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## Senate

### Statement of Senator Dianne Feinstein

*“Support the Feinstein Substitute Amendment to Provide for Tougher Penalties for Injuring or Killing a Pregnant Woman and Her Fetus”*

Mrs. FEINSTEIN. Madam President, I would like to call up amendment 2858.

The PRESIDING OFFICER. The clerk will report.

Mrs. FEINSTEIN. I ask unanimous consent the reading of the amendment be dispensed with. Madam President, I agree with virtually everything the Senator from Ohio has said. Although there are many State laws which do take into consideration a fetus, it is true that the Federal laws, which would impact only those on Federal property, are silent. I am in complete concurrence with everything the Senator has said. I have had the privilege of working with him, so it is a delight for me to be able to discuss and debate this issue with him.

The substitute amendment I have called up is on behalf of Senators Bingaman, Boxer, Corzine, Kennedy and Lautenberg. I would like to make clearer a couple of places in that amendment. I ask unanimous consent to send a modification to the desk.

Mr. DeWINE. I object.

The PRESIDING OFFICER. Objection is heard.

Mrs. FEINSTEIN. I hear the objection. I am rather surprised by the objection. It is generally common courtesy to allow a Senator to amend his or her amendment. However, I believe our amendment is clear on its face.

I would like to point out that since 2000, in the Senate, there has been no hearing on this amendment and no opportunity for the Judiciary Committee to make corrections. This amendment is on the floor as a rule XIV.

I am very disappointed the Senator will not allow me to make a modification. For the record, let me simply state that I was proposing a minor change designed to further clarify what I believe to be the clear intent and application of our amendment. The bottom line is this: Even without the technical changes, our amendment is clear. We include the same structure, the same crimes, and

the exact same penalties as the DeWine bill.

The only real difference between our amendment and the DeWine bill is that we do not attempt to place into law language defining life as beginning at conception--beginning with an embryo.

Just to clarify, for the purpose of giving judges more legislative history with which to interpret our amendment, let me be clear about the two provisions at issue.

The first modification concerns section (c)(2) of our amendment which reads “For medical treatment of the woman or matters relating to the pregnancy.” This language simply tracks the DeWine language and the House bill language. I believe it is quite clear what we meant by this was to exempt medical treatment of the woman or any other medical treatment related to the pregnancy.

The second criticism or modification was that section (c)(2), which applies to

intentional crimes against the pregnant woman, is awkwardly worded and thus vague. The intent of the section is also clear. Our amendment and the House and the DeWine bill would punish an individual who intentionally ends a pregnancy in accordance with the murder, manslaughter, or intent statutes already on the books. The level of penalty would be determined by a judge and would be based on the level of intent. For instance, punishment under the murder statute would require malice. Punishment under the manslaughter statute would not. But either way the intent is clear.

I believe the only real reason to raise these issues is to try to defeat our amendment without addressing the underlying fact that our amendment contains the same law enforcement goals as the DeWine and the House bill, but without injecting a debate over a woman's right to choose into the equation.

This issue is not as simple as it seems at first glance. Everyone in the Senate wants to accomplish the same goal--punishing those who, by attacking or killing a pregnant woman, deprive families not only of the mother but also of the joy to help raise the child yet to be born. Punishing those who end a pregnancy and thus end the potential life experience, all of the hopes and dreams embodied by that pregnancy and the child to come, is an important advance in Federal criminal law.

But here is where it gets more complicated. The House bill

before us, the DeWine bill, now takes the position in law that life begins at conception. This, then, involves this bill directly into a woman's right to choose--an issue that need not be raised and should not be raised in this debate.

Although the text of the amendment itself technically provides an exception for abortion, experts on both sides of this issue agree the language in the bill will clearly place into Federal law a definition of life that will chip away at the right to choose as outlined in *Roe v. Wade*. I hope to make that crystal clear as I go on.

The *Philadelphia Inquirer* in its editorial yesterday put it succinctly by saying:

“If passed and signed, as promised by President Bush, the Federal law would be the first to recognize unborn children at any stage of development as victims with legal rights separate from those of their mothers. .... It's so easy to see how a Federal unborn victims law, coupled with unborn victims laws in 29 States, will form the basis of a new legal challenge to *Roe v. Wade*, the landmark case that gives women the right to terminate certain pregnancies. If a fetus who dies during a crime is a murder victim, then isn't abortion murder?”

That is the *Philadelphia Inquirer* editorial of yesterday.

That is why I offered this substitute amendment. I think when I am finished describing the differences between our

amendment and the underlying legislation, it will become crystal clear that these two measures accomplish the same goal in terms of criminal justice and the same goal in terms of deterrence.

The difference between the two measures--the only difference--is our substitute does not include a new unprecedented definition of when life begins.

The bottom line is this: It is unnecessary to include a definition of when life begins in this legislation, and including such language could, and I believe will, make it much more difficult to obtain convictions in these cases.

The substitute amendment I offer today essentially provides that if a perpetrator of an attack on a woman commits certain violent Federal crimes against that woman and harms or ends her pregnancy, a prosecutor can charge the perpetrator with the underlying Federal crime first but can also charge the perpetrator with harming or ending her pregnancy and effectively harming or killing another potential life.

How is this different from the DeWine bill? It is not different at all. The DeWine bill provides exactly the same provisions. A prosecutor can charge two crimes--one for the underlying attack on the woman and one for the termination of the pregnancy. The penalties in the DeWine bill are identical to the penalties in our amendment.

For instance, the DeWine bill provides that if the separate

offense results in the ending of the pregnancy, the penalty is identical to the penalty for taking an adult's life. The Feinstein substitute is the same. The DeWine bill says the maximum penalty for ending a pregnancy is a life sentence, and the maximum penalty for harming that pregnancy is a 20-year sentence. The Feinstein substitute is the same.

Neither bill allows for the death penalty and neither bill applies to conduct to which the pregnant woman has consented.

The simple truth is this: Whichever bill passes in the end, a prosecutor will be given exactly the same ability to charge a defendant. The crimes are the same. The penalties are the same. Everything will be the same except a few simple words that inject the abortion debate into this issue by clearly establishing in criminal law for the first time in history that life begins at the moment of conception. I contend that if this result is incorporated in law, it will be the first step in removing a woman's right to choice, particularly in the early months of a pregnancy before viability.

As we all know, the question of when life begins is a profound and a deeply divisive one. So I don't believe we should be addressing that issue here today--without a hearing since the year 2000, without expert testimony, and without need to do so. But, more importantly than that, this language unnecessarily turns a simple law into a controversial one and, most importantly, this language

could make it more difficult for prosecutors to obtain a conviction for the second offense of harming or ending a pregnancy. I will describe why later.

It is possible that some pro-choice jurors might refuse to convict simply because the language of the law refers to an unborn "child in utero"--that is a quote, "child in utero," that is bill language--when the victim may have only been 1 week or even 1 day pregnant.

An embryo in this bill becomes a person for the purpose of Federal criminal sanctions for the first time in America's history. That is the significance of this bill. This substitute allows jurors to look at evidence and the law and it doesn't force jurors to grapple with the complicated and controversial issue of when life begins.

Including language defining the beginning of life is not in any way necessary to the criminal law but, rather, it is only relevant to the abortion debate.

Let me show you a statement that I believe reveals the clear intent of this bill. That statement is made by Samuel Casey, executive director and CEO of the Christian Legal Society. This is the intent:

"In as many areas as we can, we want to put on the books that the embryo is a person ..... that sets the stage for a jurist to acknowledge that human beings at any stage of development deserve protection--even protection that would trump a

woman's interest in terminating a pregnancy."

This will be the first strike against all abortion in the United States of America. This will draw back the veil and, I believe, makes crystal clear what this legislation actually is. This is the key to much of the support for this legislation: Not just adding a new criminal law on the books, but also defining life as beginning at conception in statute here and then in the future, wherever else and however else possible. This is a concerted effort to insert the definition of when life begins into the law wherever possible.

Let me give some examples of quotes that again make this very clear. The intention of the anti-choice community has been clearly revealed by a Republican strategist by the name of Jeffrey Bell. Here is how he put it:

"Parental notification rules don't really prohibit anything. They don't ban the act of abortion. But a cloning ban--this is saying that something should be illegal. And if taking [unborn] human life became illegal, that would be a breakthrough. Since Roe, no one has been able to do that."

So this, Members of the Senate, is clearly the agenda, freezing the law, any law, in this case criminal law, that life begins at conception. Then, once declared legally, that law becomes the stepping-stone to refuse embryonic stem cell research and to ban abortion. Once the law defines human life as beginning at conception, stem

cell research could become murder, abortion becomes murder, even in the first days of a pregnancy.

That is where this is going. Please see it. Understand it. Know it. Everyone in this body who believes embryonic stem cell research holds a promise for cures to Parkinson's, for cures to Alzheimer's, for cures to juvenile diabetes, for perhaps spinal cord rupture repair, will have to contend with a statute that has said life begins at conception. So embryonic stem cell research may become murder and abortion in the first trimester becomes murder. That is where this debate is taking us. That is the reason for this bill.

The supporters of this bill will say they do not want to undermine Roe, but that is precisely what Nebraska State senator Mike Foley said when he proposed legislation to allow wrongful death suits involving the termination of a pregnancy. Let me quote him. Let me pull back the veil again:

“We said specifically in our bill that we did not want to challenge Roe v. Wade, and that would not affect abortion in the legal sense. But philosophically, sure, these laws are a challenge... If a state can put someone in jail for life because they took the life of an unborn child, then we're clearly saying there is something very valuable there.”

Why is he saying that? He is saying that because a fetus, even at conception, becomes a person, becomes a human being.

Professor R. Alta Charo of the University of Wisconsin further points out how these efforts are aimed at changing the law and how the Supreme Court might rule in future abortion cases. Charo said recently:

“If you can get enough of these bricks in place, draw enough examples from different parts of life and law where embryos are treated as babies, then how can the Supreme Court say they're not? This is, without question, conscious strategy.”

This is a professor of law at the University of Wisconsin, pulling the veil back further and exposing this exactly for what it is, a “conscious strategy” to say life begins at conception and enshrine it in this Federal law, and then other laws, and then other laws, and then go to the Supreme Court and Roe vs. Wade is struck down.

In a CNN interview last May, the distinguished chairman of the Senate Judiciary Committee--and I have had the pleasure of serving on that committee for 12 years--made the following comment:

“They say it undermines abortion rights. It does undermine it. But that's irrelevant. We're concerned here about a woman and her child...The partisan arguments over abortion should not stop at a bill that protects women and children.”

If that is true, then the Senator from Utah should vote for our amendment because our amendment does exactly the

same thing, the same penalties for the same crimes as the House bill.

When Justice Harry Blackmun wrote in 1973 the Roe decision, he said:

“...[T]he unborn have never been recognized in law as persons in the whole sense...”

Let me repeat that: “the unborn have never been recognized in the law as persons in the whole sense.”

What he did by saying that was actually, inadvertently provide a roadmap for the anti-choice people and those who want to undermine Roe and eventually to reverse it. This bill, the underlying bill, is following that roadmap by changing a criminal law in a way which clearly says an embryo can be an individual as a person for the purposes of criminal prosecution.

Clearly, this is a concerted effort to codify in law the legal recognition life begins at conception. If we allow that to happen today in this bill or in any bill, we put the right to choose squarely at risk. Roe v. Wade allowed States to claim a legitimate interest in preventing abortion post-viability. Many states--and we both know that--have laws on the books with respect to the third trimester and even the second trimester.

If the concept of viability, which means when a fetus can live outside of the womb, gives way to a definition that provides life begins at conception, we could soon see abortion in this country outlawed entirely. Our

amendment avoids that problem and focuses only on the need to increase penalties for those who attack pregnant women.

There has been a lot of discussion about the tragic Laci Peterson case in my State of California. I have had the pleasure of meeting with Laci's mother, Sharon Rocha, a very fine woman and a woman who I can understand is decimated by what happened to her daughter. Some in the Senate have suggested that this tragedy is evidence of a loophole in Federal law that needs to be closed.

However, the House bill and the DeWine bill will have no impact in any way, shape, or form on the Laci Peterson case. The perpetrator of that crime will be prosecuted and punished under current California law and the perpetrators of almost all similar crimes through the country will, in fact, be prosecuted under State laws, not a Federal law, unless the crime takes place on Federal property.

In my State of California, the legislature amended California's existing murder statute in 1970--that is 34 years ago--to read as follows:

“Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.”

Now, if this were the case, if this were written in Federal law, easy, I would support it in a minute because it draws a distinction, it permits the “double charge” that both Senator DeWine and I agree is necessary. But the use of the

words “or fetus” makes a distinction between a human being and a fetus for purposes of the application of the homicide statute. That is important. And that is the law under which Laci Peterson's alleged murderer is going to be prosecuted.

If you look at it, you will see it is completely adequate. The complexity of that case, which continues today, is one that relates to evidence and proof, not a problem with statutes or penalties. The California statute is wholly adequate. So the bill we discuss today would have absolutely no impact on the Laci Peterson case, none.

Now, I would like to bring to the Senate's attention a July 10 letter from a Stanford law professor. He goes into the problems of what this law, if passed, could actually do in the courtroom to actual prosecutions and to juries. His name is George Fisher. He is a criminal law expert. He is a former prosecutor. He served as an assistant D.A., an assistant attorney general. He has taught criminal law at Stanford Law School since 1995, and he has founded Stanford's criminal prosecution unit.

He makes three points. Let me quote him:

“The bill's apparent purpose of influencing the course of abortion politics will discourage prosecutions under any future Act. I do not know what motives gave rise to the Bill's use of the expressions ‘child in utero’ and ‘child, who is in utero,’ but I do know that any

vaguely savvy reader will conclude that these terms and the bill's definition of them were intended by the Bill's authors to influence the course of abortion politics.

“If the authors of the Bill truly seek to protect unborn life from criminal violence, they will better accomplish this purpose by avoiding such expressions as ‘child in utero.’ Better alternatives would refer to injury or death to a fetus or damage to or termination of a pregnancy.”

Dr. Fisher goes on to say: “The Bill's apparent purpose of influencing the course of abortion politics will motivate prosecutors to exclude those prospective jurors who otherwise would be most sympathetic to the prosecution's case.

“I predict that many or most judges will bar prosecutors and defense counsel from questioning prospective jurors about their views on abortion or about related matters such as their religion, religious practices, or political affiliations. Forced to act largely on instinct, prosecutors may be inclined to exercise peremptory challenges against those prospective jurors who appear to be most sympathetic to the rights of pregnant women. This result clearly would frustrate the Bill's stated purpose of protecting unborn life from criminal violence.”

He concludes: “The Bill's apparent purpose of influencing the course of abortion politics offends the integrity of the

criminal law. To anyone who cares deeply about the integrity of the criminal law, this Bill's apparent attempt to insert an abortion broadside into the criminal code is greatly offensive."

Now, that is a former prosecutor, a former assistant DA, assistant AG, a professor of law at Stanford Law School--one of the great law schools of our country--and head of the criminal prosecution unit at Stanford Law School.

Mr. President, the substitute amendment, which I have offered, has been crafted to avoid these problems.

Our amendment, the Motherhood Protection Act, will accomplish the same goal as the Unborn Victims of

Violence Act, but will do so in a way that does not involve us in the debate about abortion or when life begins. In my view, there is no reason to vote against this substitute unless the intention is to establish legally that human life, for the purposes of Federal criminal law, begins at the moment of conception because, ladies and gentlemen, that is exactly what this bill does.

To emphasize the point, let me again turn to the comments of Samuel Casey, executive director and CEO of the Christian Legal Society, who clearly states the intention behind the bill in this quote:

"In as many areas as we can, we want to put on the books that the embryo is a person. ....That sets the stage for a jurist to

acknowledge that human beings at any stage of development deserve protection--even protection that would trump a woman's interest in terminating a pregnancy."

Let there be no doubt about the intent. Anyone who is pro-choice cannot vote for this bill without the expectation that they are creating the first legal bridge to destroy Roe v. Wade.

Now, there is a time and a place to discuss the morality and philosophy of when life begins. This is not that time. Now is the time to change our Federal law to punish criminals who would inflict grievous injuries or death upon pregnant women on Federal lands. So I urge my colleagues to support the substitute amendment.