

SB


219



SENATOR FRED DYSON

MEMORANDUM

To: Senator Ralph Seekins, Chair
Senate Judiciary Committee

From: Senator Fred Dyson 

Date: April 7, 2004

RE: Request for Hearing—SB 219

Please consider hearing SB 219—*An Act relating to offenses against unborn children*—in the Senate Judiciary Committee. A Federal Unborn Victims of Violence Act was previously passed by the U.S. House of Representatives and signed by President Bush. In addition to this federal protection, there are areas where we, on the state level, can provide additional safeguards. If you have questions, I would be glad to discuss this bill with you, as would my staff. Thank you for your consideration.



SENATOR FRED DYSON

SPONSOR STATEMENT

SB 219—*"An Act relating to offenses against unborn children."*

Twenty-nine states have enacted laws that recognize unborn children as victims of violent crimes covered by *state* laws. Recently, the U.S. Congress passed the Unborn Victims of Violence Act, and President Bush subsequently signed the bill into law. This federal law recognizes that when a person attacks a pregnant woman, and injures or kills her unborn child, the attacker has harmed two victims. The bill establishes that if an unborn child is injured or killed during the commission of a federal crime of violence, then the assailant may be charged with a second offense on behalf of the second victim, the unborn child. The exact charge would depend on which federal law is involved, the degree of harm done to the child, and other factors. Recently, this issue has saturated the media in the highly publicized case involving Scott, Laci, and Conner Peterson.

Thus far, it has been consistently established that unborn victims laws do *not* conflict with the U.S. Supreme Court's pro-abortion decrees (*Roe v. Wade*, etc.). Many legal challenges have been brought against state unborn victims laws, based on *Roe* and other constitutional arguments, but state and federal courts have rejected all such challenges.

Pregnant women who have been harmed by violence, and their families, know that there are two victims -- the mother and the unborn child -- and both victims should be protected by law. SB 219 recognizes this value of life and establishes, in law, defense for the unborn victims of violent crime.

SB 219 establishes the following crimes against an unborn child: murder, manslaughter, criminally negligent homicide, and assault. Explicit exceptions from these crimes are made for legal abortion and for customary medical treatment. This bill also defines "unborn child" within the criminal statutes.

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 1
 Bill Version: SB 219
 (S) Publish Date: 4/7/04

Revision Date/Time (Note if correction): _____ Dept. Affected: LAW
 Title "An Act relating to offenses against unborn children." RDU CRIMINAL
 Component CDCO
 Sponsor Senator Dyson
 Requester Senate State Affairs Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill amends AS 11.41 by creating new felonies involving murder, manslaughter, negligent homicide or assault of an unborn child.

Passage of this legislation will have no foreseeable fiscal impact on the Department of Law.

Prepared by: Kathryn A. Daughetee, Director Phone 465-3673
 Division Administrative Services Date/Time 4/5/04 9:53 AM
 Approved by: Kathryn Daughetee for Gregg D. Renkes, Attorney General Date 4/5/2004
 Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 2
 Bill Version: SB 219
 (S) Publish Date: 4/7/04

Revision Date/Time (Note if correction): _____ Dept. Affected: Administration
 Title An Act relating to offenses against unborn BRU Legal and Advocacy Services
 Component Public Defender Agency
 Sponsor Senator Dyson
 Requester Senate State Affairs Component No. 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services	*	*	*	*	*	*
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	*	*	*	*	*	*

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	*	*	*	*	*	*
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	*	*	*	*	*	*

Estimate of any current year (FY2004) cost: 0.0
 Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

This bill will likely have a fiscal impact on the operations of the Agency, but it is impossible to determine with any accuracy what that impact will be. Creating numerous felony offenses for death or harm done to an unborn child, mostly at the felony level, will increase the caseload and workload of the Agency. Making it a felony to knowingly cause serious physical injury to an unborn child that is subsequently born alive would certainly have a fiscal impact if it includes children born after inadequate prenatal care. It is impossible however to predict with any accuracy how many new cases this legislation would generate if enacted, therefore an indeterminate fiscal note is submitted.

Prepared by: Linda K. Wilson, Deputy Director Phone (907)-334-4416
 Division Public Defender Agency Date/Time 4/5/04 12:00 AM
 Approved by: Kevin Jardell, Assistant Commissioner Date 4/5/2004
 Agency Administration

FISCAL NOTE

STATE OF ALASKA
2004 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: SB 219
(S) Publish Date: 4/7/04

Revision Date/Time (Note if correction): _____ Dept. Affected: _____
Title Offenses Against Unborn Children BRU Alaska Court System
Component Trial Courts
Sponsor Senator Dyson
Requester _____ Component No. _____

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2005	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
-------------------------------	--	--	--	--	--	--

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2004) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2005 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

Senate Bill 219 creates new criminal offenses for certain acts that result in harm to unborn children. Although these new offenses will likely result in an increase in the number of cases brought before the court system, that increase is not anticipated to be significant enough to warrant a fiscal note.

Prepared by: Doug Wooliver Administrative Attorney Phone 463-4750
Division Alaska Court System Date/Time 4/6/04 10:05 AM
Approved by: Stephanie Cole Administrative Director by Doug Wooliver Date 4/6/2004
Agency Alaska Court System

The Washington Times

www.washingtontimes.com

Bush signs fetus-protection bill

By Joseph Curl

THE WASHINGTON TIMES

Published April 2, 2004

President Bush yesterday signed legislation that criminalizes harming a fetus while assaulting a pregnant woman during a federal crime, the first national law granting an unborn child a status separate from the mother.

In a high-profile ceremony in the White House's East Room, attended by parents and relatives of murdered pregnant women, the president signed the Unborn Victims of Violence Act, a narrow law that mirrors statutes now in place in 29 states.

"As of today, the law of our nation will acknowledge the plain fact that crimes of violence against a pregnant woman often have two victims," Mr. Bush said.

"Under this law, those who direct violence toward a pregnant woman will answer for the full extent of the harm they have done, and for all the crimes they have committed," he said to applause.

Although the law applies only in assaults that are already federal, such as a drug-related shooting, the statute pleases social conservatives, who make up the president's political base and overwhelmingly oppose abortion. The law applies to fetuses at "any stage of development."

More than 80 percent of Americans think the murder of a pregnant woman takes two lives, according to three national public opinion polls. Fewer than 10 percent think such a crime has only one victim.

Democratic presidential candidate John Kerry voted against the bill last month in the Senate. Yesterday, his spokesman called the new law an infringement of a woman's right to choose.

"John Kerry strongly supports making it a federal crime to commit an act of violence against a pregnant woman," David Wade said. "He agrees with the vast majority of Americans who want tough punishment for anyone who would commit such heinous crimes and know we can do so without undermining a woman's right to choose."

The House passed the bill by a 245-163 vote; the Senate by a 61-38 margin.

The law states that "nothing in this section shall be construed to permit the prosecution ... 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."

Despite that clause, Kate Michelman, president of NARAL Pro-Choice America, said Mr. Bush "is making good on his pledge to do everything in his power to restrict a woman's right to choose."

"Pro-choice Americans aren't going to forget this president's record, with its steady drumbeat of attacks on reproductive freedom," she said in a statement.

David Seldin, a spokesman for the group, said his organization supported a bill that did not establish the unborn child as a separate entity.

"What they insisted on that was so unnecessary to the goal of protecting women and punishing criminals was to grant separate legal status to embryos, fetuses and two-cell zygotes at the moment of conception," he said.

Opponents of abortion said the new law will protect unborn children and took issue with

Mr. Kerry's contention that it will infringe on a woman's right to abortion.

"If there ever was a bill to protect a woman's right to choose, it is this bill that seeks to deter violence against or at least provide justice to the pregnant woman who is choosing life for her unborn child only to see her choice deprived by a crime of violence against her and/or her child," said Samuel B. Casey, head of the Christian Legal Society.

Mr. Bush said the new statute, often referred to as the "Laci and Conner" law, after Laci Peterson, who was eight months pregnant with a boy she planned to name Conner when she was slain, simply corrects a legal "omission." Her husband, Scott, is accused of two counts of murder.

"The death of an innocent unborn child has too often been treated as a detail in one crime, but not a crime in itself," he said.

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One Victim or Two?

The Unborn Victims of Violence Act (S. 1019) would recognize as a legal victim an unborn child who is injured or killed during commission of a *federal* crime against the baby's mother. A substitute amendment to be offered by Senator Dianne Feinstein would increase penalties for federal crimes against pregnant women – but would recognize only *one* victim, the mother, and without recognizing any loss of human life if the mother survives the assault. Sharon Rocha, mother of Laci Peterson and grandmother of Conner Peterson, has called such a single-victim proposal “a step away from justice, not toward it.” But what does the general public say? If a criminal assaults a woman who carries an unborn child, does that crime have two victims, or only one? Here are three recent national polls on that issue.

Polls	One Victim	Two Victims
<p>“If a violent physical attack on a pregnant woman leads to the death of her unborn child, do you think prosecutors should be able to charge the attacker with murder for killing the fetus?”</p> <p>Yes 79% (including 69% of “pro-choice”) No 10% Not sure 11%</p> <p>Fox News/Opinion Dynamics, July 15-16, 2003. (900 registered voters. Margin of error: +/- 3%.)</p>	10%	79%
<p>“We’re interested in how you think the criminal justice system should deal with cases involving the murder of a pregnant woman. When, if ever, do you think prosecutors should be able to bring SEPARATE murder charges against someone who kills a fetus still in the womb? In other words, try them for two murders instead of one. Do you think this should be done in ALL cases where a pregnant woman is murdered, only in cases where the fetus is viable – that is, is able to survive outside the womb, or not at all?”</p> <p>All cases 56% Fetus Viable 28% Not at all 9% DK 7%</p> <p>Newsweek/Princeton Survey Research Associates, May 29-30, 2003. (1,009 adults, age 18+. Margin of error: +/- 3%.)</p>	9%	84%
<p>“If Scott Peterson is convicted of killing his pregnant wife Laci, do you think he should be charged with one count of homicide for murdering his wife or two counts of homicide for murdering both his wife and unborn son?”</p> <p>One count 7% Two counts 84% Something else (vol.) 1% sure 8%</p> <p>Fox News/Opinion Dynamics, April 22-23, 2003. (900 registered voters. Margin of error: +/- 3%.)</p>	7%	84%

To go to the main unborn victims (fetal homicide) page, please click [here](#).

Constitutional Challenges to State Unborn Victims (Fetal Homicide) Laws

February 16, 2004

(All challenges were unsuccessful. All challenges were based at least in part on *Roe v. Wade* and/or denial of equal protection, unless otherwise noted.)

California

In *People v. Davis* [872 P.2d 591 (Cal. 1994)], the California Supreme Court upheld the legislature's addition of the phrase "or a fetus" to the state murder law in 1970, but held that the term "fetus" applies "beyond the embryonic stage of seven to eight weeks." (California Penal Code 187(a) says, "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.") In *People v. Dennis* [950 P.2d 1035 (Cal. 1994)], the California Supreme Court upheld inclusion of fetal homicide under Penal Code 190.2(3), which makes a defendant eligible for capital punishment if convicted of more than one murder.

Georgia

A three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously upheld the conviction of Richard James Smith, Sr., under Georgia's "feticide" statute. Smith argued that the law conflicted with *Roe v. Wade*, but the court rejected this assertion as "without merit." The court held: "The proposition that Smith relies upon in *Roe v. Wade* -- that an unborn child is not a "person" within the meaning of the Fourteenth Amendment -- is simply immaterial in the present context to whether a state can prohibit the destruction of a fetus." *Smith v. Newsome*, 815 F.2d 1386 (11th Cir. 1987). Related state supreme court decision: *Brinkley v. State*, 322 S.E.2d 49 (Ga. 1984) (vagueness/due process challenge).

Illinois

U.S. ex rel. Ford v. Ahitow, 888 F.Supp. 909 (C.D.Ill. 1995), and lower court decision, *People v. Ford*, 581 N.E.2d 1189 (Ill.App. 4 Dist. 1991).

People v. Campos, 592 N.E.2d 85 (Ill.App. 1 Dist. 1992). Subsequent history: *appeal denied*, 602 N.E.2d 460 (Ill. 1992), *habeas corpus denied*, 827 F.Supp. 1359 (N.D. Ill. 1993), *affirmed*, 37 F.3d 1501 (7th Cir. 1994), *certiorari denied*, 514 U.S. 1024 (1995).

Louisiana

Re double jeopardy -- *State v. Smith*, 676 So.2d 1068 (La. 1996), *rehearing denied*, 679 So.2d 380 (La. 1996).

Minnesota

State v. Merrill, 450 N.W.2d 318 (Minn. 1990), *cert. denied*, 496 U.S. 931 (1990).

Re establishment clause -- *State v. Bauer*, 471 N.W.2d 363 (Minn. App. 1991).

Missouri

In the 1989 case of *Webster v. Reproductive Health Services* (492 U.S. 490), the U.S. Supreme Court refused to invalidate a Missouri statute (Mo. Rev. Stat. 1.205.1) that declares that "the life of each human being begins at conception," that "unborn children have protectable interests in life, health, and well-being," and that all state laws "shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons, citizens, and residents of this state," to the extent permitted by the Constitution and U.S. Supreme Court rulings. A lower court had held that Missouri's law "impermissibl[y]" adopted "a theory of when life begins," but the Supreme Court nullified this ruling, and held that a state is free to enact laws that recognize unborn children, so long as the state does not include restrictions on abortion that *Roe* forbids.

In *State v. Knapp*, 843 S.W. 2nd (Mo. en banc) (1992), the Missouri Supreme Court held that the definition of "person" in this law is applicable to other statutes, including at least the state's involuntary manslaughter statute.

Pennsylvania

Commonwealth of Pennsylvania v. Corrine D. Wilcott, No. 2426 A & B of 2002 (Court of Common Pleas of Erie County, Pennsylvania, Criminal Division). Rejected challenges that Pennsylvania Crimes Against Unborn Children Act is unconstitutionally vague, violates U.S. Supreme Court abortion cases, violates equal protection clause, and conflicts with state tort law on definition of "person." January 24, 2003.

Utah

State of Utah v. Roger Martin MacGuire. MacGuire was charged under the state criminal homicide law with killing his former wife and her unborn child. He argued that the law, which covered "the death of another human being, including an unborn child," was unconstitutional because the term "unborn child" was not defined. The Utah Supreme Court upheld the law as constitutional, holding that "the commonsense meaning of the term 'unborn child' is a human being at any stage of development in utero. . . ." MacGuire was also charged under the state's aggravated murder statute, which applies a more severe penalty for a crime in which two or more "persons" are killed; the court ruled that this law was also properly applied to an unborn victim and was consistent with the U.S. Constitution. January 23, 2004.

Wisconsin

Re due process -- *State v. Black*, 526 N.W.2d 132 (Wis. 1994) (upholding earlier statute).

One Hundred Eighth Congress
of the
United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Tuesday,
the twentieth day of January, two thousand and four*

An Act

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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Unborn Victims of Violence Act of 2004" or "Laci and Conner's Law".

SEC. 2. PROTECTION OF UNBORN CHILDREN.

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

"CHAPTER 90A—PROTECTION OF UNBORN CHILDREN

"Sec.
"1841. Protection of unborn children.

"§ 1841. Protection of unborn children

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

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

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

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

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

"(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall 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."

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

"90A. Protection of unborn children 1841".

SEC. 3. MILITARY JUSTICE SYSTEM.

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

"§ 919a. Art. 119a. Death or injury of an unborn child

"(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 and shall, upon conviction, be punished by such punishment, other than death, as a court-martial may direct, which shall be consistent with the punishments prescribed by the President for that conduct had that injury or death occurred to the unborn child's mother.

"(2) 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.

"(3) 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 paragraph (1), 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.

H. R. 1997—3

"(4) 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."

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

"919a. 119a. Death or injury of an unborn child."

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*

**The Unborn Victims of Violence Act and *Roe v. Wade*—
Read what these supporters of legal abortion
say about “fetal homicide” laws**

February 2, 2004

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)

UNBORN VICTIMS OF VIOLENCE AND ROE V. WADE, 2

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>

UNBORN VICTIMS OF VIOLENCE AND ROE V. WADE, 3

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.

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U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAR 24 2004

The Honorable Mike DeWine
United States Senate
Washington, DC 20510

Dear Senator DeWine:

The Department of Justice is happy to respond to your March 24, 2004, inquiry concerning the substitute amendment proposed by Senator Feinstein to H.R. 1997, the Unborn Victims of Violence Act, which the Senate is to consider shortly.

The Department has major concerns with Senator Feinstein's substitute amendment ("substitute"). H.R. 1997, as introduced, prohibits conduct that results in injury or death to the unborn child, which conduct is punished in the same way as it would be punished by federal law if the object of the conduct had been born. Because the substitute removes any reference to the unborn child, the prohibited conduct in the substitute cannot be the injury or death of the child. Instead, the offenses it apparently creates are "termination of a pregnancy" and "interruption of the normal course of the pregnancy."

However, the substitute then states that it prohibits prosecution for "conduct relating to any medical treatment of the pregnant woman, or matters related to the pregnancy." Because "termination of a pregnancy" and "interruption of the normal course of the pregnancy" are both "matters related to the pregnancy," a court interpreting the exception expansively, rather than reading it as only prohibiting prosecution for medical treatment related to the pregnancy that leads to termination or interruption, could come to the conclusion that there can be no prosecution for the very offenses the substitute purports to create.

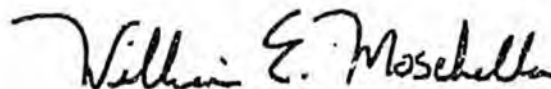
Additionally, by omitting any reference to the unborn child, but retaining language contained in H.R. 1997 as introduced, the substitute appears to create an ambiguity that likely leaves an offense, could one be found, without a corresponding penalty. The substitute provides that punishment for an offense proscribed by the legislation is the same as the punishment provided under Federal law had the "injury or death occurred" to the pregnant woman.

The Honorable Mike DeWine
Page Two

In H.R. 1997, the object of the "injury or death" was the unborn child. However, in the substitute, the "injury or death" provision has no object, because the only victim under the substitute is the woman herself. Because there are currently no penalties in federal law for the offenses of "termination of a pregnancy" or the "interruption of the normal course of pregnancy," there would be no penalty even assuming that a successful prosecution could be brought.

We appreciate the opportunity to provide these comments. Please do not hesitate to contact this office should you have further questions on this issue.

Sincerely,

A handwritten signature in cursive script that reads "William E. Moschella".

William E. Moschella
Assistant Attorney General

TO: Senate Judiciary
FROM: Linda K. Wilson, Deputy Public Defender
RE: SB 219
DATE: 4/16/04

WRITTEN TESTIMONY:

Chairman Seekins, and members of the Committee:

Thank you for allowing me to submit this written testimony on SB 219.

The Public Defender Agency has submitted an indeterminate fiscal note on this bill that you should have in your packet, but I wanted to submit written testimony on the legal aspects of this bill that might not have a noticeable fiscal impact.

The Agency has some concerns about Section 2 in particular. That section creates two new offenses for assaults on unborn children. The first at page 3, lines 1 –8, makes it a C felony to cause serious physical injury to an unborn child if that child is subsequently born alive. Similarly, at page 3, lines 9-16, it makes it an A misdemeanor to intentionally place a pregnant woman in fear of death of her unborn child or cause physical injury to an unborn child and the child is later born alive. The concerns center around whether this new offense would be used to prosecute mothers who do not follow good prenatal care, like moms who drink during pregnancy or use drugs and their child is born with FAS/FAE or other drug related injuries or disorders. If it were used to prosecute these moms, it might further deter them from seeking appropriate medical care because of the fear of exposing them to criminal charges. Also would it be used against a person who might have caused some injury to a fetus during pregnancy, but then by the time a child was born, the baby was fine and there were no injuries? How would a physical injury to an unborn child be proven? The definition of "physical injury" in AS 11.81.900(45) includes "physical pain or an impairment of physical condition." How would you prove pain to a fetus? The definition of "serious physical injury" might also prove problematic if this bill passes. There are two ways to commit serious physical injury under the definition in AS 11.81.900(55). The first, subsection (A), only requires "physical injury caused by an act performed under circumstances that create a substantial risk of death." Arguably, drinking and using drugs during pregnancy might certainly be considered circumstances that create a substantial risk of death to the fetus.

The above concerns may be characterized as unintended consequences from the passage of the bill, but they are significant. I hope that this committee will consider these concerns when hearing the bill.

Thanks again, Linda Wilson, Deputy Director, Public Defender Agency