Texas Wesleyan Law Review

Volume 4 | Issue 2 Article 5

3-1-1998

Protecting Our Vital Organs: The Case for Fetal Homicide Laws in Texas

Annissa R. Obasi

PROTECTING OUR VITAL ORGANS: THE CASE FOR FETAL HOMICIDE LAWS IN TEXAS*

INTRODUCTION

Making the decision to have a child
—it's momentous. It is to decide forever
to have your heart go walking around
outside your body.

—Elizabeth Stone

On October 17, 1996, Frank Flores Cuellar was found guilty by a Texas jury of intoxication manslaughter for the death of Krystal Zuniga.[1] Cuellar's indictment and subsequent conviction stemmed from an accident in which Cuellar, while driving intoxicated, collided with a vehicle driven by Krystal's mother, Jeannie Coronado.[2] The jury deliberated for less than an hour before finding, according to the judge's instruction, that Cuellar "caused a collision and the death of Krystal M. Zuniga by accident or mistake."[3]

This case does not appear so extraordinary until a few additional facts are disclosed. At the time of the accident, Coronado was seven and one-half months pregnant.[4] Krystal was born the same day by emergency Cesarean section and died forty-four hours later from extensive brain damage she suffered *in utero* during the accident.[5] Additionally, the Texas Penal Code defines a "person"[6] as an "individual"[7] who is "a human being who has been born and is alive." In light of the fact that Krystal did not satisfy this definition at the time of the accident—she was not a person according to the Texas Penal Code—Cuellar's conviction might become more suspect.

So how is it that Cuellar was convicted of this crime in Texas? According to Corpus Christi Assistant District Attorney Roy Hudspeth, the D.A.'s office spent several weeks studying rulings in similar cases.[8] A New Jersey case, *State v. Anderson*,[9] finally

---

* The author would like to dedicate the publication of this article to her brother, Robert Wayne Shearon, Jr., who departed from her presence but not her heart on December 30, 1997.

1. Cuellar v. State, 957 S.W.2d 134 (Tex. App.—Corpus Christi 1997, pet. ref'd).
2. *See id.*
3. *Id.*
4. *See id.*
5. *See id.*
6. TEX. PENAL CODE ANN. § 1.07(a)(38) (Vernon 1994).
7. TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon 1994).
8. *See The Today Show* (NBC television broadcast, Sept. 27, 1996) *available in* 1996 WL 10306977 [hereinafter *The Today Show*].
9. 343 A.2d 505 (N.J. Super. Ct. Law Div. 1975).

DOI: https://doi.org/10.37419/TWLR.V4.I2.4

convinced the D.A. to prosecute.[10] In *Anderson*, a man who shot a woman that was seven months pregnant with twins was convicted of murder for the death of the fetuses.[11] The twins were born alive but later died—one of immaturity, the other of the bullet wound in addition to immaturity.[12] The court held that fetuses were "persons" within the meaning of the state's homicide laws; the defendant's action was the proximate cause of both fetuses' deaths.[13]

Texas prosecutors adopted a similar argument in their case against Cuellar by focusing on the child's status at the time of death. According to D.A. Carlos Valdez, "[L]ittle Krystal[] was a person under the definition that's set out in the penal code. She had been born and was alive at the time of her death."[14] The jury apparently agreed with him and, as a result, sentenced Cuellar to sixteen years in the Texas Department of Institutional Corrections.[15] The decision has been affirmed by the intermediate appellate court in Corpus Christi[16] and is currently on appeal to the Texas Court of Criminal Appeals.

Texas is one of twenty-six states that has no law prohibiting the killing of a fetus.[17] To date, Texas courts have failed to construe the

10. *See The Today Show, supra* note 8.

11. *See Anderson*, 343 A.2d at 507.

12. *See id.*

13. *See id.* at 509.

14. *The Today Show, supra* note 8.

15. Appellant's Brief at 18, State v. Cuellar, 957 S.W.2d 134 (Tex. App.—Corpus Christi 1997, pet. ref'd).

16. *Cuellar v. State*, 957 S.W.2d 134 (Tex. App.—Corpus Christi 1997, pet. ref'd).

17. Eight states—Colorado, Delaware, Hawaii, Indiana, Maine, Montana, New Hampshire, and Oregon—have no statutes or case law addressing the killing of a fetus. Many state courts have addressed the issue and ruled against making the killing of a fetus homicide. *See* Vo v. State, 836 P.2d 408 (Ariz. 1992) (holding that a fetus is not a human being or person as defined in state murder statute); Meadows v. State, 722 S.W.2d 584 (Ark. 1987) (holding that viable fetus is not a person within the meaning of state manslaughter statute); State v. Anonymous, 516 A.2d 156 (Conn. App. Ct. 1986) (holding that an unborn, viable fetus is not a human being or person within the meaning of state murder statute); State v. Trudell, 755 P.2d 511 (Kan. 1988) (holding that state's aggravated vehicular homicide statute does not cover viable fetus); State v. Green, 781 P.2d 678 (Kan. 1989) (holding that fetus is not human being within first degree murder statute); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) (dismissing indictment by finding that killing of unborn fetus is not murder); People v. Guthrie, 293 N.W.2d 775 (Mich. Ct. App. 1980) (holding that unborn child is not a person within state murder statute); People v. Vercelletto, 514 N.Y.S. 2d 177 (Ulster County Ct. 1987) (holding that killing of unborn fetus is not manslaughter); *In re* A.W.S., 440 A.2d 1144 (N.J. Super. Ct. App. Div. 1981) (holding that fetus is not a human being within the homicide statute); State v. Willis, 652 P.2d 1222 (N.M. App. Ct. 1982) (holding that an unborn fetus is not a human being within meaning of state vehicular homicide statute); State v. Beale, 376 S.E.2d 1 (N.C. 1989) (holding that killing of fetus is not murder); State v. Sogge, 161 N.W. 1022 (N.D. 1917) (finding error when jury instructions failed to require a child to be born alive for murder verdict); State v. Dickinson, 275 N.E.2d 599 (Ohio 1971) (holding that child be born alive for protection under vehicular homicide statute); State v. Amaro, 448 A.2d 1257 (R.I. 1982) (holding that unborn child must be born alive for protection under vehicular homicide statute); State v. Oliver, 563 A.2d 1002 (Vt. 1989) (holding that

penal code definition of "individual" to include a viable fetus.[18] However, since the facts in *Cuellar* are of first impression for the court, both the prosecution and the defense agree that the appellate court will decide if this case signifies a change in Texas law in this regard.[19] Until then, the propriety of a criminal prosecution of a third party remains unresolved. If a fetus is born alive, by definition, it becomes a person. The difficult question is this: is the status of "person" retroactively conferred on the fetus because of the *child's* subsequent death as a result of injuries it sustained *in utero*?

This Comment argues that Texas should provide protection for viable fetuses by recognizing criminal liability of a third party for fetal injury resulting in death. Part I explores the development of fetal rights in the common law and examines modern trends in the recognition of fetal homicide. Part II analyzes fetal rights in Texas and highlights the inconsistencies in various areas of Texas law with respect to rights granted to the unborn. Finally, Part III proposes changes to the law in Texas to incorporate criminal liability of a third party for fetal homicide into the Texas penal system.

This Comment offers both an approach for the judiciary that is consistent with Texas jurisprudence as well as proposed changes to existing Texas penal statutes. With regard to the judiciary, this Comment offers a hybrid between two distinct approaches to protection of the fetus: the Born Alive Rule and the Viability Theory. With regard to Texas's penal statutes, this Comment argues that a broadening of the definition of *individual* to include a viable fetus is legally sound both in its integration with current law as well as its application in the criminal context.

When Does Life Begin?

Advocating third party criminal liability for injury to a fetus should not affect a woman's right to an abortion. In fact, such an action sanctions the belief that no one, including a drunk driver[20] or an enraged ex-husband,[21] should determine the fate of a pregnant woman and her

---

viable fetus is not a person as defined in motor vehicle statutes); Lane v. Commonwealth, 248 S.E.2d 781 (Va. 1978) (overturning murder conviction for insufficient evidence of child's being born alive); State *ex. rel.* Atkinson v. Wilson, 332 S.E.2d 807 (W. Va. 1984) (finding that murder statute did not include killing of viable unborn child); State v. Cornelius, 448 N.W.2d 434 (Wis. 1989) (holding that fetus is subject to homicide if born alive).

18. *See* Boushey v. State, 804 S.W.2d 148, 150 (Tex App.—Corpus Christi 1990, pet. ref'd); Reed v. State, 794 S.W.2d 806, 810 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd); Bobo v. State, 757 S.W.2d 58, 63 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd); Ogas v. State, 655 S.W.2d 322 (Tex. App.—Amarillo 1983, no pet.).

19. *See The Today Show*, *supra* note 8.

20. *See Cuellar*, 957 S.W.2d 134 (action involving drunk driver).

21. *See* People v. Keeler, 470 P.2d 617 (Cal. 1970) (holding that a man who intentionally kneed his pregnant ex-wife in the abdomen cannot be guilty of homicide for the subsequent *in utero* death of the child).

unborn child except the woman. Allowing the state to prosecute those whose actions are repugnant to a pregnant woman's wishes serves to strengthen women's biological autonomy.

Although, as the United States Supreme Court in *Roe v. Wade*[22] concluded that it need not decide the issue of when life begins to reach its conclusion, this Comment does not assume a position in the continuing debate regarding the beginning of life.[23] Like *Roe*, this Comment takes the position that "a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some point prior to live birth."[24] The assertions in this Comment begin where *Roe* ended and adopt what *Casey*,[25] *Webster*,[26] and *Harris*[27] reiterate: The state has an interest in the protection of the unborn. This Comment is merely an attempt to juxtapose common law theories of fetal rights with contemporary state interests to justify a cause of action currently not recognized in Texas criminal law.

I. THE DEVOLOPMENT OF FETAL RIGHTS IN COMMON LAW

Early common law adopted the view that a fetus *in utero*[28] or *en ventra sa mere*[29] was a part of its mother and, therefore, was not entitled to any separate judicial recognition or rights.[30] This early perspective has been altered by two theories: the Born Alive Rule and the Viability Theory.[31]

A. *The Born Alive Rule*

The Born Alive Rule imposes liability for injury to a fetus regardless of when the injury occurs as long as the fetus is born alive.[32] This

22. 410 U. S. 113 (1973).
23. *See id.* at 150.
24. *Id.*
25. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992).
26. *See* Webster v. Reproductive Health Serv., 492 U.S. 490, 516 (1989).
27. *See* Harris v. McRae, 448 U.S. 297, 313 (1980).
28. A child *in utero* is a child in the uterus. WEBSTER'S NEW COLLEGIATE DICTIONARY 636 (9th ed. 1983).
29. A child *en ventre sa mere* is a child in his mother's womb. *See* BLACK'S LAW DICTIONARY 534 (6th ed. 1990).
30. *See, e.g.,* Berlin v. J.C. Penney Co., 16 A.2d 28 (Pa. 1094) (holding that an infant cannot maintain action for injuries sustained while *en ventre sa mere*); Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W. 2d 944, 945 (1935) (holding that no right of action exists for prenatal injury).
31. *See* James Andrew Freeman, Comment, *Prenatal Substance Abuse: Texas, Texans and Future Texans Can't Afford It*, 37 S. TEX. L. REV. 539, 564-65 (1996).
32. *See* Farley v. Sartin, 466 S.E.2d 522, 528 (W. Va. 1995). *See also* Bicka A. Barlow, Comment, *Severe Penalties for the Destruction of "Potential Life"—Cruel and Unusual Punishment?*, 29 U.S.F. L. REV. 463, 467 (1995); Murphy S. Klasing, *The Death of an Unborn Child: Jurisprudential Inconsistencies in Wrongful Death, Criminal Homicide, and Abortion Cases,* 22 PEPP. L. REV. 933, 935 (1995); Mary Lynn

rule was adopted from the English common law.[33] As stated by Sir Edward Coke, the rule provided:

> If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great [misdemeanor], and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in *rerum natura*, when it is born alive.[34]

It is widely conceded that this view was based on the limitations of medical knowledge from the sixteenth through the nineteen centuries.[35] During that time, no evidence existed to confirm that a child was alive prior to birth.[36] Because of this lack of evidence, it was difficult to prove the corpus delicti of fetal homicides.[37]

American courts uniformly adopted the Born Alive Rule in the nineteenth century[38] and there are jurisdictions, both civil and criminal, that still recognize it.[39] This rule undergirds contemporary tort recovery theories for wrongful death, as every jurisdiction allows a child who is born alive to recover for prenatal injuries.[40] In adherence with the Born Alive Rule, there are some jurisdictions that deny recovery for wrongful death of a fetus not born alive.[41]

Kime, Note, Hughes v. State: *The Born Alive Rule Dies a Timely Death,* 30 TULSA L.J. 539, 540-43 (1995).

33. *See generally* Stephanie Ritrivi McCavitt, Note, *The Born Alive Rule: A Proposed Change to the New York Law Based on Modern Medical Technology*, 36 N.Y.L. SCH. L. REV. 609 (1991). In the thirteenth century, Henry de Bracton was the first medieval writer to distinguish between "formation and animation of the fetus in the womb." *Id.* at 611. Animation or "quickening" was defined as "the moment at which a rational soul infused into the developing fetus" and was assumed to occur at some point between conception and birth. *Id.* Bracton's view was the basis for the early English common law doctrine of abortional homicide and, by the seventeenth century, was adopted and advocated by Sir Edward Coke and Sir William Blackstone. *See id.*

34. 3 SIR EDWARD COKE, INSTITUTES 50 (1648).

35. *See* Clarke D. Forsythe, *Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms,* 21 VAL. U. L. REV. 563, 571 (1987); Kime, *supra* note 32 at 540.

36. *See* Kime, *supra* note 32, at 540; Gary v. Perko, Note, State v. Beale *and the Killing of a Viable Fetus: An Exercise in Statutory Construction and the Potential for Legislative Reform*, 68 N.C. L. Rev. 1144, 1146 (1990).

37. *See* Perko, *supra* note 36, at 1146 (citing Forsythe, *supra* note 35, at 590).

38. *See* Clarke v. State, 23 So. 671, 674 (Ala. 1898).

39. *See, e.g.,* State v. Willis, 652 P.2d 1222 (N.M. Ct. App. 1982); NEB. REV. STAT. § 28-302 (1996).

40. *See* RESTATEMENT (SECOND) OF TORTS §§1, 2 (1977).

41. *See, e.g.*, Estate of Baby Foy v. Morningstar Resort, Inc., 635 F. Supp. 741 (V.I. 1986); Milton v. Cary Med. Ctr., 538 A.2d 252 (Me. 1988); Giardina v. Bennett, 545 A.2d 139 (N.J. 1988); Smith v. Columbus Community Hosp., Inc., 387 N.W.2d 490 (Neb. 1986); Kuhnke v. Fisher, 683 P.2d 916 (Mont. 1984), *aff'd in part and rev'd in part*, 740 P.2d 625 (Mont. 1987); Dunn v. Rose, 333 N.W.2d 830 (Iowa 1983); Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980); Justus v. Atchison, 565 P.2d 122 (Cal.

Many criminal jurisdictions also adhere to the "Born Alive" rule.[42] Several states that refuse to criminalize the killing of a viable fetus confer liability on the actor if the child is born alive, but dies of the injury sustained before birth.[43]

However, in light of advancements in medicine, many jurisdictions now regard the Born Alive Rule as archaic and have abandoned it.[44] Because medical practitioners can now determine the gestational point at which a fetus "quickens," those jurisdictions that have discarded the Born Alive Rule have adopted a rule of viability, discussed below, similar to that found in civil law.

B. *The Viability Theory*

The Viability Theory assigns rights to a fetus at the point of viability. Once the fetus is deemed viable, any subsequent injury is actionable regardless of whether the child is born alive. This theory gained acceptability with the advancement of medical science which has developed to the level of producing credible evidence regarding the state of a fetus at the time of injury.[45]

Since a right of action for recovery for wrongful death is statutorily created,[46] the widespread adoption of the Viability Theory is largely due to court interpretations of state wrongful death statutes.[47] This theory currently prevails as the reigning rationale justifying tort claims for the wrongful death of a viable fetus.[48]

1977); Hamby v. McDaniel, 559 S.W.2d 774 (Tenn. 1977); Endresz v. Friedburg, 248 N.W.2d 901 (N.Y. 1969); Lawrence v. Craven Tire Co., 169 S.E.2d 440 (Va. 1969).

42. *See, e.g.*, State v. Soto, 378 N.W.2d 625 (Minn. 1985) (holding that only a living being could be a homicide victim and that the Born Alive Rule is the majority rule).

43. *See id. See also* Singleton v. State, 35 So. 2d 375 (Ala. 1948) (reversing murder conviction on grounds that evidence insufficient to establish newborn child was born alive); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983) (dismissing murder indictment but applying Born Alive Rule prospectively).

44. *See, e.g.*, *Foy*, 635 F. Supp. at 741; Hughes v. State, 868 P.2d 730 (Okla. Crim. App. 1994); Blackman v. Langford, 795 S.W.2d (Tex. 1990); Milton v. Cary Med. Ctr., 538 A.2d 252 (Me. 1988); *Giardina*, 545 A.2d at 139; State v. Burrell, 699 P.2d 499 (Kan. 1985); Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984); *Hernandez*, 390 So. 2d at 357; *Kuhnke*, 683 P.2d at 916; *Columbus Community Hosp., Inc.*, 387 N.W.2d at 490; State v. Horne, 319 S.E.2d 703 (S.C. 1984); *Dunn*, 333 N.W.2d at 830; *Hamby*, 559 S.W.2d at 774 (Tenn. 1977); *Justus*, 565 P.2d at 122; *Lawrence*, 169 S.E.2d at 440; *Endresz*, 248 N.E.2d at 901.

45. *See* Summerfield v. Superior Ct., 698 P.2d 712, 722 (Ariz. 1985).

46. *See* Klasing, *supra* note 32, at 934 (quoting Sheryl A. Symonds, Comment, *Wrongful Death of the Fetus: Viability Is Not a Viable Distinction*, 8 U. PUGET SOUND L. REV. 103, 104 (1984)).

47. *See* Klasing, *supra* note 32, at 934. *See also* Gary A. Meadows, *Wrongful Death and the Lost Society of the Unborn*, 13 J. LEGAL MED. 99 (1992) (citing Mone v. Greyhound Lines, Inc., 331 N.E.2d 916 (Mass. 1975) (holding that fetus is a person within the meaning of wrongful death statute); Verkennes v. Corniea, 38 N.W.2d 838, 841 (Minn. 1949) (noting decisions in New Jersey, Pennsylvania, and Louisiana supporting civil liability for prenatal injury); Strzelczyk v. Jett, 870 P.2d 730 (Mont. 1993) (holding that full-term fetus is a person within meaning of wrongful death statute).

48. *See Summerfield*, 698 P.2d at 722. The *Summerfield* court stated:

Within the criminal prosecution context, the viability of a fetus has been largely influenced due to the continuing social and legal controversy surrounding abortion. The issue was first introduced in the federal judiciary by the Court in *Roe v. Wade*.[49] The *Roe* Court acknowledged that viability is generally established between twenty-four and twenty-eight weeks.[50] Next, *Planned Parenthood v. Danforth*[51] defined viability as the possibility of the fetus surviving the trauma of birth with or without artificial medical aid.[52] Finally, *Webster v. Reproductive Health Services*[53] held that procedures to test for viability of a fetus can be administered as early as the twentieth week of gestation.[54]

Among the states, viability as a prerequisite for criminal liability remains variant. Viability is one method of determining when fetal rights attach.[55] For example, as established by its decision in *Hughes v. State*,[56] Oklahoma recognizes criminal liability for the death of a viable fetus.[57] In *Hughes*, the defendant was charged with manslaughter of a fetus after driving while intoxicated and colliding with the automobile of a woman nine months pregnant.[58] Though the child was brain dead, had no blood pressure, and no respiration at birth, medical evidence determined that the fetus was viable at the time of the accident and that it died as a result of the vehicular collision caused by the defendant.[59] In a case of first impression, the Oklahoma court expressly parted with the Born Alive Rule and found that an unborn, viable fetus is a human being within the meaning of the state's homicide statute.[60]

Other states have no viability requirements. Louisiana amended its criminal code in 1976 to define "person" as "a human being from the moment of fertilization and implantation."[61] In 1989, the state added the term "unborn child" to the code and defined the phrase as "any

---

> [T]he magic moment of "birth" is no longer determined by nature. The advances of science have given the doctor . . . the power to determine just when "birth" shall occur. We believe that the common law now recognizes that it is the ability of the fetus to sustain life independently of the mother's body that should determine when tort law should recognize it as a "person" whose loss is compensable to the survivors.

Id. at 722.

49. 410 U.S. 113 (1973).
50. *See id.* at 160.
51. 428 U.S. 52 (1976).
52. *See id.* at 63.
53. 492 U.S. 490 (1989).
54. *See id.* at 515-16.
55. *See, e.g.*, GA. CODE ANN. § 16-5-80 (1996).
56. 868 P.2d 730 (Okla. Crim. App. 1994).
57. *See id.* at 731.
58. *See id.*
59. *See id.* at 732.
60. *See id.* at 736.
61. LA. REV. STAT. ANN. § 2(7) (West 1996).

individual of the human species from fertilization and implantation until birth."[62]

After passing legislation to amend the murder statute to include the killing of a fetus, the state of California addressed the issue of viability in a landmark case.[63] The defendant appealed his murder conviction on the grounds that the trial court erred in its instruction to the jury regarding viability of the fetus as the *possibility* of survival after birth.[64] The defendant contended that the determination of viability should be made based on the *probability* of survival of the fetus after birth.[65]

In an en banc decision, the Supreme Court of California ruled that viability was not an element of fetal murder as delineated in the statute.[66] The court supported its finding by examining the legislative history of the statute which indicated that the California legislature contemplated defining "fetus" in the homicide statute as "viable fetus."[67] Since it did not, the court concluded that the legislature did not intend to restrict the criminal liability to viable fetuses.[68] Also, as additional justification for not restricting the statute to viable fetuses, the court noted the legislature's express rejection of a proposed amendment requiring the fetus to be at least twenty weeks gestation period before the statute applied.[69] Thus, viability is not a prerequisite to culpability for fetal murder in California.

C. *Modern Trends in Fetal Murder*

The continuing development of common law doctrines in fetal rights by state courts and legislatures has evolved to create recognized fetal rights in varying forms. In some states, feticide is murder[70] while in others, it is a lesser charge of manslaughter.[71] As previously delineated, while some states have enacted separate statutes that criminalize the killing of a fetus,[72] others simply amend pre-existing homicide statutes to include a fetus.[73] Finally, some states enforce this action

62. *Id.* § 2(11).
63. *See* People v. Davis, 872 P.2d 591, 594 (Cal. 1994) (en banc).
64. *See id.* at 593.
65. *See id.*
66. *See id.* at 594.
67. *See id.*
68. *See id.* at 599.
69. *See id.* at 594.
70. *See, e.g.,* CAL. PENAL CODE § 187 (West 1997); Commonwealth v. Lawrence, 536 N.E.2d 571, 575-76 (Mass. 1989).
71. *See, e.g.,* State v. Knapp, 843 S.W.2d 345 (Mo. 1992) (en banc); MISS. CODE ANN. § 97-3-37 (1972).
72. *See* 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 1996); OKLA. STAT. tit. 21, § 713 (1996); S.D. CODIFIED LAWS § 22-16-1.1 (Michie 1996);
73. *See* N.Y. PENAL LAW § 125.00 (McKinney 1997).

through court decisions interpreting the meaning of existing homicide laws defining "person" to include a fetus.[74]

1. Judicial Imposition of Criminal Liability

Now that the appeals court has affirmed Cuellar's conviction,[75] Texas has joined Oklahoma, Massachusetts, and South Carolina, among other states, in recognizing fetal homicide in the absence of state statutes specifically protecting the fetus.[76] In most instances, these decisions overturn the Born Alive Rule inherently implied in homicide statutes by construing the definition of "person" or "human being" in state penal codes to include a viable fetus.[77] It is interesting to note that the decision affirmed at the appellate level, in *Cuellar,* was the opposite of similar landmark holdings in other states. By conferring criminal liability on Cuellar for Krystal's death, the Texas court would be upholding the Born Alive Rule.

2. State Feticide Statutes

Several state legislatures provide express statutory protection for the unborn.[78] Iowa has enacted a feticide statute that makes it a felony for anyone besides a licensed medical or osteopathic physician to intentionally terminate a human pregnancy after the end of the second trimester.[79] Georgia punishes a person by life imprisonment if he "willfully kills a [quick, unborn child] by injury to the mother . . . which would be murder if it resulted in the death of [the] mother."[80] Florida's statute deems identical behavior manslaughter.[81]

In some states, protection for the unborn is accomplished by including a viable fetus in the definition of homicide.[82] New York defines homicide as "conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-

74. *See Knapp*, 843 S.W.2d at 349; Goodman v. State, 601 P.2d 178, 185 (Wyo. 1979).

75. *See* Cuellar v. State, 957 S.W.2d 134 (Tex. App.—Corpus Christi 1997, pet. ref'd).

76. *See* Commonwealth v. Cass, 467 N.E.2d 1324 (Mass. 1984); Hughes v. State, 868 P.2d 730 (Okla. 1994); State v. Horne, 319 S.E.2d 703 (S.C. 1984). *See also Knapp*, 843 S.W.2d at 345.

77. *See* Kime, *supra* note 32 at 550-53.

78. *See, e.g.,* 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 1996) (providing for the offense of intentional homicide of an unborn child); MINN. STAT. ANN. § 609.2661 (West 1996) (stating that the killing of an unborn child is a murder in the first degree); KAN. STAT. ANN. § 21-3440 (1995) (making the injury to a pregnant woman during the commission of another crime a felony).

79. *See* IOWA CODE ANN. § 707.7 (West 1996).

80. GA. CODE ANN. § 16-5-80 (1996).

81. *See* FLA. STAT. ANN. § 782.09 (West 1997).

82. *See* CAL. PENAL CODE § 187(a) (West 1997).

four weeks under circumstances constituting murder," or other lesser offenses.[83]

II. FETAL RIGHTS IN TEXAS

Texas law is inconsistent in its recognition of fetal rights.[84] Some areas of law have adopted common law views.[85] Other areas statutorily create or deny fetal rights.[86] Still other areas have evolved due to the influence of medical science.[87]

A. *Fetal Rights in Civil Law in Texas*

Most of the rights Texas affords the unborn in civil law are based on common law doctrines.[88] The inconsistencies in this area can be largely attributed to contributions in the fields of science, philosophy, and theology which have been variably accepted by those who make the law.[89]

1. Fetal Rights in Property Law

In 1914, Texas property law recognized the right of an unborn child to inherit.[90] This right of the fetus to inherit is recognized from conception and is predicated on the common law belief that the rights of a child in gestation should be protected from divestment before birth.[91]

Some elements of property law that confer rights on the unborn date back even further.[92] The Rule Against Perpetuities is one exam-

83. N.Y. PENAL LAW § 125.00 (McKinney 1997).

84. *See generally,* S. Jeffrey Gately, Comment, *Texas Fetal Rights: Is There a Future for the Rights of Future Texans?,* 23 ST. MARY'S L.J. 305 (1991) (discussing fetal rights in various areas of Texas law).

85. *See* Nelson v. Galveston, H. & S.A. Ry. Co., 14 S.W. 1021, 1022-23 (1890) (finding a child conceived but unborn at time of father's death could recover for wrongful death).

86. *See, e.g.,* TEX. FAM. CODE ANN. §160.109 (Vernon 1996) (providing for payment of prenatal health care expenses of child in paternity suit); TEX. PROB. CODE ANN. § 34A (Vernon Supp. 1998) (providing for representation of unborn persons in probate proceedings); TEX. PROP. CODE ANN. § 115.014a (Vernon 1995) (providing for representation of unborn persons in suits involving trusts).

87. *See* TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(a)(3) (Vernon Supp. 1991) (providing that "viable" is defined based on physician's judgment). *But see* Witty v. American Gen. Capital Distribs., 727 S.W.2d 503, 505 (Tex. 1987) (quoting the dissent in Presley v. Newport Hosp., 365 A.2d 748, 756 (R.I. 1976) (Kelleher, J., dissenting) (stating that although scientific advancements have been made, the legislature creates rights of action)).

88. *See Witty,* 727 S.W.2d at 505.

89. *See id.*

90. *See* James v. James, 164 S.W. 47 (Tex. Civ. App.—San Antonio 1914, writ dism'd).

91. *See id.*

92. *See* Nelson v. Galveston, H. & S.A. Ry. Co., 14 S.W. 1021, 1022-23 (Tex. 1890) (citing common law decisions as early as 1798 allowing an unborn child to inherit).

ple.[93] This Rule renders void any attempt to create an interest which does not vest within twenty-one years of a life in being at the time the interest is created.[94] For the purpose of measuring a life in being, a gestation period exists that accounts for persons who have been conceived, but not yet born at the time the interest is created, or at the time the interest vests.[95]

Some provisions in Texas probate law protect the unborn in suits affecting their property rights. For example, the Texas Probate Code allows a judge to appoint a guardian or attorney ad litem to represent the unborn in probate cases[96] and requires notice be given for unborn persons in suits involving trusts.[97]

2. Fetal Rights in Family Law

The Texas Family Code also allows action affecting the unborn. For example, a suit to terminate the parent-child relationship can be filed before the child is born.[98] Also, though a mother is not allowed to receive child support until the child is born,[99] she has the right to compensation for prenatal care from the father of the child.[100]

3. Fetal Rights in Tort Law

Initially, Texas did not allow for tort recovery by or for a child injured *in utero*.[101] A 1967 Texas Supreme Court decision, *Leal v. C.C. Pitts Sand & Gravel, Inc.*,[102] marked a significant change in the law.[103] Expressly overruling its previous decision disallowing recovery for prenatal injury, the *Leal* court recognized the dramatic legal shift among state courts in the recognition of fetal rights in this regard.[104] The court in *Leal* noted, "So rapid has been the overturn [of cases denying recovery for prenatal injuries to a fetus] that at the time of publication nothing remains of the older law except decisions, not yet overruled, in Alabama, Rhode Island, and Texas."[105] In fact, at the

93. *See* JESSE DUKEMINEIR & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 755 (4th ed. 1990) (discussing the development of the Rule Against Perpetuities in the sixteenth through nineteenth centuries).

94. *See* TEX. PROP. CODE ANN. § 112.036 (Vernon 1995).

95. This is based on a Texas constitutional prohibition of perpetuities. *See* TEX. CONST. art. I, § 26; TEX. PROP. CODE ANN. § 112.036 (Vernon 1995); Foshee v. Republic Nat'l Bank of Dallas, 617 S.W.2d 675, 677 (Tex. 1981).

96. *See id.* § 34(a) (Vernon Supp. 1998).

97. *See id.* § 115.014(a) (Vernon 1995).

98. *See* TEX. FAM. CODE ANN. § 161.102(a) (Vernon 1996).

99. *See* TEX. FAM. CODE ANN. § 160.005 (Vernon 1996).

100. *See id.*

101. *See* Magnolia Coca Cola Bottling Co. v. Jordan, 78 S.W.2d 944, 945 (Tex. 1935).

102. 419 S.W.2d 820 (Tex. 1967) (overruling *Magnolia Coca Cola Bottling Co.* and holding that where child born alive, wrongful death action exists).

103. *See id.* at 822.

104. *See id.*

105. *Id.* (quoting WILLIAM PROSSER, LAW OF TORTS, at 335-56 (3d ed. 1964).

time of the *Leal* decision, Rhode Island had overruled its prior decision against recovery for fetal injury,[106] and Alabama was the only state left that did not allow such an action.[107]

In addition to a cause of action for wrongful birth, as established in *Leal*, Texas also currently allows filing suit for prenatal injury to a fetus[108] and wrongful birth.[109] However, these actions exist only if the child suffering the injury is born alive.[110]

The state also provides that a child born alive may recover for the wrongful death of a parent whose death occurs before the child is born.[111] However, because of the live birth requirement for tort recovery, a parent cannot sue for wrongful death of a fetus not born alive.[112]

The state has most recently upheld this live birth requirement in *Edinburg Hospital Authority v. Trevino*.[113] In this case, parents of a stillborn child brought suit against a city hospital authority for mental anguish resulting from negligent treatment of the mother prior to the stillbirth of their child.[114] At trial, a jury found for the parents and awarded them $750,000 each in damages.[115] The case was affirmed on appeal, and the Authority applied for a writ of error.[116]

The Texas Supreme Court found that the parents could not recover damages for mental anguish as bystanders because in order to recover, the bystander must establish that the defendant negligently inflicted serious or fatal injury on the primary victim.[117] The court concluded that since the primary victim, the stillborn child, was not born alive, the hospital owed no duty to the fetus and could therefore not be negligent.[118]

---

106. *See* Sylvia v. Gobeille, 220 A.2d 222 (R.I. 1966).

107. *See Leal*, 419 S.W.2d at 822 n.3.

108. *See* Yandell v. Delgado, 471 S.W.2d 569, 570 (Tex. 1971).

109. *See* Jacobs v. Theimer, 519 S.W.2d 846, 850 (Tex. 1975) (holding there is no public policy for denying parents a cause of action for wrongful birth).

110. *See Leal*, 419 S.W.2d at 820-21; *Yandell*, 471 S.W.2d at 570.

111. *See* Nelson v. Galveston, H. & S.A. Ry. Co., 14 S.W. 1021, 1023 (Tex. 1890) (holding wrongful death recovery allowed because unborn child was "in being" at time of father's death).

112. *See* Blackman v. Langford, 795 S.W.2d 742, 743 (Tex. 1990); Witty v. American Gen. Capital Distribs., 727 S.W.2d 503, 506 (Tex. 1987); Tarrant County Hosp. Dist. v. Lobdell, 726 S.W.2d 23 (Tex. 1987) (all holding that no cause of action exists for wrongful death of a fetus).

113. No. 95-0939, 1997 WL 47912, at *1 (Tex. Feb. 6, 1997).

114. *See id.*

115. *See id.*

116. *See id.*

117. *See id.* at *2.

118. *See id.*

B. *Fetal Rights in Criminal Law in Texas*

Texas has traditionally enacted strict criminal laws regulating pregnant women's access to abortion.[119] *Roe v. Wade*[120] nullified these laws by holding that the denial of an abortion infringes upon a woman's constitutional right to privacy.[121] In the aftermath of *Roe*, Texas has left unborn children virtually unprotected in criminal law.

---

119. *See* James Andrew Freeman, *supra* note 31. Abortion was first criminalized in 1854. See Law of Feb. 9, 1854, ch. 49, § 1, 1854 Tex. Gen. Laws, 58, 3 H. GAMMEL, LAWS OF TEXAS 1502 (1898). The prohibition was initially codified at Texas Penal Code arts. 531-536 (1857) (also known as the "O.C." or "Old Code"). This article was carried substantially unchanged in the Penal Code arts. 536-541 (1879), Tex. Penal Code arts. 641-646 (1895), Tex. Penal Code arts. 1071-1076 (1911), and Tex. Penal Code arts. 1191-1196 (1925). The 1925 provision was declared unconstitutional in Roe v. Wade, 410 U.S. 113 (1973). These former Texas abortion statutes criminalized obtaining or attempting to obtain an abortion, except on medical advice from a physician for the purpose of saving the life of the mother. They read as follows:

> Abortion:
>
> If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By "abortion" is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused.

TEX. PENAL CODE ANN. § 1191 (Vernon 1948) (repealed 1973).

> Furnishing the means:
>
> Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice.

TEX. PENAL CODE ANN. § 1192 (Vernon 1961) (repealed 1973).

> Attempt at abortion:
>
> If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars.

TEX. PENAL CODE ANN. § 1193 (Vernon 1961) (repealed 1973).

> Murder in producing abortion:
>
> If the death of the mother is occasioned by an *abortion* so produced or by an attempt to effect the same it is murder.

TEX. PENAL CODE ANN. § 1194 (Vernon 1961) (repealed 1973).

> By medical advice:
>
> Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.

TEX. PENAL CODE ANN. § 1196 (Vernon 1971) (repealed 1973).

> Destroying unborn child:
>
> Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years.

TEX. PENAL CODE ANN. § 1195 (Vernon 1961) (repealed 1973).

120. 410 U.S. 113 (1973).

121. *See id.*

Though Texas has a criminal abortion statute,[122] Texas law denies any further protection to unborn children from criminal acts by statutory definitions construed to exclude the unborn.[123]

The applicability of these definitions has been tested in several cases. Texas courts have consistently ruled against construing the Penal Code definition of "individual" to include a fetus. In *Showery v. State*,[124] a physician who performed an abortion by hysterectomy was convicted by an El Paso jury for the murder of a newborn infant.[125] In his appeal, the physician argued, among other things, that the murder statute found in the penal code could not constitutionally apply to a nonviable fetus.[126] The court agreed with him on this point.[127] However, the pivotal issue of the case rested on the defendant's assertion that the trial court relied on an overbroad Family Code definition of "born alive."[128] At the jury trial, evidence established that the child was alive when the defendant extracted her from her mother's uterus and, in completing the abortional act, the defendant affirmatively acted to suffocate the newborn infant by placing the placenta over her head, plunging her into a bucket of liquid, and sealing her in a plastic trash bag.[129] His conviction was upheld on the court's finding that the facts of the case supported a criminal conviction under the Penal Code and the Family Code which required findings of live birth and actual life.[130]

Texas courts have also held that, for purposes of asserting an affirmative defense, the Penal Code definition of "individual" does not include an unborn fetus.[131] In *Ogas v. State*,[132] the court invalidated the defendant's argument of defense of a third person when she was convicted of killing her boyfriend who slapped her and threatened to leave her when she was five months pregnant.[133] In its analysis the

122. *See* TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1994) (mandating a five year minimum sentence for destroying vitality or life in a child during birth which otherwise would have been born alive).

123. *See* TEX. PENAL CODE ANN. § 1.07(a)(26), (38) (Vernon 1994).

124. 690 S.W.2d 689 (Tex. App.—El Paso 1985, pet. ref'd).

125. *See id.* at 691.

126. *See id.* at 692.

127. *See id.*

128. *See id.* at 691. *See also* Jim Darnell, *Criminal Law, Annual Survey of Texas Law Part III: Public Law*, 40 SW. L. J. 679, 684-85 (1986) (discussing various Texas Penal Code provisions).

129. *See Showery*, 690 S.W.2d at 691, 694-96.

130. *See id.* at 694; Darnell, *supra* note 128, at 685.

131. *See generally* Reed v. State, 794 S.W.2d 806, 810 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (holding unborn child not "person" for purposes of defending third persons and under defense of necessity); Boushey v. State, 804 S.W.2d 148, 149 (Tex. App.—Corpus Christi 1990, pet. ref'd) (holding defense of third person did not include defense of the unborn and was, therefore, not available to pro-life demonstrator).

132. 655 S.W.2d 322 (Tex. App.—Amarillo 1983, no pet.).

133. *See id.* at 325.

court concluded, "It . . . appears that an unborn fetus is not included within the statutory definition of 'person' and, hence, not included within the provision of [Texas Penal Code] Sec. 9.33 [Defense of Third Person]."[134]

In cases of criminal trespass by anti-abortion protestors, the court has upheld refusals to admit evidence or nullifed admissions of evidence of defenses of necessity and defense of third persons.[135] The defendants in *Bobo v. State*,[136] appealed on the grounds that the trial court's exclusion of evidence to support defenses of necessity and defense of third persons was reversible error. The appellate court indicated that, in order to prevail, the defendants must illustrate the trial court's abuse of discretion by demonstrating that the defendants had met all the elements of the justification theory defenses.[137] Affirming the lower court's decision, the court of appeals stated that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[138] The court went on to conclude that, since the Texas Penal Code similarly uses the word "person," the decision in *Roe* would apply and defendants did not meet this element.[139]

Finally, at least one Texas court has held that a mother cannot be criminally liable for actions taken during pregnancy that result in adverse consequences for the child once the child is born.[140] In *Collins v. State*,[141] prosecutors charged the defendant with reckless injury to a child due to voluntary ingestion of cocaine during pregnancy.[142] In its finding that the mother did not have notice that her ingestion of cocaine could subject her to prosecution for injury to a child, the appellate court also held that the Penal Code does not "proscribe any conduct with respect to a fetus."[143]

To date, Texas courts have failed to infer from the Texas Penal Code any protection for the unborn. An affirmance in *Cuellar* would mark a significant departure from previous decisions.

III. Proposed Fetal Rights in Texas Criminal Law

Texas could provide protection from criminal injury for a fetus without being inconsistent with fetal rights in similar areas of federal and state law. As shown above, *Roe* and its offspring create a state interest in the protection of a viable fetus that supersedes even the mother's privacy rights. One could argue that, if the state has an in-

134. *Id.*
135. *See Reed*, 794 S.W.2d at 809-10.
136. 757 S.W.2d 58, 61 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).
137. *See id.* at 62-63.
138. *Id.* at 63 (quoting *Roe v. Wade*, 410 U.S. 113, 158 (1973)).
139. *See id.*
140. *See* Collins v. State, 890 S.W.2d 893 (Tex. App.—El Paso 1994, no pet.).
141. 890 S.W.2d 893 (Tex. App.—El Paso 1994, no pet.).
142. *See id.*
143. *Id.* at 897.

terest in protecting a viable fetus against the mother, whose privacy rights are otherwise supreme, the state should logically have an interest in protecting a viable fetus against a third party—someone who has caused injury to a fetus without the mother's consent and has no similar privacy right.

On the state level, Texas recognizes a tort interest for injury to an unborn child.[144] Could the state not provide a similar interest in the criminal context—especially in light of the fact that several states already recognize this interest and such recognition has not been deemed offensive to federal law?

This author supports the creation of a state interest in Texas with respect to the death of a viable fetus against a third party for purposes of criminal prosecution.[145] Establishing the starting point of criminal liability at viability is consistent with current law.[146] To advocate imposing liability at an earlier gestational point would be to advocate that Texas proceed beyond acknowledged legal parameters. While other states have created a window of liability for fetal injury from fertilization or conception to birth,[147] encouraging Texas to do so is inconsistent with the arguments advanced in this Comment.

By virtue of recognition in the civil context, society acknowledges the wrong of injury to a fetus. To do so in civil law, but not in criminal law, is hypocritical. "All wrongdoing is sin."[148]

Analyzing this proposed criminal interest in the context of two classic theories of punishment—retribution and deterrence—results in a compelling argument for its adoption. According to the retributionist Immanuel Kant, it is "the right of the sovereign as the supreme power to inflict pain upon a subject on account of a crime commited by him. . . . For if justice and righteousness perish, human life would no longer have any value in the world."[149] Society or the entity to whom society gives power, has the right, if not the duty, to punish perpetra-

144. *See* Leal v. C.C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (creating a wrongful death action for the death of a child injured before birth and born alive).

145. Other commentators have put forth reform proposals to deal with fetal causes of action. *See, e.g.*, Gately, *supra* note 84, at 320-23 (proposing reform in Texas law to consistently recognize fetal rights).

146. *See* Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992). In *Roe*, the Supreme Court established a trimester framework for determining when the state has an interest in a woman's fetus. *See Roe*, 410 U.S. at 163-66. In the subsequent decision by the Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey*, the Court did not use the trimester framework; at the same time, *Casey* held that viability was the fundamental element for determining the state's interest. *See Casey*, 505 U.S. at 835-36.

147. *See* 720 ILL. COMP. STAT. ANN. 5/9-1.2(3)(b)(1) (West 1996); LA. REV. STAT. ANN. § 2(7) (West 1996).

148. 1 *John* 5:17 (New International Version).

149. IMMANUEL KANT, THE PHILOSOPHY OF LAW, (W. Hastie tr. 1887) *reprinted in* SANFORD H. KADISH & STEPHEN J. SHULHOFER, CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS 102-03 (6th ed. 1995).

tors of identified wrongs.[150] The destruction of potential human life, with few exceptions, should be a punishable wrong in Texas criminal law.

Though recidivism, as evidenced by the abundance of repeat offenders, weakens the rationale of deterrence, the theory still provides sufficient justification to impose criminal liability for fetal injury inflicted by a third party.

> Pain and pleasure are the great springs of human action. When a man perceives or supposes pain to be the consequence of an act, he is acted upon in such a manner as tends, with a certain force, to withdraw him, as it were, from the commission of that act.[151]

Even with minimal effect, society should do what it can to deter acts that result in harm to a pregnant woman and her child, especially when the action is blatant.[152]

The *Cuellar* case provides a prime opportunity for Texas to reconsider its position on the protection of the unborn in the criminal context. Jeannie Coronado, Krystal's mother, has recourse against Cueller under the Texas Wrongful Death Statute.[153] However, civil pursuit of such an egregious act is seldom as cathartic for the victim and the victim's family as the remedies provided by the penal system. Additionally, in a civil action, Coronado would bear the burden of proof, while in a criminal action, the state bears that burden. Also, unless a defendant in a civil suit has "deep pockets," a civil judgment amounts to little more than a moral victory.

Society requires the sacrifice of personal freedom for the most severe deviant criminal behavior. Injury to an unborn child that causes death should necessitate such a sacrifice. Sanction for this behavior is not currently incorporated in Texas law. However, a change in the law can be effected by either the judiciary or the legislature.

A. *Proposed Judicial Action*

This author proposes, for Texas courts, an approach that might best be described as a hybrid between the Viability Theory and the Born Alive Rule. Texas courts could recognize a criminal act where injury by a third party has been inflicted on a viable fetus who is later born and subsequently dies as a result of those injuries. Unlike the Born

150. *See* HOBBES, SOCIAL CONTRACT, *reprinted in* CONCEPTS OF SOVEREIGNTY 88 (2d ed. 1960).

151. JEREMY BENTHAM, PRINCIPLES OF PENAL LAW, J. BENTHAM'S WORKS 396, 402 (J. Bowring ed. 1843), *reprinted in* SANFORD H. KADISH & STEPHEN J. SHULHOFER, CRIMINAL LAW AND ITS PROCESSES, CASES AND MATERIALS 115-16 (6th ed. 1995).

152. *But see* Keeler v. Superior Ct., 470 P.2d 617 (Cal. 1970) (holding defendant not liable for homicide of unborn child of pregnant ex-wife after saying, "I'm going to stomp it out of you," kneeing pregnant ex-wife in the abdomen, causing death of unborn child). *Id.*

153. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001-71.011 (Vernon 1996).

Alive Rule, it is crucial that the injuries inflicted occur after viability. Unlike the Viability Theory, the fetus must be born alive for a cause of action to be found. The Texas Penal Code currently requires an individual be "a human being who has been born and is alive."[154] Primary emphasis has been placed on the state of the fetus at the time injury occurred. However, in the case of a viable fetus that is subsequently born and then later dies of the injuries it received as a viable fetus, as in the *Cuellar* case, the "crime" of homicide is not actually completed until after the fetus is born, lives for a period of time, and then dies. As stated in *State v. Anderson*,[155] "[T]here are many instances where an adult victim has died some considerable time after the infliction of the fatal blow or wound. If the victim recovers and survives, . . . there is no homicide; yet, if he dies from such wounds, it is murder."[156] Should the injury sustained during gestation be the proximate cause of death, the third party could be held criminally liable if the fetus is born alive and dies as a result of the prenatal injury.[157]

Several courts have applied this rationale in similar fact situations. In *Jones v. Commonwealth*,[158] the defendant's conviction of second degree manslaughter was upheld.[159] Though the injury inflicted to the fetus occurred during the mother's eighth month of pregnancy,[160] the court sustained the conviction by noting the victim's status is determined at the time of death.[161]

It is interesting to note that a few legislatures have precluded this interpretation by their respective state courts. Alaska's legislature eliminated any alternative interpretation by defining "person" in the statute as someone born and alive *at the time the crime is committed.*[162] The state of Nebraska has adopted a similar definition within the meaning of its homicide statute.[163]

Additionally, the District Attorney's argument in support of Cuellar's conviction is, in essence, the Born Alive Rule which, as discussed earlier, is a long-standing common law doctrine. Affirming the *Cuellar* jury's decision by relying on either delayed causation or the Born Alive Rule is the first step by the Texas judiciary in the recognition of criminal liability for injury to a viable fetus.

With regard to fact situations similar to that in *Cuellar*, Texas courts could also use the rationale advanced in *Leal v. C.C. Pitts Sand and*

154. TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon 1994).
155. 343 A.2d 505 (N.J. Super. Ct. Law Div. 1975).
156. *See id.* at 508.
157. *See id.* at 509.
158. 830 S.W.2d 877 (Ky. 1992).
159. *See id.* at 878.
160. *See id.*
161. *See id.* at 879.
162. *See* ALASKA STAT. § 11.41.140 (Michie 1996) (emphasis added).
163. *See* NEB. REV. STAT. § 28-302 (1996).

Gravel, Inc.[164] to impose criminal liability on a third party for injury to a viable fetus that would not be repugnant to the penal code. In *Leal*, the court stated, "[A] right of action existed under the Wrongful Death Statute[165] only where the injured party could have maintained an action for damages had death not ensued."[166] By finding that, but for death, the injured party could have maintained a suit, the court overruled its previous decision in *Magnolia Coca Cola Bottling Co. v. Jordan*[167] which disallowed recovery for fetal injury.[168]

This rationale can be similarly applied in the criminal context where the state is the injured party. For example, in the *Cuellar* case, if Krystal Zuniga had lived, the state could still have charged Cuellar with intoxication assault,[169] which is in the same class of offenses as intoxication manslaughter.[170]

Many oppose judicial imposition of criminal liability for fetal injury. Pro-abortion advocates disapprove of any change in the law "that attempts to confer rights on a fetus."[171] Such individuals are concerned that creation of additional fetal rights in this area foreshadows infringement of the mother's rights,[172] especially in cases of drug and alcohol abuse by pregnant women.[173]

Others might argue that a court engaging in a creative interpretation of the statute raises additional constitutional questions. If the

---

164. 419 S.W.2d 820 (Tex. 1967).

165. TEX. CIV. PRAC. & REM. CODE ANN. §§ 71.001-71.031 (Vernon 1997).

166. *Leal*, 419 S.W.2d at 821.

167. 78 S.W.2d 944 (Tex. 1935).

168. *See Leal*, 419 S.W.2d at 822.

169. The intoxication assault statute provides in pertinent part:

> (a) A person commits an offense if the person, by accident or mistake, while operating an aircraft, watercraft, or motor vehicle in a public place while intoxicated, by reason of that intoxication causes serious bodily injury to another.
>
> . . .
>
> (c) An offense under this section is a felony of the third degree.

TEX. PENAL CODE ANN. § 49.07 (Vernon 1994).

170. The intoxication manslaughter statute provides that:

> (a) A person commits an offense if the person:
>
> (1) operates a motor vehicle in a public place, an aircraft, or a watercraft; and
>
> (2) is intoxicated and by reason of that intoxication causes the death of another by accident or mistake.
>
> (b) An offense under this section is a felony of the second degree.

TEX. PENAL CODE ANN. § 49.08 (Vernon 1994).

171. Bruce Tomaso, *Driver Accused of Manslaughter After Hitting Pregnant Woman*, DALLAS MORNING NEWS, Sept. 9, 1996 at 5.

172. *See* Tomaso, *supra* note 171.

173. *See, e.g.*, Collins v. State, 890 S.W.2d 893 (Tex. App.—El Paso 1994, no pet.) (attempting to hold the mother criminally responsible for endangering her child by ingesting drugs while pregnant). Other states have also attempted to bring criminal charges for prenatal endangerment. Neither Texas nor these other states have upheld such charges to date. However, with a new cause of action for fetal homicide, it is possible that Texas courts could hold differently in the future.

definition of an "individual"[174] as "a human being who has been born and is alive"[175] does not exclude a viable fetus, then is the statute vague or ambigious?[176] And, if the time the prohibited conduct occurs is not controlling, does that also add to the ambiguity of the statute? If so, could a reasonably intelligent person comprehend the exact nature of the forbidden conduct? If not, has that reasonably intelligent person been afforded adequate notice that this particular conduct, the killing of a fetus, is prohibited? Finally, if all of the above elements are reconciled, would not the imposition of this new interpretation in the *Cuellar* case abridge the defendant's rights safeguarding against *ex post facto* laws?[177] These questions must be addressed by any court that chooses a statutory interpretation in favor of protection of the unborn.

In addition to these points, Cuellar argues that Texas has already decided the Penal Code does not afford protection to the unborn,[178] and that a finding to the contrary would constitute judicial legislation.[179]

Though this case has now been appealed to the Texas Criminal Court of Appeals, it is unlikely to use *Cuellar* to make new law. Though the prosecution is attempting to couch the issue as one of first impression by its novel argument, there is an important distinction between Texas and New Jersey,[180] the jurisdiction that sanctioned an argument similar to that of the prosecution. The New Jersey legislature left the term "human being" undefined in its penal code.[181] There-

174. TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon 1994).

175. *Id.*

176. Such laws have been held to be unconstitutional and, thus, void. *See* United States v. Lanier, 117 S. Ct. 1219, 1225 (1997) (citation omitted) (holding that "no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed"); Soderman v. Texas, 915 S.W.2d 605, 610 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (holding that a statute may be void for vagueness when men of common intelligence must guess as to its meaning); *But see* Lucario v. Texas, 677 S.W.2d 693, 699 (Tex. App.—Houston [14th Dist.] 1984, no writ) (holding that a statute is not unconstitutional simply because words or terms are not specifically defined).

177. *Ex post facto* is a latin phrase that means "after the fact." BLACK'S LAW DICTIONARY 580 (6th ed. 1996). An *ex post facto* law is a limitation on the federal government, and state governments through incorporation by the Fourteenth Amendment, from prosecuting innocent acts of the past by creation of legislation in a later point in time. This limitation also prevents changing the level of punishment for an offense that has already occurred. U.S. CONST. art. I, § 10, cl. 1. *See* California Dept. of Corrections v. Morales, 514 U.S. 499, 505 (1995); Caulder v. Bull, 3 U.S. 386, 389 (1798).

178. *See* Appellant Brief at 31, Cuellar v. State, 957 S.W.2d 134 (Tex. App.—Corpus Christi 1997, pet. ref'd).

179. *Id.* at 35.

180. *See* State v. Anderson, 343 A.2d 505, 508 (N.J. Super. Ct. Law Div. 1975).

181. *See id. See also* State v. Loce, 630 A.2d 843, 844 (N.J. Super. Ct. Law Div. 1991) (citing Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982) (viewing that the court "treated the fetus as not being a person")); Giardina v. Bennett, 545 A.2d 139

fore, the *Anderson* court had the discretion to adopt a common law definition of criminal liability in making its determination on this issue.[182]

Finally, but perhaps most importantly, the Texas legislature's definition of "individual"[183] rejects the Born Alive Rule.[184] According to the court in *Showery v. State*,[185] the murder statute applies only to "a human being who has been born and is alive *at the time of the alleged conduct.*"[186] As a matter of law, this interpretation will be difficult for the prosecution to overcome.

B. *Recommended Legislative Action*

If the court declines to make new law in this area and continues to look to the state legislature for direction regarding third party criminal liability for injury to a viable fetus, the Texas State Legislature should act on the issue. Up to now, the legislature has refused to take action.[187]

This inaction on the part of the legislature cannot be blamed on lack of direction. Of the twenty states that recognize fetal homicide, they do so in varying forms.[188] The legislature could follow the lead of many of these states and draft separate, comprehensive feticide statutes.[189]

For example, Texas could insert the following into Chapter Nineteen of the Penal Code:

(1988) (holding a fetus is not a person within the meaning of the Wrongful Death Act).

182. *See Anderson*, 343 A.2d at 508.

183. TEX. PENAL CODE ANN. § 1.07(a)(26) (Vernon 1994).

184. *See* Freeman, *supra* note 31, at 577.

185. 690 S.W.2d 689 (Tex. App.—El Paso 1985, writ ref'd).

186. *Id.* at 692 (emphasis added) (citing TEX. PENAL CODE ANN. § 19.02 (Vernon 1994)).

187. *See* Tomaso, *supra* note 171, at 1. Texas State Representative Steve Ogden (R-Bryan) has repeatedly introduced legislation that would increase penalties for assaulting a pregnant woman. *See id.* The measure has been defeated consistently. *See id.*

188. The following states have enacted statutes providing for criminal liability for fetal homicide: CAL. PENAL CODE § 187(a) (West & Supp. 1998); FLA. STAT. ANN. § 782.09 (West 1992); GA. CODE ANN. § 16-5-80 (1996); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 1993); IOWA CODE ANN. § 707.7 (West 1993 & Supp. 1997); KAN. STAT. ANN. § 21-3440 (1995); LA. REV. STAT. ANN. § 2(7) (West 1996); MINN. STAT. ANN. § 609.2661 (West 1987); MISS. CODE ANN. § 97-3-37 (1994); S.D. CODIFIED LAWS § 22-16-1.1 (Michie 1996); TENN. CODE ANN. § 39-13-214 (1997); WASH. REV. CODE ANN. § 9A.32.060 (West & Supp. 1998). *See also* Commonwealth v. Lawrence, 536 N.E.2d 571 (Mass. 1989) (holding fetus is a person for purposes of common law murder); State v. Horne, 319 S.E.2d 703 (S.C. 1984) (holding common law definition of murder includes viable fetus); State v. Cornelius, 448 N.W.2d 434 (Wis. Ct. App. 1989); Goodman v. State, 573 P.2d 400 (Wyo. 1997).

189. *See* CAL. PENAL CODE § 187(a) (West & Supp. 1998).

§ 19.06 (PROPOSED). FETICIDE

(a) A person commits an offense if he causes the death of a *viable fetus* by any injury to the mother of such child, that would be [murder] [manslaughter] if it resulted in the death of such mother.

(b) An offense under this section is a [capital felony] [felony of the second degree].[190]

If the legislature wished to impose similar liability for intoxication manslaughter, it could amend Chapter Forty-Nine of the Penal Code to read as follows:

§ 49.08 INTOXICATION MANSLAUGTHER

(a) A person commits an offense if the person:

(1) operates a motor vehicle in a public place, an aircraft, or a watercraft; and

(2) is intoxicated and by reason of that intoxication causes the death of another person *or viable fetus* by accident or mistake.

(b) An offense under this section is a felony of the second degree.[191]

The legislature might alternatively consider amending Section 1.07(26) to read:

(26) "Individual" means a human being, either who has been born and is alive *or is a viable fetus*

and insert to Section 1.07:

(48) "Viable fetus" means any individual of the human species developed to the point of viability.[192]

The state of California, which embarked on a journey in this area of the law that eventually led to the recognition of criminal liability for fetal injury, also provides an insightful example. In 1970, the California Supreme Court dismissed a trial court proceeding of a defendant for the death of an unborn child.[193] The defendant had been charged with the murder of a fetus after intentionally assaulting his estranged ex-wife who was pregnant with another man's child.[194] In the action for a writ of prohibition to restrain further proceedings, the court found the state legislature did not intend to include the act of feticide when it defined murder as the unlawful killing of a human being.[195] The California legislature reacted to this decision by amending the state's definition of murder to include "the unlawful killing of a

190. *See* Barlow, *supra*, note 32, at 508.

191. TEX. PENAL CODE ANN. § 49.08 (Vernon 1997) (emphasis attributed to proposed language).

192. TEX. PENAL CODE ANN. § 1.07 (48) (Vernon 1997) (proposed language).

193. *See* Keeler v. People, 470 P.2d 617 (Cal. 1970).

194. *See id.* at 619.

195. *See id.* at 622-23.

human being, or a fetus."[196] And, as discussed earlier, a subsequent landmark California Supreme Court decision determined that viability of the fetus is not an element of fetal murder.[197]

Similarly to the California legislature and other state law-making bodies,[198] the Texas legislature could simply amend its homicide statute as follows:

§ 19.01 TYPES OF CRIMINAL HOMICIDE
(a) A person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual *or a viable fetus.*
(b) Criminal homicide is murder, capital murder, manslaughter, or criminally negligent homicide.

CONCLUSION

Before *Roe,* Texas was adamant in its protection of the unborn. To leave such potential life completely unprotected from criminal action by a third party for more than twenty years is incomprehensible. State interest in the protection of viable fetuses has been established and upheld in federal court, even when that interest has been asserted against the mother.

According to *Roe*, when the state's interest in protecting the life of a developing fetus is not counterbalanced against a mother's privacy right to an abortion, the state's interest should prevail.[199] Texas has a legitimate right to recognize criminal liability of a third party for injury to a viable fetus.

Even if *Cuellar* is upheld, the decision does not extend far enough to ensure adequate protection for the unborn. An affirmance in *Cuellar* would find liability only in situations where the unborn child suffers prenatal injury, is born alive, and then dies. The legislature must act to guarantee a pregnant woman in Texas that the state provides appropriate retribution on her behalf if she is unfortunate enough to experience the tragedy of unwillingly losing her unborn child at the hands of a third party. This protection should be afforded even if the child dies before being born.

As the state of Texas was forced to action in 1967 by the tide of wrongful death recognition for the unborn throughout the states,[200] this author is convinced that Texas will once again be compelled to "catch up" with the rest of the nation in regard to the recognition of

196. CAL. PENAL CODE § 187(a) (West & Supp. 1998).
197. *See* People v. Davis, 872 P.2d 591, 602 (Cal. 1994).
198. *See* N.Y. PENAL LAW § 125.00 (McKinney 1984 & Supp. 1997).
199. *See* Roe v. Wade, 410 U.S. 113, 154 (1973).
200. *See* Leal v. C. C. Pitts Sand & Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (quoting WILLIAM L. PROSSER, THE LAW OF TORTS, 355-56 (3d ed. 1964)). At the time this case was decided, Texas was the last state to recognize civil wrongful death liability for the unborn. *See id.*

criminal liability of a third party for prenatal injury. Until then, it appears that Texas perpetuates "the medieval and brutal common law concept that it is more profitable for a wrong-doer to kill than to maim or injure."[201]

Annissa R. Obasi

201. Langford v. Blackman, 790 S.W.2d 127, 130 (Tex. App.—Beaumont 1990, writ granted), *rev'd*, 795 S.W.2d 742 (Tex. 1990).