, 1999

Mr. Chairman and members of the Subcommittee: My name is Ronald Weich and I am a partner in the law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker. I am pleased to appear before you today to discuss the criminal law and sentencing implications of H.R. 2436, the "Unborn Victims of Violence Act."

I bring several qualifications to this task. From 1983 to 1987 I worked as an Assistant District Attorney in New York City, where I prosecuted a wide array of criminal cases. Thereafter I served as Special Counsel to the United States Sentencing Commission and participated in drafting amendments to the federal sentencing guidelines. I then served on the staff of several Senate committees where I assisted in the development of federal crime and sentencing policy. I am now in private practice, but I continue to serve on the advisory board of the Federal Sentencing Reporter, a scholarly journal in which I have frequently published articles on sentencing law and policy. I am also a member of the Criminal Justice Council of the American Bar Association.*

After reviewing H.R. 2436 in light of my experience in the criminal justice system, my knowledge of the federal sentencing guidelines and an examination of relevant case law, I reach one basic conclusion: *this bill is unnecessary*. Current federal law provides ample authority for the punishment of criminals who hurt fetuses. H.R. 2436 adds nothing meaningful to the charging arsenal of federal prosecutors or the sentencing options available to federal judges.

* I wish to make clear that I am not testifying on behalf of the American Bar Association or any other entity with which I am affiliated. Nor am I testifying on behalf of any of my law or lobbying clients. For example, it is a matter of public record that I have represented Planned Parenthood Federation of America (PPFA) with respect to pharmaceutical pricing issues, but I do not represent PPFA at this hearing. The views I express herein are strictly my own.

Because the bill is unnecessary from a criminal law perspective, I suspect that its purpose, instead, is to score rhetorical points in the never-ending struggle over abortion rights. But for reasons that I will explain, I strongly object to the use of the federal criminal code as a battlefield in the abortion wars.

I will first describe why the bill is unnecessary in light of current federal law and then explain why I believe it is an unwise addition to federal law.

I. H.R. 2436 IS UNNECESSARY.

Current federal law already provides sufficient authority to punish the conduct that H.R. 2436 purports to punish.

At the outset it should be understood that very few violent crimes are prosecuted in the federal courts. Most street level violent crimes are prosecuted under state law by state prosecutors in state courts. Under our constitutional system, federal criminal jurisdiction only exists if the crime implicates federal civil rights or interstate commerce – which few violent crimes do – or if the crime occurs on a federal enclave such as a federal office building, a military base or an Indian reservation. Thus there are only a handful of federal murder and assault prosecutions each year, and most of those involve Native Americans.

H.R. 2436 targets relatively rare conduct to begin with, namely criminal assault on a fetus. And in the federal context, that rare conduct is even more unusual. I researched federal case law and found only one reported case in recent years in which the victim of the offense of conviction was a fetus. In that case, US v. Spencer, 839 F.2d 1341 (9th Cir. 1988), the Native American defendant assaulted a pregnant woman on an Indian

reservation, kicking and stabbing her in the abdomen. The woman was successfully treated for life-threatening injuries, but her fetus was born alive and then died. The Ninth Circuit upheld the defendant's conviction under the federal murder statute, 18 U.S.C. § 1111. Thus, even without the help of H.R. 2436, a federal defendant was successfully prosecuted for murdering a fetus.

The Spencer decision is significant for several reasons. First, it illustrates how rare such cases are in the federal system -- the court refers to the issue of federal criminal liability for fetal death as one of "first impression" and in the 11 years since it was decided, Spencer has never been cited by another court. While there may be isolated incidents that can be addressed under existing federal or state law, there is no crime wave of federal fetal assaults crying out for a legislative solution. But even should this rare scenario present itself in federal court again, Spencer stands for the proposition that criminal liability may be imposed under current federal statutory provisions. The Spencer court relies on the well established common law doctrine, developed in state courts, that fetal death subsequent to birth due to fetal injuries may be prosecuted as homicide. See, Annotation, Homicide Based on Killing of Unborn Child, 64 A.L.R. 5th 671 (1998).

Analytically separate from the question of criminal liability is the question of punishment. Here again, *current federal law is sufficient*. There is no dispute that causing harm to a fetus during the commission of a federal felony should generally result in enhanced punishment, and courts have uniformly held that such enhancements are available under the current sentencing guidelines. For example, in both U.S. v. Peoples, 1997 U.S. App. LEXIS 27067 (9th Cir. 1997) and U.S. v. Winzer, 1998 U.S. App. LEXIS 29640 (9th Cir. 1998), the court held that assaulting a pregnant woman during a bank robbery could lead to a two level enhancement (approximately a 25% increase) under

§ 2B1.1(b)(3)(A) of the Guidelines relating to physical injury. In U.S. v. James, 139 F.3d 709 (9th Cir. 1998), the court held that a pregnant woman may be treated as a “vulnerable victim” under § 3A1.1 of the Guidelines, again leading to a two level sentencing enhancement for the defendant. And in United States v. Manuel, 1993 U.S. App. LEXIS 14946 (9th Cir. 1993), the court held that the defendant’s prior conviction for assaulting his pregnant wife warranted an upward departure from the applicable guideline range for his subsequent assault conviction.

While there have been no federal death penalty prosecutions of civilians in recent years involving fetal assaults, the military justice system treats the murder victim’s pregnancy as an aggravating factor to be considered during the capital sentencing phase of a trial. United States v. Thomas, 43 M.J. 550 (US Navy-Marine Corps Ct. of Crim. App. 1995). This holding follows state law precedents in which the pregnancy of the victim is a statutory aggravator in capital cases. See, e.g., Del. Code Ann. Tit. 11, § 4209(e)(1)(p) (Supp. 1986).

The federal cases that already treat fetal injury as a relevant factor for establishing criminal liability or enhancing the defendant’s sentence are consistent with a much larger body of state cases. Indeed, these state cases, which the Ninth Circuit relies on in Spencer and which are comprehensively collected at Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R. 5th 671 (1998), reveal that the issue of criminal liability for fetal injury is one that Anglo-American law long ago addressed and resolved in a common sense way. Several states, such as Georgia and Illinois, have enacted feticide statutes, but in other states the governing common law rule is that assaulting a pregnant woman and thereby causing the death of a viable fetus gives rise to criminal liability.

In sum, H.R. 2436 is unnecessary because federal case law and the federal sentencing guidelines, building on well-established common law principles, already authorize serious punishment for the harm that the bill seeks to address.

II. H.R. 2436 IS DETRIMENTAL TO THE CRIMINAL JUSTICE SYSTEM.

To say that H.R. 2436 is unnecessary does not end the inquiry. As members of the Judiciary Committee well know, the federal criminal code is characterized by regrettable redundancy, and one more criminal law prohibiting what is elsewhere prohibited would barely add to the thicket. But for three reasons, H.R. 2436 would not only constitute an unnecessary addition to the Code, it would also be an undesirable addition.

First, the bill has been drafted in a structurally unsound manner and will lead to considerable confusion and litigation. To be convicted under 18 U.S.C. § 1841, the new criminal offense created by H.R. 2436, a defendant must have “engage[d] in conduct that violates” one of the existing federal crimes enumerated in § 1841 (b). But must the defendant be convicted of one of those other offenses before he may be convicted of the separate offense under § 1841? I think that is a sound reading of the statutory text, but the language is unclear. There is already considerable controversy and resource-draining litigation in the federal courts over whether various title 18 provisions constitute separate offenses requiring proof beyond a reasonable doubt or sentencing enhancements requiring only proof by a preponderance of evidence, see, e.g., Jones v. United States, 119 S. Ct. 1215 (1999). H.R. 2436 would add to this confusion if there were ever a prosecution under the new criminal provision it establishes.

This problem could be addressed if, instead of creating a new criminal offense, H.R. 2436 merely directed the Sentencing Commission to either establish a new sentencing enhancement when the victim of the crime is a pregnant woman, or make clear that a pregnant woman may be considered a “vulnerable victim” under existing § 3A1.1 of the Sentencing Guidelines. As demonstrated above, the generic provisions of the Guidelines already accomplish this result. But at least a sentencing enhancement bill would not foster confusion and litigation.

Second, H.R. 2436 is overbroad. To begin with, it incorporates by reference an unduly broad definition of “bodily injury” from 18 U.S.C. § 1365. Whereas the common law rule applied to termination of the pregnancy, H.R. 2436 would make it a violation of federal law to cause “physical pain” to the fetus or “any other injury to the [fetus], no matter how temporary.” 18 U.S.C. § 1365 (g)(4). That definition may make sense in the consumer safety context from which it derives, but it is bizarre and extreme in the prenatal context of H.R. 2436. Further, H.R. 2436 applies to all fetuses, not merely those that are viable, and applies to unintentional as well as intentional conduct. The common law rule, evolved over centuries of Anglo-American jurisprudence, is that an assault causing the death of a viable (or, in the archaic phrase, “quickened”) fetus gives rise to criminal liability. The rule in H.R. 2436 is that an assault unintentionally causing “pain” to a weeks-old fetus gives rise to criminal liability.**

Third, the bill is a transparently rhetorical exercise in the perennial effort to undermine Roe v. Wade. Since H.R. 2436 adds nothing meaningful to substantive federal

** The bill’s new § 1841 (d) defines the term “unborn child” tautologically as “a child in utero.” Unless the drafters of H.R. 2426 intend the word “child” to imply viability, the bill would apply to conduct that impacted a first trimester pregnancy. Whether an “unborn child” of such gestational age constitutes a human being raises constitutional issues beyond the scope of this testimony.

criminal law, its purpose is purely symbolic: to bestow statutory personhood on fetuses, even those that are not viable.

It is no accident that the bill says nothing about injuries to pregnant women; instead the newly created title is styled "PROTECTION OF UNBORN CHILDREN." An assault on a fetus cannot occur without an assault on the pregnant woman, but the bill is deliberately framed in terms that ignore the woman. To be sure, there is an explicit exception to the criminal penalties in the bill for "conduct relating to an abortion" but make no mistake -- this bill is just one more step in the anti-abortion movement's methodical strategy to humanize fetuses, marginalize women, demonize abortion providers, and make the image of abortion less palatable to the American people. The extreme overbreadth of H.R. 2436 flows directly from that strategy.

The validity of the constitutional protections established in Roe v. Wade exceeds the scope of this testimony and is beyond my field of expertise. But as someone who cares deeply about the integrity of the criminal law, I cringe to see a skirmish in the abortion wars flare up unnecessarily in the federal criminal code. The criminal justice system is built on ancient principles such as proportionality of punishment and the requirement that a wrongdoer have acted with intent to cause harm (mens rea). H.R. 2436, crafted as it apparently was with an eye toward public relations rather than public safety, ignores these principles and thereby corrodes respect for the criminal law as a whole.

Because I believe H.R. 2436 to be both unnecessary and unwise, I urge the subcommittee to reject it.

Statement of Terry Dempsey
Before the Subcommittee on the Constitution
on H.R. 2436, the "Unborn Victims of Violence Act of 1999"

My name is Terry Dempsey, and I want to thank you all for allowing me to appear before this committee to address issues that I feel are important.

As a member of the Minnesota House of Representatives, a similar issue came to my attention, and I felt strongly that it merited a legislative response. What gave rise to the issue was a tragic automobile accident that involved an expectant mother who was operating her vehicle on a normal driving day. Sometime before she could complete her trip, her automobile was involved in a collision. Her car and one being operated by a drunk driver collided. Although the mother wasn't seriously injured, the collision did result in the death of her unborn child. The mother was beyond her sixth month of pregnancy.

Our statutes at the time did not provide for any penalty for someone causing such an injury—in this case the death of the fetus. There was a strong outpouring of sentiment that such conduct should be punishable under our criminal law. Albeit, that civil liability may result, with insurance coverages and other factors coming into play, that did not seem to be an adequate remedy.

Minnesota Statutes were amended by a bill I authored. At the outset there was some discussion that the motives for the legislation was something other than to attach criminal sanctions for such conduct, but the bill passed and became law. There was not a lot of interest in the new law until a case was brought in District Court in northern Minnesota. That charge seemed to generate some questions about my motive and those who voted for the legislation. Was it really wrongful conduct warranting criminal prosecution, or was it a ruse to somehow confer upon the unborn a standing that might lead to other legislation or even court decisions of a similar nature. It even attracted one major news network to come to Minnesota to do a short news story about it on network TV. I was asked in an interview about why the legislation was needed; others were similarly asked the same question. That was a number of years ago. The law remains intact today. Those of us who supported the legislation, and now even some of those who at one time had reservations about the precedent that it might set, agree it wasn't an attempt to erode the Roe v. Wade decision of a person's right to an abortion, but was the right thing to do.

As a lawyer and a judge, I have not seen any attempt to use the law for any purpose, except to punish those who break its provisions. Is it an absolute deterrent to the crimes they address? I can't say. But I can say with some degree of surety

that for those who are affected by the conduct which this Minnesota statute addressed, agree that it closed a glitch in the law that had existed by making such conduct a criminal offense. To defeat the proposal before you based on some fear that this might be a slippery slope and used to "confer" or "attribute" rights to the unborn is contrary to the experience in Minnesota. Our statutes do not deal with the right of abortion, nor do they conflict with the U.S. Supreme Court decisions on abortion. In truth and in fact, the legislation in Minnesota addresses the conduct of a person as it affects the lives of others and hasn't been expanded beyond that by our courts, nor have I seen any attempt that it be used for other purposes.

As you consider the proposal before you, I hope you will look to the Minnesota experience as a precedent. The legislation is similar, and the reasons for passage are evident. The reason for opposing this legislation I feel cannot be on the merits of the proposal, but rather a feeling that there might be some side effects that some may attempt to use this legislation for purpose beyond the sanctions attached to a criminal act. I doubt that such attempts would be successful based upon what has occurred in Minnesota. There is clearly a wrong to be addressed by the bill you are considering.

Thank you again for letting me discuss my feelings and experiences with you.

**Prepared Statement of Hadley Arkes,
Ney Professor of Jurisprudence and
American Institutions, Amherst College
Hearings for the Subcommittee on the Constitution
House Committee on the Judiciary
July 21, 1999**

Chairman Canady, Members of the Committee:

My name is Hadley Arkes. I am currently the Edward Ney Professor of Jurisprudence and American Institutions at Amherst College. I've taught at Amherst for the past 33 years, with the exception of several years in which I have been in Washington on leave and visiting at places like the Brookings Institution, the Woodrow Wilson Center at the Smithsonian Institution, and Georgetown University. My main interests as a writer and a teacher have been focused on political philosophy, public policy, and constitutional law. I have written, in that vein, several books, published by Princeton University Press, including *The Philosopher in the City* (1981), *First Things* (1986), *Beyond the Constitution* (1990), and *The Return of George Sutherland* (1994). My principal concerns in recent years have been with the so-called "life issues," of abortion and euthanasia, and if it suits the Committee I can append a list of my publications bearing on those issues.

I am here today to testify on behalf of HR 2436, a bill titled as the "Unborn Victims of Violence Act of 1999." It might be said of this bill what Lincoln said of that rather moderate and modest bill he proposed to encourage the gradual and compensated removal of slavery: that it would come "gently as the dews of Heaven, not rending or wrecking anything." The bill does not seek to extend the federal jurisdiction; it achieves its end mainly by filling out the authority that is already in place. The bill is so carefully cabined or limited that it reaches only the killings that are committed in the course of crimes that clearly fall now within the jurisdiction of the federal government. That question, of what the federal jurisdiction reaches, has been one of the most maddening and vexing questions in our law, and it seems to me bound up with some of the insoluble problems of a national government professing at the same time to be the government of a federal republic. It was only within our own lifetimes that it was thought appropriate to bring forth a distinct federal authority to prosecute for the murder of a president of the United States. We ought to recall that, if Lee Harvey Oswald had gone on trial, he would have been tried for a homicide under the laws of Texas. We ought to recall, too, that there were plausible arguments against the need or justification for that extension of authority, just as there were plausible arguments in the Supreme Court, at the turn of the century, as to whether the federal government could act distinctly to protect justices of the Supreme Court who were threatened or assaulted. [See *In re Neagle*, 135 U.S. 1 (1890)] And if there were plausible arguments on those points, it was all the more problematic when the federal statutes were extended to cover the assault by private persons on private citizens, holding no office. But a

generation ago, the murder of three Civil Rights workers in the South, by thugs allied with a local sheriff, brought us past another threshold here in our understanding of the federal jurisdiction. [*U.S. v. Price*, 383 U.S. 977 (1966).]

Without the crossing of that threshold, in the cases on civil rights, it would be hard to account for the accumulation of statutes since that time, extending the federal authority to cover drive-by shootings in cases dealing with drugs, or acts of intimidation by private persons who might be obstructing the access to abortion clinics. It would be rather late in the day, then, to invoke concerns about "States' rights" and raise an earnest question about the reach of the federal government in these cases. Nor would it be apt to argue that acts of fetal homicide could be covered already under local law, since in virtually all of these other cases, the crimes were already covered by local law. The argument for a federal law had something to do with teaching new lessons about the seriousness of the crime by raising it to the level of a federal offense. That is the only plausible account that may yet be given about the need for the federal government to be addressing "hate crimes" and "sexual harassment." In order to oppose the current bill, it seems to me that one would have to begin by arguing that the federal jurisdiction was wrongly extended in any these statutes that provide the "predicate" for this bill.

Those kinds of arguments may always be in season, but even if we changed our minds, say, on the matter of drive-by shootings over drugs [18 U.S.C. Sec. 36], that would not affect the substance of this bill. For this bill seeks to follow, closely, the contours of the federal jurisdiction. Its framers seem content to focus only on the matters clearly within the reach of the federal government, and for them that is already an important scaling down in the name of moderation. Even if we repealed the statutes on drive-by shootings, or the protection of access to abortion clinics, the bill would simply apply to the domain of federal jurisdiction that remained. Presumably, the federal government would continue to bear a distinct responsibility, say, for crimes committed within the military. And so this bill could bear, with a dramatic relevance, on the recent case of an enlisted man in the air force who beat his wife and caused the death of the child she was carrying (*U.S. v. Robbins*, argued before the Court of Appeals for the Armed Forces in May, 1999).

In that case, Gregory Robbins was charged with several offenses, but prosecutors for the Air Force did not think they could charge him for the killing of the unborn child who had already been given the name of Jasmine. For cases of this kind, this bill would make a profound difference. But again, it would not make that difference by extending the federal jurisdiction into new domains. Its "novelty," if we could call it that, comes by only by extending the protections of life to the innocent human being who is present on the scene, but covered in her mother's womb. Yet, that is to say, the federal law would be filled out by adding what we should have understood to have been there all along. For we would simply adjust the federal law more precisely to the understanding of the Founders, as reflected, for example, in James Wilson, one of the framers of the Constitution and a member of the first Supreme Court. In his first lecture on jurisprudence in 1790, Wilson reminded his audience that the purpose of the government was to secure and enlarge our "natural rights," and if there were natural rights, the question was, When

did they begin? Wilson's answer was that they began as soon as we ourselves began to be:

In the contemplation of law, [wrote Wilson] life begins when the infant is first able to stir in the womb. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, and, in some cases, from every degree of danger. [James Wilson, "Of the Natural Rights of Individuals," in *The Works of James Wilson* (Cambridge: Harvard University Press, 1967; originally published in 1804), Vol. 2.]

This understanding is, of course, quite unsettling to the partisans of the "right to abortion," and yet this bill rests on premises that even the proponents of "choice" on abortion have been compelled to accept. In prominent articles in recent years, "pro-choice" writers like Naomi Wolff and Camille Paglia have insisted that the pro-choice argument cannot plausibly begin with the claim that we have any doubts about the species, or the human standing, of the child in the womb. If we did not know that there was indeed a child there, the problem of an "unwanted pregnancy" would dissolve. If that organism was a bird or an orange, there is less moral difficulty in disposing of an unwanted bird or orange. But beyond that, the proponents of "choice" have supported the actions to prosecute, or recover damages, for the injuries done to unborn children. Where pregnant women have decided to carry their pregnancies to term, where their children in the womb are regarded as babies, wanted by their mothers, the proponents of choice seem to have been obliged, by their own principles, to recognize the standing of those unborn children as human beings in utero, whose injuries then have standing in the law.

From that perspective, this current bill offers nothing that need be unsettling to the proponents of "abortion rights." And in fact, the bill makes it clear, in two places, that it does not threaten *Roe v. Wade*, or call into question the "right to abortion." That must be taken as a sign of the prudence shown by the drafters of the bill: They knew that they would be inviting a sweeping rejection of this measure in the courts if this bill were thought to be a device for making a nullity out of *Roe v. Wade*. But for the same reason, it should be understandable that this bill would raise concerns among those of us who have sought to extend the full protections of the law to unborn children. It certainly must stand as an exemplary awkwardness here that the law would protect the right of a woman to destroy her unborn child, but that if she is assaulted on the way into the abortion clinic, she could then sue for damages that may be done to that same child! The problem, for some of us, can be crystallized in this way: The bill could have been written only in its current form, with its explicit acceptance of *Roe v. Wade*; and yet, the law cast in that way threatens to confirm the deeper premises of *Roe v. Wade* --namely, that the child bears no intrinsic dignity in herself, as a human being with a claim to the protections of the law. The child will be protected by federal law only if her existence accords with the interests or convenience of her mother. She is protected by the law only if the mother is pleased to have her live.

Why, then, should this bill be supported by those people who are styled "pro-life"? I would suggest that this bill has a mix of properties we have seen only in rare cases: there is the

most limited reach of the bill, staying closely to the contours of what the law permits, but at the same time, as everyone can sense, the bill draws on an understanding of principle running deep. The bill is carefully limited, but at the same time it plants, in the federal law, the premise that unborn children are indeed beings of jural standing--beings who can receive the protections of the law; and that the authority of Congress does in fact reach to the protection of unborn children, at the very least, in the places where the federal government can now reach. The protection of federal law is not confined to "citizens," or "residents" or "inhabitants," because it may extend to aliens or visitors. And it is not confined to "persons" because it may be extended to cover animals or "endangered species." It is hardly a stretch then for the law to encompass, in its protections, those human beings who are as yet strangers because they have not yet left the womb--but whose faces and features may be known already to their parents and families through sonograms.

On the other side, the people who style themselves "pro-choice" may find consolation in the fact that the law has lived now, for many years, with contradictions of this kind, without undoing the right to abortion. Several years ago a judge in Washington, D.C. confined a woman in prison because, as a "crack" addict, she was endangering her unborn child. The irony, however, quite hard to miss, was that this woman could not have been divested of her constitutional "right" to an abortion; and so at any moment she could have removed the very ground of her incarceration by ordering up the surgery that would have removed, in a stroke, the object of the court's concern. In other parts of the law, we have seen unborn children in the womb invested with "standing" in courts as the inheritors of legacies, or as victims, with a claim to recover against negligent drivers. That is to say, our law has remarkably managed to preserve itself in this world of assumptions radically in conflict: On the one hand, the child in the womb is treated as a victim, with standing in the law to vindicate its injuries. On the other hand, when a woman elects an abortion, that same child is regarded as a legal nonentity, with no standing, or no "injuries" that the law can recognize. The opponents of this bill no doubt suspect that the intention of the law is lend just a bit more weight to the parts of the law that seek to protect the child. The current bill, H.R. 2436, simply reflects the anomalies that run through the law, and it can do nothing itself to dissolve them. But the bill also works to remind the partisans of "choice" on abortion that they too, in many ways, affirm their understanding that there is nothing other than a human being, a small child, in the womb; and it may put the question to them, with a gentle but wholesome strain, of just how long they can preserve the fiction for themselves that they don't know what is in the womb, or that killing is taking place.

For those of us on the other side, the bill bears the promise of teaching something and lending a certain added, moral weight to the parts of the law that seek the protection of the child. Still, it is worth cautioning again that this bill would protect only those unborn children somehow caught up in those actions marked off, with clear boundaries, as federal crimes. It goes without saying that these unborn children are not the objects of intimidation, say, in preventing people from voting, serving on juries, filing claims under federal law. They may be only the closest relatives or people suffering those assaults, or they may be the victims of collateral damage. But here they are covered by the axioms of the law: If the federal government

can protect presidents and congressmen, that authority must extend to those who would assault presidents and congressmen by assaulting their relatives or taking them hostage. If a person has no "right" to engage in shooting at a Post Office, he cannot be curiously insulated from any charges of wrongdoing, under the same statutes, if he happens to kill innocent bystanders.

My own hope is that the significance of this legislation may be enlarged, or come to its fuller meaning, when unborn children can become in themselves the objects of federal protection: The deprivation of "life" without due process of law, already contained in the Constitution, could be understood, once again, to apply to all human beings, as it was understood at the time of our Founding.

Yet, as everyone knows, we are distant from that state of affairs right now. We can make a first step in that direction only when the Congress is able to establish, finally, that there is some limit on the right to abortion, even at the point of live birth. In my own judgment, the bill before us today would reach its fuller significance when Congress resumes its effort to put in place those premises, running even deeper yet.

But that for another day; I don't mean to mix my missions. I am here today to support this bill, which in itself, in its own limited compass, accomplishes a profound good. For this modest measure may actually succeed in saving lives, and so I'd rework a line of Lincoln's and say--as he once said of another modest measure, running deep--may the vast future not have to lament that we have neglected to do this modest, but telling thing.

Hadley Arkes
July 1999



July 21, 1999

Good afternoon. My name is Juley Fulcher and I am the Public Policy Director of the National Coalition Against Domestic Violence. The National Coalition Against Domestic Violence is a nationwide network of approximately 2,000 domestic violence shelters, programs and individual members working on behalf of battered women and their children. My role here today is to advocate for increased safety for battered women, which in turn will lead to healthier pregnancies and births. Unfortunately, the "Unborn Victims of Violence Act" does NOT provide the protection that battered women need to obtain safety.

Historically, one of the major obstacles to eradicating domestic violence from the lives of women has been the unwillingness of the legal system to treat domestic violence as a serious crime. The hard work of dedicated domestic violence advocates on the front lines has slowly brought about a change in the way we treat the crime of domestic violence. States began toughening laws on domestic violence and enforcing existing laws in the late 1980s. In 1994, Congress gave an important boost to this trend by passing the Violence Against Women Act and committing to a federal investment in protecting battered women and their children. As a result, we have seen increased criminal prosecutions of domestic violence nationwide. It is important that we continue this trend and recognize domestic violence threats, assaults and murders as the serious crimes that they are.

According to a 1994 report from the Centers for Disease Control and Prevention, at least 6% of all pregnant women in this country are battered by the men in their lives. As an attorney representing victims of domestic violence, I have seen the effects of this violence first hand. Several years ago, a client of mine lost a pregnancy due to domestic violence. While she was 8 months pregnant, her batterer lifted her up in his arms and held her body horizontal to the ground. He then slammed her body to the floor causing her to miscarry. No matter how many

stories like this I hear, it never ceases to sicken me. I should note that in this case and others I have worked on, it was clear by the batterer's words and actions that his intent was to cause physical and emotional injury to the woman and establish undeniably his power to control her. We, as a society, are right to want to address this problem and protect women from such a fate. However, our response to the problem should be one that truly protects the pregnant woman.

The "Unborn Victims of Violence Act" is not designed to protect women. The goal of the Act is to create a new cause of action on behalf of the unborn. The result is that the crime committed against a pregnant woman is no longer about the woman victimized by violence. Instead the focus often will be switched to the impact of that crime on the unborn fetus, once again diverting the attention of the legal system away from domestic violence or other violence against women.

Moreover, passage of the "Unborn Victims of Violence Act" would set a dangerous precedent which could easily lead to statutory changes that could hurt battered women. This bill would, for the first time, federally recognize that the unborn fetus could be the victim of a crime. It would not be a large intellectual leap to expand the notion of unborn fetus as victim to other realms. In fact, some states have already made that leap and, in those states, women have been prosecuted and convicted for acts that infringe on state recognized legal rights of a fetus. While the "Unborn Victims of Violence Act" specifically exempts the mother from prosecution for her own actions with respect to the fetus, it is easy to imagine subsequent legislation that would hold her responsible for injury to the fetus, even for the violence perpetrated on her by her batterer under a duty to protect theory. Moreover, a battered woman can be intimidated or pressured by her batterer not to reveal the cause of her miscarriage and, if she is financially or emotionally reliant on her batterer, may be less likely to seek appropriate medical assistance if doing so could result in the prosecution of her batterer for an offense as serious as murder. The long-term public health implications of such a policy would be devastating for victims of domestic violence and all women.

The harmful potential of this bill is, unfortunately, balanced by little or no additional protections for battered women and other women victimized by violence. The vast majority of domestic

violence threats, assaults and murders -- like other crimes of violence -- are prosecuted by the states. While important federal laws exist to prosecute interstate domestic violence and interstate violation of a protection order, these are stop-gap statutes which are appropriately applied in a very small number of cases relative to the incidence of domestic violence nationwide. In fact, the federal domestic violence criminal statutes have been called into play less than 200 times in the last four years. As the "Unborn Victims of Violence Act" would only apply in federal cases, the change in the law would do little, if anything, to address the crime of domestic violence in our country or other assaults on pregnant women.

I hope you agree with me that the crime of domestic violence is a horrendous one, not only in terms of the physical impact of the violence, but also in terms of its emotional, psychological, social and economic toll upon its victims. Certainly, there can be no doubt that a pregnancy lost due to domestic violence greatly increases that toll on a battered woman. We at the National Coalition Against Domestic Violence wish to fully recognize and respond to that loss. However, the more appropriate means of dealing with this problem with respect to battered women is to provide comprehensive healthcare, safety planning and domestic violence advocacy for victims. This solution would maintain the focus of any criminal prosecution on the intended victim of violence -- the battered woman -- and make an important affirmative step toward providing safety for her. If Congress wishes to protect the pregnancy, the way to do that is by protecting the woman.



GEORGETOWN UNIVERSITY LAW CENTER

Peter J. Rubin
Visiting Associate Professor of Law

H.R. 2436, THE PROPOSED "UNBORN VICTIMS OF VIOLENCE ACT OF 1999"

WRITTEN TESTIMONY OF PETER J. RUBIN,
VISITING ASSOCIATE PROFESSOR OF LAW,
GEORGETOWN UNIVERSITY LAW CENTER

BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE
HOUSE COMMITTEE ON THE JUDICIARY

July 21, 1999

I have been asked by this subcommittee to review and comment upon H.R. 2436, which would create a separate federal criminal offense where criminal conduct prohibited under a list of over sixty federal statutes, in the words of the proposed law "causes the death of, or bodily injury . . . to a child, who is *in utero*." I am honored to have the opportunity to convey my views to the subcommittee.*

Where an act of violence against a pregnant woman results in a miscarriage, that act of violence has wrought a distinct and unique harm in addition to the harm it would have done had the woman not been pregnant. Similarly, injury to a baby that may result from unlawful violence perpetrated upon its mother when it was a fetus *in utero* is something from which government may properly seek to protect the woman and the child.

Consequently, although many states adhere to the traditional rule that the criminal law reaches only conduct against a person already born alive, some states have enacted laws that penalize conduct that may kill or, in some cases, injure, a fetus *in utero*. One example is North Carolina's state statute which provides that

A person who in the commission of a felony causes injury to a woman, knowing the woman to be pregnant, which injury results in a miscarriage or stillbirth by the woman is guilty of a felony that is one class higher than the felony committed.

N.C. Gen. State. §14-18.2.

*My testimony is provided in the public interest; I do not speak on behalf of any client or organization.

If the members of Congress conclude that causing injury in this way during the commission of a federal crime warrants additional punishment, it, too, could adopt such a provision. Indeed, it seems as though this is one area on which both sides of the debate about abortion might be able to find common ground in supporting a properly worded statute that might give additional protection to women and their families from this unique class of injury.

As currently drafted, however, the proposed statute differs from some state laws on this issue in two critical respects. First is its use of the phrase “child, who is *in utero*” to describe the fetus. This is not the ordinary way statutes refer to fetuses *in utero*. Indeed, the proposed law appears to be unique in its use of this formulation. The use of this language will likely subject H.R. 2436 to legal challenge, and will likely render the proposed law ineffective in preventing and punishing acts that harm or kill fetuses being carried by pregnant women.

Second is the bill’s treatment of the fetus solely as a separate victim of certain federal crimes. This approach is different from that taken by some states that have enacted criminal laws addressing fetal injury or death in that it fails to focus at all on the woman who is the victim of the violence that may injure or kill the fetus. It would be far easier to reach common ground with an approach that takes account of the place of the pregnant woman when acts of violence against her lead to fetal injury or death. Indeed, the approach taken by the current statute may lead to some unintended results, and is not consistent with the treatment of the fetus in the American legal tradition.

To begin with, the proposed law refers to “a child, who is *in utero* at the time the conduct takes place.” Because it uses these words, the proposed law would likely result more in useless litigation about the statute’s meaning than in the prevention and punishment of conduct that results in fetal injury or death. It’s use of the phrase “child, who is *in utero*” may give a defendant an argument that the statute is ambiguous, and that he lacked the notice of what acts are criminal that is required by the Due Process Clause of the Fifth Amendment.¹ Does it mean the statute applies only to the injury or death of a “child,” that is one who is subsequently born, but who was injured *in utero*? Does it refer to a fetus past the point of viability? Does it refer to a single-cell fertilized ova that has not yet implanted in the uterine wall? The statute does not tell us.

Even if the law is not held inapplicable because of unconstitutional vagueness, the Supreme Court has articulated a doctrine known as the doctrine of “lenity.”² Rooted in part in separation of powers concerns, this doctrine means that an ambiguous federal criminal statute must be construed in the way most favorable to the defendant, lest an individual be criminally punished for conduct that Congress did not intend to criminalize.³ At best, the phrase “child, who is *in utero*” is ambiguous

¹See, e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966).

²See, e.g., *United States v. Bass*, 404 U.S. 336, 347 (1971).

³See *id.* at 347-349.

here, and a defendant is likely to be able to avoid prosecution for whatever conduct it is that the drafters of this law intend to criminalize.

In addition, this statute operates in a very unusual manner. It does not just increase the penalty for unlawful violence against a pregnant woman that results in the death of or injury to a fetus, nor does it criminalize injuring or killing a fetus if one has the requisite mental state and is aware of the woman's pregnancy. Rather it includes fetuses within the universe of persons who may be protected from injury or death resulting from violations of other federal criminal laws.

Many state laws address fetal injury and death only in certain circumstances, and, reflecting the unique nature of the developing fetus, many provide some penalty that is different from the penalty that would have applied had the defendant killed or injured a person who was already born. They tend also to take account of the fetus's stage of development. State feticide laws often do not treat even the intentional killing of a fetus through violence perpetrated upon the pregnant woman as murder equivalent to the murder of a person who has been born. Some, like North Carolina, enhance the penalty for the underlying criminal conduct. Others treat even intentional feticide only as manslaughter. Thus, in Mississippi, for example, the law provides that

The wilful killing of an unborn quick child, by an injury to the mother of such child, which would be murder if it resulted in the death of the mother, shall be manslaughter.

Miss. Code. Ann. §97-3-37.

The proposed law by contrast says that whenever causing death or injury to a person in violation of a listed law would subject an individual to a particular punishment, he shall be subject to the same punishment if he causes death or injury to a fetus. This is true regardless of the stage of fetal development. Whatever its rhetorical force, the proposed law would lead to some unusual, and probably unintended, results. To give just one example, under the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. §248, one of the statutes listed in H.R. 2436, if an individual who is engaged in obstructing access to an abortion clinic knocks a pregnant woman to the ground during a demonstration, he is liable to imprisonment for up to one year. If he causes her "bodily injury" when he knocks her down, he would be subject under FACE to a ten-year term of imprisonment. Under the proposed law, however, if she miscarried as a result of being knocked down, he would be subject to life imprisonment, the same as if his action had caused the death of the woman herself.

In addition to being far more practical, it would be far easier to reach common ground on this issue with adoption of a statute similar to those state statutes providing for enhanced punishments that I have described. For in addition to the practical consequences, the use of a statutory framework that seeks to achieve its result through treating all fetuses at all stages of development as persons distinct from the women who carry them unnecessarily places federal statutory law on the path toward turning the pregnant woman into the adversary rather than the protector of the fetus she

carries. For although *this* law contains exceptions for abortion, for medical treatment of the woman or the fetus, and for the woman's own conduct – exceptions that are both wise and constitutionally required – if the fetus were truly a “person,” there would be no principled reason to include such exceptions. Yet of course a law that did not contain them would be shocking to most Americans and both obviously and facially unconstitutional.

Finally, then, in failing to take account of the woman, the proposed statute also sets federal law apart from the American legal and constitutional tradition with respect to the treatment of the fetus. As the Supreme Court has described, “the unborn have never been recognized in the law as persons in the whole sense.”⁴ At common law, the destruction of a fetus *in utero* was not recognized as homicide unless the victim was born alive.⁵ And, of course, the Supreme Court has held that fetuses are not persons within the meaning of the Fourteenth Amendment.⁶ This is a position with which even as staunch an opponent of *Roe v. Wade* as Justice Antonin Scalia agrees.⁷

In addition, therefore, to the practical and political considerations that counsel in favor of an alternative approach, the proposed law would also unnecessarily set federal statutory law on a conceptual collision course with the Supreme Court's abortion decisions. Whatever one may think of those decisions, an unnecessary conflict about them would not contribute to the important work of healing where possible the country's division over abortion.

⁴*Roe v. Wade*, 410 U.S. 113, 162 (1973).

⁵See *Commonwealth v. Cass*, 467 N.E. 2d 1324, 1328 (Mass. 1984) (describing the common law).

⁶*Roe*, 410 U.S. at 157.

⁷See *Webster v. Reproductive Health Services*, 492 U.S. 490, 535 (Scalia, J., concurring in part and concurring in judgment) (stating that the legality of abortion is “a political issue” that should be decided by the states, a position dependent upon an implicit conclusion that fetuses are not “persons” within the meaning of the Fourteenth Amendment).

Nat'l Women's Law Center Claire / Lofgren
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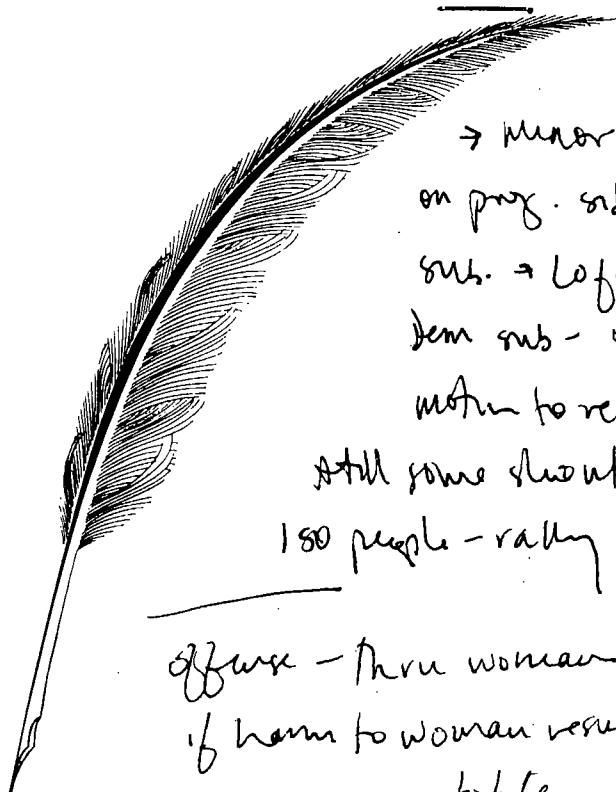
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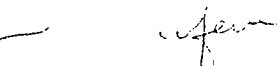
Nicole -

Per my message, please
find attached the testimony
from yesterday's hearing.
Thanks for your

help. — Sharon Levin

Julien Epstein, Counsel  Committee
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**Committee on the Judiciary, U.S. House of Representatives
Hearing on H.R. 2436 The Unborn Victims of Violence Act
July 21, 1999**

**Testimony of Gerard V. Bradley
Professor of Law, University of Notre Dame**

I am pleased to address the question of the constitutionality of the **Unborn Victims of Violence Act of 1999**. [Hereafter, "**Act**".]

The first question about the constitutionality of the Act is **not** whether it violates a right protected by the Constitution, including the right articulated by the Supreme Court in Roe v. Wade. That would be the first, and only interesting, question where a government of general jurisdiction, like our state governments, passed a law like this **Act**. About half the states have effectively done so, either by separate enactment or by subsuming harm to the unborn within homicide protections of murder or manslaughter. Courts throughout the country have found these laws to be compatible with the right articulated in Roe.

Our national government possesses extensive but not indefinite powers, large but not unlimited jurisdiction. Ours is a national government of specific and enumerated powers. It possesses no general power to protect persons, including unborn persons, against private violence. The closest the national government comes to such an authority is the power conferred by the Fourteenth Amendment's guarantee to all "persons" of the "equal protection" of state laws, including state laws against assault and homicide. Upon an appropriate finding of fact by Congress that some identifiable class of persons – say, a racial or ethnic minority, or a particularly vulnerable and politically powerless group, like the infirm or unborn – is, on a widespread basis, unequally exposed to private violence by exclusion from, or lax enforcement

of, state homicide laws, direct federal protection against such discrimination would be constitutional.

The first question is whether there is an enumerated power which authorizes the protections accorded the unborn by the **Act**. With the recent revival of judicially enforceable limits upon Congress's commerce power – see U.S. v. Lopez – and the narrow reading of Congress's "enforcement" power under Section 5 of the Fourteenth Amendment in City of Boerne v. Flores, one might expect some debate about the enumerated bases for the **Act**. Not so. The **Act** does not engage recent developments, and is subjected to no doubt of its constitutionality because of them. For the **Act** does not **extend** Congress's reach; no conduct whatsoever which is presently free of federal regulation will be regulated if the **Act** becomes law. No conduct which was lawful is to be unlawful; no conduct which was legal is to be illegal. The **Act** is essentially a punishment enhancement provision.

The **Act** is perhaps best compared in this regard to the Racketeer Influenced and Corrupt Organizations Act – RICO. RICO, too, relies upon (what it expressly calls) "predicate" offenses – and then lists them, as does the **Act** – in order to set up what, like the **Act**, is essentially an enhanced punishment statute. The **Act** relies upon predicate acts for its constitutional hook, one might say. If there is any question about the constitutionality of its reach, then, it is a question of the constitutionality of the "predicate" offense, and not about this **Act**.

(There is one question to be taken up concerning the constitutionality of the reach of this **Act**, where federal authority is predicated entirely upon the identity of an individual attacked. I postpone it until later, for reasons that I believe will be more clear then.)

The **Act** relies upon established criminal law principles of transferred intent to affix the

enhanced penalty to an already criminal act. The basic idea is simple: a bad actor with the requisite malice to, in the language of the bill, "violate [] any of the provisions of law listed in subsection (b)", may be charged with an additional violent offense, without evidence of malice towards or even knowledge of, the baby in utero where the malefactor in fact causes harm to it. This established principle is perhaps classically illustrated in felony murder statutes, where the malice manifested in the commission of a felony is transferred to what may be even an accidentally caused death. So, for example, an arsonist who honestly believes the building he torches is unoccupied is nonetheless indictable for felony murder if, by chance, someone is inside, and is killed.

Nothing in the **Act** affects, much less unconstitutionally restricts, the mother's right to terminate her pregnancy. (The current expression of the constitutional standard is the "undue burden" test of Casey v. Planned Parenthood.) I can scarcely imagine language more adequate to the preservation of the right to abortion than that found in section (c) of the **Act**. Not only is the mother and all those cooperating with her in securing an abortion completely immunized against all potential liability. No woman may be prosecuted under this **Act** "with respect to her unborn child." No woman engaged in predicate criminal conduct may be prosecuted for harm to her child, even where she did not intend to abort. So, a woman engaged in a hijacking or assault upon a federal juror or in animal terrorism or in any covered activity and who, as a result (of flight or some mishap) causes harm or death to her own fetus, is beyond prosecution under this **Act**, even though she may be liable for hijacking or assault upon a juror or animal terrorism. The **Act** simply does not inhibit the woman's freedom to choose whether to bear a child or not.

In fact, one of the state interest which might be said to be promoted by the **Act** is

precisely the liberty articulated in Roe. A woman's freedom to carry a baby to term is inhibited or denied by conduct which results in harm or death to her unborn child.

Someone might object that nevertheless the **Act**, in its protection of what the **Act** calls "unborn children" to practically the same extent as other persons is somehow inconsistent with Roe, or its progeny. Is there no difference, the objection might hold, between this **Act** and a flat Congressional declaration that the unborn are persons? And is not that declaration inconsistent with Roe, or its progeny.

The answer to this challenge would very likely have to be yes if the Supreme Court in Roe or some other case held that the unborn are not persons. But the Court has never so held. The Roe court said that it did not "need [to] resolve the difficult question of when life begins" (410 U.S. at 159). The Court there said the "the judiciary...is not in a position to speculate as to the answer." (Id.) In no general or broad way, moreover, did the Court hold that the states or the Congress operated under a similar disability. All that the Court held in this regard was that Texas (and thus any other governmental body, including for argument sake, the Congress) "could not override the rights of the pregnant woman" by adopting an answer to the question of when life begins, that she could not be deprived of all freedom of choice by the consequences of legislation regarding the beginning of life. (See 410 U.S. at 162). But this **Act** does not affect, much less "override," the rights of any pregnant woman. The Roe court opined that the unborn were not to be considered persons in the "whole" sense, an opinion consistent with treating the unborn as persons for some purposes, like inheritance and tort injury, purposes which the Roe court itself recognized as legitimate.

This understanding of Roe was explicitly confirmed by the Supreme Court in the 1989

Webster decision. There the state of Missouri had legislated that the "life of each human being begins at conception", and the "unborn children have protectable interests in life, health, and wellbeing." The 8th Circuit Court of Appeals seems to have adopted the view of Roe stated as an "objection" here, that the state had, in light of Roe, "impermissibl[y]" adopted a "theory of when life begins." But the Supreme Court reversed this part of the 8th Circuit holding, stating that its own prior decisions, including Roe, meant "only that a state could not justify an abortion regulation *otherwise invalid under Roe v. Wade* on the ground that it embodied the state's view". (emphasis added). Since this Act is no way is questionable under roe apart from the viewpoint issue, the matter is settled: congress is as free as was the state of Missouri to conclude and to enforce outside the parameters of Roe its view that life begins at conception. If there remains something anomalous about the situation, it is an anomaly engendered by Roe, and not by this **Act**.

Now, the postponed question. What if federal jurisdiction is predicated entirely upon the identity of a particular individual, say the President or a cabinet officer or foreign dignitary? Is there a satisfactory basis for enhanced punishment of a violator of, for example, 18 U.S.C. 1751, one who attacks the President and, who as a result of that felonious conduct, injures or kills her unborn child?

The answer must start with the recognition that, strictly speaking, it is only the discharge of federal functions, and not persons just as such, which grounds federal criminal jurisdiction even in cases like our example. Protection of federal officers and jurors and foreign visitors of a certain rank is justified by virtue of the national interest in protecting the functions which those persons perform, or (to put it differently) the offices whose duties they discharge. These

functions are impeded by assaults upon the person of the various officers, as well as by threats to them and even to their families. So, it would in my judgment be constitutional to extend federal protection to the entire families of at least certain federal officers, to insure that nothing distracted them or caused them to be derelict in their duty. It seems a reasonable judgment for Congress to make that there is a distinct, punishable harm to the discharge of federally imposed duties where the unborn child of a protectable person is harmed or destroyed. This would seem to exactly the reasoning behind 18 U.S.C. 115, which protects members of the immediate family of a United States official or law enforcement officer against assault, murder and kidnaping.