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EXHIBIT 7  
DATE 1/18/05  
HB 231

**ACLU OPPOSES "UNBORN CHILD HOMICIDE ACT" (HB231)**

Testimony of Jan VanRiper on behalf of ACLU

The proposed new crimes in this bill parallel current homicide and assault statutes, but with a different victim and with either additional or missing elements as compared to the current crimes. The differences from the existing crimes are potentially unconstitutional, and hence the passage of the bill would likely create litigation. The bill also threatens to raise medical malpractice premiums further. Finally, current law provides remedies for the kinds of harm that this bill purportedly address, but with none of the controversy or litigation and malpractice cost implications.

**Constitutional due process problems.** The proposed new crimes of homicide, assault and aggravated assault against an "unborn child" have serious flaws with their "intent requirement." Under the bill language, a perpetrator could potentially be convicted and sentenced up to 100 years for a crime he or she did not know he or she was committing, likely giving rise to a constitutional due process challenge. Due process requires the perpetrator to either have knowledge that his/her actions would likely harm *the victim*, or that he/she knowingly put *the victim* at an increased risk of harm. Because the proposed new crimes cover harm that occurs well before a woman is obviously pregnant (or even before she herself knows she is pregnant), in many instances the kind of mental intent required by the Constitution would be impossible to have under the proposed language.

**Constitutional privacy problems.** In all these proposed new crimes, prosecution would entail investigation into whether the conduct in question caused harm or death to a fetus while it was in the mother's womb. Keeping in mind that a woman does not have to consent to a criminal prosecution, an investigation concerning what happened inside a woman's body would frequently be necessary to a successful prosecution. Both federal law (*Roe v. Wade*) and Montana Law (*Armstrong v. State*, 199 Mont 261, 1999) protect a woman's bodily privacy, especially in the early stages of her pregnancy. Because the language in this bill would require the invasion of a woman's privacy, it may run afoul of constitutional privacy protections.

**Increases in medical malpractice insurance costs.** Section 7 purports to shield health care providers from criminal liability under the bill as long as the provider is acting according to "usual and customary standards of medical practice." This is an insurance term that is used to determine whether certain medical procedures or treatments are covered under an insurance policy. Health care providers are normally held to the appropriate "standard of care," and failure to meet that standard can subject a provider to civil penalties. The language used here places an insurance term in a criminal statute, and would create an entirely new type of liability for practitioners, especially those who treat pregnant women - a specialty that is already threatened by high malpractice insurance costs.

**Adequate remedies exist under current law.** Under current criminal law, a sentencing judge can take everything that is relevant into consideration when making a sentencing determination. That would include the kinds of harms meant to be punished in this bill. The fact that a perpetrator of a violent act against a pregnant woman resulted in harm or death to a fetus could, under the proper circumstances (i.e. the perpetrator knew that the female victim was pregnant), be used to increase penalties. If that is not adequate to address any problems, an increased penalty statute, such as one passed in North Carolina, would be a better solution. An enhanced penalty statute would avoid the controversy inherent in this type of "unborn child" legislation, and get the job done without subjecting the taxpayers of Montana to litigation over SB231 and our healthcare providers with another barrier to caring for pregnant women.