The Unborn Victims of Violence Act and *Roe v. Wade*–
Read what these supporters of legal abortion say about "fetal homicide" laws
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Professor Walter Dellinger, former advisor to President Clinton

Walter Dellinger of Duke University School of Law was at one time perhaps the most prominent legal advocate in the pro-abortion-rights movement. He was closely associated with NARAL, and until 1992, he co-chaired a NARAL-sponsored commission to defend *Roe v. Wade.* After President Clinton was elected, Dellinger was appointed as a White House advisor to Clinton on "constitutional issues," in which capacity he says he drafted five executive orders that were issued by President Clinton on his third day in office, nullifying various anti-abortion policies adopted by earlier presidents. Dellinger later served the Clinton Administration as Assistant Attorney General and as Acting Solicitor General of the United States. On July 13, 2003, the *Raleigh News-Observer* published the following passage in a story titled "A Question of Rights," posted here: http://newsobserver.com/news/v-print/story/2690147p-2494289c.html

> Walter Dellinger, a former solicitor general with the Clinton administration who teaches at Duke University, says that, although he is a strong advocate for a woman's right to choose abortion, he sees no major problem with the fetal-homicide laws. "I don't think they undermine *Roe v. Wade*," he said. "The legislatures can decide that fetuses are deserving of protection without having to make any judgment that the entity being protected has freestanding constitutional rights. I just think that proposals like this ought to be considered on their own merit."

Professor Richard Parker, Harvard University

In "Victim Politics," by Marcia Yablon, *The New Republic*, May, 2001, (http://www.beliefnet.com/story/79/story_7941_1.html), this passage appeared:

> Organizations like Planned Parenthood and the National Abortion Federation . . . oppose the Unborn Victims of Violence Act because they say that by legally enshrining fetal personhood it undermines *Roe v. Wade*. But that simply isn't true. Since the bill specifically exempts all forms of legal abortion, it leaves the constitutional rationale for the right to choose unaffected. According to Richard Parker, a professor of criminal law at Harvard University and a supporter of abortion rights, "There is nothing as a formal law that would undermine *Roe v. Wade*. . . . This is not at all a big deal."

The Alan Guttmacher Institute

Heather Boonstra, senior public policy analyst at the Alan Guttmacher Institute (affiliated with Planned Parenthood), acknowledged that the federal Unborn Victims of Violence Act "would probably survive a court challenge." (*National Journal*, April 21, 2001, page 1173)

(continued)

Professor Michael Dorf, Columbia University School of Law

Professor Michael Dorf is a former Supreme Court clerk who, by some accounts, drafted some key parts of the 1992 5-4 ruling in Casey v. Planned Parenthood, which reaffirmed Roe v. Wade. This passage is excerpted from Dorf's essay for Findlaw.com, titled "How Abortion Politics Impedes Clear Thinking on Other Issues Involving Fetuses," under the subheading, "Why Feticide Prohibitions that Exempt Abortion Are Consistent with Roe."
http://writ.news.findlaw.com/scripts/printer_friendly.pl?page=/dorf/20030528.html

There are two satisfactory answers to the worry that supporting anti-feticide laws undermines Roe.

First, laws treating feticide as murder do not need to define fetuses as persons. California's law is illustrative. It defines murder as the killing of a human being or a fetus.

Second, there is nothing especially troubling about permitting the law to define the word "person" differently for different purposes. Statutes routinely define various words, including "person," so that they will mean exactly what the legislature intends in a particular context, and even general constitutional language can be interpreted differently depending upon the context. Corporations, for example, are "persons" under the Fourteenth Amendment in the sense that their property cannot be taken without fair processes, but not in the sense that they are entitled to vote on equal terms with natural persons.

Roe v. Wade said that states are not obligated to treat fetuses as persons. It also said that in a conflict with the constitutional liberty of a pregnant woman seeking an abortion before the fetus is capable of survival outside the womb, the fetus may not be given the same rights as the woman. However, that certainly does not mean that there are no circumstances in which fetuses can be given legal protection. Again, it all depends on the context.

Consider another analogy. Cats and dogs are not "persons" under the Fourteenth Amendment. Yet surely there is nothing constitutionally suspect about laws forbidding cruelty to animals, even though they limit the liberty of those who would perpetrate such acts of cruelty. Indeed, there would be no inherent constitutional problem with terming a malicious cat or dog killing "murder"-- though imposing too severe a sentence for that act might run afoul of the Eighth Amendment's ban on cruel and unusual punishment.

In sum, so long as respecting the rights and interests of fetuses does not conflict with the right of a woman to decide whether to terminate her pregnancy, there is no necessary contradiction between the abortion right established in *Roe* and feticide laws.

Professor Sherry F. Colb, Rutgers Law School

The following is excerpted from an essay on www.findlaw.com by Professor Sherry F. Colb of Rutgers Law School, titled, "Is Killing an Undiscovered First-Trimester Fetus Murder in California? The Answer Probably Is, and Should Be, 'Yes'," January 28, 2004,
http://writ.findlaw.com/colb/20040128.html

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Earlier this month, the California Supreme Court heard argument in a case raising important issues about how the crime of fetal murder is to be defined in the State of California. The Justices' questions and comments to counsel during oral argument suggest that they are inclined to rule that a defendant can be guilty of murder for killing the fetus of a woman who neither the defendant, nor the woman herself, knew was pregnant. Though seemingly draconian, this result is both sensible and fair, upon close analysis. . . .

First, in the current case, when defendant Harold Taylor shot his ex-girlfriend Patty Fansler to death in 1999, neither the victim nor Taylor knew that Fansler was pregnant. In killing her, the defendant accordingly did not intentionally or knowingly cause the death of anyone other than his ex-girlfriend.

Second, unlike in *Keeler*, where the fetus was viable and could probably have been born alive and healthy on the very day that the killing took place, Patty Fansler's fetus was nowhere near viability, at somewhere between eleven and thirteen weeks gestation -- that is, within, or just at the end of, the first trimester of pregnancy.

Upon first considering the Taylor prosecution, it might seem that the killer's ignorance about his ex-girlfriend's pregnancy should be an absolute bar to a murder conviction. Having had no idea that the fetus even existed, how could Taylor possibly be guilty of "murdering" it?

The answer is that he could not, if he had lacked any sort of murderous intention, knowledge, or recklessness. Had Taylor, for example, accidentally caused a miscarriage by slipping on a crowded subway platform and consequently knocking a pregnant woman to the ground, he could not be prosecuted for murder. Our case, however, is notably distinct from this hypothetical scenario. The actual Harold Taylor intentionally killed his ex-girlfriend by shooting her to death. His behavior was in no way accidental, and he was in fact subsequently convicted of second-degree murder for killing Fansler. In the process of deliberately killing his intended victim, however, he unwittingly also killed her fetus.

A truer analogy, then, is not to the man who slips on a subway platform but rather to the man who shoots at a woman who is lying in her bed but whose bullet kills not only the woman but also a child concealed underneath the woman's blanket. Though the shooter did not know about the child when he aimed his gun, his actions were nonetheless intentional, and he specifically meant for those actions to result in a person's death. . . .

So it was for good reason that the Justices on the California Supreme Court appeared, during the arguments, unconvinced that Harold Taylor's conviction for murder of a fetus should be overturned on appeal in the absence of proof that he knew of the fetus's existence. . . .

The fact that a fetus is not yet born, or even viable, speaks not to the value of that fetus but only to the consequences of terminating an unwanted pregnancy. Lack of viability -- and the location of a growing fetus inside a mother who is prepared to carry that fetus -- thus do nothing to mitigate the homicide of a sentient, living creature. California law in its current incarnation properly affirms that premise.