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Exclusive: Obama's lost law review article

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As president of the Harvard Law Review and a law professor in Chicago, Senator Barack Obama refined his legal thinking, but left a scant paper trail. His name doesn't appear on any legal scholarship.

But an unsigned — and previously unattributed — 1990 article unearthed by Politico offers a glimpse at Obama's views on abortion policy and the law during his student days, and provides a rare addition to his body of work.

The six-page summary, tucked into the third volume of the year's Harvard Law Review, considers the charged, if peripheral, question of whether fetuses should be able to file lawsuits against their mothers. Obama's answer, like most courts': No. He wrote approvingly of an Illinois Supreme Court ruling that the unborn cannot sue their mothers for negligence, and he suggested that allowing fetuses to sue would violate the mother's rights and could, perversely, cause her to take more risks with her pregnancy.

The subject matter took Obama to the treacherous political landscape of reproductive rights, and - unlike many student authors - he dived eagerly into the policy implications of the court decision. His article acknowledged a public interest in the health of the fetus, but also seemed to demonstrate his continuing commitment to abortion rights, and suggested that the government may have more important concerns than "ensuring that any particular fetus is born."

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The temperate legal language doesn't display the rhetorical heights that run through his memoir, published a few years later, but provides insight into his support for abortion rights and expanded social services.

"[T]he case raises the broader policy and constitutional considerations that argue against using civil liability to control the behavior of pregnant women," Obama wrote of *Stallman vs. Youngquist*.

And he concluded the article with a flourish: "Expanded access to prenatal education and health care facilities will far more likely serve the very real state interest in preventing increasing numbers of children from being born in to lives of pain and despair."

Law students elected to the prestigious Harvard Law Review spend two years working there. In their first year, most write the brief, anonymous "case comments" like Obama's,

which bears the unwieldy heading: TORT LAW - PRENATAL INJURIES - SUPREME COURT OF ILLINOIS REFUSES TO RECOGNIZE CAUSE OF ACTION BROUGHT BY FETUS AGAINST ITS MOTHER FOR UNINTENTIONAL INFLICTION OF PRENATAL INJURIES.

Obama's tenure at the Review has been [chronicled at length in the Politico](#), [the New York Times](#), and elsewhere.

But Obama has never mentioned his law review piece, a demurral that's part of his campaign's broader pattern of rarely volunteering information or documents about the candidate, even when relatively innocuous. When Politico reporters working on a story about Obama's law review presidency earlier this year asked if he had written for the review, a spokesman responded accurately - but narrowly - that "as the president of the Law Review, Obama didn't write articles, he edited and reviewed them."

The case comment was published a month before he became president.

The notion that Obama hadn't written at all for the Review prompted skepticism.

"They probably don't want [to] have you [reporters] going back" to examine the Review, University of Southern California law professor (and Michael Dukakis campaign manager) Susan Estrich said at the time.

The Obama campaign swiftly confirmed Obama's authorship of the fetal rights article Thursday after a source told Politico he'd written it. The campaign also provided a statement on Harvard Law Review letterhead confirming that the unsigned piece was Obama's - the only record of the anonymous authors is kept in the office of the Review president - and that records showed it was the only piece he'd written for the Review.

"Like most second-year law students on the Harvard Law Review, Senator Obama wrote an unsigned student case comment that summarized a recent decision by a state or lower federal court. The piece analyzed a case in which a mother was sued by her child for injuries caused by the mother's negligent driving during her pregnancy. Senator Obama concluded that, in such cases, the Illinois Supreme Court was correct not to allow lawsuits by children against their mothers," said Obama spokesman Ben LaBolt in an email. "He wrote that the best way to protect the health of fetuses was to provide prenatal education and health care to pregnant women - issues he remains committed to today and which he has worked to advance as a legislator and in this campaign."

LaBolt also provided a brief analysis from Cass Sunstein, a University of Chicago law professor who supports Obama.

"Student Obama was acutely attuned to the limits of the judiciary, and of suits between children and their mother, in this sensitive area," Sunstein wrote. "This is a modest and balanced piece that fits easily within the framework of the law at the time."

Outside lawyers who reviewed the piece for Politico also said it was a fairly standard example of the genre, an approving recap of an interesting - and quite mainstream -- state court verdict.

The recent case reviews take a basically "journalistic" approach to the decisions they analyze, said Scott Altman, another professor at the University of Southern California Law School.

Obama approached "what remains a controversial issue in a temperate way," said Altman, who was on the Harvard Law Review a few years before Obama. He noted that Obama's terms were carefully hedged - "may" and "many people think" in place of bold

declarations.

"It's a very narrow essay," he said.

The case at issue in Stallman, though, was an interesting one. According to Obama's footnotes, the child's mother, Bari Stallman was involved in a car accident in 1981 with a Clarence Youngquist. Her daughter, Lindsey, was born with severe injuries from the wreck, and so Stallman's husband, acting for the baby, sued both his wife and Youngquist for negligence, hoping to recover damages from their insurance companies.

After a series of court rulings and reversals, the Illinois Supreme Court held that the fetus doesn't have the right to sue its mother. The court warned that allowing a fetus to sue its mother could make them "legal adversaries from the moment of conception until birth."

Obama's article addressed only the narrow question of whether a fetus could sue its mother for negligence. He didn't take on the broader question of the fetus's personhood, or whether it could sue others.

He described cases "involving maternal activities that might be considered intentional or reckless infliction of prenatal injuries on the fetus" as "more difficult," though he wrote that as a matter of encouraging good maternal behavior, giving fetuses the right to sue their mothers remained "ill-conceived."

Fetal rights is, as Obama acknowledged, a charged issue largely because of its connection to the abortion debate. That's a question Obama touched in passing, and from both sides, in his article.

On one hand, he warned that allowing fetuses to sue their mothers could actually lead to more abortions.

"Imposing civil liability on mothers may be as likely to deter the carrying of pregnancies to term as to deter maternal negligence during pregnancy," he wrote.

He was also acutely sensitive to women's rights, and to the consequences of involving civil law in childbearing.

"Fetal-maternal tort suits might entail far more intrusive scrutiny of a woman's behavior than the scrutiny involved in the discrete regulation of the abortion decision," he wrote. "On the other hand, the state may also have a more compelling interest in ensuring that fetuses carried to term do not suffer from debilitating injuries than it does in ensuring that any particular fetus is born."

Obama's article, which begins on page 823 of Volume 103 of the Harvard Law Review, is available in libraries and subscription-only legal databases.