

UNBORN VICTIMS OF VIOLENCE ACT OF 2001

APRIL 20, 2001.—Ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 503]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 503) to amend 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 without amendment and recommends that the bill do pass.

CONTENTS

	Page
Purpose and Summary	2
Background and Need for the Legislation	2
Hearings	15
Committee Consideration	15
Vote of the Committee	15
Committee Oversight Findings	18
Performance Goals and Objectives	18
New Budget Authority and Tax Expenditures	18
Congressional Budget Office Cost Estimate	18
Constitutional Authority Statement	19
Section-by-Section Analysis and Discussion	19
Changes in Existing Law Made by the Bill, as Reported	20
Markup Transcript	23
Dissenting Views	73

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. 503, the "Unborn Victims of Violence Act of 2001," 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. 503 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." 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."

BACKGROUND AND NEED FOR THE LEGISLATION

I. CURRENT FEDERAL LAW

A. *The "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

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.

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).

development of unborn children.⁵ Pursuant to this enhanced knowledge, the law today recognizes, 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

H.R. 503 thus follows the current trend of 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. 503 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. Mr. Ronald Weich, Esq., testified to that effect before the Subcommittee on the Constitution during the 106th Congress.¹² This is simply not the case.

The fact 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 preg-

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; Ga. Code Ann. §§ 16-5-80, 40-6-393.1, 52-7-12.3; 720 Ill. Comp. Stat. Ann. §§ 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. Cons. Stat. Ann. §§ 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 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 Rittrivi 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.).

nant 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—including 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 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 Federal official 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 Federal official 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 6 months, even if the assailant intended to kill the unborn child. This minor increase in

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 sentence enhancement because “the victim, an 8-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).

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).

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. 503 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 8 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

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, and the military judge sentenced him to confinement for 8 years, a dishonorable discharge, and a reduction to the lowest

²² 48 M.J. 745 (A.F.C.C.A. 1998). During the 106th Congress, 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.

²⁴ *Id.*

²⁵ See *id.*

²⁶ *Id.*

²⁷ *Id.* at 752.

²⁸ *Id.*

²⁹ See *id.* at 748.

³⁰ *Id.*

enlisted grade. If, however, Robbins had committed the act in a State which did not have a fetal homicide law, he would have received no additional punishment for killing baby Jasmine. Indeed, 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 8-months-pregnant wife and killing their unborn child. H.R. 503 would correct this deficiency and ensure that all of those who, like Robbins, commit violent crimes against pregnant women and are subject to Federal prosecution receive just and adequate punishment for injuries inflicted upon unborn children.

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 6 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 during the 106th Congress, 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

Ruth Croston was 5 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 Ms. Croston's brother, William Croston, testified before the Subcommittee on the Constitution on March 15, 2001, regarding the tragic death of his sister and the failure of Federal law to recognize the death of his unborn niece.³⁷

Monica Smith, a pregnant secretary, and her unborn child were killed in the World Trade Center bombing in New York on February 26, 1993.³⁸ Jurors at one trial were told about the harm done to Ms. Smith's unborn child,³⁹ but no additional punishment may be imposed under Federal law for the death of that child.

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.

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 *The Unborn Victims of Violence Act of 2001: Hearings on H.R. 503 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong., March 15, 2001 (statement of William Croston).

³⁸ See Jeanne King, *Pictures of N.Y. bombing stir emotional response from jury*, Houston Chronicle, Aug. 8, 1997, at 26.

³⁹ See *id.*

On January 1, 1999, Deanna Mitts, who was 8 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.⁴⁰ Joseph Minard, the presumed father of the child, was arrested almost a year later for the murder of Deanna and Kayla and is currently awaiting trial in Federal court. Even if convicted, however, he will receive no punishment for killing the unborn child.⁴¹

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.⁴² Almost 3 years later, the unborn child's father, Coleman Johnson, was arrested on Federal explosives charges for the death of Ms. Baker and is awaiting trial. Even if he is convicted, he will receive no additional punishment for killing the unborn child.

D. H.R. 503: The Unborn Victims of Violence Act

H.R. 503 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. 503 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.

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 de-

⁴⁰ See Lawrence Walsh, *Bombing Shocks Small Town Blast That Killed Mother*, Pittsburgh Post-Gazette, May 2, 1999, at B1.

⁴¹ See *id.*

⁴² 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.

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.*

gree murder or voluntary manslaughter if the unborn child dies, or attempted murder or manslaughter if the child survives the assault.

H.R. 503 specifically exempts “conduct for which the consent of the pregnant woman has been obtained or for which such consent is implied by law.” 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. 503, Congress will have spoken with regard to the protection of unborn children, 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. 503 does not permit the prosecution of those who act without criminal intent. Instead, H.R. 503 operates in a manner consistent with generally-accepted mens rea principles of criminal law.

As a general rule, H.R. 503 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 an additional offense, the punishment for which is the same as the punishment the defendant would have received had that 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 mother “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 a born person 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

⁴⁴ See, e.g. Memorandum of American Civil Liberties Union, Washington National Office, to Interested Persons 2 (March 14, 2001) (claiming that conviction for an offense under H.R. 503 does not require proof of “a mens rea (or criminal intent) requirement”); 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”).

⁴⁵ 2 Plowd. 473, 75 Eng. Rep. 706 (1576).

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 Republic⁴⁷ 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 constituted 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. 503 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 an additional offense of the same level that would have resulted had the same injury or death oc-

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. LaFare & Austin W. Scott, Jr., *Criminal Law* 284 (2d ed. 1986).

⁴⁹ *Id.*

⁵⁰ *Id.* at 283.

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

curred 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. 503 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 the unborn child.

In short, H.R. 503 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 principles. 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. 503

The next question that arises regarding the constitutionality of H.R. 503 is whether Congress has the constitutional authority to enact such legislation. That question must be answered in the affirmative because the bill does not extend Congress' reach to prohibit any conduct that does not currently violate Federal law.⁵⁵

⁵²H.R. 503 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").

⁵³The 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).

⁵⁴The 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).

⁵⁵See *The Unborn Victims of Violence Act of 2001: Hearings on H.R. 503 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong., March 15, 2001 (statement of Professor Richard Myers, Ave Maria Law School); *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).

Instead, H.R. 503 merely provides an additional offense and punishment for those who injure or kill an unborn child during the commission of one of the predicate Federal 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. 503.⁵⁷

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 reasoning 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. 503 and Abortion Rights

H.R. 503 does not affect or in any way interfere with a woman's right to abort 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." 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 param-

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 Richard Myers, *supra*; Statement of Professor Gerard V. Bradley, *supra*.

⁵⁹ See *id.*

⁶⁰ See *id.*

eters 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 the Court's 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. 503 in no way interferes with or restricts the abortion right articulated in *Roe*, the act is clearly constitutional. Congress 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

⁶¹ See Statement of Professor Richard Myers, *supra*; 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).

⁷¹ 705 N.E.2d 419 (Ohio Ct. App. 1997).

⁷² *Id.* at 421.

⁷³ 956 S.W.2d 286 (Mo. Ct. App. 1997).

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. 503 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.

D. Use of the Term “Unborn Child”

Opponents of H.R. 503 have also argued that the use of the term “unborn child” is “designed to inflame” and may, in the words of those dissenting from the Judiciary Committee report during the 106th Congress, “result in a major collision between the rights of the mother and the rights of” the unborn child. This objection is based upon an apparent lack of knowledge of the widespread use of the term “unborn child” in the decisions of the United States Supreme Court and the United States Courts of Appeals, in State statutes and court decisions, and even in the legal writings of abortion advocates.

The use of the term “unborn child” by the Supreme Court can be illustrated by reference to no greater authority than *Roe v. Wade*,⁸² in which Justice Blackman used the term “unborn children” as synonymous with “fetuses.” Justice Blackman also used the term “unborn child” in *Doe v. Bolton*,⁸³ the companion case to *Roe* in which the Court struck down Georgia’s abortion statute.

The Court has also used the term “unborn child” outside of the abortion context. In *Burns v. Alcala*,⁸⁴ for example, the Court held that “unborn children” are not “dependent children” for purposes of obtaining aid under the Aid to Families with Dependent Children (AFDC) program. Not only did Justice Powell use the term “unborn child” in the majority opinion in *Burns*, but Justice Thurgood Mar-

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 Richard Myers, *supra*; 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.”).

⁸² 410 U.S. 113 (1973).

⁸³ 410 U.S. 179 (1973).

⁸⁴ 420 U.S. 575 (1975).

shall dissented in that case and argued that “unborn children” *should* be covered as “dependent children” under AFDC. Surely the opponents of H.R. 503 would not seriously contend that Justice Marshall—a staunch defender of abortion rights—was putting abortion rights at risk by arguing that “unborn children” should be recognized under a Federal statute.

There are numerous decisions that use the term “unborn child” as synonymous with “fetus,” including *City of Akron v. Akron Center for Reproductive Health*,⁸⁵ *Webster v. Reproductive Health Services*,⁸⁶ and *International Union v. Johnson Controls*.⁸⁷ Additionally, there are numerous decisions by the United States Courts of Appeals using the term “unborn child.” For a few examples, see *Alexander v. Whitman*,⁸⁸ *Jane L. v. Bangerter*,⁸⁹ and *Smith v. Newsome*.⁹⁰

There are also at least nineteen State criminal statutes similar to H.R. 503 that currently use the term “unborn child” to refer to a fetus.⁹¹ Statutes such as these have been consistently upheld by the courts in the face of constitutional challenges.⁹²

Even feminist abortion rights advocates such as Catharine MacKinnon have used the term “unborn child” as synonymous with “fetus.” In an article published in the Yale Law Journal entitled *Reflections on Sex Equality Under the Law*,⁹³ Professor MacKinnon conceded that a “fetus is a human form of life” that “is alive,”⁹⁴ and opined that “[m]any woman have abortions as a desperate act of love for their unborn children.”⁹⁵

It is clear, then, that objections to the use of the term “unborn child” in H.R. 503 are without merit. The term “unborn child” has been widely used and accepted by judges, legislators and legal scholars, and has withstood challenges in the courts.

IV. CONCLUSION

H.R. 503 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 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. 503 relies on the well-established doctrine of transferred intent in supplying the mental element nec-

⁸⁵ 462 U.S. 416 (1983).

⁸⁶ 492 U.S. 490 (1989).

⁸⁷ 499 U.S. 187 (1991).

⁸⁸ 114 F.3d 1392 (3d Cir. 1997).

⁸⁹ 61 F.3d 1493 (10th Cir. 1995).

⁹⁰ 815 F.2d 1386 (11th Cir. 1987).

⁹¹ See, e.g., Ariz. Rev. Stat. § 13-1103(A)(5); Ark. Code Ann. § 5-1-102(13)(B)(i)(a); Fla. Stat. Ann. § 782.09; Ga. Code Ann. §§ 16-5-80, 40-6-393.1, 52-7-12.3; 720 Ill. Comp. Stat. Ann. §§ 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. §§ 609.2661-609.2665, 609.267-609.2672; Miss. Code Ann. § 97-3-37; Mo. Ann. Stat. §§ 1.205, 565.024, 565.020; Nev. Rev. Stat. 200.210; N.D. Cent. Code §§ 12.1-17.1-05, 12.1-17-06; Okla. Stat. Ann. tit. 21, § 713; Pa. Cons. Stat. Ann. §§ 2601-2609; 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; Wis. Stat. Ann. §§ 939.75, 939.24, 939.25, 940.01, 940.02, 940.05, 940.06, 940.08, 940.09, 940.10.

⁹² See, e.g., *State v. Coleman*, 705 N.E.2d 419, 421 (Ohio Ct. App. 1997); *State v. Merrill*, 450 N.W.2d 318, 322 (Minn. 1990); *People v. Davis*, 872 P.2d 591, 597 (Cal. 1994); and *Smith v. Newsome*, 815 F.2d 1386, 1388 (11th Cir. 1987).

⁹³ 100 Yale L.J. 1281 (1991).

⁹⁴ *Id.* at 1316.

⁹⁵ *Id.* at 1318.

essary 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. 503 serves vital national interests by extending the criminal law's protections for *all* human life.

HEARINGS

The Committee's Subcommittee on the Constitution held a hearing on H.R. 503 on March 15, 2001. Testimony was received from the following witnesses: William Croston III, Charlotte, North Carolina; Professor Richard S. Myers, Professor of Law, Ave Maria School of Law, Ann Arbor, Michigan; Juley Fulcher, Director of Public Policy, National Coalition Against Domestic Violence; Robert J. Cynkar, Attorney at Law, Cooper, Carvin & Rosenthal.

COMMITTEE CONSIDERATION

On March 21, 2001, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 503, without amendment, by a voice vote, a quorum being present. On March 28, 2001, the Committee met in open session and ordered favorably reported the bill, H.R. 503, without amendment, by a recorded vote of 15 to 9, a quorum being present.

VOTE OF THE COMMITTEE

1. An amendment in the nature of a substitute was offered by Ms. Lofgren and Mr. Conyers to provide additional punishment, up to a life sentence, for "interruption of the normal course of pregnancy resulting in prenatal injury (including termination of the pregnancy)." The amendment was defeated by rollcall vote of 13 to 20.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr		X	
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Cannon		X	
Mr. Graham		X	
Mr. Bachus		X	
Mr. Scarborough		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Conyers	X		
Mr. Frank	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
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	X		
Mr. Delahunt	X		
Mr. Wexler	X		
Ms. Baldwin			
Mr. Weiner	X		
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman		X	
Total	13	20	

2. An amendment was offered by Mr. Conyers and Ms. Baldwin to provide that the Unborn Victims of Violence Act of 2001 would “only take effect in fiscal years for which Congress appropriates 100 percent of the amounts authorized for programs established under the Violence Against Women Act.” The amendment was defeated by a rollcall vote of 11 to 19.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Hyde			
Mr. Gekas		X	
Mr. Coble		X	
Mr. Smith (Texas)		X	
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Chabot		X	
Mr. Barr			
Mr. Jenkins		X	
Mr. Hutchinson		X	
Mr. Cannon		X	
Mr. Graham		X	
Mr. Bachus		X	
Mr. Scarborough		X	
Mr. Hostettler		X	
Mr. Green		X	
Mr. Keller		X	
Mr. Issa		X	
Ms. Hart		X	
Mr. Flake		X	
Mr. Conyers	X		
Mr. Frank			
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	X		
Mr. Delahunt	X		
Mr. Wexler			
Ms. Baldwin			

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Mr. Weiner	X	.....	.....
Mr. Schiff	X	.....	.....
Mr. Sensenbrenner, Chairman .....	.....	X	.....
Total	11	19	.....

3. An amendment in the nature of a substitute was offered by Mr. Scott to require the United States Sentencing Commission to “review and amend the Federal sentencing guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate sentencing enhancement when a crime is committed in violation of title 18 of the United States Code causing bodily injury or death to a pregnant woman.” The amendment was defeated by a voice vote.

4. Final Passage. The motion to report favorably the bill H.R. 503 was adopted. The motion was agreed to by a rollcall vote of 15 to 9.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Hyde .....	.....	.....	.....
Mr. Gekas	X	.....	.....
Mr. Coble	X	.....	.....
Mr. Smith (Texas)	X	.....	.....
Mr. Gallegly	X	.....	.....
Mr. Goodlatte	X	.....	.....
Mr. Chabot	X	.....	.....
Mr. Barr .....	.....	.....	.....
Mr. Jenkins	X	.....	.....
Mr. Hutchinson .....	.....	.....	.....
Mr. Cannon	X	.....	.....
Mr. Graham	X	.....	.....
Mr. Bachus .....	.....	.....	.....
Mr. Scarborough	X	.....	.....
Mr. Hostettler	X	.....	.....
Mr. Green	X	.....	.....
Mr. Keller .....	.....	.....	.....
Mr. Issa	X	.....	.....
Ms. Hart	X	.....	.....
Mr. Flake .....	.....	.....	.....
Mr. Conyers .....	.....	X	.....
Mr. Frank .....	.....	.....	.....
Mr. Berman .....	.....	.....	.....
Mr. Boucher .....	.....	.....	.....
Mr. Nadler .....	.....	X	.....
Mr. Scott .....	.....	X	.....
Mr. Watt .....	.....	X	.....
Ms. Lofgren .....	.....	X	.....
Ms. Jackson Lee .....	.....	.....	.....
Ms. Waters .....	.....	.....	.....
Mr. Meehan .....	.....	X	.....
Mr. Delahunt .....	.....	X	.....
Mr. Wexler .....	.....	X	.....
Ms. Baldwin .....	.....	.....	.....
Mr. Weiner .....	.....	X	.....
Mr. Schiff .....	.....	.....	.....
Mr. Sensenbrenner, Chairman	X	.....	.....
Total	15	9	.....

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.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 503 does not authorize funding. Therefore, clause 3(c) of House Rules XIII is inapplicable.

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. 503, 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, March 30, 2001.

Hon. F. JAMES SENSENBRENNER, Jr., *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. 503, the Unborn Victims of Violence Act of 2001.

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.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Member

H.R. 503—Unborn Victims of Violence Act of 2001.

CBO estimates that implementing H.R. 503 would not result in any significant cost to the federal government. Because enactment of H.R. 503 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. 503 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. 503 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. 503 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 2001.

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 further 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. 503.

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

TITLE 18—CRIMES AND CRIMINAL
PROCEDURE

* * * * *

PART I—CRIMES

Chap.		Sec.
1.	General provisions	1
	* * * * *	
90A.	Protection of unborn children	1841
	* * * * *	

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 instead of being punished under subparagraph (A), 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, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;*

(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

* * * * *

SUBCHAPTER X—PUNITIVE ARTICLES

Sec.	Art.	
877.	77.	Principals.
919.	119.	Manslaughter.
919a.	119a.	Protection of unborn children.

* * * * *

§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)(A) *Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under this chapter 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 accused 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, instead of being punished under subparagraph (A), be punished as provided under sections 880, 918, and 919(a) of this title (articles 80, 118, and 119(a)) 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 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) 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, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(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) 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.

* * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

WEDNESDAY, MARCH 28, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 10 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner (chairman of the committee) presiding.

Chairman SENSENBRENNER. The committee will be in order. The next item on the agenda is the adoption of H.R. 503, the Unborn Victims of Violence Act of 2001.

[H.R. 503 follows:]

107TH CONGRESS
1ST SESSION

H. R. 503

To amend title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 7, 2001

Mr. GRAHAM (for himself, Mr. BACHUS, Mr. BARR of Georgia, Mr. CHABOT, Mr. COSTELLO, Mr. DELAY, Mr. HUTCHINSON, Mr. HYDE, Mr. BARCIA, Mr. SMITH of New Jersey, Mr. VITTER, Mr. HILLEARY, Mr. BURTON of Indiana, Mr. RYUN of Kansas, Mr. HALL of Texas, Mr. SHOWS, Mr. LARGENT, Mr. PITTS, Mr. GREEN of Wisconsin, Mr. COLLINS, Mr. GOODLATTE, Mr. GARY MILLER of California, Mr. BLUNT, Mrs. EMERSON, Mr. PHELPS, Mr. HANSEN, Mr. SHIMKUS, Mr. HOEKSTRA, Mr. KNOLLENBERG, Mr. TANCREDO, Mr. GUTKNECHT, Mr. DEMINT, Mr. HAYWORTH, Mr. CHAMBLISS, Mr. ENGLISH, Mr. WELDON of Florida, Mr. BRADY of Texas, Mr. JONES of North Carolina, Mr. SCHAFFER, Mr. STEARNS, Mr. DEAL of Georgia, Mr. CANTOR, Mr. EVERETT, Mrs. JO ANN DAVIS of Virginia, Mr. LAHOOD, Mr. HASTINGS of Washington, Mr. LIPINSKI, Mr. LEWIS of Kentucky, Mr. OXLEY, Mr. DOOLITTLE, and Mr. ROGERS of Michigan) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Armed Services, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend title 18, United States Code, and the Uniform Code of Military Justice to protect unborn children from assault and murder, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
 2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Unborn Victims of Vio-
 5 lence Act of 2001”.

6 **SEC. 2. PROTECTION OF UNBORN CHILDREN.**

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

9 **“CHAPTER 90A—PROTECTION OF UNBORN**
 10 **CHILDREN**

“Sec.

“1841. Protection of unborn children.

11 **“§ 1841. Protection of unborn children**

12 “(a)(1) Whoever engages in conduct that violates any
 13 of the provisions of law listed in subsection (b) and thereby
 14 causes the death of, or bodily injury (as defined in section
 15 1365) to, a child, who is in utero at the time the conduct
 16 takes place, is guilty of a separate offense under this sec-
 17 tion.

18 “(2)(A) Except as otherwise provided in this para-
 19 graph, the punishment for that separate offense is the
 20 same as the punishment provided under Federal law for
 21 that conduct had that injury or death occurred to the un-
 22 born child’s mother.

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

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

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

6 “(C) If the person engaging in the conduct thereby
7 intentionally kills or attempts to kill the unborn child, that
8 person shall instead of being punished under subpara-
9 graph (A), be punished as provided under sections 1111,
10 1112, and 1113 of this title for intentionally killing or at-
11 tempting to kill a human being.

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

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

17 “(1) Sections 36, 37, 43, 111, 112, 113, 114,
18 115, 229, 242, 245, 247, 248, 351, 831, 844(d), (f),
19 (h)(1), and (i), 924(j), 930, 1111, 1112, 1113,
20 1114, 1116, 1118, 1119, 1120, 1121, 1153(a),
21 1201(a), 1203, 1365(a), 1501, 1503, 1505, 1512,
22 1513, 1751, 1864, 1951, 1952 (a)(1)(B), (a)(2)(B),
23 and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116,
24 2118, 2119, 2191, 2231, 2241(a), 2245, 2261,

1 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A,
2 and 2441 of this title.

3 “(2) Section 408(e) of the Controlled Sub-
4 stances Act of 1970 (21 U.S.C. 848(e)).

5 “(3) Section 202 of the Atomic Energy Act of
6 1954 (42 U.S.C. 2283).

7 “(c) Nothing in this section shall be construed to per-
8 mit the prosecution—

9 “(1) of any person for conduct relating to an
10 abortion for which the consent of the pregnant
11 woman, or a person authorized by law to act on her
12 behalf, has been obtained or for which such consent
13 is implied by law;

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

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

18 “(d) As used in this section, the term ‘unborn child’
19 means a child in utero, and the term ‘child in utero’ or
20 ‘child, who is in utero’ means a member of the species
21 homo sapiens, at any stage of development, who is carried
22 in the womb.”.

23 (b) CLERICAL AMENDMENT.—The table of chapters
24 for part I of title 18, United States Code, is amended by

1 inserting after the item relating to chapter 90 the fol-
 2 lowing new item:

“90A. Protection of unborn children 1841”.

3 **SEC. 3. MILITARY JUSTICE SYSTEM.**

4 (a) PROTECTION OF UNBORN CHILDREN.—Sub-
 5 chapter X of chapter 47 of title 10, United States Code
 6 (the Uniform Code of Military Justice), is amended by in-
 7 serting after section 919 (article 119) the following new
 8 section:

9 **“§ 919a. Art. 119a. Protection of unborn children**

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

16 “(2)(A) Except as otherwise provided in this para-
 17 graph, the punishment for that separate offense is the
 18 same as the punishment provided under this chapter for
 19 that conduct had that injury or death occurred to the un-
 20 born child’s mother.

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

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

1 “(ii) the accused intended to cause the death of,
2 or bodily injury to, the unborn child.

3 “(C) If the person engaging in the conduct thereby
4 intentionally kills or attempts to kill the unborn child, that
5 person shall, instead of being punished under subpara-
6 graph (A), be punished as provided under sections 880,
7 918, and 919(a) of this title (articles 80, 118, and 119(a))
8 for intentionally killing or attempting to kill a human
9 being.

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

13 “(b) The provisions referred to in subsection (a) are
14 sections 918, 919(a), 919(b)(2), 920(a), 922, 924, 926,
15 and 928 of this title (articles 118, 119(a), 119(b)(2),
16 120(a), 122, 124, 126, and 128).

17 “(c) Nothing in this section shall be construed to per-
18 mit the prosecution—

19 “(1) of any person for conduct relating to an
20 abortion for which the consent of the pregnant
21 woman, or a person authorized by law to act on her
22 behalf, has been obtained or for which such consent
23 is implied by law;

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

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

3 “(d) In this section, the term ‘unborn child’ means
4 a child in utero, and the term ‘child in utero’ or ‘child,
5 who is in utero’ means a member of the species homo sapi-
6 ens, at any stage of development, who is carried in the
7 womb.”.

8 (b) CLERICAL AMENDMENT.—The table of sections
9 at the beginning of such subchapter is amended by insert-
10 ing after the item relating to section 919 the following
11 new item:

“919a. 119a. Protection of unborn children.”.

○

Chairman SENSENBRENNER. The chair recognizes the gentleman from Ohio, Mr. Chabot, the chairman of the Subcommittee on the Constitution, for a motion.

Mr. CHABOT. Thank you, Mr. Chairman.

The Subcommittee on the Constitution reports favorably the Bill H.R. 503 and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, H.R. 503 will be considered as read and open for amendment at any point. The chair recognizes the gentleman from Ohio for 5 minutes to strike the last word.

Mr. CHABOT. Thank you, Mr. Chairman. I would like to briefly address several legal issues that have been raised regarding the Unborn Victims of Violence Act.

First, questions have been raised regarding Congress's constitutional authority to enact this legislation. The challenge to the bill on this ground is completely without merit. It is clear the Congress has such constitutional authority because the bill will only affect conduct that is already prohibited by Federal law.

H.R. 503 merely provides an additional offense and punishment for those who injure or kill an unborn child during the commission of one of the existing predicate offenses set forth in the bill. If there is any question regarding the constitutionality of the act's reach, that question is directed to the constitutionality of the predicate offenses, not H.R. 503.

Opponents of H.R. 503 have also argued that the bill somehow violates the decision of the Supreme Court in *Roe v. Wade*. This argument is also without merit. To begin with, H.R. 503 simply does not apply to abortions. On Page 4 of the bill, beginning on Line 9, prosecution is explicitly precluded "for any 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."

The act also does not permit prosecution of any person for any medical treatment of the pregnant woman or her unborn child or of the mother for any conduct with respect to her unborn child. The act could not be more clear in exempting abortion.

Moreover, there is nothing in *Roe v. Wade* that prevents Congress from giving legal recognition to the lives of unborn children outside the parameters of the right to abortion marked off in that case. In establishing 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 because the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."

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. 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 and uniformly upheld those laws. For example, in *State v. Coleman*, the Ohio Court of Appeals stated that "*Roe* protects a woman's constitutional right. It does not protect a third party's unilateral destruction of a fetus."

Similarly, the Minnesota Supreme Court has 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.

In *People v. Davis*, the California Supreme Court was even more to the point in rejecting this argument, stating that "*Roe v. Wade* principles are inapplicable to a statute that criminalizes the killing of a fetus without the mother's consent."

The 11th Circuit Court echoed that sentiment in *Smith v. Newsome*, holding that *Roe v. Wade* was immaterial to whether a State can prohibit the destruction of a fetus by a third party.

Finally, opponents of H.R. 503 have argued that the bill lacks the necessary mens rea requirement for a valid criminal law, and is therefore unconstitutional. This argument ignores the well-established doctrine of transferred intent in the criminal law. Under H.R. 503, an individual may be guilty of an offense against an unborn child only if he has committed an act of violence with criminal intent upon a pregnant woman, thereby injury or killing her unborn child.

Under the doctrine of transferred intent, the law considers the criminal intent directed toward the pregnant woman to have also been directed toward the unborn child. The transferred intent doctrine was recognized in England as early as 1576 and was adopted by American courts during the early days of the Republic. A 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 legislation.

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.

H.R. 503 operates on these basic and well-settled principles.

Mr. Graham deserves our thanks for his work in developing this thoughtfully structured bill, which will help close an unfortunate gap in the law, and I urge my colleagues to support this important legislation.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman's time has expired.

Who seeks time on the minority side?

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from New York, Mr. Nadler is recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, I oppose the bill before us today, H.R. 503, the Unborn Victims of Violence Act, because it is unnecessary, misguided, and facially unconstitutional. The Supreme Court in *Roe v. Wade* clearly said, "The unborn have never been recognized in the whole sense," and concluded that, "person," as used in the Fourteenth Amendment of the Constitution does not include the unborn."

Mr. Chairman, we are going to hear a lot today about violence to fetuses, violence to embryos, violence to zygotes, violence to blastocysts. We'll hear about horrific acts of violence perpetrated against women at advanced stages of pregnancy, causing injuries to the fetus. The sponsors will claim, even though this bill address-

es only violence against fetuses, that this bill is really being considered to protect the welfare of these women.

We should have no illusions about the purposes of this bill, that it is yet another battle in a war of symbols in the abortion debate, in which opponents of a woman's constitutional right to choose attempt to portray fetuses, from the earliest moments of development, as children, the same rights as the adult women who are carrying them.

The implication is that anyone who does not share the metaphysical slant, the metaphysical slant of the radical anti-choice movement that a two-celled blastocyst is a person on exactly the same basis and with the same rights as any child or adult must secretly favor infanticide.

This bill, by making the destruction of a fetus or even of a zygote a separate crime of murder, without any reference to the possible harm to the pregnant woman speaks volumes about that view. If causing a miscarriage is murder, then, by implication, so is abortion, the Supreme Court never mind. Even if the sponsors have papered over this premise with language to the contrary, no one should be under any illusions that this is the real purpose of this bill.

Let us take the sponsors at their word. In the last Congress, the report of the majority of this committee made clear that their concern was that "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," and that the bill's purpose was, again, "to narrow the gap in the law by providing that an individual who kills an unborn child during the commission of certain Federal crimes of violence will be guilty of a separate offense." Providing such a separate offense, as opposed, for example, to making greater the degree of the offense, clearly recognizes and has the purpose of doing so, the fetus as the victim of the violence, as opposed to the woman being the victim, a proposition that is at odds with the holding of the Supreme Court and of the Constitution.

One of the other problems with the bill is that it is unclear, as one of the majority's witnesses testified at the hearings a couple of weeks ago. Does the bill cover an embryo only after implantation in the womb, as it seems to say, or does it cover the blastocysts at conception? Put another way, is it only murder if you cause the miscarriage of a viable fetus or is it also murder if you destroy a two-celled zygote at the moment of conception? I will ask the sponsor that question during the discussion.

I think the sponsor of this legislation should tell us which he means. It's a simple question and should have a simple straightforward answer and not the confused language in the bill.

The sponsors of H.R. 503 claim that it is a crime bill. Yet, this bill was sent to the Subcommittee on the Constitution instead of the Subcommittee on Crime. The implication seems to be that the legislation is driven by the politics of abortion, rather than by any substantive effort to end violence against women, pregnant or otherwise. It will certainly reopen the debate in the context of criminal prosecutions over such questions as when life begins and other issues which are properly addressed as constitutional matters or perhaps even as metaphysical ones.

Violence against a pregnant woman is, first and foremost, a criminal act of violence against the woman that deserves strong preventive measures and stiff punishment. According to an article in last week's Journal of the American Medical Association, homicides during pregnancy and the year following birth represent the largely preventable source of premature mortality among young women in the United States.

While in the United States homicide is the leading killer of young women, pregnant or not, homicides of pregnant women occurred with much greater frequency than did homicides of all women.

Mr. Chairman, it's a disgrace that while these preventable crimes continue to occur, Congress fiddles with largely symbolic legislation, rather than taking real steps to deal with the problem. Why, for example, did the Republican majority fall \$200 million short of President Clinton's request for full funding of the Violence Against Women Act, something that might really help this problem? Are the members who vote for this legislation today going to join the rest of us in seeking full funding of the Violence Against Women Act in fiscal year 2002? Will they fight efforts to zero out, for the second year in a row, programs authorized by this committee last year—

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. Mr. Chairman, I ask unanimous consent for an additional 1 minute.

Chairman SENSENBRENNER. Without objection.

Mr. NADLER. Thank you.

Will they fight efforts to zero out for the second year in a row programs authorized by this committee last year to prevent such violence?

No one who listened to the testimony at our subcommittee hearing could have been left unmoved by the terrible story of a young woman who was murdered by her intimate partner in the eighth month of pregnancy. I think we owe it to her, and to the many women like her, to ensure that early intervention is available and that States and localities receive the full resources for the Violence Against Women Act.

We should also enact strong penalties, ones which are not constitutionally suspect for these heinous crimes, but let's not crowd that issue by plunging law enforcement effort into the murky waters of the abortion debate.

Finally, this bill opens the door to prosecuting women or restraining them physically for the sake of the fetus. Some courts have already experimented with this approach. The whole purpose of *Roe v. Wade* was to protect the liberty interests of the women. This bill would undermine it.

One more point, finally, which I think we need to understand. For those of us who are pro-choice, that right extends not just to a woman's right to have an abortion, but to a woman's right to carry her pregnancy to term and to deliver a healthy baby in safety if she wants to. That's why we supported the Violence Against Women Act, that's why we support programs to provide proper prenatal—

Chairman SENSENBRENNER. The gentleman's time has once again expired.

Mr. NADLER. And why we support the Family Medical Leave Act. I suggest we not play politics with abortion and we not pass this bill, and I thank the chair.

Chairman SENSENBRENNER. Without objection, opening statements will be placed in the record.

For what purpose does the gentleman from Michigan seek recognition?

Mr. CONYERS. Mr. Chairman, if there are no other amendments, I offer a substitute by myself and Ms. Lofgren.

Chairman SENSENBRENNER. We haven't gotten to amendments yet.

Are there any amendments?

The gentlewoman from California, Ms. Lofgren, for what purpose do you seek recognition?

Ms. LOFGREN. The same as the ranking member.

[Amendment to H.R. 503 offered by Ms. Lofgren and Mr. Conyers follows:]

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 503
OFFERED BY MS. LOFGREN AND MR. CONYERS**

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the "Motherhood Protection
3 Act of 2001".

**4 SEC. 2. CRIMES AGAINST A WOMAN—TERMINATING HER
5 PREGNANCY.**

6 (a) Whoever engages in any violent or assaultive con-
7 duct against a pregnant woman resulting in the conviction
8 of the person so engaging for a violation of any of the
9 provisions of law set forth in subsection (c), and thereby
10 causes an interruption to the normal course of the preg-
11 nancy resulting in prenatal injury (including termination
12 of the pregnancy), shall, in addition to any penalty im-
13 posed for the violation, be punished as provided in sub-
14 section (b).

15 (b) The punishment for a violation of subsection (a)
16 is—

17 (1) if the relevant provision of law set forth in
18 subsection (c) is set forth in paragraph (1), (2), or
19 (3) of that subsection, a fine under title 18, United



F:\M7\LOFGRE\LOFGRE.011

H.L.C.

3

1 (4) Sections 918, 919(a), 919(b)(2), 920(a),
2 922, 924, 926, and 928 of title 10, United States
3 Code (articles 118, 119(a), 119(b)(2), 120(a), 122,
4 124, 126, and 128).



Chairman SENSENBRENNER. The clerk will report the amendment.

The CLERK. Amendment in the nature of a substitute to H.R. 503, offered by Ms. Lofgren and Mr. Conyers. Strike all—

Chairman SENSENBRENNER. Without objection, the amendment is considered as read and open for amendment at any point.

The gentleman from Ohio?

Mr. CHABOT. Reserving a point of order, Mr. Chairman.

Chairman SENSENBRENNER. Point of order is reserved, and the gentlewoman from California is recognized for 5 minutes.

Ms. LOFGREN. Mr. Chairman, this amendment is very simple. It substitutes the Motherhood Protection Act for the Unborn Protection Act. This amendment, which is offered by Mr. Conyers and myself, recognizes that there are existing crimes in Federal law that protect women from violence, such as violent assault, but further it recognizes that when such crimes cause a woman to miscarry, there is an additional harm to that woman. This amendment provides for a crime with a sentence for that additional crime against a woman.

I think it's important for us to pass this amendment and to adopt the extreme penalty that is provided in the amendment. As has been mentioned by Mr. Nadler, the bill before us is another attempt to whittle away at the rights of women to determine their own reproductive choices. I recognize that the proponents of this bill are sincere on behalf of their cause; namely, that the Government will make the choice of whether or not a woman has a child, not the woman. I don't agree with that position, but I recognize that that is a disagreement that we have in the committee.

The problem with the Unborn Child Protection Act and the rationale for this proposed substitute is to actually take a step that would, in fact, provide full protection for a woman who suffers a miscarriage as a result an assault. The substitute advances protection for women, instead of advancing a political cause, antichoice. And I think if we are serious and interested in protecting women who suffer assaults, we will adopt this amendment.

There was a lot of discussion that the chairman of the committee talked about relative to mens rea, and the like, but I would just like to note that the damage done, the horrible experience of a miscarriage is something that does deserve enormous protection, whether or not one knows one is pregnant. I will just give you a personal experience. In 1980, I—in December—I suffered a miscarriage. I did not know that I was pregnant when my fallopian tube exploded, and I had a terminated pregnancy. However, even though I did not know, it was not because of violence, that is something that one never forgets. One always, one's whole life, remembers what might have been and is no longer possible.

On my 39th birthday, in my fifth month of pregnancy, I was looking forward to a third child and had a miscarriage. And, again, I knew I was pregnant, and it was not because of violence, but a miscarriage is something one never forgets. One's whole life a woman thinks about the child that could have been.

And so when an assault is made against a woman and that results in a miscarriage, there is a separate offense to that woman. You have denied her ability to have the wanted child that she was

carrying. That offense, that crime is huge. It is important, and it should be recognized under Federal law.

This amendment will do that, and I hope that we can move back from the politics of division that relate to abortion and instead move together in a thoughtful and fair manner to adopt this substitute amendment that would, in fact, provide for protection for women who are pregnant and who have been assaulted and when that assault results in a miscarriage.

So I recommend that we adopt this amendment, and I thank the ranking member for sponsoring it with me, and I yield back the balance of my time.

Chairman SENSENBRENNER. Does the gentleman from Ohio insist upon his point of order?

Mr. CHABOT. No, Mr. Chairman. Although we think it's a good point of order, we will withdraw that point of order.

Chairman SENSENBRENNER. Does the gentleman seek recognition?

Mr. CHABOT. Yes, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman.

This substitute amendment should be opposed for two reasons: To begin with, the substitute is so ambiguous that it will place any prosecution for violence against the unborn in jeopardy.

Second, the substitute ignores the injuries inflicted by violent criminals upon the unborn, transforming those injuries into what amounts to mere abstractions. The terminology in the substitute amendment is virtually incomprehensible, and if adopted, it will almost certainly jeopardize any prosecution for injuring or killing an unborn child during the commission of a violent crime.

The substitute amendment provides an enhanced penalty for interruption to the normal course of the pregnancy, resulting in prenatal injury, including termination of the pregnancy. The amendment then authorizes greater punishment for an interruption that terminates the pregnancy than it does for a mere interruption of a pregnancy. But what exactly is the difference between an interruption of a pregnancy and an interruption that terminates the pregnancy? The substitute doesn't say.

Doesn't any interruption of a pregnancy necessarily result in a termination of the pregnancy? And what does the phrase "termination of the pregnancy" mean? Does it mean only that the unborn child died or could it also mean that the child was merely born prematurely, even without suffering any injuries? These ambiguities make the substitute almost impossible to comprehend.

Second, the substitute amendment appears to operate as a mere sentence enhancement authorizing punishment in addition to any penalty imposed for the predicate offense. Yet the language of Subsection 2(b) describes the additional punishment provided in Subsection 2(a) as punishment for a violation of Subsection (a), suggesting that Subsection 2(a) creates a separate offense for killing or injuring an unborn child.

This ambiguity is magnified by the fact that the substitute requires that the conduct injuring or killing an unborn child result in the conviction of the person so engaging. Does that mean that a conviction must be first obtained before the defendant may be

charged with a violation of Subsection 2(a) or does it mean that the additional punishment may be imposed at the trial for the predicate offense, so long as it is imposed after the jury convicts of the predicate offense? Is a separate charge necessary for the enhanced penalty to be imposed? The substitute amendment simply makes no sense, and prosecuting violent criminals under it would be virtually impossible.

Unlike the current language of the bill, the substitute also contains no exceptions for abortion-related conduct, for conduct of the mother or for medical treatment of the pregnant woman or her unborn child. This omission leaves the substitute amendment open to the charge that it would permit the prosecution of mothers who inflict harm upon themselves and their unborn children or doctors who kill or injure unborn children during the provision of medical treatment. For that reason, the substitute amendment is almost certainly subject to a constitutional challenge.

The substitute amendment also appears to mischaracterize the nature of the injury that is inflicted when an unborn child is killed or injured during the commission of a violent crime. Under the current language of the bill, a separate offense is committed whenever an individual causes the death of or bodily injury to a child who is in utero at the time the conduct takes place.

The substitute amendment would transform the death of the unborn child into the abstraction "terminating a pregnancy." Bodily injury inflicted upon the unborn child would become a mere "prenatal injury." Both injuries are described as resulting from an interruption of the normal course of the pregnancy. These abstractions ignore the fact that the death of an unborn child occurs whenever a pregnancy is violently terminated by a criminal. They also fail to recognize that a prenatal injury is an injury inflicted upon a real human being in the womb of his or her mother.

If an assault is committed on a pregnant woman, and her unborn child subsequently suffers from a disability because of the assault, that injury cannot accurately be described as an abstract injury to a pregnancy. It is an injury to a human being. Our bill recognizes that; the substitute does not.

The substitute is thus fatally flawed and should be rejected. The substitute amendment is so poorly drafted and ambiguous that obtaining a conviction of a violent criminal under it would be almost impossible. The substitute amendment is also subject to constitutional attack because it contains no exemption for the abortion-related conduct, for conduct of the woman or for medical treatment.

And, finally, the substitute amendment ignores the injuries inflicted by violent criminals upon unborn children, transforming those injuries into mere abstractions.

For these reasons, the substitute amendment should be rejected, and I yield back the balance of my time.

Mr. CONYERS. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from Michigan seek recognition?

Mr. CONYERS. To support the substitute.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CONYERS. Well, without blinking an eye, no one supporting this bill has conceded in any way that, in fact, what we're doing

is granting a fetus, an embryo and even a fertilized egg personhood, a person with rights and interests separate from and equal those of the mother, which of course exposes the whole truth of the matter already asserted by Mr. Nadler and Ms. Lofgren that this is a very direct attack upon *Roe v. Wade*.

Now there are many instances in which these measures are the same. The bill and the substitute, it creates a separate Federal criminal offense for harm to a pregnant woman, and it continues on, but it is different in that it recognizes the pregnant woman as the primary victim of a crime causing termination of a pregnancy. It also requires a conviction for the underlying criminal offense, thereby requiring the intent to commit the underlying criminal offense be proven. It is also different in that it focuses on the harm to the pregnant woman providing a deterrent against violence against the woman.

So what we have here now is an artful attack on a substitute, which on the floor, when this was brought forward, came within nine votes of passage. So this new attack on grounds of ambiguity, of unconstitutionality, of many, many other things is a little bit I think late in terms of the understanding of many of the members of the House of Representatives.

This bill is similar to 503, making it a separate crime to violently assault a pregnant woman and thereby interrupt or terminate her pregnancy or injure her fetus. The substitute does not require that the assailant have knowledge that the woman is pregnant, another similarity with the bill before us.

But the one important way in which the substitute differs is that it defines the crime to be against the pregnant woman, whereas the main bill makes the crime against the fetus. This distinction is the critical one because the substitute avoids the issue, correctly, of fetal rights and fetal personhood that, of course, puts the bill at odds with the major Supreme Court decision, and instead recognizes that it is the woman who suffers the injury when an assault causes harm to her fetus or causes her to lose the pregnancy.

This substitute acknowledges the interconnections of the woman and her fetus without distinguishing the rights of one from the other, and so it therefore accomplishes the stated goals of the major bill, notably the deterrence of violent acts against pregnant women that cause injury to their fetuses or the termination of her pregnancy. But unlike H.R. 503, it does not—it does it in a way that avoids the controversial issues of abortion and the right to choose. And that's why it was very instructive, when I asked all of the witnesses before the committee that the majority brought forward, whether they supported *Roe v. Wade*, and not—surprisingly all of them did not support it. All of them opposed it. And I think most of the sponsors of the bill, even in committee, are those who have problems with *Roe v. Wade*.

So this disguise is revealed, and a sensible alternative is presented to you by myself and Ms. Lofgren, and I urge its favorable passage.

Chairman SENSENBRENNER. The gentleman's time has expired.

For what purpose does the gentleman from California, Mr. Issa, seek recognition?

Mr. ISSA. I rise in opposition to the bill and seek to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. ISSA. In opposition to the amendment, to be more specific. Sorry, Mr. Chairman.

I find it very disingenuous that this alternative is suggested when, in fact, the bill, as it is presented, is probably the best example of supporting what my colleague from California and others have said is their position on a woman's right to choose. A woman's right to choose is an exclusive right. It is a right to protect that child or to terminate that child. The Supreme Court did not say that this is not a child. The Supreme Court supported a privacy claim, very narrowly constructed, which I believe, if we go back and look at the core of the problem, the problem was a question of what is a mother's right over her unborn child.

This law simply seeks to strengthen the ability for a mother who has been injured and whose child has been injured or killed to seek appropriate punishment. I think there is no question that it is hard for people on this side of the aisle and on that side of the aisle, on one side of the life question and the other, to come to consensus. But if there ever was a sensible bill, one in which each of us could, in fact, agree that this is a time in which the mother's right, and obligation, and tradition of protecting the life of her unborn child is essential and one in which the law has a gap in supporting a woman when, in fact, that life is taken without her permission.

As my colleague from Michigan has said, it is often a group on one side that speaks on one side of this issue and a group on the other that speaks on the other, and I'm no different than anyone else on this panel. I have strong views on this. But I ask my colleagues, supporting the amendment, to look more closely at the real face of the bill, not what's in the hearts of those who might present it, not what's in the mind of the crafter, but what's in the bill.

This bill, in a straightforward way, is going to allow for the punishment for those who take away a mother's right to care for their child, and I have no question that if you read the bill closely, and you put aside our petty differences over the final goal, forget about the goalpost and look at one single occurrence, you can support the bill as it is unamended.

I relinquish the rest of my time.

Ms. LOFGREN. Would the gentleman yield?

Mr. ISSA. I will yield.

Ms. LOFGREN. I thank the gentleman for yielding.

I just would like to make a gentle point because I think the underlying bill is clearly defective constitutionally. And, for example, it assigns rights to a zygote that no court, and the Supreme Court has not allowed. And consequently, the protection that I believe the gentleman has said he intends, and I don't question his intent, will not, in fact, be delivered under the underlying bill.

However, if a pregnant woman is assaulted and miscarries, even though her pregnancy is not developed towards a viable fetus, it's still an injury to that woman. It is still a lost opportunity that is a serious, serious harm. And that's why I just wanted to say I believe that the substitute amendment actually will provide constitutionally sound protection in that instance.

And I thank the gentleman for yielding.

Mr. ISSA. Mr. Chairman, just a short followup.

If you assume that the mother has all of the rights and that this is not a child, then we lose the basis on which to say that there is for sure additional damage. It is really only when you take the absence of the mother's determination to abort the child and link it with the child's inherent rights sans that determination by the mother that you create an individual, and additional, and severe penalty that should be, in fact, passed.

Mr. WEINER. Will the gentleman yield on that point?

Mr. ISSA. Yes, I will.

Mr. WEINER. What I'm not understanding in that explanation is that we do have the opportunity, in this panel and this Congress, to say that there has been additional harm to the woman because of the loss that she's had, and this is an additionally difficult and heinous crime, and we are going to increase the penalties. So we certainly can do that, and that's what the substitute does.

We absolutely have the ability to raise the stakes for committing the crime against the woman that you describe without drawing into it this other element. If we're interested in that, I think you, and I, and members of this committee can pass the bill unanimously that increases the penalty for that.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. SCHIFF. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from California, Mr. Schiff, seek recognition?

Mr. SCHIFF. Move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCHIFF. Thank you, Mr. Chairman.

Both the bill and the substitute seek to accomplish the same criminal justice purposes by using a sentencing enhancement for those who injure a pregnant woman. Both seek to deter the commission of subsequent crimes of that kind. Both seek to increase the punishment for those who commit the crime. Both seek retribution on those who have committed the crime, and seek to incapacitate by increasing the sentence. So all of the goals of the criminal justice law are satisfied by both bill and substitute.

If I had to choose, as a prosecutor going into the courtroom, and for 6 years in Federal court that's what I did, and I know other members of the committee have had the same experience, I would choose to go into court under a statute less subject to constitutional attack, one, in fact, less likely to be challenged on constitutional grounds. Like a court that, given two ways to decide a case, one that requires it decide to a question of constitutional significance, an undecided question, or it can decide one on an alternative basis, it always prefers the alternative basis. The substitute has the merit of not forcing the Supreme Court to decide when life begins.

All of the goals of the criminal justice system, all of the deterrent value that we would want, are satisfied by both bill and substitute, but the substitute is easier to implement in the courtroom, it's easier for prosecutors to use, it is less likely to involve a constitutional question, it is less likely to be struck down. And if our purpose here really is deterrence of these crimes and greater punishment for the perpetrator, why choose a statute, why choose a bill that has much

greater likelihood of failing to survive motions to dismiss the prosecution or requiring extended appellate proceedings?

We have a substitute that accomplishes all of these goals. As a prosecutor, the last thing that I would want to do is have to argue a motion about how we define an unborn child and what it means to refer to a member of the species, *homo sapiens*, at any stage of development who is carried in the womb, and have that the subject of litigation in a prosecution. And all of that is unnecessary if what we are after in this bill or substitute is deterrence and incapacitation, all of the goals of the criminal justice system.

Now, if that's not what we're after, if what we're after is precisely what, as a prosecutor you would want to avoid and that is a constitutional question of first impression, and all of the delays and appeals attendant on that, well, then that's another matter. If that is the goal, then we should support the bill in its original form. But let's not undertake the pretense that this is about something other than what it is. If we want the Supreme Court to decide when life begins, then let's go for the bill. If we want a vehicle we can use to prosecute these cases, to put away people who commit these atrocious offenses, and give prosecutors another weapon in their arsenal, I urge a vote for the substitute.

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. GRAHAM. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from South Carolina, Mr. Graham, seek recognition?

Mr. GRAHAM. I move to strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GRAHAM. Thank you, Mr. Chairman. We had this debate last year, and there are some major differences between the substitute and the underlying bill in terms of how you reach justice and what you would do as a prosecutor, and I will be glad to go over that in a moment.

But from the political aspect of it, Mr. Conyers mentioned that I think it was nine votes short for the substitute last year, but he forgot to tell us that the bill itself passed 254—by 254 votes. I would argue that there's not 254 pro-choice people in Congress. I do believe there's 254 people who understand that this is not about abortion, this is about putting people in jail to the fullest extent of the law when possible, and America has a disagreement over the right to choose.

I'm a pro-life person, and I understand that debate I think very well, and I'm not going to question your religion or your patriotism if you disagree with me, but America seems to be coming together in a couple of areas. Late-term abortions, in the seventh, eighth, ninth month of pregnancy, most Americans view abortion at that point in time as something very uncomfortable, and they would only do that to save the life of the mother.

This is a bill where a lot of Americans come together. Once the woman has chosen to have the baby, and the baby is lost through criminal activity, most Americans, I believe, would not consider the unborn child the enemy there, but something that we would want to protect and would like to put the person in jail. And let me tell you how the law is developing in this region, in this area.

There are 11 States that have statutes just exactly like the bill I have proposed. And we can talk till the cows come home about what terminating a pregnancy means, an unborn child, when the twelfth week of pregnancy occurs, that's all proof problems that every prosecutor will face. The bill is drafted, I think, very legally sound in the sense that it mirrors what 11 States have already had on the books for several years and have been tested. Thirteen States allow you to prosecute an individual who attacks a pregnant woman and destroys the unborn child after 12 weeks, after the embryonic stage of development, a different time period. Seven States have sentence enhancement. Now sentence enhancement, I believe, is a lawful way to approach this topic. I have problems with the substitute as drafted because I think it is vague, but you could probably make it work.

Let me tell you why I think the majority of States have rejected sentence enhancement in this area. The Arkansas case. The Arkansas case that Asa Hutchinson's I think nephew brought to our attention last year involved a man who hired three people to kidnap his pregnant girlfriend because he didn't want to pay child support. They did that, they kidnapped her, beat her within an inch of her life. She was begging, while she was being beaten, for the protection and safety of her unborn child. They killed a 7-pound baby in her womb. Under Arkansas law, they're prosecuted as murderers, not an additional sentence for assaulting people. I think most people would side with the mother and say they murdered her unborn child.

Now this becomes a proof problem about termination of pregnancy when a child is in utero, but legally you can do it that way if you choose. And I've chosen to do it that way because that's where the majority of States are coming out on this issue. That's where the case law is. And in my bill, we never can prosecute the woman, no matter what she does to the unborn child. We protect people who perform abortions, when the woman has given her consent, implied or otherwise, and the medical community need not worry. This is not about abortion. This is about putting people in jail to the fullest extent possible when they attack pregnant women, and the way you avoid getting put in jail with this bill is you don't hurt anybody.

I yield back the balance of my time.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York, Mr. Nadler, seek recognition?

Mr. NADLER. Strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Thank you.

Mr. CONYERS. Would the gentleman yield briefly?

Mr. NADLER. Yes, I'll yield briefly.

Mr. CONYERS. Thank you. I just wanted to let Mr. Graham know that his illustration that he doesn't think there are 254 choice votes in the Congress, pro-life votes in the Congress, illustrates my point. We had nine—we came nine votes short of winning on the floor, which means that there were people of both persuasions that were involved, and I think it's a tribute to those people with com-

mon sense on both sides of this issue to realize that this is a much more sound approach.

I thank the gentleman for yielding.

Mr. NADLER. Thank you. Mr. Chairman, reclaiming my time.

Mr. Chairman, there's been a lot said, but the essence of this debate really comes down to what is written in the memo from the National Right to Life Committee, and I'd like to read from that. It's talking about the Lofgren substitute, and it says, "This proposal did not recognize unborn children as crime victims, but rather provided enhanced penalties for the offense of interruption to the normal course of the pregnancy. Such a one-victim amendment would codify the fiction that when a criminal assailant injures a mother and kills her unborn child, there has been only a compound injury to the mother, but no loss of any human life."

And then it goes on. Then it says, "Such internal contradictions are produced by tortured efforts to avoid acknowledging what everyone really knows. These crimes have two victims." And the Supreme Court said that the unborn have never been recognized in the law as persons in the whole sense, and that "person," as used in the Fourteenth Amendment, does not include the unborn.

If we want to punish the assailant for killing or injuring the fetus, this bill will do it, the substitute will do it. The difference is precisely, and several members on the other side have acknowledged this, is precisely whether we want, for the first time in the law, to recognize the fetus or the zygote or the blastocyst as a separate person. That is the difference, that's the debate, and I understand those who want to do it, and the National Right to Life Committee is commendably honest in saying that that's the point of the bill and that the amendment is not good because it doesn't do that. I think exactly the opposite. Enough said on that point.

I'm going to ask Mr. Lindsey a question—Mr. Graham, rather. Sorry—Mr. Graham a question. The bill does say, in this section, "The term 'unborn child' means a child in utero or child who is in utero means a member of the species homo sapiens at any stage of development—" that sounds clear—"who is carried in the womb."

Now, "who is carried in the womb" would seem to mean after implantation. At any stage of development would seem to mean before implantation, as well as after implantation, and I would think that if you don't read "who is carried in that womb" to modify that and to limit to only after implantation, then it has no meaning at all. I would think any court would read it that way.

So my question is what is the intent of the bill, and is the intent really to say that a two-celled, a fertilized egg, is a person in the legal meaning of the term and has legal conse—and that the full strictures of the bill should apply to that?

I will yield.

Mr. GRAHAM. The intent of the bill is to mirror those statutes that have been on the books for years that recognize it a separate offense to attack a woman who has—who is carrying at any stage of prenatal development—an unborn member of the species, homo sapiens.

Mr. NADLER. Reclaiming my time. I have a specific question.

Mr. GRAHAM. Yes.

Mr. NADLER. Does it mean from the time of conception or does it mean from the time of implantation or does it mean from some other time? That's my only question. I'll yield for the purpose of answering that question.

Mr. GRAHAM. I think the term "carried in the womb" is the term, the operative phrase here, and it means just what we tried to do when we passed 417 to nothing—

Mr. NADLER. But what is that? Tell me which it is.

Mr. GRAHAM. It's in the statutory language. It's a proof problem. I think I understand, as a prosecutor, what I have to prove under the statute, just like every other State that has this statute on the books.

Mr. NADLER. Excuse me. A defendant has to be on notice. My question is, and you should be able to answer it, if someone kills an embryo before implantation in the womb, is that a violation of this statute or is it not, of this bill?

Mr. GRAHAM. I'd say the operative phrase is "carried in the womb," and if it's not carried in the womb, then it would be no crime.

Mr. NADLER. So it doesn't mean at any stage of development, only once implanted in the womb.

Mr. GRAHAM. What it means, Mr. Nadler, is just exactly what it means in 11 other States who have the laws on the books—

Mr. NADLER. Well, I don't have those States—

Mr. GRAHAM. And it means exactly what we tried to do when we said you couldn't execute a pregnant woman. Four hundred and seventeen people to nothing—

Mr. NADLER. Reclaiming my time.

Mr. GRAHAM. If you don't want to hear the story, I'll tell it later.

Mr. NADLER. Fine. I asked a very specific—I understand—I understood the—

Chairman SENSENBRENNER. The gentleman's time has expired.

Mr. NADLER. I guess there's no clear answer then.

Thank you, Mr. Chairman.

Chairman SENSENBRENNER. For what purpose does the gentleman from Pennsylvania, Ms. Hart, seek recognition?

Ms. HART. Mr. Chairman, I move to strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. HART. Thank you, Mr. Chairman. I also ask my colleagues to oppose this amendment, an amendment that does not do the same thing as the original bill, although they do call it a substitute.

Mr. Chairman, from my reading of that, what it does, in my opinion, is harm to legislation that is really directed at the general crime, and often in this case, of domestic violence.

Mr. Chairman, it actually lists on Line 4, Page 1, Section 2, crimes against a woman. Mr. Chairman, I submit to my colleagues that this is far more than a crime against a woman. In fact, many of these acts perpetrated against a woman who is pregnant are perpetrated for the very reason that she is pregnant. Famous cases that we've heard and that were discussed in our hearing, such as the Rae Carruth case, are unfortunately all too common in the United States. They are the extreme cases of domestic violence,

which unfortunately, with all of the education that we've had of our young people, do continue in this world.

Domestic violence is not always a crime against a woman alone, and I'm going to state that again. Domestic violence is called domestic violence because it is a crime against families. It is against other members of the family. We had testimony, Mr. Chairman, from a gentleman whose sister was murdered, along with his unborn niece. That is a crime against that family. That is what domestic violence is.

I submit that Mr. Graham's legislation seeks to provide a further penalty against the person who commits an extreme act of domestic violence, resulting in possibly the death of the pregnant woman and additionally the death of her unborn child. This substitute, in no way, substitutes sufficiently enough penalty to basically deter any perpetrator from such an extreme violent act.

Also, I would like to mention, Mr. Chairman, that as a State Senator in Pennsylvania, I was able to participate in similar discussion on legislation that we passed in 1998. I would submit to my colleagues that at that time we had, I believe, 45 votes out of 50 for the legislation, worded in a very similar manner, with the same intent. There were, by no means, 45 pro-life State Senators in that body at the time.

This is not an issue of abortion. This is an issue, as I submit, to my colleagues, I believe, of extreme domestic violence. It is a violence against a pregnant woman, yes. It is also a violence against a family, it is a violence against a child, it is a violence that if we do not punish it more fully will, unfortunately, continue to proliferate in this country.

I yield back the balance of my time.

Ms. JACKSON LEE. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentlewoman from Texas seek recognition?

Ms. JACKSON LEE. Strike the last word.

Chairman SENSENBRENNER. The gentlewoman is recognized for 5 minutes.

Ms. JACKSON LEE. I thank the chairman very much, and I rise to support the Conyers-Lofgren substitute, frankly, because this is what it is. It is an emotionally charged issue. It is an attempt, on an ongoing and continuous basis, to ignore the constitutional right to choose under *Roe v. Wade*.

I must remind my colleagues that individual State actions are different from the responsibility of this Judiciary Committee that serves as the body that governs laws for all of the people of the United States of America. There's nothing more emotionally disturbing and riveting for a mother to lose her child, for a mother to lose the ability to be a mother, for the mother involuntarily to have that taken away from her, and maybe from the entire family.

I'm reminded of sitting here in this room, with Congresswoman Pat Schroeder, who is not here, as we listened year after year of the pain that was exhibited by those women who came forward expressing the need for a medical procedure dealing with the termination of a pregnancy that would then allow them to have a child in the future. That was called my colleagues on the other side of the aisle partial birth abortion.

That moved throughout this Congress consistently labeling those of us who had a different view; that is, that we wanted the choice to be with mom, and family, and the religious leader, and physician. And I think this amendment gets to the point of what my colleagues are trying to express, and I only wish that we would understand the value of the Constitution and the existing federally constituted law, and that is the law of *Roe v. Wade*.

We can pass this legislation, under the Conyers and Lofgren amendment, and we can answer the question of my colleagues. For example, we can answer the questions of the *United States v. Robbins*, Supreme Court, where an airman on an Air Force base brutally beat his wife, she survived, but the little 8-month, not-yet-termed Jasmine, that was named, did not survive in the mother's womb. Under the legislation, both with the Conyers amendment, which cites an assault provision, that particular incident, that tragic incident, the unwillingness of that mother to have lost that unborn child, would have been covered by this substitute, for the substitute provides and protects a woman and punishes the violence resulting to injury or termination of pregnancy. How clear can we get?

You already heard a prosecutor, who has been in the courtroom for a number of years—many of us have served in similar capacities—be able to say that that is clear on its face. You have injured the woman, which has resulted in the injury or termination of a pregnancy. And additional, this provides for a 20-year-sentence for injury, but a maximum of life for death in the instance of the termination of a woman's pregnancy.

The clear deciding difference that we have in the legislation offered by my friends on the other side of the aisle, and I think it's fair to say that this is going to the very heart of the emotions and heartstrings of America. Of course, in various State legislatures, where they do not have the responsibility to speak for the vastness of the Nation, it is easy to pass legislative initiatives such as that.

When I was in local Government, we rarely had divide over these kinds of issues because there were more likeness of point of view, little attention to constitutional soundness. The responsibility of the Judiciary Committee is constitutional soundness. This is not constitutionally sound. And the tragedy of this is that time after time we come here, and rather than forthrightly say let's put the amendment on the table to undo *Roe v. Wade*, we chip, chip away, and we dangerously undermine the rights of women and the rights of Americans who quietly remain in their homes not protesting, not speaking out loud, supporting the right to privacy and the right of *Roe v. Wade*.

I can tell you that we have all experienced a tragedy. Those of us who are women have had, in our lives, tragedies dealing with the losing of a child.

MS. JACKSON LEE. Fathers have lost and felt this experience from a different perspective. So I simply say that can we not come together, can we get along and support the substitute which responds to the concerns that are being expressed I believe fairly and justly that gives you both relief, that provides the punishment for that brutal person who would terminate or injure that pregnancy and yet protects what is constitutionally our right, which is the *Roe v. Wade* decision that has yet been undermined.

Now, let me just conclude, Mr. Chairman, by simply saying that we know the journey of this legislation at this point. It is now attempted again so that it will go through I assume the Senate if it takes it up, and we know what the results will be with the new Administration. How tragic, and I hope that those who have expressed themselves at the polls understand what votes mean today. It means that constitutionally sound law that have been the law of the land for years and years and years now will be undermined because of someone's failure to count a vote or someone's failure to vote. It's a tragedy. I frankly believe that the Lofgren and Conyers substitute is constitutionally sound, but more importantly, it provides the relief that the present H.R. 503 does not.

Chairman SENSENBRENNER. The gentlewoman's time has expired. The question is on the amendment in the nature of a substitute offered by the gentlewoman from California, Ms. Lofgren. Those in—

Mr. CONYERS. Record vote.

Chairman SENSENBRENNER. Record vote is requested. Those in favor will, as your names are called, answer aye; those opposed, no; and the Clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. No.

The CLERK. Mr. Gekas, no. Mr. Coble?

[No response.]

The CLERK. Mr. Smith?

Mr. SMITH. No.

The CLERK. Mr. Smith, no. Mr. Gallegly?

Mr. GALLEGLY. No.

The CLERK. Mr. Gallegly, no. Mr. Goodlatte?

Mr. GOODLATTE. No.

The CLERK. Mr. Goodlatte, no. Mr. Chabot?

Mr. CHABOT. No.

The CLERK. Mr. Chabot, no. Mr. Barr?

Mr. BARR. No.

The CLERK. Mr. Barr, no. Mr. Jenkins?

Mr. JENKINS. No.

The CLERK. Mr. Jenkins, no. Mr. Hutchinson?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. No.

The CLERK. Mr. Cannon, no. Mr. Graham?

Mr. GRAHAM. No.

The CLERK. Mr. Graham, no. Mr. Bachus?

[No response.]

The CLERK. Mr. Scarborough?

Mr. SCARBOROUGH. No.

The CLERK. Mr. Scarborough, no. Mr. Hostettler?

[No response.]

The CLERK. Mr. Green?

Mr. GREEN. No.

The CLERK. Mr. Green, no. Mr. Keller?

Mr. KELLER. No.

The CLERK. Mr. Keller, no. Mr. Issa?

[No response.]
 The CLERK. Ms. Hart?
 Ms. HART. No.
 The CLERK. Ms. Hart, no. Mr. Flake?
 Mr. FLAKE. No.
 The CLERK. Mr. Flake, no. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Frank?
 Mr. FRANK. Aye.
 The CLERK. Mr. Frank, aye. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 [No response.]
 The CLERK. Mr. Nadler?
 Mr. NADLER. Aye.
 The CLERK. Mr. Nadler, aye. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?
 Mr. WATT. Pass.
 The CLERK. Mr. Watt, pass. Ms. Lofgren?
 Ms. LOFGREN. Aye.
 The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
 Ms. JACKSON LEE. Aye.
 The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
 Ms. WATERS. Aye.
 The CLERK. Ms. Waters, aye. Mr. Meehan?
 [No response.]
 The CLERK. Mr. Delahunt?
 Mr. DELAHUNT. Aye.
 The CLERK. Mr. Delahunt, aye. Mr. Wexler?
 Mr. WEXLER. Aye.
 The CLERK. Mr. Wexler, aye. Ms. Baldwin?
 [No response.]
 The CLERK. Mr. Weiner?
 Mr. WEINER. Aye.
 The CLERK. Mr. Weiner, aye. Mr. Schiff?
 Mr. SCHIFF. Aye.
 The CLERK. Mr. Schiff, aye. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. The gentleman from North Carolina?
 Mr. COBLE. No.
 The CLERK. Mr. Coble, no.
 Chairman SENSENBRENNER. The gentleman from Alabama.
 Mr. BACHUS. No.
 The CLERK. Mr. Bachus, no.
 Chairman SENSENBRENNER. The gentleman from Arkansas.
 Mr. HUTCHINSON. No.
 The CLERK. Mr. Hutchinson, no.
 Chairman SENSENBRENNER. The gentleman from Indiana.
 Mr. HOSTETTLER. No.
 The CLERK. Mr. Hostettler, no.
 Chairman SENSENBRENNER. The gentleman from Massachusetts.
 Mr. MEEHAN. Aye.

Chairman SENSENBRENNER. The gentleman from North Carolina.

Mr. WATT. Mr. Chairman, I change my pass to aye.

Chairman SENSENBRENNER. The gentleman from California.

Mr. ISSA. No.

Chairman SENSENBRENNER. Are there any additional members in the room who wish to record their vote or to change their vote?

If not, the Clerk will report.

The CLERK. Mr. Chairman, there are 13 ayes and 20 nays.

Chairman SENSENBRENNER. And the amendment is not agreed to.

Are there further amendments? The gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. I have an amendment at the desk.

Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Mr. Chairman, I do not have—amendment to H.R. 503 offered by Mr. Conyers and Ms. Baldwin. Add at the end the following: Section 4—

Mr. CONYERS. I ask unanimous consent the amendment be considered as read.

[The amendment to H.R. 503 offered by Mr. Conyers and Ms. Baldwin follows:]

F:\M7\CONYER\CONYER.009

H.L.C.

AMENDMENT TO H.R. 503
OFFERED BY MR. CONYERS AND MS. BALDWIN

Add at the end the following:

1 SEC. 4. EFFECTIVE DATE.

2 This Act shall only take effect in fiscal years for
3 which Congress appropriates 100 percent of the amounts
4 authorized for programs established under the Violence
5 Against Women Act.



Chairman SENSENBRENNER. Without objection, and the gentleman is recognized for 5 minutes.

Mr. CONYERS. Members of the Committee, this follows the discussion about the Violence Against Women Act full funding, and this is a full-funding amendment that I offer that would make the effective date of the bill contingent on full funding programs authorized by the Violence Against Women Act.

Most of us here last Congress remember that this Committee unanimously passed the Violence Against Women Act and the House overwhelmingly approved the same measure by a vote of 415 to 3. But unfortunately, the Violence Against Women Act authorized over \$677 million to be spent on programs to combat domestic violence and sexual assault in the Fiscal Year 2001, the amounts appropriated in that same budget are more than \$200 million short of the authorization levels, and this disparity is inexcusable, and I am hoping that we here would ensure that VAWA is fully funded in the next year's budget.

Now, although VAWA authorized \$235 million for the stop grant program, less than \$210 million was appropriated for this purpose. So even though the authorization had an increase in funding in real terms, there was actually less money appropriated for stop grants than there was for the past 2 or 3 years. We all know that this wasn't the intent of the VAWA reauthorization.

In addition, there was no money appropriated for new programs created by VAWA reauthorization legislation. This includes programs that were proposed and passed on a bipartisan basis by this Committee, such as protections for older and disabled women, education and training for judges and court personnel, the Domestic Violence Research Task Force and supervised visitation centers.

We know that VAWA is the lifeblood for shelters and services, victims of violence throughout the country, and we also know that the Violence Against Women Act works. Since the passage in 1994, we have seen a reduction in levels of sexual assault and domestic violence.

So before we criminalize injury to even a fertilized egg, I hope that we would make sure that there's full funding for the bipartisan Violence Against Women Act programs that truly help prevent domestic violence. Please support the amendment.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. CHABOT. Mr. Chairman?

Chairman SENSENBRENNER. Does the gentleman yield back the balance of his time?

Mr. CONYERS. Yes, of course.

Chairman SENSENBRENNER. The gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. CHABOT. Thank you, Mr. Chairman. I will be relatively brief.

Most of us on this side do clearly support the Violence Against Women Act but there's absolutely no reason to tie funding to that particular bill to this legislation.

Our purpose in the bill that has been proposed by Mr. Graham is to protect pregnant women who are viciously attacked by criminals and to also protect the unborn children that they're carrying.

Domestic violence is clearly a serious problem in this country. There is a congressional role most of us believe and have supported that in the past and will continue to support in the future, but there's absolutely no reason to tie these two together. For that reason, I oppose this amendment and yield back the balance of my time.

Chairman SENSENBRENNER. For what purpose does the gentleman from Massachusetts seek recognition?

Mr. DELAHUNT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. DELAHUNT. I speak in support of the amendment and I want to speak to the issue that I think was raised by the gentlewoman from Pennsylvania regarding the efficacy of this act in terms of domestic violence, and I really believe it's important that the American people understand that what we do here in terms of the underlying bill will have absolutely no impact at all in terms of deterrence, in terms of deterring those who would commit a violent act upon a woman whether the woman was pregnant or whether she was not pregnant.

The issue of domestic violence is an issue that I have been committed to for some 26 years. I was a former State's Attorney in a large metropolitan jurisdiction outside of Boston. We initiated the first domestic violence program in the United States, and it is very clear that the resources that have been authorized by VAWA have made a difference in terms of domestic violence and assaults and violence against women, whether they be pregnant or whether they be not pregnant.

So let's not suggest that the underlying bill will in any way deter violence against women, because it will not; and again, I urge my colleagues to support the Conyers amendment and yield back.

Chairman SENSENBRENNER. The question is on the Conyers amendment.

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. To strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. NADLER. Mr. Chairman, I support this amendment. It seems to me that the amendment goes to the heart of the real purpose of the bill. If the real purpose of the bill is to deal with assaults against women, then we ought to be fully funding the real preventive programs in the Violence Against Women Act. If the real purpose of the bill is something else, as for example to define human life in a way to undermine *Roe v. Wade*, if that's the real purpose of the bill, then obviously the Violence Against Women Act doesn't have too much relevance to it and this amendment really doesn't advance the purpose of the bill.

But if the real purpose of the bill is that we have to help women who are attacked, that we're upset about, in particular, the attacks on pregnant women, the damage to women and the fetuses they carry, then obviously we would want to fully fund the Violence Against Women Act and anything that we could do to prod our col-

leagues into doing that such as this amendment, which really brings it into stark outline, advances the purpose of the bill.

And let me remind you of the finding of the Journal of the American Medical Association last week that pregnancy-associated death represents a largely preventable source of premature mortality among young women in the United States and devastates the children, families, communities left behind. Largely preventable sources of premature mortality among young women in the United States.

I would hope that we would pass this amendment. I hope we don't—I should be very clear, not disingenuous—I hope we do not pass the bill, but if we're going to pass the bill, at least we can do something constructive in this bill by associating it with an attempt to get adequate funding for things that will really help in this battle against domestic violence.

I thank the Chairman. I urge my colleagues to support the amendment and I yield back.

Mr. GRAHAM. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from South Carolina seek recognition?

Mr. GRAHAM. Strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GRAHAM. And I know we're all ready to vote, but I do believe there is a deterrent aspect to this bill versus waiting or doing sentence enhancement, and it doesn't allow the use of the death penalty because I did not want to get in that debate when I drafted the bill; I wanted to try to bring the Congress together the best I could and avoid issues like the death penalty.

But the Arkansas case I think is a good illustration. The people who kidnapped the pregnant woman and beat her for money so that the man would not have to pay child support are on death row in Arkansas. Maybe the next time someone comes along and offers people to beat up pregnant women, they'll turn down the offer because the consequences are too great.

My bill doesn't allow for the death penalty, but we're trying to make the consequences of a violent assault in society against pregnant women and protect the unborn coexist together, not inconsistent with *Roe v. Wade*. I think it does add a great deal of deterrence to have two separate offenses. I think any prosecutor, as the Air Force did in Ohio by incorporating the Ohio law through the Crimes Act, would relish the opportunity to prosecute the offender twice, not once, for something this brutal and this bad.

And the point is to do justice, to bring the full force of law as we can and view it to be appropriate, and this amendment doesn't do justice. This is politics, I think, at its worst and I would ask you to reject it.

Chairman SENSENBRENNER. The question is on the amendment offered by the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. rollcall.

Chairman SENSENBRENNER. rollcall is ordered. Those in favor of the Conyers amendment will as your names are called answer aye; those opposed no; and the Clerk will call the roll.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?
 Mr. GEKAS. No.
 The CLERK. Mr. Gekas, no. Mr. Coble?
 [No response.]
 The CLERK. Mr. Smith?
 Mr. SMITH. No.
 The CLERK. Mr. Smith, no. Mr. Gallegly?
 Mr. GALLEGLY. No.
 The CLERK. Mr. Gallegly, no. Mr. Goodlatte?
 [No response.]
 The CLERK. Mr. Chabot?
 Mr. CHABOT. No.
 The CLERK. Mr. Chabot, no. Mr. Barr?
 [No response.]
 The CLERK. Mr. Jenkins?
 Mr. JENKINS. No.
 The CLERK. Mr. Jenkins, no. Mr. Hutchinson?
 Mr. HUTCHINSON. No.
 The CLERK. Mr. Hutchinson, no. Mr. Cannon?
 [No response.]
 The CLERK. Mr. Graham?
 Mr. GRAHAM. No.
 The CLERK. Mr. Graham, no. Mr. Bachus?
 [No response.]
 The CLERK. Mr. Scarborough?
 [No response.]
 The CLERK. Mr. Hostettler?
 [No response.]
 The CLERK. Mr. Green?
 Mr. GREEN. No.
 The CLERK. Mr. Green, no. Mr. Keller?
 Mr. KELLER. No.
 The CLERK. Mr. Keller, no. Mr. Issa?
 Mr. ISSA. No.
 The CLERK. Mr. Issa, no. Ms. Hart?
 Ms. HART. No.
 The CLERK. Ms. Hart, no. Mr. Flake?
 Mr. FLAKE. No.
 The CLERK. Mr. Flake, no. Mr. Conyers?
 Mr. CONYERS. Aye.
 The CLERK. Mr. Conyers, aye. Mr. Frank?
 [No response.]
 The CLERK. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 [No response.]
 The CLERK. Mr. Nadler?
 Mr. NADLER. Aye.
 The CLERK. Mr. Nadler, aye. Mr. Scott?
 Mr. SCOTT. Aye.
 The CLERK. Mr. Scott, aye. Mr. Watt?
 [No response.]
 The CLERK. Ms. Lofgren?
 Ms. LOFGREN. Aye.
 The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?

Ms. JACKSON LEE. Aye.
 The CLERK. Ms. Jackson Lee, aye. Ms. Waters?
 Ms. WATERS. Aye.
 The CLERK. Ms. Waters, aye. Mr. Meehan?
 Mr. MEEHAN. Aye.
 The CLERK. Mr. Meehan, aye. Mr. Delahunt?
 Mr. DELAHUNT. Aye.
 The CLERK. Mr. Delahunt, aye. Mr. Wexler?
 [No response.]
 The CLERK. Ms. Baldwin?
 [No response.]
 The CLERK. Mr. Weiner?
 Mr. WEINER. Aye.
 The CLERK. Mr. Weiner, aye. Mr. Schiff?
 Mr. SCHIFF. Aye.
 The CLERK. Mr. Schiff, aye. Mr. Chairman?
 Chairman SENSENBRENNER. No.
 The CLERK. Mr. Chairman, no.
 Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Coble.
 Mr. COBLE. No.
 Chairman SENSENBRENNER. The gentleman from Virginia, Mr. Goodlatte.
 Mr. GOODLATTE. No.
 Chairman SENSENBRENNER. The gentleman from Florida, Mr. Scarborough.
 Mr. SCARBOROUGH. No.
 The CLERK. Mr. Scarborough, no.
 Chairman SENSENBRENNER. The gentleman from Utah, Mr. Cannon.
 Mr. CANNON. No.
 Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus.
 Mr. BACHUS. No.
 Chairman SENSENBRENNER. The gentleman from North Carolina, Mr. Watt.
 Mr. WATT. Aye.
 Chairman SENSENBRENNER. Are there additional members in the chamber who wish to record their vote or change their vote?
 If not, the Clerk will report.
 The CLERK. Mr. Chairman, there are eight—eleven ayes and 18 nays.
 Chairman SENSENBRENNER. The gentleman from Indiana, Mr. Hostettler.
 Mr. HOSTETTLER. If I may be recorded, Mr. Chairman, no.
 Chairman SENSENBRENNER. The Chair has not announced the result of the vote. Mr. Hostettler votes no.
 The CLERK. Mr. Chairman, there are eleven ayes and 19 nays.
 Chairman SENSENBRENNER. And the amendment is not agreed to.
 Are there further amendments? The gentleman from Virginia, Mr. Scott.
 Mr. SCOTT. Mr. Chairman, I have an amendment at the desk.
 Chairman SENSENBRENNER. The Clerk will report the amendment.

The CLERK. Amendment in the Nature of a Substitute to H.R. 503 Offered by Mr. Scott.

Mr. SCOTT. Mr. Chairman, I ask unanimous consent that the amendment be considered as read.

Chairman SENSENBRENNER. Without objection, the amendment is considered as read.

The gentleman from Ohio reserves a point of order and the gentleman from Virginia is recognized for 5 minutes.

[The Amendment in the Nature of a Substitute to H.R. 503 offered by Mr. Scott follows:]

Amendment in the Nature of a Substitute to H.R. 503
Offered by Mr. Scott #1

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Enhanced Sentencing for Crimes against Pregnant Women Act of 2001".

SECTION 2. AMENDMENT OF SENTENCING GUIDELINES WITH RESPECT TO CRIMES AGAINST PREGNANT WOMEN.

(a) Pursuant to its authority under Section 994(p) of Title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and the policy statements of the Commission, as appropriate, to provide an appropriate sentencing enhancement when a crime is committed in violation of Title 18 of the United States Code causing bodily injury or death to a pregnant woman. The enhancements shall consider whether or not the normal development of the fetus is interrupted or terminated other than by live birth, and whether it was reasonably foreseeable that interruption or termination of a pregnancy would result from the commission of the offense.

(b) In implementing this section, the United States Sentencing Commission shall ensure that the sentencing enhancement shall not apply to:

- (1) conduct relating to an abortion;
- (2) conduct relating to the provision of medical treatment of the pregnant woman or the fetus, including but not limited to the provision of prenatal care; or
- (3) conduct of the pregnant woman.

Mr. SCOTT. Mr. Chairman, this amendment is an attempt to solve a serious problem, and that problem is violence against pregnant women.

Last week's issue of the Journal of the American Medical Association reported on a study of pregnancy-related mortality in Maryland over a 5-year period. The findings were stunning.

The American Medical Association found that the leading cause of death among pregnant or recently pregnant women was homicide. Homicides made up 20 percent of all pregnancy-related deaths, twice the rate of cause of death of non-pregnant women, and more than twice as many deaths as embolisms, which was in second place.

Maryland's study was consistent with other studies. It showed that pregnant women are at increased risk for domestic violence. And so for pregnant women, threats from social—threats from the social envelope, such as homicide and domestic violence, are at least as dangerous as those from the biological envelope.

Violence against pregnant women devastates not only the women involved, but also children, families and communities. It is a largely preventable problem that we should be able to address without engaging in a debate over abortion or the philosophical issue of when life begins, and we should be able to do it without creating additional categories of victims.

I believe the simplest way to address the problem is with sentencing enhancements to take into account those situations where the victim of a crime is a pregnant woman. Sentencing enhancements offer the opportunity to take into account a number of different factors such as whether the pregnancy was interrupted or terminated, or whether the crime was specifically intended to interrupt or terminate a pregnancy.

Mr. Chairman, this amendment addresses several of the concerns articulated by the gentleman from Ohio because it has exceptions for cases where it's an abortion or the conduct of the pregnant woman. The sentencing enhancements would not apply to conduct relating to abortion or the conduct relating to provisions for medical treatment or the conduct of the pregnant woman as addressed by the gentleman from Ohio as concerns.

I suggest that we take a reasonable approach to the serious problem of violence against pregnant women, and I ask that you support this amendment in the nature of a substitute so we can address the problem of violence against pregnant women that the American Medical Association has found to be a serious threat.

Chairman SENSENBRENNER. Does the gentleman yield back?

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. For what purpose does the gentleman from Ohio seek recognition? The gentleman from Ohio wishes to press his point of order?

Mr. CHABOT. Mr. Chairman, as before, I'll withdraw my point of order at this time.

Chairman SENSENBRENNER. Okay. Does the gentleman move to strike the last word?

Mr. CHABOT. I do, Mr. Chairman.

Chairman SENSENBRENNER. He is recognized for 5 minutes.

Mr. CHABOT. Thank you very much, Mr. Chairman.

This substitute amendment should be opposed for a couple of reasons. The substitute, as the first amendment made today was, is ambiguous. We believe it would place any prosecution again against the unborn in jeopardy. Second, the—against violence against the unborn in jeopardy.

In addition to that, the substitute ignores the injuries inflicted by violent criminals upon the unborn, transforming these injuries,

as I said before, we believe into mere abstractions. The terminology in the substitute amendment is very difficult and, if adopted, it would almost certainly again jeopardize any prosecution for injuring or killing an unborn child during the commission of a violent crime.

The substitute amendment would authorize an enhanced penalty for interruption or termination of a pregnancy. Again, it's difficult—what exactly is the difference between an interruption of a pregnancy and an interruption that terminates a pregnancy? The substitute really doesn't address that. It doesn't—wouldn't any interruption of a pregnancy necessarily result in termination of the pregnancy? Does terminate mean only that the unborn child died, or could it mean that the child was merely born prematurely even without suffering injuries? These ambiguities make the substitute very, very difficult to understand and we think that if it were attacked, there is a good chance that it would be overturned.

The substitute amendment also appears to mischaracterize the nature of the injury that is inflicted when an unborn child is killed or injured during the commission of a violent crime.

Under the current language of the bill, a separate offense is committed whenever an individual causes the death of or bodily injury to a child who is in the womb at the time the conduct takes place. The substitute amendment would transform the death of the unborn child into again what we consider an abstraction, terminating or interruption of a pregnancy.

These abstractions ignore the fact that the death of an unborn child occurs whenever a pregnancy is violently terminated by a criminal. They also fail to recognize that a prenatal injury is an injury inflicted upon a real human being in the womb of his or her mother.

The substitute is thus fatally flawed and should be rejected. The substitute amendment we believe is not very well drafted and ambiguous. No offense to the maker of the amendment, but obtaining a conviction of the violent criminal under this would be very difficult.

The substitute amendment ignores the injuries inflicted by violent criminals upon unborn children, again, as we said, transforming them into what we think are mere abstractions.

Moreover, the substitute would only authorize a mere sentence enhancement when the victim of a violent crime is pregnant, and 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 pregnant woman, the base offense level for the offense under sentencing guidelines is 15, which carries a sentence of between 18 and 24 months if this were a congresswoman, for example, because these are Federal predicate statutes.

If the congresswoman were pregnant and her unborn child were 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.

The permissible range of punishment for the assault would thus increase only by an additional 6 months, and we think that that's

just totally inappropriate, especially 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, and for these and many other reasons, the substitute amendment should be rejected. And I yield back the balance of my time.

Chairman SENSENBRENNER. For what purpose does the gentleman from New York, Mr. Weiner, seek recognition?

Mr. WEINER. To briefly strike the last word, Mr. Chairman.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WEINER. I have a great deal of respect for my good friend from Ohio, but I just—I find it a tad ironic to criticize the amendment for its level of abstraction when the base bill seeks to define human beings as a—seeks to define zygotes or blastocysts or embryos as human beings and begin this what is clearly a philosophical debate about when life begins.

I mean, there are reasons that you can support the base bill and oppose the substitute. You can say that we want to have, in the context of the 66 laws that are in the books just under USC 18 that this might impact, we want to have a debate about abortion in every single one of them; you can say that we want to spur another level of debate about when a life—when life begins; and you can say that I believe very strongly even if it jeopardizes prosecutions, as my good friend from California pointed out earlier, we still want to do it. But to say that you oppose the amendment because it raises this debate to a level of abstraction is a little bit absurd.

The whole point of the base bill is to raise to the level of—to raise to level of person a zygote. I mean, if that isn't an abstract notion, then I think that nothing is.

The fact remains and I think that it has been put here several times that if your objective is to punish someone and to throw the book at someone and to whack them with the full force of law, then there are many, many ways that we can do that that do not get into the morass that the bill gets us into.

You can increase the—if you don't like the sentencing guideline language that's in this substitute and you want to ratchet it up another notch, I can tell you I would probably vote for an amendment that you can offer for that purpose. If you think that there should be that a life sentence isn't enough, you want to have two life sentences, or five life sentences, or 900 years sentences for doing violence against women, I think we could have a debate and I would probably be willing to support you. I have never voted against an effort to increase the penalties for violating—for committing crimes against women.

But the fact remains that if you're wedded to the idea about having a debate about when life begins, then this is the way to do it, the base bill is the way to do it. If you really want to do something, if you want to increase the penalties, then we're essentially offering you anything possible that will allow you to do that.

But if you want to have abstraction to the nth degree, if you want to have when they're having a trial about whether or not someone threw scalding water within a special maritime jurisdiction in the United States and you think that we should also have

a debate about abortion in that context, then you should not vote for the amendment, you should vote for the base bill.

If you want to have a—in the context of prosecution about tampering with the consumer products that affects interstate commerce and you think we should have, in the context of that trial, we should have a discussion about whether a zygote or an embryo constitute a human life, then you're right, you should not support this amendment, you should support the base bill.

And I got to tell you, I'm not really sure why the sponsors are stopping here. Why not simply amend all references to person in the entire US Code and substitute zygote? Let's do that. Why even stop here, why stop and just—I mean, if that's really what the purpose of the debate is from the perspective of the sponsors, then substitute it throughout. Never mind just 18 USC and a few spots in 21 USC or 42 USC, let's substitute all throughout, let's have every single prosecution of every single Federal law ever brought. Also, it should have an abortion debate within it. That seems to be the objective of the sponsors of the base bill.

I yield back my time.

Chairman SENSENBRENNER. The gentleman's time has expired.

Just so that members can make their plans, let me state that it is the Chair's intention to recess the Committee at the time of the next vote on the floor, which is anticipated to be within the next 15 minutes, and to come back at two o'clock to complete the calendar.

For what purpose does the gentleman from South Carolina seek recognition?

Mr. GRAHAM. To strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. GRAHAM. I would ask my colleagues to oppose the amendment, but I do appreciate my colleague from Virginia bringing out a disturbing fact, that one of the leading causes of death is murder among young pregnant women, and that there was a study done in the District of Columbia of women who were killed between—in an 8-year period, and they went back through the autopsy records and found that 30 of them were pregnant and they're beginning to find that one of the common problems in these cases is that boyfriends—domestic violence abuse situations result in their death, and they're afraid that the pregnancy may be part of the motivating factor. So we've defined the problem as a growing problem in America. Now what to do about it?

Now, my good friend from New York, I just ask you to read the statutes on the books. There are seven sentencing enhancement statutes that talk about terminating a pregnancy. When a pregnancy begins is defined in the law in those statutes and prosecutors have to prove that a pregnancy was interrupted resulting in a termination.

I have chosen another course. I have chosen the larger body of law that allows someone to be prosecuted for criminal activity when they assault a pregnant woman, for any damage done to unborn child at the earliest stages of development, being carried in the womb, and that's what the prosecutor would have to prove. In eleven States, they do that fairly routinely.

But the problem is growing, and I would ask you for a moment not to look at this through the eyes of an abortion advocate or a pro-life person, but to go into the testimony that we've acquired over the last couple of years from the families involved in situations that occur where the mother is killed carrying an unborn child wanted by the mother and the father.

Michael Lenz lost his wife and unborn baby boy in the Oklahoma City bombing in April 1995. His unborn son's name was Michael James Lenz III, and his wife had just brought in pictures of the unborn child ultrasound images in the office the week before and she got to work particularly early that day and we all know what happened in Oklahoma City.

And he came to us and tell—to tell us that, "I'm not a Republican, I'm not a Democrat, I'm not here to talk about the abortion debate; I'm here to tell you that I believe that I lost my son and the person who took my son away from my wife and myself was not fully punished, and when you list the victims in the Oklahoma City bombing, I wish you would put Michael James Lenz III."

We had a gentleman come in from North Carolina, William Creston, who said that his niece—excuse me—his sister, Ruthie, and her unborn child were murdered by her boyfriend, and he said, "I'm not a Democrat, I'm not a Republican and I'm not a lawyer, but our family grieves for the loss of that unborn child that was murdered."

I would argue to my friends on the other side that if you really want to address this problem, let's bring the full force of the law down on the heads of people who do this.

I yield back the—

Mr. DELAHUNT. Would the gentleman yield? Lindsey, would you yield for a minute?

Mr. GRAHAM. Yes. Yes.

Mr. DELAHUNT. I would just pose the question, the one that I did earlier in the debate. Let me pose it to you. When you say bring the full force of the law down upon the offender, I presume what you're saying is that there is—that society has a right to punish, and that there is a right to—a legitimate right, a legitimate right in a justice context to seek retribution. But in any of these cases, would you claim that by passing this particular bill that's before us, that it would serve as a specific deterrent, whether it be Timothy McVeigh in Oklahoma or whether it be any other perpetrator? Because I believe, from my own experience, that first, a potential assailant in a domestic violence situation is not—first of all, he's not going to be aware of this particular bill, this particular proposal. You and I both know that most criminals do not carry with them a compendium of the criminal statutes of the United States Code.

On top of that, clearly this act itself—and if you're claiming that punishment is appropriate or enhanced punishment is an appropriate response by society to these acts, I can understand that.

Chairman SENSENBRENNER. The gentleman's time has expired.

For what purpose does the gentleman from North Carolina, Mr. Watt, seek recognition?

Mr. WATT. Thank you, Mr. Chairman. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. I'll yield a minute to Mr. Delahunt to finish his point if he wants to.

Mr. DELAHUNT. Yes. I just would—I would pose that to my friend and colleague from South Carolina. I'm aware of no evidence whatsoever, either anecdotal or empirical, that would indicate that anything that we do in that regard would deter an assault, an attack.

Mr. GRAHAM. Will the gentleman yield? Would the gentleman yield?

Mr. WATT. I'm going to yield to Mr. Graham so he can respond.

Mr. GRAHAM. Thank you.

I would agree with the gentleman along with the idea that crimes of passion we need to punish to the fullest extent of law, and the deterrent factor when you have crimes of passion, I don't know the effect of the punishment regime. Crimes for hire, which we've had two cases brought before the committee where people hired to attack the pregnant woman, shoot her, beat her to make sure the person doesn't have to pay child support, there would be a deterrent effect there.

But the whole idea is to do justice, and we can have a discussion about that, but I do believe very sincerely that the best way to do justice is to look at this through the eyes of the families who have lost not only the mother but the unborn child and to bring the full force and effect of the law on the perpetrator, and over time, hopefully that will make people think differently. I hope so. But I know from the justice point of view that we're falling well short when we just enhance punishment.

Thank you.

Mr. WATT. Reclaiming my time, Mr. Chairman, my intent was to speak on this amendment independently, but Mr. Scott's arguments I think adequately express my sentiments on this. He has acknowledged that there is a real problem that exists. The amendment tries to deal with that problem in a way that gets us outside the context of this whole abortion, when-life-begins debate and is a reasonable way to deal with it, and I fully support his amendment.

And I'll yield to Mr. Scott.

Mr. SCOTT. Thank you. Thank you and I thank the gentleman for yielding.

I just wanted to respond briefly to comments made by the gentleman from Ohio when you said that this might complicate the prosecutions. There is no complication on the prosecution. If you get complicated and lose your argument on the pregnancy related, you might lose the enhanced penalty, but you're not going to lose the underlying conviction. There is no transformation into abstraction; it's transformed into additional time that's real time, and I would hope that the committee would accept this as a logical way to address a serious problem.

I yield back.

Mr. WATT. And I'll yield the balance of my time to Ms. Lofgren.

Ms. LOFGREN. Thank you.

I—just a note on that amendment. I preferred the earlier amendment of Mr. Conyers and myself, but I certainly can support Mr. Scott's amendment for the following reason. It really actually pro-

vides much greater protection for women and to prevent assaults resulting in miscarriage than does the underlying bill.

If you read through what the Supreme Court has said about prenatal status, prior to viability, the States' interest as expressed by the Supreme Court is less than post-viability. Under this amendment, even those women whose pregnancy had not actually progressed to viability would gain protection from assault that resulted in miscarriage, and I think that is appropriate because such an assault does tremendous damage and harm to a woman who is intending and wants to have a child, and I think this amendment would actually accomplish something that the underlying bill does not.

I did want to make one additional comment. Someone on the other side of the aisle suggested that people who are pro-choice are proponents of abortion. In fact, that is not correct. I am someone who is pro-choice, someone who believes that individual women ought to make decisions about their fertility, not the United States Congress, and that goes in both directions—women who decide that they need to terminate the pregnancy and women who decide that they want to have a child. That's what choice is about, the women's choice, not Congress' choice.

And I yield back the balance of the time to Mr. Watt.

Chairman SENSENBRENNER. The gentleman's time—

Mr. WATT. I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired.

The question is on the amendment in the nature of a substitute offered by the gentleman from Virginia, Mr. Scott.

Those in favor will say aye.

Opposed, no.

The no's appear to have it, the no's have it and the amendment is not agreed to.

Are there further amendments?

Mr. SCOTT. Mr. Chairman?

Chairman SENSENBRENNER. The gentleman from Virginia.

Mr. SCOTT. Move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. SCOTT. Mr. Chairman, I would like to ask the sponsor of the bill a question just to clarify legislative intent.

On page 4 of the bill, on line 7 through 13, you have essentially exempted from prosecution cases relating to an abortion for which the consent of the pregnant woman has been ascertained. On page 4, on line 7 through 13.

Mr. GRAHAM. What was the purpose of that language?

Mr. SCOTT. And my question is the consent of the pregnant woman is really a term of art, and I assume it's not your intention to ensnare a physician—page 4, line 7 through 13—I assume it is not your intention to ensnare a physician who violates a parental consent law or something like that, that you really mean permission of the pregnant woman and not to have the physician ensnared for a murder charge by having violated the informed consent law of a particular State. What is the—is that the intent?

Mr. GRAHAM. Yes. My intent is to make sure that people who are following the law of the State or the jurisdiction in question who

are performing an abortion as recognized by law and providing medical treatment not be prosecuted.

Mr. SCOTT. Okay. My question is if you have someone who has violated, intentionally or unintentionally, a parental consent law, so that technically the physician does not have the consent of the patient, would they be in trouble with their medical license, civil liability, or would they be looking at a murder charge?

Mr. GRAHAM. Well, if a person violated a law intentionally requiring that you not perform an abortion under certain circumstances without approval of someone else and they didn't seek that approval, then they basically would be violating—violating the law.

Mr. SCOTT. Let me get it directly, then. If you have a 17-year-old in a parental consent State that lies about her age, the doctor did not get the consent although he got permission, would he be looking at a murder charge under this bill?

Mr. CHABOT. Would the gentleman yield?

Mr. SCOTT. I will yield to the gentleman from Ohio.

Mr. CHABOT. Thank you for yielding.

There would have to be an underlying Federal offense, a predicate offense in order for this proposed legislation to have any effect at all, and unless an underlying Federal offense has been committed, this would not have any impact whatsoever.

Chairman SENSENBRENNER. The Chair would like to report the bill before we go and vote. Mr. Conyers kind of feels the same way, too.

Mr. SCOTT. I yield back.

Chairman SENSENBRENNER. The gentleman's time has expired.

The question is on reporting the bill favorably. I'm sure a rollcall will be demanded, so the Clerk will call the roll. Those in favor will signify by saying aye; those opposed no.

The CLERK. Mr. Hyde?

[No response.]

The CLERK. Mr. Gekas?

Mr. GEKAS. Aye.

The CLERK. Mr. Gekas, aye. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Barr?

[No response.]

The CLERK. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Hutchinson?

[No response.]

The CLERK. Mr. Cannon?

Mr. CANNON. Yes.

The CLERK. Mr. Cannon, yes. Mr. Graham?

Mr. GRAHAM. Aye.

The CLERK. Mr. Graham, aye. Mr. Bachus?
 [No response.]
 The CLERK. Mr. Scarborough?
 Mr. SCARBOROUGH. Aye.
 The CLERK. Mr. Scarborough, aye. Mr. Hostettler?
 Mr. HOSTETTLER. Aye.
 The CLERK. Mr. Hostettler, aye. Mr. Green?
 Mr. GREEN. Aye.
 The CLERK. Mr. Green, aye. Mr. Keller?
 [No response.]
 The CLERK. Mr. Issa?
 Mr. ISSA. Aye.
 The CLERK. Mr. Issa, aye. Ms. Hart?
 [No response.]
 The CLERK. Mr. Flake?
 [No response.]
 The CLERK. Mr. Conyers?
 Mr. CONYERS. No.
 The CLERK. Mr. Conyers, no. Mr. Frank?
 [No response.]
 The CLERK. Mr. Berman?
 [No response.]
 The CLERK. Mr. Boucher?
 [No response.]
 The CLERK. Mr. Nadler?
 Mr. NADLER. No.
 The CLERK. Mr. Nadler, no. Mr. Scott?
 Mr. SCOTT. No.
 The CLERK. Mr. Scott, no. Mr. Watt?
 Mr. WATT. No.
 The CLERK. Mr. Watt, no. Ms. Lofgren?
 Ms. LOFGREN. No.
 The CLERK. Ms. Lofgren, no. Ms. Jackson Lee?
 [No response.]
 The CLERK. Ms. Waters?
 [No response.]
 The CLERK. Mr. Meehan?
 Mr. MEEHAN. No.
 The CLERK. Mr. Meehan, no. Mr. Delahunt?
 Mr. DELAHUNT. No.
 The CLERK. Mr. Delahunt, no. Mr. Wexler?
 Mr. WEXLER. No.
 The CLERK. Mr. Wexler, no. Ms. Baldwin?
 [No response.]
 The CLERK. Mr. Weiner?
 Mr. WEINER. No.
 The CLERK. Mr. Weiner, no. Mr. Schiff?
 [No response.]
 The CLERK. Mr. Chairman?
 Chairman SENSENBRENNER. Aye.
 The CLERK. Mr. Chairman, aye.
 Chairman SENSENBRENNER. Are there additional members in the
 room who desire to cast, change their votes?
 The gentleman from Virginia.
 Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Chairman SENSENBRENNER. The gentlewoman from Pennsylvania.

Ms. HART. Aye.

The CLERK. Ms. Hart, aye.

Chairman SENSENBRENNER. Anybody else who wishes to record or change their vote?

If not, the Clerk will report.

The CLERK. Mr. Chairman, there are 15 ayes and 9 nays.

Chairman SENSENBRENNER. And the motion to report is agreed to. Without objection, the Chairman is authorized to move to go to conference pursuant to House rules. Without objection, the staff is directed to make any technical and conforming changes. All members will be given 2 days as provided by House rules in which to submit additional dissenting, supplemental or minority views.

The Chair is about ready to recess the Committee until two o'clock in the afternoon. The remaining bill on the calendar has strong bipartisan support. I do not believe it will be very time-consuming and I would encourage all members to return promptly at two o'clock so that we can finish the business today and move on.

So without objection, the Committee is recessed until two.

[Recess.]

Chairman SENSENBRENNER. The Committee will be in order. The Chair notes the presence of a working quorum.

The Chair recognizes the gentlewoman from Texas to strike the last word.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I was detained at the Capitol as you were voting on H.R. 503. Prior to the final vote, I would have offered an amendment that I had at the desk dealing with striking the language "of unborn children" and inserting "against violence during pregnancy." I hope to be able to offer that amendment to the Rules Committee which I believe is a fair compromise that protects a woman who may have destructive conduct of not eating or not taking the appropriate medication, that that individual would not be subject to H.R. 503.

I hope my colleagues will join in the support of the amendment that I would offer at the Rules Committee, but at this time, Mr. Chairman, I would like to submit into the record a statement on that amendment. I ask unanimous consent to submit that statement into the record.

Chairman SENSENBRENNER. Without objection.

[The amendment to H.R. 503 offered by Ms. Jackson Lee follows:]

AMENDMENT TO H.R. 503
OFFERED BY MS. JACKSON-LEE OF TEXAS

Page 2, line 6, strike "**OF UNBORN CHILDREN**" and insert "**AGAINST VIOLENCE DURING PREGNANCY**".

Page 2, beginning in line 9, strike "**OF UNBORN CHILDREN**" and insert "**AGAINST VIOLENCE DURING PREGNANCY**".

Page 2, in the matter following line 10, strike "of unborn children" and insert "against violence during pregnancy".

Page 2, line 11, strike "**of unborn children**" and insert "**against violence during pregnancy**".

Page 2, beginning in line 21, strike "unborn child's".

Page 3, strike lines 4 through 5."

Page 4, line 15, strike "or her unborn child" and insert "including medical care rendered in utero".

Page 4, strike lines 18 through 22.

Page 4, line 17, insert a close quotation mark followed by a period after the period.



Page 5, in the matter following line 2, strike **“of unborn children”** and insert **“against violence during pregnancy”**.



Ms. JACKSON LEE. And I would like to have noted for the record in my absence for the final vote that if I had been present, I would have voted no for H.R. 503.

Chairman SENSENBRENNER. Without objection, the statement will——

Ms. JACKSON LEE. I yield back. Thank you, Mr. Chairman.

Chairman SENSENBRENNER. Pursuant to notice, the next——

Ms. JACKSON LEE. Thank you, Ranking Member.

DISSENTING VIEWS

Acts of violence against women, especially pregnant women, are tragic and should be punished appropriately. However, we must oppose H.R. 503, the “Unborn Victims of Violence Act of 2001,” because, as drafted, the bill will diminish, rather than enhance, the rights of women and do little to protect pregnant women from violence.

H.R. 503 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. 503 creates an offense that would occur when one or more enumerated Federal crimes have been committed and the “death” or “bodily injury” to the fetus occurs. 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. The woman carrying the pregnancy is specifically exempt from prosecution under the bill, as are medical professionals who perform consensual abortions or emergency medical treatment.¹ (The bill is identical to legislation considered last Congress, H.R. 2436, which passed the House, but was not taken up in the Senate.)

H.R. 503 is unanimously opposed by groups concerned about protecting a woman’s right to choose and opposed to domestic violence, including the National Abortion and Reproductive Rights Action League, Planned Parenthood Federation of America, National Abortion Federation, National Women’s Law Center, National Partnership for Women and Families, Center for Reproductive Law and Policy, American Civil Liberties Union, Feminist Majority, American Association of University Women, National Family Planning and Reproductive Health Association, American Medical Women’s Association, National Coalition Against Domestic Violence, National Council of Jewish Women, National Organization for Women, Physicians for Reproductive Choice and Health, and People for the American Way.

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, it appears that the use of words such as “unborn child,” “death” and “bodily injury”

¹ Georgetown Law Professor Peter Rubin expressed some concern that this language may be too narrowly tailored to pass constitutional scrutiny because it is unclear whether, as drafted, the exception would apply to an abortion for which parental consent was not obtained, but which had been approved through a judicial bypass. See Written Testimony of Peter J. Rubin, *Hearing on H.R. 503 before the Subcomm. on Const. House Jud. Comm.*, March 15, 2001 [hereinafter, “March 15, 2001 Hearing”].

merely inflame the debate, and the bill sets the stage for an assault on *Roe v. Wade*² 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 undermine *Roe*, and for the other reasons set forth herein, we are compelled to dissent.

I. H.R. 503 WILL UNDERMINE THE RIGHTS OF WOMEN

Our principal concern is that H.R. 503 represents an effort to endow a fetus with rights—such as recognition as a crime victim—and to thus erode the foundational premise of *Roe*. If passed, this bill would mark the first time that our Federal laws would recognize the fetus, and earlier stages of gestational development, as a person, a notion that the *Roe* Court considered but rejected. Aside from this general concern, there is the real threat that this bill will spur the anti-choice movement to use this bill as a building block to undermine a woman's right to choose.

The threat to *Roe v. Wade* could not be more clear. In *Roe*, the Court recognized a woman's right to have an abortion as a privacy right protected by the Fourteenth Amendment. In considering the issue of whether a fetus is a "person," the Court noted that, except in narrowly defined situations, and except when the rights are contingent upon live birth, "the unborn have never been recognized in the law as persons in the whole sense" and concluded that "'person,' as used in the Fourteenth Amendment, does not include the unborn."³ In the 28 years since *Roe*, the Supreme Court has never afforded legal personhood to a fetus.⁴

These concerns were strongly echoed by the Clinton Justice Department last Congress. In a letter to the Committee regarding the predecessor version of the bill, the Department wrote: "[I]dentification 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."⁵ Indeed, other observers have parsed through the rhetoric and assessed the political motivations behind this bill, with a New York Times editorial stating that the legislation "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."⁶

We are also deeply concerned that the bill's underlying theory of fetal personhood would establish a dangerous precedent that could result in women and their physicians being targeted for criminal

² 410 U.S. 113 (1973).

³ *Id.* at 158.

⁴ The Court has only twice been asked to uphold a state's determination that a fetus was an "unborn child," and in both cases, the Court declined to do so. See *Burns v. Alcala*, 420 U.S. 575 (1975) (an "unborn child" is not a "dependant" for purposes of AFDC benefits); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (holding that a Missouri law which afforded legal protection to "unborn children" was merely rhetorical and not "operative" because it was a statement of principle, and was not actually being applied; as such, the Court never addressed the merits of the constitutionality).

⁵ Letter from Jon P. Jennings, Acting Assistant Attorney General, September 9, 1999.

⁶ *New York Times*, September 14, 1999 at A30.

prosecution in the future. Specifically, the pregnant woman could be placed in a position that is directly at odds with, or subordinate to, her fetus. For example, a future statute might require a woman to be prosecuted for any act or “error” in judgement during her pregnancy that results in harm to the fetus, including violence perpetrated on her by her batterer under a “failure to protect” theory.⁷ Current laws requiring warning labels on wine and cigarettes could be used, by extension, as a basis to restrain or prosecute women who smoke or drink during pregnancy.⁸

As Juley Fulcher, the Public Policy Director of the National Coalition Against Domestic Violence testified:

This bill would, for the first time, federally recognize that the unborn fetus could be the victim of a crime. It would not be a large intellectual leap to expand the notion of unborn fetus as victim to other realms. In fact, some states have already made that leap and, in those states, women have been prosecuted and convicted for acts that infringe on state recognized legal rights of a fetus.⁹

Indeed, the true goal of the legislation is belied by the extreme rhetoric of the sponsors and its proponents in the anti-choice community. For example, last Congress, then-Chairman Hyde explained during full committee markup that, under this bill, “finally 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 (a Professor at Amherst) and Gerard Bradley (a Professor at Notre Dame Law School), explicitly linked the bill to the abortion debate through their testimony. Perhaps most candidly, Mr. Arkes noted that the bill “would find its fuller significance when Congress finally puts into place the understanding that there are limits to the right of abortion. . . .”¹⁰ This year, in a letter to Members, the National Right to Life Committee has again written that the bill is necessary to establish that a crime against a pregnant woman involves two human lives.¹¹ In

⁷Prosecutions of this type have already been brought at the State level. South Carolina now prosecutes women whose babies are found to have drugs in their systems. *Whitner v. State*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998). In one case, a court ordered into custody a pregnant woman who refused medical care because of her religious convictions, in an attempt to ensure that the baby would be born safely. National Public Radio, *Pregnant Woman Being Forced Into Custody at a State Medical Facility in Massachusetts to Ensure That Here Baby is Born Safely*, (Sept 14, 2000). In another case, a court sent a student to prison to prevent her from obtaining a midterm abortion. Reuters, *Judge Intends Prison Time to Block Abortion* (Oct. 10, 1998).

⁸A woman could also conceivably be held liable for any behavior during her pregnancy having potentially adverse effects on her fetus, including failing to eat properly, using prescription, non-prescription and illegal drugs, 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 induce 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. When expanded to cover fetuses, child custody provisions could be used as a basis for seizing custody of the fetus to control the woman’s behavior, or in some cases, civilly committing a pregnant woman to “protect” her fetus.

⁹Written Testimony of Juley Fulcher, *March 15, 2001 Hearing*.

¹⁰*Hearing on H.R. 2436 before the Subcomm. on Const. House Jud. Comm., July 21, 1999. At 46 (Statement of Harley Arkes.)*

¹¹In criticizing the Lofgren/Conyers amendment, the group argued: “Such a ‘one-victim’ amendment would codify the fiction that when a criminal assailant injures a mother and kills her unborn child there has been only a compound injury to the mother, but no loss of any human life. The one-victim substitute would also enact the notion that when a criminal assail-

addition, the fact that in each of the last two Congresses the bill was referred to the *Constitution* Subcommittee, rather than the *Crime* Subcommittee, would seem 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—diverting the legal system away from domestic violence or other violence against women.

If the sponsors of H.R. 503 were truly concerned with the problem of violence against women, they would support full funding of the Violence Against Women Act of 2000 ("VAWA").¹³ The problem of violence against women, and specifically violence against pregnant women and women who have given birth within the previous year, is all too real; with the Journal of the American Medical Association recently finding that homicide was the leading cause of death among pregnant, or recently pregnant, women.¹⁴

The funding deficit for VAWA is also far too real. For example, although VAWA authorized over \$677 million to be spent on programs to combat domestic violence and sexual assault in fiscal year 2001, the amounts appropriated in the 2001 budget are more than \$200 million short of the authorization levels. Moreover, although VAWA authorized \$235 million for the STOP Grant program, less than \$210 million was appropriated for this purpose. Thus, even though VAWA authorized an increase in funding, in real terms, there actually was less money appropriated for STOP Grants than there was 3 years ago.

Furthermore, last year there was no money appropriated for new programs created by the VAWA reauthorization legislation. This includes programs that were proposed and passed on a bipartisan basis by *this very Committee*—such as protections for older and dis-

ant kills a pregnant woman, the assailant should be punished once for killing the mother and then again for depriving her of her 'pregnancy'—but if there is only one victim, it is difficult to see why this would not be a duplicative criminal charge, since legally speaking a woman who has been killed can hardly suffer an additional 'loss.'" Letter from Douglas Johnson, Legislative Director, and Patricia Coll, Legislative Assistant, National Right to Life Committee, Inc., March 12, 2001.

¹²When Representative Scott inquired as to why H.R. 2436, last Congress' version of the bill, 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.

¹³Pub. L. No. 106-386 (2000). VAWA provides funding for domestic violence shelters, victim services, training for law enforcement personnel, and many other programs at the state and local level that help to prevent and deal with violence against women, regardless of their pregnancy status. Since the original Violence Against Women Act was passed in 1994, there has been a 21% decrease in intimate partner violence. Bureau of Justice Statistics: Special Report "Intimate Partner Violence," by Callie Marie Rennison, Ph.D. and Sarah Welchans (BJS Statisticians), May 2000.

¹⁴I.L. Horon, V. Chung, *Enhanced Surveillance for Pregnancy-Associated Mortality—Maryland, 1993–1998*, 285 JOURNAL OF THE AMERICAN MEDICAL ASSN. 1455 (March 21, 2001); Victoria Frye, *Examining Homicide's Contribution to Pregnancy-Associated Deaths*, *id.* at 1510–1511; S. Martin, L. Mackie, L. Kupper, P. Buescher, Moracco, *Physical Abuse of Women Before, During, and After Pregnancy*, *id.* at 1581. In contrast, homicide was the fifth leading cause of death among non-pregnant women during the same time period. Homicides made up 20% of all pregnancy-associated deaths, more than twice as many deaths as embolisms, which comprised 9% of pregnancy-associated deaths.

abled women, education and training for judges and court personnel, the domestic violence research task force, and supervised visitation centers. Yet H.R. 503 totally ignores this problem in a headlong effort to politicize the abortion issue. Sadly, when an amendment to provide for full funding of VAWA was offered by Rep. Conyers, it was defeated by the Majority in a party line vote.

III. THE LEGISLATION RAISES ADDITIONAL CONSTITUTIONAL CONCERNS

In addition to the concern that the bill may run afoul of *Roe v. Wade*, several additional constitutional concerns exist with H.R. 503 as it is presently drafted.

A critical problem is that key provisions of the bill are written so vaguely as to be potentially constitutionally “void” or violative of due process.¹⁵ The principal problem is the uncertainty regarding the meaning of the bill’s scope, namely its application to an “unborn child” defined as “a child, who is in utero,” which in turn is defined as “a member of the species homo sapiens, at any stage of development, who is carried in the womb.”¹⁶ The broadest interpretation would apply to zygotes (fertilized eggs) formed immediately after conception. A slightly narrower interpretation would apply to blastocysts which have not yet been implanted in the uterine wall. And an even narrower interpretation would limit the bill’s scope to embryos or fetuses after they have been implanted. It is because of these concerns that Georgetown Law Professor Peter J. Rubin has written:

[The bill’s use] of the phrase “child, who is in utero” may give a defendant an argument that the statute is ambiguous, and that he lacked the notice of what acts are criminal that is required by the Due Process Clause of the Fifth Amendment. (See, e.g., *Giaccio v. Pennsylvania*, 382 U.S. 399, 402–403 (1966).)¹⁷

The legislative process has done little to elucidate the meaning of the phrases “child in utero,” and “unborn child.” For example, during full committee, when Rep. Nadler asked “[d]oes it [i.e., ‘unborn child’] mean from the time of conception or does it mean from the time of implantation or does it mean from some other time?” Rep. Graham, the bill’s lead sponsor, responded: “if it’s not carried

¹⁵ Another possible vagueness concern is presented by the bill’s broad definition of “bodily injury” in that it raises questions as to how the sponsors intend to account for such speculative criteria as “fetal pain.”

¹⁶ Supporters of the legislation argue that the bill uses the same definition as the “Innocent Child Protection Act of 2000” which prohibited the execution of pregnant prison inmates, and passed the House by a vote of 417–0–2. The language in that bill defined “a child in utero” as “a member of the species sapiens, at any stage of development, who is carried in the womb.” There are several problems with this argument. First, the language in that bill was based on the predecessor version of this bill, not vice versa. According to Rep. Pitts, “H.R. 4888’s definition of ‘child in utero’ (‘a member of the species sapiens, at any stage of development, who is carried in the womb’) was taken verbatim from the Unborn Victims of Violence Act (H.R. 2436).” Congressional Record, July 25, 2000, H6797 (Statement of Rep. Joseph Pitts). In addition, that bill skipped Committee and was taken up on suspension and therefore never offered Members the opportunity for clarifying amendments. Finally, the Innocent Child Protection Act does not operate to apply criminal penalties, so the need for clarity and specificity is far less.

¹⁷ Written Testimony of Peter J. Rubin, *March 15, 2001 Hearing*.

in the womb, then it would be no crime,” without clarifying to what stage of development this term referred.¹⁸

Concerns have also been raised that H.R. 503 may lack a *mens rea* requirement¹⁹, and thereby run afoul of the Constitution’s due process mandate that criminal laws require the perpetrator must have a *criminal intent*.²⁰ This is because under H.R. 503, a person may be convicted of the offense of harm to a fetus even if he or she did not know, and had no reason to know, that the woman was pregnant. The problem is compounded by the fact that the bill does not even require that the predicate offense of a crime against the woman be first established in a court of law.²¹

IV. A PREFERABLE LEGISLATIVE ALTERNATIVE IS AVAILABLE

Finally, we oppose H.R. 503 because a far more effective alternative is available, which discourages crimes against pregnant women without undermining *Roe v. Wade* or otherwise running afoul of the Constitution. Such an alternative is embodied in the Lofgren/Conyers substitute, which received 201 votes on the House Floor in the 106th Congress. This substitute was again offered at the Committee markup this year and rejected along a party line vote.

The Lofgren-Conyers substitute includes the following elements: (1) it creates a separate Federal criminal offense for harm to a pregnant woman, which protects the legal status of a woman; (2) it recognizes the pregnant woman as the primary victim of a crime that causes termination of a pregnancy; (3) it includes exactly the same sentences for these offenses as does the base bill, providing for a maximum 20 year sentence for injury to a woman’s pregnancy, and a maximum life sentence for termination of a woman’s pregnancy; and (4) it requires a conviction for the underlying predicate offense, thereby requiring that intent to commit the predicate offense be proven.

¹⁸ Also, during a line of questioning by Rep. Nadler during the legislative hearing on H.R. 503, he asked what the words “who is carried in the womb” mean. Mr. Myers, a Majority witness who does not support the Supreme Court decision in *Roe*, replied “I am not sure that adds anything. In fact, I think it may be better to take that clause out.” *March 15, 2001 Hearing* (transcript at 68).

¹⁹ In fact, the bill explicitly disavows a *mens rea* requirement, providing that: “An offense under this section does not require proof that . . . the person engaging in the conduct had knowledge that the victim of the underlying offense was pregnant . . . or the defendant intended to cause the death of, or bodily injury to, the unborn child.”

²⁰ See *New York v. Ferber*, 458 U.S. 747, 765 (1982) (holding that, except in a small class of public welfare cases, “criminal responsibility . . . not be imposed without some element of *scienter* (intent) on the part of the defendant.” See also *Liporta v. United States*, 471 U.S. 419, 426, (1985) (“[C]riminal offenses requiring no *mens rea* have a generally disfavored status.” (internal quotations omitted)); *Staples v. United States*, 511, 605 U.S. 6000 (1994) (“The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” quoting *Morisette v. United States*, 342 U.S. 246, 250 (1952)).

²¹ The sponsors of H.R. 503 rely on the criminal law doctrine of *transferred intent*, which transfers the malevolent intent which the perpetrator of a crime harbors and acts upon against a pregnant woman, to her fetus. However, H.R. 503’s application of the transferred intent doctrine may prove to be difficult to apply because, as noted *supra*, under *Roe* the fetus is not considered a person in the constitutional sense.

A related concern is that H.R. 503 may present needless procedural and evidentiary difficulties in prosecuting offenders under laws already on the books. Under the bill, if a separate offense is charged on behalf of the fetus, as opposed to a single offense brought on behalf of the pregnant woman under current law, the case would have to be presented to a grand jury and charged separately. Each element of the separate offense must be proven beyond a reasonable doubt. As such, the procedural complexity and questionable constitutional basis for this bill may dissuade prosecutors from bringing charges in such cases.

Perhaps the most important manner in which the substitute differs from H.R. 503 is that the Lofgren/Conyers substitute defines the crime to be against the pregnant woman, whereas H.R. 503 makes the crime against the fetus, in utero. This distinction is a critical one, because the Substitute avoids the issues of "fetal rights" and "fetal personhood" that put the bill at odds with the principles of *Roe v. Wade*.

Instead, the Lofgren/Conyers substitute recognizes that it is the woman who suffers the injury when an assault causes harm to her fetus or causes her to lose the pregnancy. The substitute also acknowledges the interconnectedness of the woman and her fetus, without distinguishing the rights of one from the other. The substitute therefore accomplishes the stated goals of H.R. 503, deterring violent acts against pregnant women that cause injury to their fetuses or the termination of a pregnancy. However, unlike H.R. 503, the substitute does so in a way that avoids the controversial issues of abortion and the right to choose.

CONCLUSION

It is unfortunate that the Majority's goal of averting violence against 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 threatens 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 violence. Instead of moving toward the laudable goal of enhancing the welfare of mothers, H.R. 503 lays the groundwork for governmental intervention into their bodies and their reproductive choice.

JOHN CONYERS, JR.
HOWARD L. BERMAN.
JERROLD NADLER.
ROBERT C. SCOTT.
ZOE LOFGREN.
SHEILA JACKSON LEE.
MAXINE WATERS.
MARTIN T. MEEHAN.
WILLIAM D. DELAHUNT.
TAMMY BALDWIN.
ANTHONY D. WEINER.