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Part 1

UNBORN VICTIMS OF VIOLENCE ACT OF 1999

SEPTEMBER 24, 1999.—Ordered to be printed

Mr. CANADY of Florida, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 2436]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2436) amending title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Unborn Victims of Violence Act of 1999".

SEC. 2. PROTECTION OF UNBORN CHILDREN.

(a) IN GENERAL.—Title 18, United States Code, is amended by inserting after chapter 90 the following:

"CHAPTER 90A—PROTECTION OF UNBORN CHILDREN

"Sec.
"1841. Protection of unborn children.

"§ 1841. Protection of unborn children

"(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

"(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

"(B) An offense under this section does not require proof that—

"(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

"(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

"(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.

"(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

"(b) The provisions referred to in subsection (a) are the following:

"(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229, 242, 245, 247, 248, 351, 831, 844(d), (f), (h)(1), and (i), 924(j), 930, 1111, 1112, 1113, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203, 1365(a), 1501, 1503, 1505, 1512, 1513, 1751, 1864, 1951, 1952(a)(1)(B), (a)(2)(B), and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

"(2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848(e)).

"(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

"(c) Nothing in this section shall be construed to permit the prosecution—

"(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency;

"(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

"(3) of any woman with respect to her unborn child.

"(d) As used in this section, the term 'unborn child' means a child in utero, and the term 'child in utero' or 'child, who is in utero' means a member of the species homo sapiens, at any stage of development, who is carried in the womb.".

(b) CLERICAL AMENDMENT.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item relating to chapter 90 the following new item:

"90A. Protection of unborn children ..... 1841".

SEC. 3. MILITARY JUSTICE SYSTEM.

(a) PROTECTION OF UNBORN CHILDREN.—Subchapter X of chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is amended by inserting after section 919 (article 119) the following new section:

"§ 919a. Art. 119a. Protection of unborn children

"(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

"(2) The punishment for that separate offense is the same as the punishment provided for that conduct under this chapter had the injury or death occurred to the unborn child's mother, except that the death penalty shall not be imposed.

"(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

"(c) Subsection (a) does not permit prosecution—

"(1) for conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency;

"(2) for conduct relating to any medical treatment of the pregnant woman or her unborn child; or

"(3) of any woman with respect to her unborn child.

"(d) In this section, the term 'unborn child' means a child in utero.".

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of such subchapter is amended by inserting after the item relating to section 919 the following new item:

"919a. 119a. Protection of unborn children.".

PURPOSE AND SUMMARY

Under current Federal law, an individual who commits a Federal crime of violence against a pregnant woman receives no additional punishment for killing or injuring the woman's unborn child during the commission of the crime. Therefore, except in those States that recognize unborn children as victims of such crimes, injuring or killing an unborn child during the commission of a violent crime has no legal consequence whatsoever.[1]

H.R. 2436, The Unborn Victims of Violence Act of 1999, was designed to narrow this gap in the law by providing that an individual who injures or kills an unborn child during the commission of certain Federal crimes of violence will be guilty of a separate offense. The punishment for that separate offense is the same as the punishment provided under Federal law had the same injury or death resulted to the pregnant woman. If the perpetrator commits the predicate offense with the intent to kill the unborn child, the punishment for that offense is the same as the punishment provided under Federal law for intentionally killing or attempting to kill a human being.

By its own terms, H.R. 2436 does not apply to "conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency." The bill also does not permit prosecution "of any person for any medical treatment of the pregnant woman or her unborn child," or "of any woman with respect to her unborn child."

[1] Eleven States currently have laws that recognize the unborn as victims throughout the period of prenatal development. Another thirteen States have laws that recognize the unborn as victims during only part of their prenatal development, and seven other States criminalize certain conduct that "terminates a pregnancy" or causes a miscarriage.

BACKGROUND AND NEED FOR THE LEGISLATION

I. CURRENT FEDERAL LAW

A. The Obsolete "Born Alive" Rule

Federal law does not currently permit prosecution of violent criminals for killing or injuring unborn children. Instead, Federal criminal statutes incorporate the common law "born alive" rule, which provides that a criminal may be prosecuted for killing an unborn child only if the child was born alive after the assault and later died as a result of the fetal injuries.[2]

The born alive rule has been rendered obsolete by progress in science and medicine, however. As one commentator explains, "the historical basis of the born alive rule was developed out of a lack of sophisticated medical knowledge."[3] Because pregnancy was difficult to determine, the common law recognized that live birth was the most reliable means of ensuring that a woman was with child and that the child was in fact a living being.[4]

The use of ultrasound, fetal heart monitoring, in vitro fertilization, and fetoscopy has greatly enhanced our understanding of the development of unborn children.[5] Pursuant to this enhanced knowledge, courts today recognize, for example, a cause of action for wrongful death where an unborn child has been killed,[6] as well as a mother's right to compensation from the father for prenatal care in domestic relations cases, even where the child is not yet born.[7] Even the United States Supreme Court in *Roe* v. *Wade* acknowledged the inheritance and other property rights that unborn children enjoy in modern law.[8]

Because of these developments, the current trend in American law is to abolish the born alive rule.[9] In many States, this abolition is manifest in the enactment of legislation making it a crime to kill an unborn child.[10] Such legislation further reflects the growing trend in American jurisdictions of recognizing greater legal protections for unborn children, a trend consistent with the advancements in medical knowledge and technology.[11]

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[2] See *United States* v. *Spencer*, 839 F.2d 1341 (9th Cir. 1988).

[3] Cari L. Leventhal, Comment, *The Crimes Against the Unborn Child Act: Recognizing Potential Human Life in Pennsylvania Criminal Law*, 103 Dick. L. Rev. 173, 175 (1998).

[4] *Id.* at 175–76. See also *State* v. *Trudell*, 755 P.2d 511, 513 (Kan. 1988) (same); Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other legal Anachronisms*, 21 Val. U. L. Rev. 563, 567–80 (1987) (same).

[5] See Mary E. Barrazoto, Note, *Judicial Recognition of Feticide: Usurping the Power of the Legislature?*, 24 J. Fam. L. 43, 45 (1986).

[6] See *Fowler* v. *Woodward*, 138 S.E.2d 42 (S.C. 1964).

[7] See Tex. Fam. Code Ann. § 160.005.

[8] See *Roe* v. *Wade*, 410 U.S. 113, 162 (1973).

[9] See Leventhal, *supra* note 3, at 176.

[10] See, e.g., Ariz. Rev. Stat. § 13–1103(A)(5); Ark. Code Ann. § 5–10–101; Fla. Stat. Ann. § 782.09; Ill. Comp. Stat. Ch. 720, §§ 5/9–1.2, 5/9–2.1, 5/0–3.2; La. Rev. Stat. Ann. §§ 14:32.5–14.32.8; Mich. Stat. Ann. § 28.555; Minn. Stat. Ann. §§ 609.2661–609 – 609.2665; Minn. Stat. Ann. §§ 609.267 – 609.2672; Miss. Code Ann. § 97–3–37; Mo. Stat. Ann. §§ 1.205, 565.024, 565.020; Nev. Rev. Stat. § 200.210; N.D. Cent. Code §§ 12.1– 17.1–02 to 12.1–17.1–04; N.D. Cent. Code §§ 12.1–17.1–05, 12.1–17.1–06; 18 Pa.C.S.A. §§ 2601–2609; Okla. Stat. Ann. Tit. 21 § 713; R.I. Gen. Laws § 11–22–5; S.D. Codified Laws Ann. §§ 22–16–1, 22–16–1.1, 22–16–20; Utah Code Ann. § 76–5–201; Wash. Rev. Code Ann. § 9A.32.060; Wisc. Stat. Ann. §§ 939.75, 939.24, 939.25, 940.01, 940.02, 940.05, 940.06, 940.08, 940.09, 940.10. Two States have held that killing an unborn child is a crime even at common law, thus dispensing with the need for legislation. See *Commonwealth* v. *Cass*, 467 N.E.2d 1324 (Mass. 1984); *State* v. *Horn*, 319 S.E.2d 703 (S.C. 1984).

[11] See *People* v. *Hall*, 557 N.Y.S.2d 879 (N.Y. App. Div. 1990) (relying on advancements in medical technology to determine that a 28-week-old fetus removed from its mother's womb by

H.R. 2436 thus follows modern legal theory and practice by dismantling the common law born alive rule at the Federal level. The legislation ensures that Federal prosecutors are able to punish those who injure or kill unborn children during the commission of violent Federal crimes, whether or not the child is fortunate enough to survive the attack and be born alive.

B. Federal Sentencing Guidelines Are Inadequate

Opponents of H.R. 2436 have argued that the Act is unnecessary because current Federal sentencing guidelines provide enhanced punishment for violent criminals who injure or kill unborn children during the commission of their crimes. Ronald Weich, Esquire, testified to that effect before the Subcommittee on the Constitution.[12] This is simply not true.

The truth is that not one of the cases cited by Mr. Weich in his testimony held that Federal sentencing guidelines currently authorize enhanced punishment solely because the victim was pregnant or because an unborn child was injured or killed during the commission of a violent crime. In two of the cases cited by Mr. Weich, the defendants received sentence enhancements under § 2B3.1(b)(3)(A) of the United States Sentencing Guidelines because the defendants caused "bodily injury" to the victims of robberies, not because the victims were pregnant or because their unborn children were injured or killed.[13] In a third case, *United States* v. *Manuel*,[14] the court upheld a sentence enhancement not because the victim of the crime was pregnant but because of the defendant's criminal history, which included two assaults on his wife, on one occasion when she had been pregnant.[15]

Nor did the court hold in *United States* v. *James*,[16] as Mr. Weich contended, that a pregnant woman may be treated as a "vulnerable victim" under § 3A1.1 of the United States Sentencing Guidelines, which provides a sentence enhancement if the defendant knew or should have known the victim was "vulnerable" because of "age, physical or mental condition." In that case the court of appeals upheld a vulnerable victim sentence enhancement for a bank robber because he made the following statement to a pregnant bank teller during the commission of the robbery: " 'Don't give me any of the trackers, alarms or magnets or I'll kill you. I notice that you

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Caesarian section and immediately placed on a ventilator was a "person" under New York Penal Law). See also Annissa R. Obasi, *Protecting Our Vital Organs: The Case for Fetal Homicide Laws in Texas*, 4 TEX. WESLEYAN L. REV. 207, 216 (1998) (explaining that advancements in medical science have influenced the development of fetal rights); Stephanie Ritrivi McCavitt, Note, *The "Born Alive" Rule: A Proposed Change to the New York Law Based on Modern Medical Technology*, 36 N.Y.L. SCH. L. REV. 609, 618 (1991) (arguing that courts should be willing to use technological advancements to determine whether unborn children are "persons" for homicide purposes).

[12] See *The Unborn Victims of Violence Act: Hearings on H.R. 2436 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., July 21, 1999 (statement of Ronald Weich, Esq.).

[13] See *United States* v. *Winzer*, No. 97–50239, 1998 WL 823235, at *1 (9th Cir. Nov. 16, 1998) (upholding bodily injury sentence enhancement because victim "was knocked to the ground" and "experienced soreness to her right shoulder and neck and suffered a discharge of blood"); *United States* v. *Peoples*, No. 96–10231, 1997 WL 599363, at *1 (9th Cir. Sept. 22, 1997) (upholding bodily injury enhancement because "the victim, an eight-month pregnant woman forced to lie face down on the floor, suffered injuries and sought medical attention after being struck in the back by a twenty-five pound loot bag").

[14] No. 91–30232, 1993 WL 210680 (9th Cir. June 15, 1993).

[15] See *id.* at *2.

[16] 139 F.3d 709 (9th Cir. 1998).

are pregnant and I love children, but I will come back and kill you and the baby.'"[17] The court noted that the defendant's sentence was properly enhanced under § 3A1.1 not "simply because [the victim] was pregnant,"[18] but because "her pregnancy created a potential vulnerability which [the defendant] acknowledged and exploited when he expressly threatened to kill her unborn child."[19]

Even assuming, however, that current Federal sentencing guidelines would permit a two-level sentence enhancement when the victim of a violent crime is pregnant, whether under the "bodily injury" or "vulnerable victim" provisions, that trivial increase in punishment would not reflect the seriousness with which violent crimes against pregnant women and unborn children should be treated. For example, if an individual assaults a Member of Congress in violation of 18 U.S.C. § 111, the base offense level for that offense under the sentencing guidelines is 15, which carries a sentence of between 18 and 24 months.[20] If the Congresswoman is pregnant and her unborn child is killed or injured as a result of the assault, a bodily injury or vulnerable victim sentence enhancement would result in an offense level of 17, which carries a sentence of 24 to 30 months.[21] The permissible range of punishment for the assault would thus increase by only an additional six months, even if the assailant intended to kill the unborn child. This minor increase in punishment is woefully inadequate for the offense of killing or injuring an unborn child.

In short, there does not appear to be a single published or unpublished decision in which a Federal court has enhanced a sentence for a violent criminal solely because the victim was pregnant or because an unborn child was killed or injured during the commission of the crime. And even assuming a trivial sentence enhancement could be imposed under current Federal sentencing guidelines, such an enhancement would not provide just punishment for what should be treated as a very serious offense.

C. Filling the Existing Void: Some Recent Examples

The need for H.R. 2436 is well illustrated by the case of *United States* v. *Robbins*.[22] In that case, Gregory Robbins, an airman, and his wife, who was over eight months pregnant with a daughter they had named Jasmine, resided on Wright-Patterson Air Force Base, Ohio, an area of exclusive Federal jurisdiction. On September 12, 1996, Mr. Robbins wrapped his fist in a T-shirt (to reduce the chance that he would inflict visible bruises) and badly beat his wife "by striking her repeatedly in her face and abdomen with his fist."[23]

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[17] *Id.* at 714.
[18] *Id.*
[19] *Id.* at 715.
[20] See U.S.S.G. § 2A2.2(a).
[21] See U.S.S.G. § 2A2.2(b)(A).
[22] 48 M.J. 745 (A.F.C.C.A. 1998). The Subcommittee on the Constitution heard testimony regarding the Robbins case from Lieutenant Colonel Keith L. Roberts, Acting Chief of the Air Force Military Justice Division. See *The Unborn Victims of Violence Act: Hearings on H.R. 2436 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., July 21, 1999 (statement of Lt. Colonel Keith L. Roberts, Acting Chief of the Air Force Military Justice Division).
[23] *Id.* at 747.

Mrs. Robbins survived the attack with "a severely battered eye, a broken nose, and a ruptured uterus."[24] She was taken to the emergency room, but medical personnel could not detect the baby's heartbeat.[25] Doctors performed an emergency surgery on Mrs. Robbins and found

> Jasmine laying sideways, dead, in [Mrs. Robbins'] abdominal cavity. As a result of [Mr. Robbins'] repeated blows rupturing [Mrs. Robbins'] uterus, the placenta was torn from the inner uterine wall, which expelled Jasmine into [Mrs. Robbins'] abdominal cavity.[26]

Air Force prosecutors recognized that "[f]ederal homicide statutes reach only the killing of a born human being,"[27] and that Congress "has not spoken with regard to the protection of an unborn person."[28] As a result, the prosecutors attempted to prosecute Mr. Robbins for Jasmine's death under Ohio's fetal homicide law, using Article 134 of the Uniform Code of Military Justice.[29] Article 134 "incorporates by reference all Federal criminal statutes and those State laws made Federal law via the [Assimilated Crimes Act, 18 U.S.C. § 13]."[30]

Mr. Robbins pleaded guilty to involuntary manslaughter for Jasmine's death, but the legality of assimilating Ohio's fetal homicide law through Article 134 is now the subject of Mr. Robbins' appeal to the Court of Appeals for the Armed Forces. If the court of appeals agrees with Mr. Robbins that assimilation of Ohio's law was improper, he will receive no additional punishment for killing baby Jasmine. Moreover, had Mr. Robbins battered his wife in a State that had no fetal homicide law, he could have been charged with only battery for beating his eight-months-pregnant wife and killing their unborn child.

There have been numerous other recent examples of violent Federal crimes that resulted in the death of unborn children. On April 19, 1995, Carrie Lenz, a Drug Enforcement Agency employee, was showing coworkers ultrasound pictures of her unborn child at six months when the Murrah Federal Building in Oklahoma City was destroyed by a bomb. Just the day before the horrific bombing, she and her husband Michael Lenz, who testified before the Constitution Subcommittee, learned by ultrasound that they were having a boy and named him Michael James Lenz III.[31] Under current Federal law, those responsible for the bombing were not subject to any additional punishment for the death of the Lenz's unborn child.[32]

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[24] *Id.*
[25] See *id.*
[26] *Id.*
[27] *Id.* at 752.
[28] *Id.*
[29] See *id.* at 748.
[30] *Id.*
[31] See *The Unborn Victims of Violence Act: Hearings on H.R. 2436 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., July 21, 1999 (statement of Michael Lenz). See also Karen Abbott & Lynn Bartels, *Tears Reflect the Horror of Loss, Nichols Courtroom in Shock at Wrenching, Desolate Tales as Jurors Begin Penalty Phase*, Rocky Mountain News, Dec. 30, 1997, at 5A.
[32] At the conclusion of his testimony before the subcommittee on the Constitution, Mr. Lenz added that "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. . . . [I]n my mind 171 people lost their lives that day, and three 'Daddies to be' became widowers." See Lenz Statement, *supra* note 31.

Ruth Croston was five months pregnant when she was shot on April 21, 1998, by her estranged husband Reginald Anthony Falice as she sat in her car at a Charlotte, North Carolina intersection.[33] She and her unborn daughter died after being shot at least five times.[34] Falice was prosecuted and convicted of interstate domestic violence and using a firearm in the commission of a violent crime.[35] There was no criminal charge for the murder of the unborn baby girl.[36]

Monica Smith, a pregnant secretary, and her unborn child were killed in the World Trade Center bombing in New York on February 26, 1993.[37] Jurors at one trial were told about the harm done to Ms. Smith's unborn child,[38] but no additional punishment may be imposed under Federal law for the death of that child.

On January 1, 1999, Deanna Mitts, who was eight months pregnant, returned home with her 3 year old daughter, Kayla, after celebrating New Year's Eve with her parents. Shortly after entering her Connellsville, Pennsylvania apartment, she, Kayla and her unborn child were killed in an explosion from a bomb.[39] Federal and local authorities are still searching for the person responsible.[40]

On December 3, 1997, Tammy Lynn Baker was near term with her unborn child when a bomb exploded outside her apartment killing her and her unborn child.[41] The Federal Bureau of Alcohol, Tobacco and Firearms is investigating this as one of several unsolved bombings in Louisa County, Virginia.[42] Even if those responsible for these vicious crimes are apprehended, they will receive no additional punishment for killing the unborn children.

D. H.R. 2436: The Unborn Victims of Violence Act

H.R. 2436 fills this gap in Federal law by providing that an individual who injures or kills an unborn child during the commission of one of over sixty Federal crimes will be guilty of a separate offense. The punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had the same injury or death resulted to the unborn child's mother. An offense under H.R. 2436 does not require proof that the defendant knew or should have known that the victim was pregnant, or that the defendant intended to cause the death or injury of the unborn child. If, however, the defendant committed the predicate offense with the intent to kill the unborn child, the punishment for the separate offense shall be the same as that provided under Federal law for intentionally killing or attempting to kill a human being.

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[33] See *Georgia man convicted in slaying of estranged, pregnant wife*, Associated Press, July 14, 1999.
[34] See *id.*
[35] See *id.*
[36] See *id.*
[37] See Jeanne King, *Pictures of N.Y. bombing stir emotional response from jury*, Houston Chronicle, Aug. 8, 1997, at 26.
[38] See *id.*
[39] See Lawrence Walsh, *Bombing Shocks Small Town Blast That Killed Mother*, Pittsburgh Post-Gazette, May 2, 1999, at B1.
[40] See *id.*
[41] See Dominic Perella, *Bombings instill fear in small town: Suspicion of serial blasts complicates life in Louisa, Va.*, Detroit News, Dec. 27, 1998, at A2.
[42] See *id.*

For example, if an individual assaults a Member of Congress in violation of 18 U.S.C. § 111, and as a result of that assault kills the Congresswoman's unborn child, the perpetrator may be punished for either second-degree murder, voluntary manslaughter, or involuntary manslaughter for killing the unborn child (depending upon the circumstances surrounding the assault)—the same punishment the individual would have received had the Congresswoman died as a result of the assault.[43] If the prosecution proves that the defendant assaulted the Congresswoman with the intent to kill the unborn child, the perpetrator may be prosecuted for first or second degree murder or voluntary manslaughter if the unborn child dies, or attempted murder or manslaughter if the child survives the assault.

H.R. 2436 specifically exempts "conduct for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency." The bill also exempts conduct related to medical treatment of the pregnant woman or her unborn child, or conduct of the pregnant woman with respect to her unborn child. The bill further provides that the death penalty shall not be imposed.

By enacting H.R. 2436, Congress will have spoken with regard to the protection of unborn persons, thereby ensuring that those who commit violent Federal crimes against pregnant women receive additional punishment for killing or injuring an unborn child.

II. CONSTITUTIONAL ISSUES

A. Mens Rea Element

Contrary to assertions made by those opposed to providing protection from violence to unborn children,[44] H.R. 2436 does not permit the prosecution of those who act without criminal intent. Instead, H.R. 2436 operates in a manner consistent with generally-accepted mens rea principles of criminal law.

As a general rule, H.R. 2436 provides that when one commits a violent crime against a pregnant woman, *with criminal intent*, and thereby injures or kills the victim's unborn child, the perpetrator is guilty of the same offense that would have resulted had the same injury or death occurred to the unborn child's mother. In accordance with the well-established criminal law doctrine known as "transferred intent," the criminal intent directed toward the moth-

[43] Under the Federal homicide statutes, second-degree murder requires proof of "(1) the physical element of unlawfully causing the death of another, and (2) the mental element of malice, satisfied either by an intent to kill, an intent to cause serious bodily injury, or the existence of a depraved heart." *United States* v. *Browner*, 889 F.2d 549, 552 (5th Cir. 1989). Voluntary manslaughter also requires proof of an unlawful and malicious killing of another, but the offense "is deemed to be without malice because it occurs in what the courts called 'the heat of passion.'" *Id.* Involuntary manslaughter is distinguished from both murder and voluntary manslaughter by an absence of malice, and that absence "arises not because of provocation induced passion, but rather because the offender's mental state is not sufficiently culpable to meet the traditional malice requirements." *Id.* at 553. With involuntary manslaughter, "the requisite mental state is reduced to 'gross' or 'criminal' negligence, a culpability that is far more serious than ordinary tort negligence but still falls short of that most extreme recklessness and wantonness required for 'depraved heart' malice." *Id.*

[44] See, e.g. Letter from Jon P. Jennings, Acting Assistant Attorney General, United States Department of Justice, to Chairman Henry Hyde, Committee on the Judiciary, United States House of Representatives 2 (Sept. 9, 1999) (characterizing H.R. 2436 as "mak[ing] a potentially dramatic increase in penalty turn on an element for which liability is strict"); Press Release of American Civil Liberties Union, Washington National Office 2 (July 21, 1999) (stating that "H.R. 2436 Lacks a Necessary Mens Rea Requirement").

er "transfers" to the unborn child, and the criminal is liable for the injury or death of the unborn child just as he would have been liable had the unborn child's mother been injured or killed.

The transferred intent doctrine was recognized in England as early as 1576 in the case of *Regina* v. *Saunders*.[45] In that case, the court stated that

> it is every man's business to foresee what wrong or mischief may happen from that which he does with an ill-intention, and it shall be no excuse for him to say that he intended to kill another, and not the person killed. . . . For if a man of malice prepense shoots an arrow at another with an intent to kill him, and a person to whom he bore no malice is killed by it, this shall be murder in him, for when he shot the arrow he intended to kill, and inasmuch as he directed his instrument of death at one, and thereby has killed another, it shall be the same offense in him as if he had killed the person he aimed at, . . . so the end of the act, viz. the killing of another shall be in the same degree, and therefore it shall be murder, and not homicide only.[46]

The transferred intent doctrine was adopted by American courts during the early days of the Republic[47] and is now black letter law. One prominent criminal law commentator describes the modern formulation of the doctrine in this manner:

> [W]hen one person (A) acts (or omits to act) with intent to harm another person (B), but because of bad aim he instead harms a third person (C) whom he did not intend to harm, the law considers him (as it ought) just as guilty as if he had actually harmed the intended victim.[48]

In such situations, "A's intent to harm B will be transferred to C."[49] Therefore,

> where A aims at B with a murderous intent to kill, but because of a bad aim he hits and kills C, A is uniformly held guilty of the murder of C. And if A aims at B with a first-degree-murder state of mind, he commits first degree murder as to C, by the majority view. So too, where A aims at B with intent to injure B but missing B hits and injures C, A is guilty of battery of C.[50]

Another well-known criminal law commentator describes the application of the doctrine to the crime of murder in language that is remarkably similar to the language and operation of this bill:

> Under the common-law doctrine of transferred intent, a defendant who intends to kill one person but instead kills a bystander, is deemed the author of whatever kind of homicide would have been committed had he killed the intended victim. If, as to the intended victim, the homicide would have con-

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[45] 2 Plowd. 473, 75 Eng. Rep. 706 (1576).
[46] *United States* v. *Sampol*, 636 F.2d 621, 674 (D.C. Cir. 1980) (quoting *Regina* v. *Saunders*, 2 Plowd. 473, 474a, 75 Eng. Rep. 706, 708 (1576)).
[47] See *id.*
[48] Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law 284 (2d ed. 1986).
[49] *Id.*
[50] *Id.* at 283.

> stituted murder, the defendant is guilty of murder as to the actual bystander who was the actual victim. Similarly, if the homicide would have constituted voluntary manslaughter as to the intended victim, the defendant is guilty of voluntary manslaughter as to the bystander who was the actual victim; and if the homicide, as to the intended victim, would have been justifiable, as in the case of self-defense, the defendant is deemed the author of a justifiable homicide as to the bystander.[51]

H.R. 2436 operates on these basic and well-settled principles. It provides that when one commits a violent crime against a pregnant woman, and thereby injures or kills the victim's unborn child, the unlawful intent toward the mother transfers to the unborn child, and the perpetrator is guilty of the same level of offense that would have resulted had the same injury or death occurred to the unborn child's mother.[52] It is not necessary for the prosecution to prove that the defendant knew or should have known that the victim was pregnant, or that the defendant intended to kill or injure the unborn child.[53]

H.R. 2436 contains one exception to this general rule. In cases in which the prosecution proves that an individual committed one of the predicate violent crimes against a pregnant woman, *with the intent to kill the unborn child*, that individual shall be punished as provided under Federal law for intentionally killing or attempting to kill a human being. The bill thus ensures that those who engage in violent Federal crimes against pregnant women, with the intent to kill their unborn children, are subject to more severe punishment than those who do not act with the intent to kill.

In short, H.R. 2436 does not lack a criminal intent requirement.[54] In situations in which the defendant kills or injures an unborn child during the commission of a Federal crime of violence against a pregnant woman, the mens rea requirement is satisfied because the criminal intent directed toward the mother transfers to the unborn child in accordance with traditional common law prin-

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[51] 2 *Wharton's Criminal Law* 291–94 (Charles E. Torcia ed., 15th ed. 1994).

[52] H.R. 2436 thus permits prosecution of the defendant for the offense against the unintended victim (*i.e.*, the unborn child), even though the defendant succeeded in committing the crime against the intended victim (*i.e.*, the pregnant woman). The defendant's intent with respect to the pregnant woman suffices for both offenses. This is the better view of the transferred intent doctrine. See, e.g., *State* v. *Worlock*, 569 A.2d 1314, 1325 (N.J. 1990) ("reject[ing] defendant's argument that the successful killing of the intended victim prevents the 'transfer' of that intent to an unintended victim" because "the purpose of deterrence is better served by holding that defendant responsible for the knowing or purposeful murder of the unintended as well as the intended victim"); *State* v. *Hinton*, 630 A.2d 593, 598–99 (Conn. 1993) (same). Indeed, one Federal court has held that "[t]here are even stronger grounds for applying the principle where the intended victim is killed by the same act that kills the unintended victim." *United States* v. *Sampol*, 636 F.2d 621, 674 (D.C. Cir. 1980). The committee rejects the view, followed by some courts, that the defendant's criminal intent does not transfer to the unintended victim if the crime was actually committed against the intended victim. See, e.g., *Ford* v. *State*, 625 A.2d 984, 997–98 (Md. 1993); but see *Poe* v. *State*, 671 A.2d 501, 530 (Md. 1996) (applying transferred intent doctrine where A shot at and hit B, and bullet went through B and killed C, to permit prosecution of defendant for attempted murder of B and murder of C; court refused to follow *Ford* "because there is a death and the doctrine is necessary to impose criminal liability for the murder of the unintended victim in addition to the attempted murder of the intended victim").

[53] The felony murder rule operates in similar manner, holding the perpetrator of a felony liable for death that results during the commission of the felony, even where that particular felon may not have intended or even participated directly in the killing. The relevant state of mind is the state of mind as to the commission of the underlying felony, not the killing that occurs subsequently. See *United States* v. *Nichols*, 169 F.3d 1255 (10th Cir. 1999); *United States* v. *Tham*, 118 F.3d 1501 (11th Cir. 1997); *Nesbitt* v. *Hopkins*, 907 F. Supp. 1317 (D. Neb. 1995).

[54] The bill does not, therefore, conflict with the notion that criminal statutes lacking a mens rea element are disfavored. See *Liparota* v. *United States*, 471 U.S. 419, 426 (1985).

ciples. If the defendant commits that violent crime against the pregnant woman with the intent to kill the unborn child, that intent itself satisfies the mens rea requirement needed to impose criminal liability upon the defendant for killing or injuring the unborn child.

B. Constitutional Authority for H.R. 2436

The next question that arises regarding the constitutionality of H.R. 2436 is whether Congress has the constitutional authority to enact such legislation. And the answer to that question is clearly yes, because, as Professor Gerard Bradley of the Notre Dame Law School testified before the Constitution Subcommittee, the bill does not extend Congress' reach to prohibit any conduct that does not currently violate Federal law. No conduct that is currently free of regulation will become regulated by H.R. 2436.[55]

Instead, H.R. 2436 merely provides an additional offense and punishment for those who injure or kill an unborn child during the course of the commission of one of the predicate offenses. The bill thus relies upon the predicate crimes for its constitutional hook.[56] Therefore, (with one qualification, discussed below) if there is any question regarding the constitutionality of the Act's reach, that question generally pertains to the constitutionality of the predicate offense, not H.R. 2436.[57]

The one qualification to this general conclusion relates to situations in which Federal jurisdiction is based upon the identity of the particular victim, such as the President, cabinet members, Members of Congress, and other government officials. In those situations, it may be asked whether constitutional authority for punishing offenses against such individuals extends to offenses against the unborn children of those victims. And the answer to that question begins with the recognition that it is only the discharge of Federal functions, not the identity of the persons as such, which grounds Federal jurisdiction in such cases.[58]

In other words, protection of Federal officers and jurors is justified by the national interest in protecting the functions that Federal officers and jurors perform. And those functions are threatened by assaults upon the person of those officers and jurors, as well as by threats to them and to their families.[59] Thus, it is clearly constitutional to extend Federal protection to the entire families of Federal officers and jurors in order to ensure that nothing distracts them or causes them to neglect their duties. That is, it is within Congress' power to determine that there is a distinct, punishable harm to the discharge of federally imposed duties where the unborn child or any other immediate family member of a protectable person is harmed or destroyed.[60] And that appears to be the rea-

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[55] See *The Unborn Victims of Violence Act: Hearings on H.R. 2436 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., July 21, 1999 (statement of Professor Gerard V. Bradley, Notre Dame Law School).

[56] See *id.*

[57] See *id.*; see also *The Unborn Victims of Violence Act: Hearings on H.R. 2436 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., July 21, 1999 (statement of Professor Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College) (same).

[58] See Statement of Professor Gerard V. Bradley, *supra*.

[59] See *id.*

[60] See *id.*

soning behind 18 U.S.C. § 115, which prohibits assaulting, murdering, or kidnapping members of the immediate family of United States officials (including Members of Congress) and law enforcement officers.

C. H.R. 2436 and Abortion Rights

H.R. 2436 does not affect or in any way interfere with a woman's right to terminate a pregnancy. Indeed, the bill clearly states that it does not apply to "conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency." Similarly, the bill also clearly states that it does not permit prosecution "of any woman with respect to her unborn child."

Nor is there anything in *Roe* v. *Wade* that prevents Congress from recognizing the lives of unborn children outside the parameters of the right to abortion marked off in that case.[61] Indeed, in recognizing a woman's right to terminate her pregnancy, the *Roe* Court explicitly stated that it was not resolving "the difficult question of when life begins,"[62] because "the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[63] What the Court held was that the government could not "override the rights of the pregnant woman" to choose to terminate her pregnancy "by adopting one theory" of when life begins.[64] In other words, the Court concluded that unborn children could not be considered "persons in the whole sense,"[65] an opinion that is consistent with recognizing unborn children as persons for purposes other than abortion, such as inheritance and tort injury, purposes which the *Roe* Court itself recognized as legitimate.[66]

The Supreme Court explicitly confirmed this understanding of *Roe* in *Webster* v. *Reproductive Health Servs.*[67] In that case, the State of Missouri had enacted a statute which stated that the "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being."[68] The United States Court of Appeals for the Eighth Circuit struck down the law, holding that Missouri had "impermissibl[y]" adopted a "theory of when life begins."[69] The Supreme Court reversed this portion of the Eighth Circuit's decision, however, stating that its own decisions mean "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 about when life begins."[70]

Since H.R. 2436 in no way interferes with or restricts the abortion right articulated in *Roe*, the Act is clearly constitutional. Con-

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[61] See Statement of Professor Gerard V. Bradley, *supra*; see also McCavitt, *supra* note 11, at 639 (concluding that Roe "should not apply to non-consensual acts by third parties and should not be used as a bar to judicial or statutory sanctions for criminal acts of third parties").
[62] 410 U.S. at 159.
[63] *Id.*
[64] See *id.* at 162.
[65] *Id.*
[66] See *id.*
[67] 492 U.S. 490 (1989).
[68] *Id.* at 501.
[69] *Id.* at 503.
[70] *Id.* at 506 (emphasis added).

gress is perfectly free, as was the State of Missouri, to enforce its conception of human life outside of the parameters of *Roe*.

Courts addressing the constitutionality of State laws that punish killing or injuring unborn children have recognized the lack of merit in the argument that such laws violate *Roe* v. *Wade*, and as a result have consistently upheld those laws in the face of constitutional challenges. In *State* v. *Coleman*,[71] for example, the Ohio Court of Appeals held that "*Roe* protects a woman's constitutional right. It does not protect a third-party's unilateral destruction of a fetus."[72] In *State* v. *Holcomb*,[73] the Missouri Court of Appeals stated that "[t]he fact that a mother of a pre-born child may have been granted certain legal rights to terminate the pregnancy does not preclude the prosecution of a third party for murder in the case of a killing of a child not consented to by the mother."[74] Similarly, in *State* v. *Merrill*,[75] the Minnesota Supreme Court held that "*Roe* v. *Wade* protects the woman's right of choice; it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus."[76]

In *People* v. *Davis*,[77] the California Supreme Court held that "*Roe* v. *Wade* principles are inapplicable to a statute . . . that criminalizes the killing of a fetus without the mother's consent."[78] The Eleventh Circuit echoed that sentiment in *Smith* v. *Newsome*,[79] holding that *Roe* v. *Wade* was "immaterial . . . to whether a State can prohibit the destruction of a fetus" by a third-party.[80] Legal scholars have reached similar conclusions.[81]

In short, H.R. 2436 clearly does not violate *Roe* v. *Wade* or its progeny. The Act specifically exempts abortion-related conduct from prosecution and the protection it affords to unborn children does not interfere with or restrict a woman's right to terminate her pregnancy.[82]

III. COMMITTEE RESPONSE TO AGENCY VIEWS

The Department of Justice has indicated that it "strongly objects" to H.R. 2436.[83] The committee responds to each of the De-

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[71] 705 N.E.2d 419 (Ohio Ct. App. 1997).
[72] *Id.* at 421.
[73] 956 S.W.2d 286 (Mo. Ct. App. 1997).
[74] *Id.* at 291. See also *People* v. *Ford*, 581 N.E.2d 1189, 1199 (Ill. App. Ct. 1991) ("Clearly, a pregnant woman who chooses to terminate her pregnancy and the defendant who assaults a pregnant woman, causing the death of her fetus, are not similarly situated.")
[75] 450 N.W.2d 318 (Minn. 1990).
[76] See *id.* at 322.
[77] 872 P.2d 591 (Cal. 1994).
[78] *Id.* at 597.
[79] 815 F.2d 1386 (11th Cir. 1987).
[80] See *id.* at 1388.
[81] See, e.g., Statement of Professor Gerard V. Bradley, *supra*; Jeffrey A. Parness, *Crimes Against the Unborn: Protecting and Respecting the Potentiality of Human Life*, 22 Harv. J. on Legis. 97, 144 (1985) ("The *Roe* decision . . . forbids the State's protection of the unborn's interests only when these interests conflict with the constitutional rights of the prospective parent. The Court did not rule that the unborn's interests could not be recognized in situations where there was no conflict.").
[82] Opponents of H.R. 2436 have also objected to the use of the term "unborn child" in the bill. The simple response to this objection is that the Supreme Court itself employed the term "unborn child" in articulating the abortion right in *Roe* v. *Wade*. See 410 U.S. at 161 (noting that "unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property").
[83] See Letter from Jon P. Jennings, Acting Assistant Attorney General, United States Department of Justice, to Chairman Henry Hyde, Committee on the Judiciary, United States House of Representatives 1 (Sept. 9, 1999) [hereinafter "DOJ Letter"].

partment's objections, which are quoted as headings to the committee's responses, as follows.

"H.R. 2436 . . . would 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."[84]

The committee recognizes that H.R. 2436 will result in a "substantial increase in sentence" for those who commit crimes of violence upon pregnant women, thereby killing or injuring unborn children. Indeed, that is precisely the point of the legislation: to ensure that those who kill or injure unborn children during the commission of violent Federal crimes receive a substantial increase in punishment for the separate harm inflicted upon the unborn child. The Department's objection is, therefore, based upon a premise the committee has rejected: that killing or injuring an unborn child is not worthy of a severe penalty.

The Department indicates that additional punishment "may be warranted for injury to pregnant women,"[85] but does not indicate what additional punishment it would approve. In light of the Department's objection to a "substantial increase in sentence," the additional punishment contemplated by the Department would be "insubstantial." The committee believes that an insubstantial increase in punishment does not truly reflect the seriousness with which violent acts against unborn children should be met.

"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."[86]

This objection reflects a misunderstanding of the nature of criminal liability imposed under H.R. 2436, and a lack of understanding of basic principles of criminal law. As outlined above, H.R. 2436 provides that when an individual commits a violent crime against a pregnant woman, *with criminal intent*, and as a result of that crime inflicts harm upon a second victim, *i.e.*, the woman's unborn child, that individual shall be liable for the harm inflicted upon both victims. That is precisely how the doctrine of transferred intent currently operates in the criminal law generally, and that is how it operates under H.R. 2436. The defendant's criminal intent toward the pregnant woman transfers to the unborn child, and the resulting liability is not "strict," because the defendant acted with criminal intent and the law holds the defendant responsible for the harm he or she caused. As the Connecticut Supreme Court stated in *State* v. *Hinton*,[87] "the law does not give the defendant a discount on the second and subsequent victims of his intentional conduct."[88]

The Department's objection seems based primarily upon the fact that "the defendant need not know or have reason to know that the

[84] *Id.* at 2.
[85] *Id.*
[86] *Id.*
[87] 630 A.2d 593 (1993).
[88] *Id.* at 598.

victim is pregnant."[89] But again, the transferred intent doctrine operates in the same way. If, for example, an individual shoots at A, with the intent to kill A, and the bullet goes through A, through a wall behind A, and into B, that individual is liable for the harm inflicted upon B, even if he or she did not know or have reason to know B was behind the wall.[90]

The Department's hypothetical in support of this objection also reflects a flawed understanding of H.R. 2436 and Federal criminal statutes generally. Under H.R. 2436, the Department complains,

> if a police officer uses a slight amount of excessive force to subdue a female suspect—without knowing or having any reason to believe that she was pregnant—and she later miscarries, the officer 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.[91]

To begin with, it is entirely unclear what the Department means by "slight excessive force." By definition, "excessive force" is excessive, not slight. But putting this rather bizarre characterization aside, an officer who uses excessive force on a pregnant woman, but does not intend to kill or inflict serious bodily injury upon the woman or her unborn child, or act so egregiously as to evidence a depraved heart, would not be subject to life imprisonment without the possibility of parole. At most, the officer would be guilty of involuntary manslaughter, which carries a maximum penalty of six years imprisonment, a fine, or both.[92] And that is precisely the same penalty the officer would receive if the woman died as a result of the officer's use of the same amount of excessive force, even if the woman had a medical condition of which the officer was not aware which made her more susceptible to death.

An additional hypothetical might assist the Department in understanding the nature of liability imposed under H.R. 2436. Suppose an individual assaults an FBI agent in violation of 18 U.S.C. § 111. Assume the agent is two months pregnant, but not visibly so, and the individual does not know, nor does he have reason to know, that she is pregnant. Let us also suppose that the individual did not intend to kill the agent, and that as result of the assault, the agent's unborn child is killed.

Under H.R. 2436, the defendant's intent to assault the woman transfers to the unborn child, and the defendant is guilty of a separate offense against the unborn child, the punishment for which is the same punishment the defendant would have received had the pregnant woman died as a result of the intentional assault without the intent to kill. Under Federal law, that offense would likely be

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[89] DOJ Letter at 2.

[90] With respect to whether the defendant should have known the victim was pregnant, the committee notes its agreement with the Minnesota Supreme Court's assertion that "[t]he possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude." *State* v. *Merrill*, 450 N.W.2d 318, 323 (Minn. 1990).

[91] *Id.*

[92] See 18 U.S.C. § 1111 (manslaughter within the special maritime or territorial jurisdiction of the United States). Involuntary manslaughter is an unintentional killing that results from the commission of an unlawful act evidencing a wanton or reckless disregard for human life. See *United States* v. *Paul*, 37 F.3d 496 (9th Cir. 1994).

involuntary manslaughter, an offense which corresponds with the level of criminal intent with which the defendant acted.

Thus, the Department is simply wrong in its assertion that H.R. 2436 "is an unwarranted departure from the ordinary rule that punishment should correspond to culpability, as evidenced by the defendant's mental state."[93] H.R. 2436 is based on that rule and punishes the defendant only in accordance with the level of criminal intent with which he or she acts.[94]

"H.R. 2436's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of Federal statute."[95]

The Department is quite right that H.R. 2436 is "unprecedented as a matter of Federal statute." If H.R. 2436 were precedented, it would be unnecessary. If the Department meant to say that the type of protection H.R. 2436 provides unborn children is unprecedented generally, the Department is simply wrong, as demonstrated by the numerous State statutes, cited above, which protect "unborn children" in the same way that H.R. 2436 does.[96] These statutes have uniformly been upheld by both State and Federal courts in the face of constitutional challenges.[97] Indeed, there does not appear to be a single published or unpublished decision declaring such protection to be constitutionally infirm.

The Department states that the committee's "approach is unnecessary,"[98] but with no explanation, it is not at all clear what that means. The Department also states that the committee's approach "is unwise to the extent that it may be perceived as gratuitously plunging the Federal Government into one of the most—if not the most—difficult and complex issues of religious and scientific consideration."[99] Unlike the Department, the committee does not believe that protecting unborn children from acts of violence constitutes "gratuitous" legislation. Nor does the committee believe that the "difficulty" or "complexity" of an issue is grounds for avoiding Congress' responsibility to ensure that Federal law provides prosecutors ample authority to punish violent criminals for the harm they inflict upon others.[100]

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[93] DOJ Letter at 2.

[94] The committee also notes that the Department's defense of police officers who use excessive force on pregnant women is surprising, given the Department's claim that "the fight against domestic violence and other violence against women [has been] a top priority" of the Administration.

[95] DOJ Letter at 3.

[96] See *supra* note 10.

[97] See discussion *supra* and cases cited therein.

[98] DOJ Letter at 3.

[99] *Id.*

[100] The Department also states that its policy objections to H.R. 2436 "are exacerbated by the likelihood that the bill will yield little practical benefit." *Id.* This argument is based upon the fact that "any assault on an 'unborn child' cannot occur without an assault on the pregnant woman," and therefore "H.R. 2436 would not provide for the prosecution of any additional criminals." *Id.* The Department is obviously right that no additional criminals will be prosecuted as a result of H.R. 2436. But the bill clearly yields substantial practical benefit in providing additional punishment for violent criminals who injure or kill unborn children, punishment that is currently not authorized under Federal law. Without H.R. 2436, these criminals will receive *no* additional punishment for harm inflicted upon the unborn. The Department also complains that prosecutors may "encounter difficulty collecting evidence to support their prosecutions," because they will have to prove "that the defendant's conduct 'cause[d] the injury.'" The committee recognizes that prosecutors will have to prove their cases, and that causation will sometimes, as in any other type of case, be difficult to prove. The committee is confident that Federal prosecutors are up to the task, however, and that in many cases, such as the *Robbins* case discussed above, causation will be easily proved.

"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." [101]

This objection also reflects a lack of understanding of the basic legal principles at work in H.R. 2436. Subsection (c) prohibits the prosecution "of any person for conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency." The Department suggests that the phrase "in a medical emergency" limits the application of this exemption in such a way that it would not encompass a situation in which a pregnant woman is incapacitated and there is no medical emergency.

The Department's objection rests upon a flawed view of the doctrine of implied consent in a medical emergency. That doctrine provides that a physician need not obtain valid consent from a patient when two factors are present: (1) "the patient is incapacitated and cannot exercise his mental ability to reach an informed choice," and (2) "a life- or health-threatening disease or injury that requires immediate treatment is present." [102] In other words, the medical emergency exception is premised upon the fact that the patient is incapacitated, and permits the physician to proceed with treatment only in order to prevent immediate harm to the patient's health.

The doctrine of implied consent does not, however, authorize medical procedures upon incapacitated persons when there is no medical emergency. According to a leading commentator, "[w]hen patients are incapacitated but do not require life- or health-saving treatment, practitioners cannot proceed." [103] That is,

> [w]hen there is time to secure consent for a patient who is incapacitated and suffering from a severe but not life-threatening illness, the law requires legally effective consent. Permission to treat patients may come from a duly authorized legal representative, a relative designated by statute in some States, or court orders compelling treatment or appointing someone to act for the patient.[104]

In situations in which these surrogate decision makers consent to medical procedures for the incapacitated, the law considers those individuals as acting in behalf of the incapacitated persons,[105] and abortion-related conduct in such situations is exempt under subsection 1841(c) so long as valid consent is obtained. For these reasons, the Department's objection is without merit.

IV. CONCLUSION

H.R. 2436 is prudent and necessary legislation that is carefully crafted to address the harms done when violent crimes are committed against pregnant women and their unborn children. The legislation remedies the defects of existing Federal law by rejecting

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[101] DOJ Letter at 3–4.
[102] FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE 106–107 (1990).
[103] *Id.* at 108.
[104] *Id.* at 108–09.
[105] See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 18, at 116 (5th ed. 1984).

the antiquated and obsolete common law "born alive" rule and ensuring just punishment for those who commit these heinous crimes of violence. Moreover, H.R. 2436 relies on the well-established doctrine of transferred intent in supplying the mental element necessary for prosecution, and it carefully excludes from its purview those acts committed by the mother or a third party that are otherwise protected by *Roe* v. *Wade* and its progeny. By recognizing the unique harms done to women and unborn children, and by mending the insufficiencies of current Federal law, H.R. 2436 serves vital national interests by extending the criminal law's protections for *all* human life.

HEARINGS

The committee's Subcommittee on the Constitution held one day of hearings on H.R. 2436 on July 21, 1999. Testimony was received from the following witnesses: 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; Terry M. Dempsey, Judge, District Court, 5th Judicial District, St. James, Minnesota; 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; and Gerard V. Bradley, Professor, Notre Dame Law School.

COMMITTEE CONSIDERATION

On August 4, 1999, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 2436, as amended, by a vote of 5 to 2, a quorum being present. On September 14, 1999, the committee met in open session and ordered favorably reported the bill H.R. 2436 with amendment by a recorded vote of 14 to 11, a quorum being present.

VOTES OF THE COMMITTEE

1. An amendment was offered by Ms. Lofgren and Mr. Conyers to provide additional punishment, up to life sentence, for "interruption of the normal course of the pregnancy or its termination" during the commission of listed predicate offenses. The amendment was defeated by a 8–20 rollcall vote.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (TX)		X	
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte		X	

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham		X	
Ms. Bono		X	
Mr. Bachus		X	
Mr. Scarborough		X	
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters		X	
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	8	20	

2. An amendment was offered by Mr. Watt to change the nature of the offense from violence against "unborn children" to "violence during pregnancy" and "termination of a pregnancy or a prenatal injury." The amendment was defeated by a 11–14 rollcall vote.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas			
Mr. Coble			
Mr. Smith (TX)			
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham		X	
Ms. Bono			
Mr. Bachus		X	
Mr. Scarborough		X	
Mr. Vitter		X	
Mr. Conyers	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Frank			
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		
Mr. Hyde, Chairman		X	
Total	11	14	

3. An amendment was offered by Ms. Baldwin to define the term "medical treatment" in the text of the bill. The amendment was defeated by a 11–13 rollcall vote.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas			
Mr. Coble			
Mr. Smith (TX)			
Mr. Gallegly			
Mr. Canady		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Pease		X	
Mr. Cannon		X	
Mr. Rogan		X	
Mr. Graham		X	
Ms. Bono			
Mr. Bachus		X	
Mr. Scarborough			
Mr. Vitter		X	
Mr. Conyers	X		
Mr. Frank			
Mr. Berman	X		
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman	X		
Ms. Baldwin	X		
Mr. Weiner	X		

ROLLCALL NO. 3—Continued

	Ayes	Nays	Present
Mr. Hyde, Chairman		X	
Total	11	13	

4. Final Passage. The motion to report the bill H.R. 2436 as amended by the amendment in the nature of a substitute was adopted. The motion was agreed to by a rollcall vote of 14–11.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Sensenbrenner			
Mr. McCollum			
Mr. Gekas		X	
Mr. Coble			
Mr. Smith (TX)	X		
Mr. Gallegly			
Mr. Canady	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Pease	X		
Mr. Cannon	X		
Mr. Rogan	X		
Mr. Graham	X		
Ms. Bono			
Mr. Bachus	X		
Mr. Scarborough			
Mr. Vitter	X		
Mr. Conyers		X	
Mr. Frank			
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Mr. Rothman		X	
Ms. Baldwin		X	
Mr. Weiner		X	
Mr. Hyde, Chairman	X		
Total	14	11	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the committee reports that the findings and recommendations of the committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

COMMITTEE ON GOVERNMENT REFORM FINDINGS

No findings or recommendations of the Committee on Government Reform were received as referred to in clause 3(c)(4) of rule XIII of the Rules of the House of Representatives.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House Rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the committee sets forth, with respect to the bill, H.R. 2436, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 20, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2436, the Unborn Victims of Violence Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz, who can be reached at 226–2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

H.R. 2436—Unborn Victims of Violence Act of 1999.

CBO estimates that implementing H.R. 2436 would not result in any significant cost to the federal government. Because enactment of H.R. 2436 could affect direct spending and receipts, pay-as-you-go procedures would apply to the bill. However, CBO estimates that any impact on direct spending and receipts would not be significant. H.R. 2436 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

H.R. 2436 would establish a new federal crime for the injury or death of an unborn child that results from certain offenses committed against the mother. Violators would be subject to imprisonment and fines. As a result, the federal government would be able to pursue cases that it otherwise would not be able to prosecute. CBO expects that any increase in federal costs for law enforcement, court proceedings, or prison operations would not be significant, however, because of the small number of cases likely to be involved. Any such additional costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under H.R. 2436 could be subject to criminal fines, the federal government might collect

additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. CBO expects that any additional receipts and direct spending would be negligible.

The CBO staff contact for this estimate is Mark Grabowicz, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the committee finds the authority for this legislation in Article I, section 8, clause 18 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title. This section provides that the title of the Act is the Unborn Victims of Violence Act of 1999.

Section 2. Protection of Unborn Children. Section 2(a) amends Title 18 of the United States Code by inserting "Section 1841" and each of the following subsections after chapter 90A of that Title. These provisions provide the substantive component of the Act.

Section 1841(a)(1) provides that where one engages in violent conduct against a pregnant woman, in violation of one or more of the Federal criminal laws listed in subsection (b), the perpetrator shall be guilty of a separate criminal offense if an unborn child is killed or injured in the commission thereof. This subsection relies on the well-established doctrine of transferred intent in providing the mens rea element for the crime against the unborn child. That is, the criminal intent directed toward the unborn child's mother is transferred to the unborn child. This subsection eliminates the obsolete common law born-alive rule, replacing it with widely accepted modern jurisprudence recognizing unborn children as victims of violent crime.

Section 1841(a)(2)(A) establishes the punishment for the separate offense committed against the unborn child. This subsection provides that when death or bodily injury to the unborn child results from the commission of an offense listed in subsection (b), the defendant shall receive the same punishment he or she would have received under Federal law had the same bodily injury or death resulted to the unborn child's mother.

Section 1841(a)(2)(B) provides that an offense under this section does not require proof that the defendant knew or should have known that the victim of the underlying offense was pregnant, or that the defendant intended to cause the death or bodily injury to the unborn child.

Section 1841(a)(2)(C) provides that if the defendant engaged in the conduct against the pregnant woman and thereby intentionally killed or attempted to kill the unborn child, the defendant shall be punished as provided under Federal law for killing or attempting to kill another human being. Section 1841(a)(2)(D) states that notwithstanding any other provision of Federal law, the death penalty shall not be imposed for an offense under this section.

Section 1841(b) lists the various provisions of the United States Code that serve as predicate offenses for the offense against the unborn child. Subsection (1) lists provisions of Title 18; subsection (2) lists Section 408(e) of the Controlled Substances Act of 1970, 21 U.S.C. § 848; and subsection (3) lists Section 202 of the Atomic Energy Act of 1954, 42 U.S.C. § 2283. If the defendant engages in the violent conduct prohibited by these provisions, and his conduct results in death or bodily injury to an unborn child, he is guilty of a separate offense, as provided in Section 2(a).

Section 1841(c) prohibits the United States from prosecuting any of the following individuals for the death or injury of an unborn child: under subsection (1), any person who performs a legally consensual abortion; under subsection (2), any person who provides medical treatment to a pregnant woman or her unborn child; and, under subsection (3), the pregnant woman herself. These provisions ensure that this legislation does not implicate or interfere with the right to an abortion established by *Roe* v. *Wade*, 410 U.S. 113 (1973) and its progeny.

Section 1841(d) defines "unborn child" as "a child in utero," a definition consistent with those State laws that courts have consistently upheld. "Child in utero" or "child, who is in utero" are, in turn, defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."

Section 2(b) of the Act is a clerical amendment, inserting "1841" after the item relating to chapter 90 in Title 18 of the United States Code.

Section 3. Military Justice System. This section amends the Uniform Code of Military Justice to provide an additional offense for injuring or killing an unborn child during the commission of certain violent crimes punishable under the Uniform Code of Military Justice. Pursuant to rule X of the Rules of the House of Representatives, this section was referred to the committee on Armed Services, as the Committee on the Judiciary does not have jurisdiction over this section of the bill. For a summary of section 3, refer to the report of the Committee on Armed Services on H.R. 2436.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, September 9, 1999.

Hon. HENRY J. HYDE, *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

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

[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.

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 and other violence against women 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 address domestic violence and sexual assault. VAWA, for the first time, created federal domestic violence offenses with strong penalties to hold violent offenders accountable. While most domestic violence crimes are appropriately prosecuted at the state and local level, the Department of Justice has brought 179 VAWA and VAWA-related federal indictments to date, and this number continues to grow. In addition, the Department of Justice alone has awarded well over $700 million through VAWA grant programs since 1994, directing critical resources to communities' efforts to respond to domestic violence and sexual assault. These funds have made a difference in women's lives, and in how communities respond to violence against women. Indeed, these funds have helped save the lives of many victims of domestic violence.

If the Committee wants to make a difference in the lives of women victims of violence, it should reauthorize the Violence Against Women Act. We hope that Congress will work with us on this common goal. H.R. 2436, however, is not an adequate response to violence against women. Our three main objections to H.R. 2436 are described below.

First, H.R. 2436 provides that the 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. The Department agrees that some additional punishment may be warranted for injury to pregnant women. H.R. 2436, however, would 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, for example, if a police officer uses a slight amount of excessive force to subdue a female suspect—without knowing or having any reason to believe that she was pregnant—and she later miscarries, the officer 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 evinced by the defendant's mental state.[2]

[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

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. Such an approach is unnecessary for legislation that would augment punishment of violence against pregnant women. Additionally, such an approach is unwise to the extent that it may be perceived as gratuitously plunging the federal government into one of the most—if not the most—difficult and complex issues of religious and scientific consideration and into the midst of a variety of State approaches to handling these issues.

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 a 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. The Administration, however, would work with Congress to develop alternative legislation that would strengthen punishment for intentional violence against women whom the perpetrator knows or should know is pregnant, strengthen the criminal provisions of VAWA, and reauthorize the grant programs established by this historic legislation.

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,

JON P. JENNINGS, *Acting Assistant Attorney General.*

cc: Honorable John Conyers, Jr.

H.R. 2436's default punishment—the punishment the defendant would receive had he injured the pregnant woman.

[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."

Ranking Minority Member

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics and existing law in which no change is proposed is shown in roman):

TITLE 18, UNITED STATES CODE

* * * * * * *

PART I—CRIMES

CHAPTER 90A—PROTECTION OF UNBORN CHILDREN

§ 1841. Protection of unborn children

(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

(B) An offense under this section does not require proof that—

(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.

(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

(b) The provisions referred to in subsection (a) are the following:

(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229, 242, 245, 247, 248, 351, 831, 844(d), (f), (h)(1), and (i), 924(j), 930, 1111, 1112, 1113, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203, 1365(a), 1501, 1503, 1505, 1512, 1513, 1751,

1864, 1951, 1952(a)(1)(B), (a)(2)(B), and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

(2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848(e)).

(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

(c) Nothing in this section shall be construed to permit the prosecution—

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency;

(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) As used in this section, the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

* * * * * * *

CHAPTER 47 OF TITLE 10, UNITED STATES CODE

CHAPTER 47—UNIFORM CODE OF MILITARY JUSTICE

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SUBCHAPTER X—PUNITIVE ARTICLES

§ 919a. Art. 119a. Protection of unborn children

(a)(1) Any person subject to this chapter who engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365 of title 18) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2) The punishment for that separate offense is the same as the punishment provided for that conduct under this chapter had the injury or death occurred to the unborn child's mother, except that the death penalty shall not be imposed.

(b) The provisions referred to in subsection (a) are sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926, and 928 of this title (articles 118, 119(a), 119(b)(2), 120(a), 122, 124, 126, and 128).

(c) Subsection (a) does not permit prosecution—

(1) for conduct relating to an abortion for which the consent of the pregnant woman has been obtained or for which such consent is implied by law in a medical emergency;

(2) for conduct relating to any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) In this section, the term "unborn child" means a child in utero.

* * * * * * *

DISSENTING VIEWS

We oppose H.R. 2436, the "Unborn Victims of Violence Act of 1999" because, as crafted, the bill will diminish, rather than enhance, the rights of women.[1]

H.R. 2436 would amend the Federal criminal code and the Uniform Code of Military Justice to create a new Federal crime for bodily injury or death of an "unborn child" who is "in utero"—defined as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." H.R. 2436 creates an offense that would occur when one or more enumerated Federal crimes has been committed and the "death" or "bodily injury" to the fetus occurs.[2] There is no requirement of knowledge or intent to cause such death or bodily injury. The bill includes a penalty that is "the same as the punishment provided under Federal law . . . had that injury or death occurred to the unborn child's mother," except that the death penalty shall not be imposed.[3]

On its face, this bill could be seen as an attempt to protect pregnant women from assault and to provide prosecutors with another tool to punish those who cause the non-consensual termination of a pregnancy. On closer examination, however, the bill sets the stage for an assault on *Roe* v. *Wade*[4] through the legislative process by treating the fetus as a person, distinct from the mother. Because we believe that this same bill could be written in a way that would not implicate *Roe*, we are compelled to dissent.

I. H.R. 2436 WILL OBSCURE THE RIGHTS OF WOMEN

H.R. 2436 represents an effort to endow a fetus with rights—such as recognition as a crime victim—and to thus erode the

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[1] H.R. 2436 is opposed by the pro-choice and women's advocacy community, as well as by the Administration, and is surely headed for veto should it pass the Congress.

[2] The use of words such as "unborn child," "death" and "bodily injury" are designed to inflame and establish the Federal precedent of recognizing the fetus as a person, which, if extended further, would result in a major collision between the rights of the mother and the rights of the fetus. We believe that the bill could be cured to prohibit the very conduct that would be criminalized by H.R. 2436 without creating such a precedent. In fact, we have offered curing amendments and alternative legislation that would accomplish this goal, but all efforts to this effect have been consistently rejected by the majority.

[3] While H.R. 2436 does create a new crime, the majority refuses to acknowledge that this bill, if enacted, would operate as a sentencing enhancement. Perhaps the reluctance to make this point lies in the fact that there is precedent for increasing Federal sentences where fetal harm has occurred, as Ron Weich, a noted former prosecutor stated in hearing testimony:

> "[I]n both *U.S.* v. *Peoples*, 1997 U.S. Appl. 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. Again 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." Weich, Constitution Subcommittee Hearing Testimony, July 21, 1999.

[4] 410 U.S. 113 (1973).

foundational premise of *Roe*.[5] If passed, this bill would mark the first time that our Federal laws would recognize the fetus, and all earlier stages of gestational development, as a person, a notion that the *Roe* Court considered but rejected.[6] The Court declined to grant fetuses the status of a person because it recognized the difficulty in finding a endpoint to rights that the fetus might claim, and the current bill raises those same issues.[7] Aside from this general concern, there is the real threat that this bill will spur the so-called "right-to-life" movement to use this bill as a building block to undermine a woman's right to choose.

The United States Justice Department recognizes the implications of this bill and has voiced similar concerns. In a recent letter to the Committee, the Department wrote: "H.R. 2436's identification of a fetus as a separate and distinct victim of crime is unprecedented as a matter of Federal statute . . . such an approach is unwise to the extent it may be perceived as gratuitously plunging the Federal Government into one of the most—if not the most—difficult and complex issues of religious and scientific consideration and into the midst of a variety of State approaches to handling these issues."[8] Indeed, other observers have parsed through the rhetoric and assessed the political motivations behind this bill, with a recent *New York Times* editorial stating that "[H.R. 2436] treats the woman as a different entity from the fetus—in essence raising the status of the fetus to that of a person for law enforcement purposes—a long time goal of the right-to-life movement."[9]

We might feel more comfortable assessing the motivations behind this bill if there were a clear signal from the majority. However, there appears to be some confusion among the bill's proponents about its purpose. Although Constitution Subcommittee Chairman Charles Canady and the lead sponsor of the bill, Representative Lindsey Graham, have downplayed the bill's relationship to the abortion issue,[10] Chairman Hyde, in subcommittee and full committee hearings, has expressed a different view. "Finally," he told us in the full committee mark up, "there will be a Federal law that recognizes that the [fetus] is not a 'nothing.'" Moreover, two of the majority's subcommittee hearing witnesses, Hadley Arkes and Gerard Bradley, explicitly linked H.R. 2436 to the abortion debate

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[5] While H.R. 2436 is replete with references to the term fetus, by its express terms, it would elevate the status of all stages of gestational development: zygote (fertilized egg); blastocyst (preimplantation embryo); and embryo (through week eight of pregnancy).

[6] 410 U.S. at 162 (stating that "the unborn have never been recognized in the law as persons in the whole sense.").

[7] For example, this legislation could open the door for future legislation through which a woman could be held civilly or criminally liable for fetal injuries caused by accidents resulting from maternal negligence, such as automobile or household accidents. A woman could also be held liable for any behavior during her pregnancy having potentially adverse effects on her fetus, including failing to eat properly, using prescription, nonprescription and illegal drugs, smoking, drinking alcohol, exposing herself to infectious disease, to workplace hazards, or engaging in immoderate exercise or sexual intercourse, residing at high altitudes for prolonged periods, or using general anesthetic or drugs to include rapid labor during delivery. Pregnant women would live in constant fear that any accident or "error" in judgment could be deemed "unacceptable" and become the basis for a criminal prosecution by the state or a civil suit by a disenchanted husband or relative.

[8] Letter from Jon P. Jennings, Acting Assistant Attorney General, September 9, 1999.

[9] *New York Times*, September 14, 1999 at A30.

[10] In fact, both Messrs. Canady and Graham have noted repeatedly that the bill by its terms expressly takes into account a woman's right to choose by exempting abortion from the scope of the bill.

through their testimony.[11] Similarly, the fact that the bill was referred to the *Constitution* Subcommittee, rather than the *Crime* Subcommittee, appears to reveal the majority's true intent to craft an abortion bill and *not* a crime bill.[12]

II. THE LEGISLATION IGNORES THE VERY SERIOUS PROBLEM OF DOMESTIC VIOLENCE

As the bill reported by the Committee stands, when a crime is committed against a pregnant women, the focus is no longer on the woman victimized by violence. Instead, the legislation switches our attention to the impact of the crime on the pregnancy—once again diverting the legal system away from domestic violence or other violence against women.

If the majority were truly concerned about protecting pregnant women and preventing harm to developing pregnancies, they would reauthorize the Violence Against Women Act of 1994 ("VAWA"), or mark up the "Violence Against Women Act of 1999" (H.R. 357) which expands protections for women against callous acts of violence regardless of their pregnancy status. VAWA is a comprehensive approach to dealing with domestic violence and sexual assault that enables shelters, rape crisis centers, health care settings, schools, police forces, and communities across the country to spearhead efforts to address and prevent violence against women in their communities.

In their letter, the Justice Department has written, "if the Committee wants to make a difference in the lives of women victims against violence, it should reauthorize the Violence Against Women Act." This was also a principal complaint of Juley Fulcher of the National Coalition Against Domestic Violence, who argued at the hearings that by creating a new cause of action, as H.R. 2436 does, the crime committed against a pregnant woman is no longer about the woman victimized by violence. "Instead the focus will often 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."[13] We share these concerns.

CONCLUSION

As we understand this bill, the majority's goal of averting violence toward women and their developing pregnancies is secondary to their goal of undermining the reproductive rights of women. Rather than seeking to score points in the abortion debate, we invite the majority to join us in crafting legislation that protects women and mothers from violence that threaten all those under their care. Because it is impossible to harm a developing pregnancy without causing harm to the woman, we would be better served by laws that protect women, pregnant and non-pregnant alike, from

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[11] Most candidly, Mr. Arkes noted that H.R. 2436 "would find its fuller significance when Congress finally puts into place the understanding that there are limits to the right of abortion. . . ." Constitution Subcommittee Hearings, July 21, 1999.

[12] When Representative Scott inquired as to why H.R. 2436 was assigned to the Constitution Subcommittee, rather than the Crime Subcommittee since it purported to involve the criminal law, he was informed by Chairman Hyde that the assignment was "arbitrary." Judiciary Committee Markup, September 14, 1999.

[13] Testimony of Juley Fulcher, Hearings: Constitution Subcommittee, July 21, 1999.

violence. Instead of moving toward the laudable goal of enhancing the welfare of mothers, H.R. 2436 lays the groundwork for governmental intervention into their bodies and their reproductive choice.

JOHN CONYERS, Jr.
HOWARD L. BERMAN.
BOBBY SCOTT.
ZOE LOFGREN.
MAXINE WATERS.
WILLIAM D. DELAHUNT.
STEVEN R. ROTHMAN.
ANTHONY D. WEINER.
JERROLD NADLER.
MELVIN L. WATT.
SHEILA JACKSON LEE.
MARTIN T. MEEHAN.
TAMMY BALDWIN.

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