



---

10-1-2004

## Inner Turmoil: Redefining the Individual and the Conflict of Rights Between Woman and Fetus Created by the Prenatal Protection Act

Michelle Haynes

Follow this and additional works at: <https://scholarship.law.tamu.edu/txwes-lr>

---

### Recommended Citation

Michelle Haynes, *Inner Turmoil: Redefining the Individual and the Conflict of Rights Between Woman and Fetus Created by the Prenatal Protection Act*, 11 Tex. Wesleyan L. Rev. 131 (2004).

Available at: <https://doi.org/10.37419/TWLR.V11.I1.7>

This Comment is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas Wesleyan Law Review by an authorized editor of Texas A&M Law Scholarship. For more information, please contact [aretteen@law.tamu.edu](mailto:aretteen@law.tamu.edu).

# INNER TURMOIL: REDEFINING THE INDIVIDUAL AND THE CONFLICT OF RIGHTS BETWEEN WOMAN AND FETUS CREATED BY THE PRENATAL PROTECTION ACT

I.	INTRODUCTION.....	131
II.	EVOLUTION OF MATERNAL AND FETAL RIGHTS.....	133
	A. <i>What is a “Person?”</i> .....	134
	1. Defining Abortion Rights in the Supreme Court .....	134
	2. Defining the “Individual” in Texas .....	136
	B. <i>Existing Conflicts Between Mother and Fetus</i> .....	141
	1. Slavery and Maternal-Fetal Conflict .....	142
	2. Maternal-Fetal Conflict in Drug Addiction .....	143
III.	PASSAGE OF THE PRENATAL PROTECTION ACT.....	145
	A. <i>Senate Bill 319</i> .....	146
	B. <i>House Bill 246</i> .....	147
IV.	MATERNAL-FETAL CONFLICTS CREATED BY THE PRENATAL PROTECTION ACT .....	149
	A. <i>Diminishing a Woman’s Rights</i> .....	149
	B. <i>The Fetus as “Almost” an “Individual”</i> .....	151
V.	PROPOSED SOLUTIONS .....	152
	A. <i>Enhancement Statute for Injury to a Pregnant Woman</i> .....	153
	B. <i>Amending the Statute to Protect the “Individual”</i> ....	154
VI.	CONCLUSION .....	155

## I. INTRODUCTION

A young woman leaves the doctor’s office in her car. She has just learned that she is four weeks pregnant. She has not told anyone else that she suspected she was pregnant and is uncertain as to whether she would carry the baby to term. On her way home her car is struck by another car, driven by a young male with a blood alcohol level of .10, which is above the legal limit in Texas.<sup>1</sup> The young woman does not think she is injured but begins to develop pain in her abdomen. She is taken by ambulance to the hospital where she suffers from a miscarriage.

Across town another woman leaves a friend’s house at the same time. Despite the fact that she is eight and a half months pregnant, she has been drinking alcohol and has a blood alcohol level of .10. On her way home she veers off the road and strikes a tree. She is also

---

1. The legal blood alcohol limit in Texas is 0.08. See TEX. PENAL CODE ANN. § 49.01 (Vernon 2003).

taken, by ambulance, to the hospital where she delivers a stillborn baby girl.

In both situations the pregnancies were ended by automobile accidents. In both situations the drivers that caused the accidents were legally intoxicated.<sup>2</sup> After the passage of the Prenatal Protection Act, one of the drivers would face criminal charges for the “death” of the fetus.<sup>3</sup> One might assume that the driver responsible for the “death” of the eight and a half month old fetus would be the one to be criminally charged; however, that assumption would be incorrect. The intoxicated male, in the first situation, may be charged with intoxication manslaughter, which is a second-degree felony,<sup>4</sup> due to the miscarriage of the four-week old fetus. On the other hand, the intoxicated pregnant woman in the second situation, may only be charged with driving while intoxicated, a class-B misdemeanor.<sup>5</sup>

The Texas legislature sought to protect a woman’s right to carry her pregnancy to term and to protect the potential life of an unborn fetus by its passage of the Prenatal Protection Act.<sup>6</sup> The Prenatal Protection Act expands the definition of an “individual” to include “an unborn child at every stage of gestation from fertilization until birth.”<sup>7</sup> As a result of this expansion, the law now provides for civil liability and criminal penalties upon the death of an unborn fetus.<sup>8</sup>

In the criminal context, by classifying a fetus as an “individual,” a third-party may be prosecuted for acts that assault a fetus or lead to the failure of a fetus to be born alive.<sup>9</sup> At the same time, any conduct of the mother is specifically exempted from criminal penalty.<sup>10</sup> Also exempted from criminal penalty are all lawful medical procedures in which the death of the fetus is the intended result of the procedure, and the procedure is performed by a doctor or other licensed health care professional with the consent of the mother.<sup>11</sup>

While supporters argue that the law seeks to protect the rights of parents who wish to carry their pregnancies to full term,<sup>12</sup> the lan-

---

2. *Id.*

3. *See* TEX. PENAL CODE ANN. § 49.08 (Vernon 2003).

4. *Id.*

5. Intoxication manslaughter does not apply to conduct committed by the mother. *See* TEX. PENAL CODE ANN. § 49.12 (Vernon Supp. 2004–2005); TEX. PENAL CODE ANN. § 49.04 (Vernon 2003).

6. HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 319, 78th Leg., R.S. (2003) (available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>).

7. *See* TEX. PENAL CODE ANN. § 1.07(26) (Vernon Supp. 2004–2005).

8. *See id. cf.* TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon Supp. 2004–2005).

9. *See* TEX. PENAL CODE ANN. §§ 19.01–19.05, 22.01–22.011, 22.02, 22.05, 49.07, 49.08 (Vernon 2003 & Supp 2004–2005).

10. TEX. PENAL CODE ANN. § 19.06 (Vernon Supp. 2004–2005); *see also* TEX. FAM. CODE ANN. § 160.102 (Vernon 2002).

11. TEX. PENAL CODE ANN. §§ 19.06, 22.12, 49.12 (Vernon Supp. 2004–2005).

12. *See* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 319, 78th Leg., R.S. (2003) (available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>).

guage of the statute creates direct conflicts between the mother and the fetus.<sup>13</sup> When a prosecutor seeks to enforce the rights of the fetus, the woman's right to keep her pregnancy private is destroyed.<sup>14</sup> Moreover, the fetus receives protection from the violent acts of third parties, but the mother is not held accountable for her own conduct that causes the failure of the fetus to be born alive.<sup>15</sup>

A fetus should not be labeled an "individual" if it is only going to receive some of the protection from third parties to which an individual is entitled. Instead, this Comment urges the Texas Legislature to repeal the criminal penalties portion of the Prenatal Protection Act and replace it with a criminal statute that protects a woman's right to carry her pregnancy to term and provides enhancements for injuries to a pregnant woman or alternatively, a criminal statute that protects the potential life of the unborn fetus as an "individual" and does not provide exceptions for the mother's conduct when she commits an assaultive or intoxicated crime upon the fetus.

Even though the Texas Legislature may have thought it was acting with good intentions, the criminal penalties portion of the Prenatal Protection Act only creates further conflicts between the rights of a pregnant woman and those of her unborn child. Part II of this Comment describes the evolution of maternal and fetal rights by exploring their development in American Jurisprudence and by discussing certain conflicts of rights that have already occurred between a woman and her fetus. Part III describes the passage of the Prenatal Protection Act in the Texas Legislature, while Part IV introduces the conflicts of rights created by its passage. Finally, Part V recommends that the Texas Legislature repeal the criminal penalties portion of the Prenatal Protection Act and replace it with a criminal statute that provides for an enhancement for injuries to a pregnant woman or at least with a statute that eliminates the exceptions for a mother's conduct when her actions would constitute an assaultive or intoxicated offense if committed by a third party.

## II. EVOLUTION OF MATERNAL AND FETAL RIGHTS

In order to completely discuss the evolution and development of maternal and fetal rights in Texas, there are two aspects of this evolution which must be considered. First, one must consider the develop-

---

13. Compare TEX. PENAL CODE ANN. §§ 19.01–19.05, 22.01–22.011, 22.02, 22.05, 49.07, 49.08 (Vernon 2003 & Supp. 2004–2005) (providing criminal penalties for acts committed against an unborn fetus), with TEX. PENAL CODE ANN. §§ 19.06, 22.12, 49.12 (Vernon Supp. 2004–2005) (allowing exceptions for acts committed against an unborn fetus when the act is committed by the mother).

14. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (explaining that the right of personal privacy encompasses a woman's decision whether or not to terminate her pregnancy); see also *Hodgson v. Minnesota*, 497 U.S. 417, 434 (1990) (noting that a woman's decision to conceive or to bear a child is a component of her liberty).

15. See TEX. PENAL CODE ANN. §§ 19.06, 22.12, 49.12 (Vernon Supp. 2004–2005).

ment of these rights in the federal and state courts. This aspect involves a discussion of a woman's reproductive rights, the idea of fetal "personhood" involved in the abortion context, and a review of the interpretations and determinations that the Texas courts have made concerning a fetus, in terms of civil liability and criminal penalties for prenatal injuries. Second, one must consider some of the direct conflicts between a woman and a fetus that have taken place in the past and may still occur in the present. This aspect involves analysis of both the practices employed during slavery, which placed the rights of a woman in direct conflict with her unborn child and the governmental actions taken to prosecute a woman rather than rehabilitate her in cases of maternal drug addiction.

### A. What is a "Person?"

While every person has his or her own concepts about the meaning of life and the meaning of existence, legislatures and courts have made more precise determinations of a "person" in certain situations.<sup>16</sup> The Supreme Court has defined personhood very narrowly in order to determine who is entitled to protection under the United States Constitution.<sup>17</sup> On the other hand, some state legislatures and state courts have given more precise and narrowly tailored definitions of a "person" in order to afford certain rights and protections under state law, such as inheritance rights and representation by attorneys *ad litem*, but they are generally contingent upon live birth.<sup>18</sup>

#### 1. Defining Abortion Rights in the Supreme Court

The Supreme Court's decision in *Roe v. Wade*<sup>19</sup> answered the controversial question of whether a fetus was a constitutional person.<sup>20</sup> Since that decision, the question of personhood and the issue of abor-

---

16. See, e.g., CAL. CIV. CODE § 43.1 (West Supp. 2004) (deeming an unborn child as an existing person so far as is necessary for the child's interests in the event of its subsequent birth).

17. See *Roe*, 410 U.S. at 158 (stating "that the word 'person,' as used in the Fourteenth Amendment, does not include the unborn").

18. See, e.g., TEX. PROB. CODE ANN. § 34A (Vernon 2003) (providing for appointment of an attorney *ad litem* to represent an unborn child in a probate proceeding); TEX. PROB. CODE ANN. § 67 (Vernon Supp. 2004–2005) (providing for inheritance benefits for pretermitted children); ALASKA STAT. § 13.16.665 (Michie 2002) (allowing agreements involving trusts, inalienable interests, or interests of third persons to include the unborn); CONN. GEN. STAT. ANN. § 45a-132 (West 2004) (providing for the appointment of a guardian *ad litem* for minors and incompetent, undetermined and unborn persons).

19. 410 U.S. 113 (1973).

20. *Id.* at 158 (stating "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"); see also Ronald Dworkin, *The Concept of Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U. CHI. L. REV. 381, 397 (1992) (discussing opposing views in the abortion debate).

tion have become highly politicized,<sup>21</sup> as most Americans consider abortion an issue of whether a fetus is a person that has a right to life.<sup>22</sup>

In *Roe*, the Court held that a Texas statute making it a crime to procure an abortion was unconstitutional and that the abortion was a fundamental right guaranteed by the Due Process Clause.<sup>23</sup> In reaching this decision, the Court discussed the use of the word “person” in the Constitution and noted that in no instance of its usage was there any assurance that it was to apply prenatally.<sup>24</sup> Therefore, the Court concluded that a fetus was not included under the label of “person” in the context of the Fourteenth Amendment.<sup>25</sup>

While Texas argued that life begins at conception, and, therefore, the State has a compelling interest in protecting that life from both before and after conception, the Court responded:

We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate as to the answer.<sup>26</sup>

The Court noted that in areas other than abortion, theories that life begins before live birth or theories that provide for legal rights to the unborn exist only in narrowly tailored situations unless the rights are contingent upon live birth.<sup>27</sup> In view of those theories, the Court determined that “by adopting one theory of life, Texas may [not] override the rights of the pregnant woman that are at stake.”<sup>28</sup> The Court stressed that the State has separate and distinct interests in “preserving and protecting the health of the pregnant woman” and “in protecting the potentiality of human life.”<sup>29</sup> Therefore, the Court held that the State may not regulate abortion in the first trimester.<sup>30</sup> During the second trimester, the State may only regulate to the extent that the

21. “Some 84% of state Democratic platforms support abortion . . . , while 88% of state Republican platforms oppose it. . . .” *Abortion in America: The War that Never Ends*, THE ECONOMIST, Jan. 18th–24th, 2003, at 24, 25.

22. See Dworkin, *supra* note 20, at 397 (discussing opposing views in the abortion debate).

23. *Roe*, 410 U.S. at 164.

24. *Id.* at 157 (discussing the three references to “person” in the Constitution).

25. *Id.* at 158 (noting that based on the lack of a precise definition in the Constitution and prevailing legal abortion practices in the 19th century, “‘person,’ as used in the Fourteenth Amendment, does not include the unborn”).

26. *Id.* at 159.

27. *Id.* at 161–62 (noting that some states permit parents of a stillborn child to maintain an action for wrongful death, some recognize unborn children for inheritance purposes, and some allow unborn children to be represented by guardians *ad litem*).

28. *Id.* at 162.

29. *Id.*

30. *Id.* at 164.

regulation reasonably preserves and protects the health of the mother.<sup>31</sup> At the point in which the third trimester begins, when the State's interest is "compelling" and the fetus has the capability of living outside the womb, the State may prohibit abortion except when it is necessary to save the life or health of the mother.<sup>32</sup>

The Court readdressed its decision in *Roe* in 1992 when it decided *Planned Parenthood v. Casey*.<sup>33</sup> While deciding to eliminate the trimester approach, the Court applied *stare decisis*<sup>34</sup> and reaffirmed *Roe's* essential holding.<sup>35</sup> Rather than continuing the trimester approach, the Court concluded that the line should be drawn at viability because "it is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman."<sup>36</sup>

While recognizing that the intimate and personal choices involved in the abortion decision are central to the liberty protected by the Fourteenth Amendment, the Court again addressed the issue of personhood stating, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."<sup>37</sup>

*Roe's* central holding has remained intact for over thirty years despite the attempts of anti-abortion legislators to whittle away at abortion rights.<sup>38</sup> While the Supreme Court has avoided determining precisely when life begins, it has clearly decided that in constitutional terms, life begins after birth.<sup>39</sup>

## 2. Defining the "Individual" in Texas

In terms of civil liability and criminal penalties, the State has fairly broad discretion in defining an "individual" as long as its definition

31. *Id.*

32. *Id.* at 164-65.

33. 505 U.S. 833 (1992).

34. *Stare decisis* is the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation. BLACK'S LAW DICTIONARY 1414 (7th ed. 1999).

35. *Casey*, 505 U.S. at 846.

36. *Id.* at 870.

37. *Id.* at 851.

38. See *Planned Parenthood v. Danforth*, 428 U.S. 52, 64 (1976) ("[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period."); see also *Stenberg v. Carhart*, 530 U.S. 914, 938 (2000) (striking down Nebraska's partial-birth abortion statute because of ambiguity and failure to provide a health exception for the life of the mother).

39. See *Casey*, 505 U.S. at 913 (Stevens, J., concurring).

does not violate the United States Constitution.<sup>40</sup> A state legislature may use the term “individual” or “person” for certain statutory purposes, and, based on the intent of the legislature, the state courts may then interpret state statutes.<sup>41</sup>

The Texas Supreme Court, through its reading of statutes allowing for civil recovery, has only recognized a cause of action for prenatal injuries to an unborn child if the child is subsequently born alive.<sup>42</sup> The Court, in reading the legislative history of the wrongful death statute, has held that “the legislature did not intend the words ‘individual’ or ‘person’ to be construed to include an unborn fetus.”<sup>43</sup>

Even though a fetus may be considered to exist separately from its mother in some situations, the rights which flow from the fetus’s separate existence have remained contingent on live birth.<sup>44</sup> The Texas Supreme Court specifically stated, “In view of the common-law rule that the rights of a fetus were contingent upon live birth, we feel that had there been the legislative intention to create a wrongful death action for an unborn fetus, the legislature would have specifically so stated.”<sup>45</sup>

Until the Prenatal Protection Act became effective on September 1, 2003, no criminal penalties existed for the death of a fetus.<sup>46</sup> An “individual” was defined as “a human being who has been born and is alive.”<sup>47</sup> However, the Texas courts of appeals have previously addressed questions concerning the legal status of a fetus in the criminal law context.<sup>48</sup> For example, the courts of appeals have answered

40. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 506 (1989) (allowing state preamble be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and the Supreme Court’s precedents).

41. See, e.g., CAL. CIV. CODE § 43.1 (West Supp. 2004); IDAHO CODE § 32-102 (Michie 1996); N.D. CENT. CODE § 14-10-15 (2004); S.D. CODIFIED LAWS § 26-1-2 (Michie 1999).

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

43. *Witty v. Am. Gen. Capital Distribs., Inc.*, 727 S.W.2d 503, 504 (Tex. 1987).

44. See TEX. FAM. CODE ANN. § 161.001 (Vernon 2002) (providing for termination of the parent-child relationship when the child is born addicted to alcohol or a controlled substance); TEX. PROB. CODE ANN. § 34A (Vernon 2003) (providing for the appointment of an attorney ad litem to represent an unborn in a probate proceeding).

45. *Witty*, 727 S.W.2d at 505.

46. Compare Act of June 19, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3589, with TEX. PENAL CODE ANN. § 1.07 (Vernon 2003).

47. Act of June 19, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3589 (current version at TEX. PENAL CODE ANN. § 1.07 (Vernon Supp. 2004–2005)).

48. See, e.g., *Cuellar v. State*, 957 S.W.2d 134, 140 (Tex. App.—Corpus Christi 1997, pet. ref’d) (holding that Defendant could be prosecuted for intoxication manslaughter when a fetus was injured *in utero* and subsequently died after birth); *Collins v. State*, 890 S.W.2d 893, 897–98 (Tex. App.—El Paso 1994, no pet.) (overturning a conviction for injury to a child finding that the defendant did not have adequate notice that voluntarily smoking crack cocaine while pregnant could subject her to prosecution after her child was born showing signs of cocaine withdrawal); *Jackson v. State*,



whether a defendant may assert as a personal defense, the defense of the fetus.<sup>49</sup> They have also addressed possession of narcotics charges brought against a mother when residual drugs were found in the body of her infant.<sup>50</sup> Further, the courts of appeals have decided whether a mother may be charged with injury to a child based on her actions while pregnant<sup>51</sup> and whether a defendant may be prosecuted for an offense when his conduct takes place while the fetus is *in utero* and ultimately results in the death of a subsequently born infant.<sup>52</sup>

In *Erlandson v. State*,<sup>53</sup> the 14th Court of Appeals in Houston addressed the attempts of four male defendants to assert the defense of a fetus as a personal defense in regard to actions taken against an abortion clinic.<sup>54</sup> The defendants entered a women's clinic in an attempt to stop abortion procedures.<sup>55</sup> At trial, the defendants argued defenses of necessity, defense of third persons, and protection of life or health, in reference to the fetuses to be aborted but were convicted of criminal trespass.<sup>56</sup> The court of appeals refused their defenses because the clinic was a facility licensed to perform abortions and "personal beliefs will not constitutionally suffice to outweigh the present status of the law."<sup>57</sup> Similarly, in *Reed v. State*,<sup>58</sup> three male defendants attempted to obstruct a passageway leading to an unlicensed abortion clinic and also argued defenses of necessity and defense of a

---

833 S.W.2d 220, 226 (Tex. App.—Houston [14th Dist.] 1992, pet. ref'd) (determining that the presence of residual drugs in the body of a stillborn fetus does not satisfy the element of possession in the possession of a controlled substance statutes); *Reed v. State*, 794 S.W.2d 806, 810 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd) (refusing to allow Defendants' argument of defense of third persons when Defendants obstructed a passageway to an unlicensed abortion clinic); *Erlandson v. State*, 763 S.W.2d 845, 852 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (refusing to allow Defendants' argument of defense of third persons when Defendants entered a women's clinic to stop abortion procedures).

49. See *Erlandson*, 763 S.W.2d at 852 (refusing to allow Defendants' argument of defense of third persons when Defendants entered a woman's clinic to stop abortion procedures); see also *Reed*, 794 S.W.2d at 810 (refusing to allow Defendants' argument of defense of third persons when they obstructed a passageway to an unlicensed abortion clinic).

50. See *Jackson*, 833 S.W.2d at 226 (determining that the presence of residual drugs in the body of a stillborn fetus does not satisfy the element of possession, in the possession of a controlled substance statutes).

51. See *Collins*, 890 S.W.2d at 895 (overturning a conviction for injury to a child finding that the defendant did not have adequate notice that voluntarily smoking crack cocaine while pregnant could subject her to prosecution after her child was born showing signs of cocaine withdrawal).

52. See *Cuellar*, 957 S.W.2d at 136–41 (holding that Defendant could be prosecuted for intoxication manslaughter when a fetus was injured *in utero* and subsequently died after birth).

53. 763 S.W.2d 845 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd).

54. *Id.* at 852.

55. *Id.* at 848–49.

56. *Id.*

57. *Id.* at 852.

58. 794 S.W.2d 806 (Tex. App.—Houston [14th Dist.] 1990, pet. ref'd).

third person.<sup>59</sup> The court of appeals explained that an unborn child is not a “person” for purposes of the defense of defending third persons.<sup>60</sup> In regard to the defense of necessity, the court further noted that “what the actor seeks to prevent must first be a legal harm,” and the fact that the clinic was unlicensed does not affect the applicability of either defending third persons or necessity defenses.<sup>61</sup>

The 14th Court of Appeals has also addressed questions of drug possession charges brought against a woman based on the presence of drugs in the body of a stillborn infant.<sup>62</sup> In *Jackson v. State*,<sup>63</sup> the court determined that “a rational trier of fact could not find either element of possession of a controlled substance beyond a reasonable doubt” when Traci Jackson was charged with possession of cocaine due to the presence of residual drugs in the body of her stillborn fetus.<sup>64</sup> An autopsy of Jackson’s stillborn child found the presence of .04 milligrams per deciliter of cocaine in the liver and revealed that the cause of death was probably from ingestion of cocaine.<sup>65</sup> Although Jackson was convicted by the trial court of possession of cocaine, the court of appeals reversed because the results of a drug test of bodily fluids fails to satisfy the possession element within the meaning of the controlled substance statutes.<sup>66</sup> The court noted that just as no Texas court has held that a person could be held in possession due to the presence of residual drugs in his body, neither has any Texas court held that a mother could be held in possession due to the presence of residual drugs in her infant.<sup>67</sup>

The El Paso Court of Appeals has determined whether a woman can be prosecuted under Texas’s injury to a child statute for conduct committed while pregnant that causes injury to her subsequently-born child in *Collins v. State*.<sup>68</sup> Debra Collins was convicted of injury to a child by the trial court after her child was born addicted to cocaine.<sup>69</sup> The court of appeals reversed her conviction noting that the Penal Code did not proscribe any conduct with respect to a fetus.<sup>70</sup> Because the legislature specifically limited the application of Texas’s penal laws to conduct committed against a “human being who has been born and

---

59. *See id.* at 807–10.

60. *Id.* at 810.

61. *Id.*

62. *See Jackson v. State*, 833 S.W.2d 220, 226 (Tex. App.—Houston [14th Dist.] 1992, pet. ref’d).

63. *Id.*

64. *Id.*

65. *Id.* at 222.

66. *Id.* at 223 (“[T]he mere presence of a controlled substance in a person’s body does not constitute possession within the meaning of criminal controlled substance statutes.”).

67. *Id.*

68. 890 S.W.2d 893 (Tex. App.—El Paso 1994, no pet.).

69. *Id.* at 896.

70. *Id.* at 897–98.

is alive” and Collins’s drug use was committed against her fetus before birth, her conduct did not constitute the offense of injury to a child.<sup>71</sup>

Finally, the Corpus Christi Court of Appeals addressed whether the Texas Penal Code authorizes conviction when the victim does not meet the status of an “individual” but subsequently attains the status of an “individual” after the alleged misconduct.<sup>72</sup> In *Cuellar v. State*,<sup>73</sup> the court found that Frank Cuellar was intoxicated when he drove his car into the car of Jeannie Coronado, who was seven and one-half months pregnant.<sup>74</sup> After observing fetal distress, the doctors performed an emergency caesarian section and a live baby girl named Krystal Zuniga was born.<sup>75</sup> However, Krystal’s condition soon deteriorated and she died approximately forty-three hours later as a result of an injury to the brain suffered during the automobile collision.<sup>76</sup> The court of appeals affirmed Cuellar’s involuntary manslaughter conviction because when the victim is born alive and lives for a period of time before dying from prenatal injuries, the widely used “born alive”<sup>77</sup> doctrine does allow a criminal conviction.<sup>78</sup>

Before September 1, 2003, the Texas Supreme Court and the Texas courts of appeals have consistently denied civil recovery as well as the imposition of criminal penalties for prenatal injuries if the child was not subsequently born alive.<sup>79</sup> In civil cases, the Texas Supreme Court reasoned that if the Texas Legislature intended to allow recovery, they

---

71. *Id.*

72. *See* *Cuellar v. State*, 957 S.W.2d 134, 137 (Tex. App.—Corpus Christi 1997, pet. ref’d).

73. *Id.*

74. *Id.* at 136.

75. *Id.*

76. *Id.*

77. The common law born alive doctrine provides that:

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

*Id.* at 137–38 (citing COKE, *Institutes* 58 (1648)).

78. *Id.* at 138.

79. *See, e.g.*, *Witty v. Am. Gen. Capital Distribs. Inc.*, 727 S.W.2d 503, 504 (Tex. 1987) (holding that the legislature did not intend the words “individual” or “person” to be construed to include an unborn fetus in the wrongful death statute); *Yandell v. Delgado*, 471 S.W.2d 569, 570 (Tex. 1971) (per curiam) (holding that a cause of action does exist for prenatal injuries sustained at any prenatal stage provided that the child is born alive and survives); *Cuellar*, 957 S.W.2d at 140 (holding that the criminal law can afford protection to children who are born and alive for a period of time before dying as a result of prenatal injuries); *Collins v. State*, 890 S.W.2d 893, 897–98 (Tex. App.—El Paso 1994, no pet.) (holding that by the definitions of “child,” “person,” and “individual,” the Texas legislature has specifically limited the application of our penal laws to conduct committed against a human being who has been born and is alive).

would have specifically stated so in the statute.<sup>80</sup> In regard to criminal penalties, the courts of appeals relied on the Texas Legislature's specific exclusion of fetuses as "individuals" by the previous definition of "individual" as "a human being who has been born and is alive" in the Texas Penal Code.<sup>81</sup>

### B. *Existing Conflicts Between Mother and Fetus*

When one attempts to protect either the rights of a mother or the interests of a fetus, more often than not, the rights of one are protected at the expense of the other.<sup>82</sup> This occurs due to the direct connection that exists between a mother and the fetus inside of her. Attempts to assert rights for either mother or fetus results in the control of one by the other. For example, a mother's attempts to assert her rights may directly conflict with or harm the fetus but the mother's rights nonetheless control the fetus.<sup>83</sup> On the other hand, if another party can assert interests on behalf of the fetus, the mother loses control over her bodily autonomy.<sup>84</sup>

---

80. See, e.g., *Witty*, 727 S.W.2d at 504 (finding nothing in the legislative history to demonstrate an intent that an unborn fetus be embraced within the scope of the statute).

81. Act of June 19, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3589 (current version at TEX. PENAL CODE ANN. § 1.07 (Vernon Supp. 2004–2005)).

82. See Wendy Chavkin, *Women and Fetus: The Social Construction of Conflict*, in THE CRIMINALIZATION OF A WOMAN'S BODY 193, 194–95 (Clarice Feinman ed., 1992) (detailing the forces that have led to recent maternal-fetal antagonism); VALERIE GREEN, *DOPED UP, KNOCKED UP, AND... LOCKED UP?: THE CRIMINAL PROSECUTION OF WOMEN WHO USE DRUGS DURING PREGNANCY* 22–23 (Stuart Bruchey ed., 1993) (explaining how "[v]iewing women and fetuses as separate entities with distinct interests . . . forces fetuses to compete against their mothers for protection under the law"); SUE MAHAN, *CRACK COCAINE, CRIME, AND WOMEN: LEGAL, SOCIAL, AND TREATMENT ISSUES* 38–39 (James A. Inciardi ed., 1996) (analyzing judicial alternatives to criminally prosecuting mothers who give birth to drug-dependent babies).

83. See ROBERT H. BLANK, *FETAL PROTECTION IN THE WORKPLACE: WOMEN'S RIGHTS, BUSINESS INTERESTS, AND THE UNBORN* 13 (1993) (recognizing that the primary responsibility during pregnancy remains the woman's); J. Ralph Lindgren, *Legal Responsibility for Prenatal Substance Abuse*, in PUNISHMENT: SOCIAL CONTROL AND COERCION 115, 115 (Christine T. Sistare ed., 1996) (describing some harmful conduct engaged in by pregnant women).

84. See GREEN, *supra* note 82, at 10 (noting that "any practice which places a fetus ahead of its mother threatens a woman's constitutionally protected rights to privacy and bodily integrity"); Lisa Maher, *Punishment and Welfare: Crack Cocaine and the Regulation of Mothering*, in THE CRIMINALIZATION OF A WOMAN'S BODY 157, 170–71 (Clarice Feinman ed., 1992) (discussing the view of fetal rights advocates that once a woman has decided not to abort, she has a duty to give birth to a healthy baby); Rosemarie Tong, *Maternal-Fetal Conflict: The Misguided Case for Punishing Cocaine-Using Pregnant and/or Postpartum Women*, in PUNISHMENT: SOCIAL CONTROL AND COERCION 151, 165 (Christine T. Sistare ed., 1996) (explaining that punishing cocaine-using women for use during pregnancy makes a pregnant woman a "mere fetal vessel" and deprives her of any right to self-determination).

## 1. Slavery and Maternal-Fetal Conflict

The first notable conflict of rights between mother and child may have taken place in slavery practices employed in the South.<sup>85</sup> Slaveholders sought to maximize profits by demanding maximum labor from pregnant slaves while also seeking to protect the long-term investment in the birth of a healthy slave child.<sup>86</sup> For example, when a slaveholder determined that a woman should be beaten, he sought to protect the fetus.<sup>87</sup> The slaveholder would dig a hole in the ground large enough for the woman's stomach.<sup>88</sup> He would then force her to lie face down with her stomach in the hole while she was beaten on her back.<sup>89</sup> This practice allowed the woman to be whipped while her unborn child was protected.<sup>90</sup>

Even after birth, the conflict between mother and child continued to exist.<sup>91</sup> Once the woman gave birth, especially if it was during harvest time, she was expected to return to work in the fields soon after delivery.<sup>92</sup> Furthermore, the birth of children kept mothers attached to the plantation.<sup>93</sup> Slaveholders threatened disobedient women with the sale of their children in order to make them behave.<sup>94</sup> Also, slaveholders held children as "hostages" in order to keep women from escaping, because many women were unwilling to run away without their children.<sup>95</sup>

Slavery practices created a conflict between a "slave woman" and her child immediately upon conception.<sup>96</sup> Slaveholders benefited economically from this conflict as the very act of a slave woman giving birth profited the system that kept her in bondage.<sup>97</sup> Even though slavery was abolished by the Thirteenth Amendment<sup>98</sup> and this conflict between the slave woman and her unborn child was removed, other conflicts between a woman and her unborn child would continue to plague American women.<sup>99</sup>

---

85. DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 39 (1997).

86. *Id.*

87. *Id.* at 40.

88. *Id.* at 39-40.

89. *Id.*

90. *Id.* at 40.

91. *Id.* at 43.

92. *Id.* at 42.

93. *Id.* at 43.

94. *Id.*

95. *Id.*

96. *Id.* at 39.

97. *Id.* at 41.

98. U.S. CONST. amend. XIII.

99. See Joan C. Callahan & James W. Knight, *Prenatal Harm as Child Abuse?*, in *THE CRIMINALIZATION OF A WOMAN'S BODY* 127, 141 (Clarice Feinman ed., 1992) ("requiring women to submit to [medical] interventions for the good of their fetuses"); Chavkin, *supra* note 82, at 195 (excluding fertile women from worksites deemed "fetotoxic"); GREEN, *supra* note 82, at 20 (noting that abortion sets the inter-

## 2. Maternal-Fetal Conflict in Drug Addiction

Conflicts between woman and fetus continue to exist as a number of states have begun to prosecute women for criminal offenses after giving birth to babies who test positive for drugs.<sup>100</sup> This trend toward prosecution of drug-addicted mothers seems to fall under a rationale of the state's interest in protecting the fetus from harm.<sup>101</sup>

While no one denies the harmful effects illegal drugs may have on a fetus,<sup>102</sup> there are many "legal" behaviors that may cause damage to developing fetuses.<sup>103</sup> A survey of 4 million pregnant women by the National Institute on Drug Abuse ("NIDA") in 1992-93 found that during their pregnancies 757,000 women drank alcoholic products; 820,000 women smoked cigarettes; and 221,000 women used illegal drugs.<sup>104</sup> Fetal alcohol syndrome can cause mental and growth retardation, "portwine stain" birthmarks, and facial deformities to a fetus.<sup>105</sup> Smoking during pregnancy, on the other hand, besides causing prenatal morbidity and mortality, also reduces infant birth-weights, and increases the incidents of respiratory illnesses and Sudden Infant Death Syndrome in infants.<sup>106</sup> Even the excessive use of caffeine can increase the rates of miscarriage, premature delivery, and stillbirth.<sup>107</sup> Furthermore, poor nutrition and the lack of prenatal care can cause

---

ests of the fetus and the interests of the woman in direct opposition); MAHAN, *supra* note 82, at 41 (listing acts or conditions on the part of a pregnant woman that could pose some threat to her fetus); Tong, *supra* note 84, at 154-55 (discussing intentional lifestyle behaviors engaged in by pregnant women that results in serious, largely irreparable damage to their infants).

100. "Between 1985 and 1995, at least two hundred women in thirty states were charged with maternal drug use." ROBERTS, *supra* note 85, at 153.

101. *Id.*; see also LAURA E. GOMEZ, MISCONCEIVING MOTHERS: LEGISLATORS, PROSECUTORS, AND THE POLITICS OF PRENATAL DRUG EXPOSURE 100 (D. Kelly Weisberg ed., 1997) (noting that prenatal drug exposure "presents a story with a visible, easy-to-blame perpetrator, a completely innocent victim, and the possibility of both redemption (for the drug-using mother) and retribution (on behalf of the law-abiding community)").

102. See Sue Page, *Preventable Causes of Congenital Abnormalities*, Women's Health Au, at <http://www.medicineau.net.au/clinical/womenshealth/PrevCongAbn.html> (last modified May 18, 1999) (on file with the Texas Wesleyan Law Review).

103. See Drew Humphries et al., *Mothers and Children, Drugs and Crack: Reactions to Maternal Drug Dependency*, in THE CRIMINALIZATION OF A WOMAN'S BODY 203, 210-11 (Clarice Feinman ed., 1992); Callahan & Knight, *supra* note 99, at 146-47 (listing causes of low birthweight); MAHAN, *supra* note 82, at 35 (noting the high risk of fetal alcohol syndrome occurring in newborn infants).

104. National Institute on Drug Abuse, *Pregnancy and Drug Use Trends*, (last modified June 25, 2003), at <http://www.nida.nih.gov/Infofax/pregnancytrends.html> (on file with the Texas Wesleyan Law Review).

105. See Page, *supra* note 102, at <http://www.medicineau.net.au/clinical/womenshealth/PrevCongAbn.html>.

106. *Id.*

107. *Id.*

just as much damage to the fetus because both are associated with low birth-weights.<sup>108</sup>

In order to protect the unborn child, the most common penalty for drug use while pregnant is the immediate removal of the baby at birth pending an investigation into parental fitness.<sup>109</sup> However, some courts have expressed concern for the constitutional rights of pregnant women and the state's possible encroachment upon those rights.<sup>110</sup> In *In re Sharon Fletcher*,<sup>111</sup> the court refused to reach the conclusion that drug use during pregnancy, resulting in a positive toxicology for cocaine, was indicative of repeated drug use after the birth of a child.<sup>112</sup> In rejecting the petitioner's claim for prenatal child neglect, the court stated, "I see no authority for the State to regulate women's bodies merely because they are pregnant. By becoming pregnant, women do not waive the constitutional protections afforded to other citizens."<sup>113</sup> The court further remarked that if the petitioner's argument was logically extended then "the State would be able to supersede a mother's custody right to her child if she smoked cigarettes during her pregnancy, or ate junk food, or did too much physical labor or did not exercise enough."<sup>114</sup>

The Supreme Court has addressed the issue of prosecution for maternal drug use in *Ferguson v. City of Charleston*.<sup>115</sup> Ten women received obstetrical care at Medical University of South Carolina ("MUSC") and were arrested after testing positive for cocaine.<sup>116</sup> Staff members at MUSC became concerned with an apparent increase in the use of cocaine by patients who were receiving prenatal treatment.<sup>117</sup> As a result of the increased use of cocaine, MUSC developed a policy that provided for the identification and testing of pregnant patients suspected of drug use.<sup>118</sup> Further, through collaboration with law enforcement officials, the MUSC policy provided procedures and criteria for the arrest of pregnant patients upon positive drug test results.<sup>119</sup> The Court looked at the "special needs" that supported the program and determined that the testing violated the Fourth Amendment and that, although MUSC claimed the ultimate goal of the pro-

---

108. See Callahan & Knight, *supra* note 99, at 146; see also ROBERTS, *supra* note 87, at 158.

109. ROBERTS, *supra* note 85, at 161; see, e.g., N.Y. FAM. CT. ACT LAW § 1027 (Consol. 1999 & Supp. 2004); TEX. FAM. CODE ANN. § 161.001 (Vernon 2002); cf. CAL. WELF. & INST. CODE § 300(a) (West Supp. 2004).

110. See, e.g., *In re Sharon Fletcher*, 533 N.Y.S.2d 241, 243 (N.Y. Fam. Ct. 1988).

111. See *id.*

112. *Id.* at 244.

113. *Id.* at 243.

114. *Id.*

115. 532 U.S. 67 (2001).

116. *Id.* at 73.

117. *Id.* at 70.

118. *Id.*

119. *Id.* at 72-73.

gram was to get women into substance abuse treatment and off of drugs,<sup>120</sup> “the immediate objective of the searches was to generate evidence *for law enforcement purposes* in order to reach that goal.”<sup>121</sup> Thus, the Court’s decision seems to recognize the need to protect the mother’s privacy interest from threat of criminal punishment.

While no one would deny the terrible effects that drug abuse can have on a fetus, criminalizing the mother’s conduct creates a conflict that may lead to more harm than good. Pregnancy often motivates women to make lifestyle changes and seek treatment for drug addiction.<sup>122</sup> However, when threatened with prosecution, women may avoid prenatal care and drug treatment altogether.<sup>123</sup>

Maternal-fetal conflicts first existed in slavery practices and continue to exist in drug addiction cases today. While these conflicts may arise when one attempts to protect the fetus, the attempt elevates the safety of the fetus above that of the mother and the resulting conflict between the two ultimately damages the humanity of the mother.

### III. PASSAGE OF THE PRENATAL PROTECTION ACT

The Prenatal Protection Act was created and passed with ease by the 78th Legislature in its regular session.<sup>124</sup> It went into effect on September 1, 2003.<sup>125</sup> The bill, which was described as “a modest extension of Texas law,”<sup>126</sup> provides civil and criminal penalties to third parties that injure a fetus.<sup>127</sup> Senator Kenneth Armbrister, who introduced the bill as Senate Bill 319 in the Senate State Affairs Committee, explained that the bill was designed to protect an unborn child from third-party harm against the wishes of the mother, namely in cases of violent crime, intoxication manslaughter, and physician negligence.<sup>128</sup>

---

120. MUSC dropped its program in October 1994 under threat of losing federal funding, yet it continued to praise its program’s success at getting women off drugs. However, it has failed to consider the possibility that the decrease in positive test results may have been caused by women seeking treatment elsewhere out of fear of arrest. See ROBERTS, *supra* note 85, at 168–69.

121. *Ferguson*, 532 U.S. at 83.

122. See *id.* at 84 n.23; ROBERTS, *supra* note 85, at 193.

123. See *Ferguson*, 532 U.S. at 84 n.23; BLANK, *supra* note 83, at 14; ROBERTS, *supra* note 85, at 193.

124. Senate Bill 319 passed the Senate on May 22, 2003, by a *viva voce* vote. S.J. OF TEX., 78th Leg., R.S. 2095 (2003). Senate Bill 319 passed the House by the vote of 112 yeas, 15 nays, and 2 present, not voting. H.J. OF TEX., 78th Leg., R.S. 4593 (2003).

125. Prenatal Protection Act, 78th Leg., R.S., ch. 822, § 1.01, 2003 Tex. Gen. Laws 2607.

126. Associated Press, *GP Legislator Says His Bill Aims To Protect Fetuses* (Dec. 11, 2002), available at <http://www.dallasnews.com/s/dallas/tsw/stories/121102dntexxgr.6e592.html> (on file with the Texas Wesleyan Law Review).

127. See Prenatal Protection Act, 78th Leg., R.S., ch. 822, § 1.01, 2003 Tex. Gen. Laws 2607.

128. See *The Prenatal Protection Act: Hearings on S.B. 319 Before the Senate State Affairs Comm.*, 78th Leg., R.S. (Feb. 24, 2003) (statement of Senator Armbrister),



In the civil context, the Prenatal Protection Act amends the wrongful death statutes to modify the definition of an "individual" to include "an unborn child at every stage of gestation from fertilization until birth."<sup>129</sup> This amendment allows parents of an unborn child that dies before being born alive to recover damages under Texas's wrongful death statutes for the negligent or intentional acts of a third party.

In the criminal statutes, an "individual" is now defined as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth" and "death" now includes "for an unborn child, the failure to be born alive."<sup>130</sup> While these changes apply to Texas Penal Code provisions regarding criminal homicide, assaultive offenses, intoxication manslaughter, and intoxication assault, they are not applicable to certain conduct against an unborn child if the conduct charged is:

- (1) conduct committed by the mother of the unborn child; (2) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent, if the death of the unborn child was the intended result of the procedure; (3) a lawful medical procedure performed by a physician or other licensed health care provider with the requisite consent as part of an assisted reproduction as defined by Section 160.102, Family Code; or (4) the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with the law.<sup>131</sup>

Also, in order to prove pregnancy, the Texas Code of Criminal Procedure was amended by Article 38.40 which provides that "in a prosecution for the death of or injury to an individual who is an unborn child, the prosecution shall provide medical or other evidence that the mother of the individual was pregnant at the time of the alleged offense."<sup>132</sup>

#### A. *Senate Bill 319*

Several people representing several different organizations voiced their support for the adoption of Senate Bill 319. Joseph Pojman, Executive Director of the Texas Alliance for Life, spoke in favor of protecting innocent human life in the womb.<sup>133</sup> MerryLynn Gerstenschlager, representing Texas Eagle Forum, listed the benefits

---

available at <http://www.senate.state.tx.us/75r/Senate/VidArchives/03.htm> (last visited on Oct. 11, 2004).

129. TEX. CIV. PRAC. & REM. CODE ANN. § 71.001 (Vernon Supp. 2004–2005).

130. TEX. PENAL CODE ANN. § 1.07(26) (Vernon Supp. 2004–2005).

131. TEX. PENAL CODE ANN. § 19.06 (Vernon Supp. 2004–2005); see also TEX. FAM. CODE ANN. § 160.102 (Vernon 2002).

132. TEX. CRIM. PROC. CODE ANN. art. 38.40 (Vernon Supp. 2004–2005).

133. *The Prenatal Protection Act: Hearings on S.B. 319 Before the Senate State Affairs Comm.*, supra note 128, at (Feb. 24, 2003) (statement of Joseph Pojman of Texas Alliance for Life).

of the bill as protecting the individual, strengthening the family, reinforcing parental rights and responsibilities, supporting traditional Judeo-Christian morals and principles, and providing equal protection to all Americans.<sup>134</sup> She also noted that twenty-seven states currently treat the killing of an unborn child against the mother's wishes as a form of homicide.<sup>135</sup> Bill Lewis, representing Mothers Against Drunk Drivers ("MADD"), testified that MADD supported the bill by recognizing that it provided an additional incentive not to drink and drive.<sup>136</sup> Several other supporters testified in support of the bill concerning the civil remedies portion.<sup>137</sup>

Opponents of the bill feared that it was "a tool of anti-choice organizations to later reverse *Roe v. Wade*."<sup>138</sup> While those that testified against the bill supported the right of a woman to carry her pregnancy to term and to seek redress, their primary concern was with labeling the fetus an "individual" and the creation of another class of persons.<sup>139</sup> Instead, they proposed a substitute bill, which was introduced by Senator Rodney Ellis;<sup>140</sup> rather than, redefining the "individual," the committee substitute provided for increased penalties against injury to a pregnant woman.<sup>141</sup> However, the Ellis substitute was not adopted and was therefore withdrawn.<sup>142</sup> Senate Bill 319 passed committee on May 9, 2003,<sup>143</sup> and ultimately passed in the Senate on May 22, 2003.<sup>144</sup>

### B. House Bill 246

The companion bill to Senate Bill 319 was introduced in the House State Affairs Committee by Representative Ray Allen as House Bill 246.<sup>145</sup> Testimony was taken on March 17, 2003 that yielded a result

---

134. *See id.* at (Feb. 24, 2003) (statement of MerryLynn Gerstenschlager of Texas Eagle Forum).

135. *See id.*; *see also* Americans United for Life, *States That Prohibit Crimes Against the Unborn Child*, at [http://www.americansunitedforlife.org/guides/fh/fh\\_statutes.htm](http://www.americansunitedforlife.org/guides/fh/fh_statutes.htm) (last visited Oct. 11, 2004) (on file with the Texas Wesleyan Law Review).

136. *The Prenatal Protection Act: Hearings on S.B. 319 Before the Senate State Affairs Comm.*, *supra* note 128, at (Feb. 24, 2003) (statement of Bill Lewis of MADD).

137. *See id.* at (Feb. 24, 2003) (statements of Dr. Mikeal Love, Mark Lanier, & Norma Jean Salinas).

138. *Id.* at (Feb. 24, 2003) (statement of Kae McLaughlin of Texas Abortion and Reproductive Rights Action League).

139. *See id.* at (Feb. 24, 2003) (statement of Kae McLaughlin of Texas Abortion and Reproductive Rights Action League); *see also id.* at (Feb. 24, 2003) (statement of Hannah Riddering of National Organization for Women).

140. *See id.* at (Feb. 24, 2003) (statement of Senator Ellis).

141. *See id.*

142. *See id.* at (May 8, 2003).

143. *See id.* at (May 9, 2003).

144. Senate Bill 319 passed the Senate by *viva voce* vote. S.J. OF TEX., 78th Leg., R.S. 2095 (2003).

145. Tex. H.B. 246, 78th Leg., R.S. (2003).

very similar to the testimony in the Senate State Affairs Committee.<sup>146</sup> Beverly Nichols, representing the Texas Family Physicians Resource Council, described House Bill 246 as a "Pro Human Rights Bill."<sup>147</sup> As a physician, she testified that human life begins at fertilization and she also noted, "It takes a lot of force to cause a child to die in the womb by trauma."<sup>148</sup> Other testimony in support of the bill compared pregnant animals to pregnant women and noted that a remedy already exists for harm inflicted upon pregnant animals.<sup>149</sup>

Opponents to House Bill 246 expressed their fears that by establishing personhood for the fetus, the legislature was simply laying the groundwork for an eventual reversal of *Roe v. Wade*.<sup>150</sup> They noted that in terms of criminal penalties, loss of pregnancy is already accounted for in the punishment phase of a trial.<sup>151</sup> Furthermore, opponents urged the legislators to, at least, require viability before enforcing criminal penalties instead of allowing punishment to begin at fertilization, as pregnancy has been defined at the point of the implantation of a fertilized egg into the uterus.<sup>152</sup> Also in opposition, Representative Farrar offered an amendment to House Bill 246 that would provide for a third degree felony when a person "intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse, who is a pregnant woman."<sup>153</sup> The amendment further provided for enhanced penalties, more stringent than those offered by House Bill 246,<sup>154</sup> when bodily injury to a pregnant woman resulted in a miscarriage or stillbirth.<sup>155</sup> Representative Farrar noted that without amendment, House Bill 246 adopts a "religious position, as the law for the rest of the state," and is essentially part of an organized nationwide effort to lay the foundation for overturning *Roe v. Wade*.<sup>156</sup> Despite the concerns of these opponents, Representative

---

146. Compare *The Prenatal Protection Act: Hearings on H.B. 246 Before the House State Affairs Comm.*, 78th Leg., R.S. (Mar. 17, 2003), available at <http://www.house.state.tx.us/committees/broadcasts.php?session=78&cmte=450> (last visited Oct. 12, 2004), with *The Prenatal Protection Act: Hearings on S.B. 319 Before the Senate State Affairs Comm.*, *supra* note 128, at (Feb. 24, 2003).

147. *The Prenatal Protection Act: Hearings on H.B. 246 Before the House State Affairs Comm.*, *supra* note 146, at (Mar. 17, 2003) (statement of Beverly Nichols of the Texas Family Physicians Resource Council).

148. *Id.*

149. *Id.* at (Mar. 17, 2003) (statement of Teresa Collette).

150. See *id.* at (Mar. 17, 2003) (statement of Peggy Romberg of the Women's Health and Family Planning Ass'n of Texas) (noting that the statute labels a fetus as a "person" which the Supreme Court has refused to do in deciding *Roe v. Wade*).

151. See *id.*

152. See *id.* at (Mar. 17, 2003) (statements of Mike Hull & Kae McLaughlin of the Texas Abortion and Reproductive Rights Action League).

153. H.J. OF TEX., 78th Leg., R.S. 4589 (2003).

154. Representative Farrar's amendment would make an assault against a pregnant woman a third degree felony, while in House Bill 246 the assault would remain a class A misdemeanor. See *id.* at 4592.

155. *Id.* at 4590.

156. *Id.* at 4591.

Farrar's amendment was not adopted, and House Bill 246 was reported favorably by the House State Affairs Committee on April 10, 2003.<sup>157</sup> Ultimately, the Prenatal Protection Act passed the House on May 28, 2003,<sup>158</sup> and was signed into law by Governor Rick Perry on June 20, 2003.<sup>159</sup>

#### IV. MATERNAL-FETAL CONFLICTS CREATED BY THE PRENATAL PROTECTION ACT

Despite good intentions, the Prenatal Protection Act creates new conflicts between a woman and a fetus.<sup>160</sup> By raising the status of a fetus equal to that of a "human being who has been born and is alive,"<sup>161</sup> the personal rights of women are diminished. At the same time, while a fetus is an "individual" in regard to the violent acts of third parties, the mother is exempted from any violent conduct that may cause death or injury to the fetus. Consequently, a fetus should not be labeled an "individual" in the context of criminal penalties if it will receive only some of the protection to which an "individual" is entitled.

##### A. *Diminishing a Woman's Rights*

The Prenatal Protection Act risks asserting the interests of the fetus against the pregnant woman because it deems the fetus an "individual."<sup>162</sup> While the fetus is not a body part, it exists inside of the woman and shares her body.<sup>163</sup> Therefore, whatever happens to the woman also happens to the fetus, although each may be affected in different ways.<sup>164</sup> To label the fetus an "individual," treats the pregnant woman as simply an incubator for potential life.<sup>165</sup> While the supporters of the law adamantly claimed its purpose is to protect a woman's right to carry her pregnancy to term,<sup>166</sup> the wording of the

---

157. HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, TEX. S.B. 319, 78th Leg., R.S. (2003) (available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>).

158. Senate Bill 319 passed the House by the following vote: Yeas 112, Nays 15, 2 present, not voting. H.J. OF TEX., 78th Leg., R.S. 4593 (2003).

159. See Prenatal Protection Act, 78th Leg., R.S., ch. 822, § 1.01, 2003 Tex. Gen. Laws 2609.

160. See discussion *supra* Part III.

161. Section 1.07 of the Texas Penal Code previously defined an "individual" as "a human being who has been born and is alive." See Act of June 19, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586, 3589 (current version at TEX. PENAL CODE ANN. § 1.07 (Vernon Supp. 2004-05)).

162. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1315-16 (1991).

163. See *id.* at 1315.

164. *Id.* at 1314.

165. See *id.* at 1316; Humphries et al., *supra* note 103, at 210; see also Chavkin, *supra* note 82, at 199.

166. HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, TEX. S.B. 319, 78th Leg., R.S. (2003) (available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>).

law focuses on the harm to the fetus as opposed to the harm that is inflicted upon the woman.<sup>167</sup>

Especially in cases resulting in the death of an unborn fetus, it cannot be denied that the primary pain from the loss of the unborn child belongs to the mother.<sup>168</sup> Most scientists agree that a fetus cannot feel pain until late in the pregnancy because the fetal brain is not sufficiently developed to feel pain until approximately the twenty-sixth week.<sup>169</sup> Therefore, the law seeks to vindicate the mother's pain and emotional suffering due to her loss. Furthermore, it is difficult to argue that death was against the interest of the fetus because it cannot be certain when a fetus actually had an interest.<sup>170</sup> Of course, if a fetus were later born certain events would have been against those interests in retrospect; however, if the fetus never exists outside the womb, did that interest ever actually develop?<sup>171</sup> The present language of the statute,<sup>172</sup> which supporters claim is simply for the right of parents who wish to have a full-term successful pregnancy and a happy birth,<sup>173</sup> fails to recognize the right as belonging to the woman rather than the fetus.

The Prenatal Protection Act also diminishes the woman's right to keep her pregnancy private. In order to prosecute for death or injury to a fetus, the prosecution is required to provide evidence that the woman was pregnant at the time of the offense.<sup>174</sup> Suppose the woman was not otherwise physically harmed by the offense and does not want her pregnancy to be publicly revealed. By labeling the fetus as an "individual," the prosecutor has a duty in the interest of justice to protect the rights of the fetus against the privacy rights of the woman and prosecute the third party for the offense.<sup>175</sup> Therefore, the prose-

167. See TEX. PENAL CODE ANN. § 1.07(26) (Vernon Supp. 2004–2005) (redefining an "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth").

168. See MacKinnon, *supra* note 162, at 1316 (explaining that the fetus "is" the pregnant woman in the sense that it is in her and of her and is hers more than anyone's"); see also BLANK, *supra* note 83, at 10 ("It is not the fetus that has rights; rather it is the child once born that must be protected from avertable harm during gestation.").

169. Dworkin, *supra* note 20, at 403.

170. *Id.*; Callahan & Knight, *supra* note 99, at 136–37 (discussing "potential persons" and "future persons").

171. See Callahan & Knight, *supra* note 99, at 136–37; Dworkin, *supra* note 20, at 403.

172. TEX. PENAL CODE ANN. § 1.07(26) (Vernon Supp. 2004–2005) (defining "individual" as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth").

173. See *The Prenatal Protection Act: Hearings on Tex. S.B. 319 Before the Senate Comm. on State Affairs*, *supra* note 128, at (Feb. 24, 2003).

174. TEX. CRIM. PROC. CODE ANN. art. 38.40 (Vernon Supp. 2004–2005).

175. The primary duty of all prosecuting attorneys is to see that justice is done. TEX. CRIM. PROC. CODE ANN. art. 2.01 (Vernon 1977 & Supp. 2004–2005).

cutor must ignore the woman's privacy interest and reveal her medical information in a court of law.

Furthermore, the Prenatal Protection Act stands to harm the relationship between pregnant women and their doctors. Some prosecutors are interpreting the law to allow them to prosecute pregnant women who use illegal substances for Delivery of a Controlled Substance to a Child.<sup>176</sup> These prosecutors require physicians to report illegal drug use during pregnancy to the local police or to the Department of Protective and Regulatory Services.<sup>177</sup> Besides harming the confidential relationship between physician and patient, this may also discourage women from seeking prenatal care.<sup>178</sup>

In some instances a woman's life and the life of a fetus may stand in direct conflict with one another. For example, if a woman is in a coma and unable to give her consent to medical procedures a doctor could be forced to weigh the interests of the woman against those of the fetus and ultimately forego medical treatment that could be beneficial to the woman, but might prove harmful to the fetus. While the likelihood of prosecution for such actions may be slim, a doctor should not be forced to take the risk. Would a guardian *ad litem* need to be appointed in order to protect the rights of the unborn? If so, the guardian *ad litem* must argue for the best interests of the child, meaning he could not agree to allow harm to be inflicted upon the fetus.

### B. *The Fetus as "Almost" an "Individual"*

By defining the fetus as an "individual" in terms of third-party harm while providing exceptions for the conduct of the mother, a fetus is not an "individual" in the true sense of the word. If the fetus were truly equal to a living human being, then intoxication manslaughter and assaultive offenses that the mother commits would not be excused because they are still direct criminal acts inflicted upon the fetus.

An exception for abortion must be included in the statute; however, because *Roe v. Wade* has already established that a woman has a fundamental right to an abortion and a fetus is not a person under the Fourteenth Amendment.<sup>179</sup> As a result of the Constitutional determination that a fetus is not considered a person, states cannot declare that fetuses have rights competitive with the constitutional rights of pregnant women.<sup>180</sup> In fact, in regard to the Texas anti-abortion law

---

176. Tanya Albert, *Texas Fetus Abuse Law Could Spell Legal Trouble for Doctors*, AMEDNEWS.COM, (Feb. 2, 2004), available at <http://www.ama-assn.org/amednews/2004/02/02/gvsb0202.htm>. A person commits a second degree felony if the person knowingly delivers a controlled substance to a child. TEX. HEALTH & SAFETY CODE ANN. § 481.122(a)(1) (Vernon 2003).

177. Albert, *supra* note 176, at <http://www.ama-assn.org/amednews/2004/02/02/gvsb0202.htm>.

178. *Id.*

179. See *Roe*, 410 U.S. at 158.

180. Dworkin, *supra* note 20, at 401.

at issue in *Roe* the Court stated: "In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake."<sup>181</sup> In other words, if there were no exception for abortion provided in the statute, the law could not be upheld without essentially overruling *Roe v. Wade*.

If the statute truly seeks to protect unborn children from violent crimes and drunk drivers,<sup>182</sup> there is no reason to include an exception for any other conduct committed by the mother that results in injury or death, besides abortion. If a fetus is protected from third party violence, why should the mother's violence be condoned?<sup>183</sup> The Prenatal Protection Act seeks to give the fetus standing equal to that of "a human being that is born and is alive" according to the provisions of the Texas Penal Code.<sup>184</sup> A mother would be charged with intoxication manslaughter if she had an automobile accident while intoxicated that resulted in the death of her infant child.<sup>185</sup> Because the fetus is supposed to be afforded the same rights as the infant, at least in the criminal context, the mother should not face penalty in one case but not the other. Justice is supposed to be blind. If the mother is allowed to inflict a criminal act upon her fetus without fear of punishment then justice does not truly exist for the harmed fetus.

If lawmakers choose to label the fetus an "individual," yet still allow exceptions for the conduct of the mother then they are essentially treating the fetus as a parasite that is merely invading the body of the woman. The woman's conduct can then be viewed as a right to defend herself against the appropriation and use of her body by a fetus.<sup>186</sup> By excusing this conduct, Texas is essentially recognizing a woman's right to protect herself from this fetus by any means necessary. If the Legislature truly intended for a fetus to be afforded the same rights as a newborn infant, then it is doubtful it would support the reasoning that a fetus is actually a parasite from which a woman may protect herself.

## V. PROPOSED SOLUTIONS

Twenty-seven states have statutes that treat the killing of an unborn child as a form of homicide.<sup>187</sup> Twelve states and the federal govern-

---

181. *Roe*, 410 U.S. at 162.

182. See HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, TEX. S.B. 319, 78th Leg., R.S. (2003) (available at <http://www.capitol.state.tx.us/hrofr/hrofr.htm>).

183. See Ashley Cook, *Judge Won't Lower Slaying Suspect's Bail*, THE LUFKIN DAILY NEWS, July 3, 2004 (reporting 18-year-old man was charged with two counts of murder for conspiring with his girlfriend to abort the couple's two unborn boys by stepping on her stomach while girlfriend could not be charged), available at <http://www.lufkindailynews.com/hp/content/auto/feed/news/2004/07/02/1088827095.18121.0817.0540.html> (last visited Oct. 3, 2004) (on file with the Texas Wesleyan Law Review).

184. See TEX. PENAL CODE ANN. § 1.07(26) (Vernon Supp. 2004-2005).

185. See TEX. PENAL CODE ANN. § 49.08 (Vernon 2003).

186. See Robin West, *Liberalism and Abortion*, 87 GEO. L.J. 2117, 2118 (1999).

187. Americans United for Life, *supra* note 135, at [http://www.americansunitedforlife.org/guides/fh/fh\\_statutes.htm](http://www.americansunitedforlife.org/guides/fh/fh_statutes.htm); see, e.g., ARK. CODE ANN. § 5-1-102(13)(A)

ment treat the killing of an unborn child as homicide regardless of the stage of the pregnancy, each with different variations.<sup>188</sup> For example, South Dakota requires that “a person knew, or reasonably should have known, that a woman bearing an unborn child was pregnant.”<sup>189</sup> Illinois also requires the person knew that the woman was pregnant and its statutory language does not provide an exception for the mother’s conduct besides permitting abortion.<sup>190</sup> On the other hand, states such as Utah, Wisconsin, Ohio, and Missouri do not require that the actor have knowledge of the woman’s pregnancy and provide no exception for the mother’s conduct except in the case of abortion.<sup>191</sup> The other fifteen states treat the killing of an unborn child as homicide depending on the different stages of embryonic development.<sup>192</sup>

### A. *Enhancement Statute for Injury to a Pregnant Woman*

In order to correct the conflicts between mother and fetus, the Prenatal Protection Act should be repealed.<sup>193</sup> It should be replaced by a statute that enhances the criminal penalties in homicide, assaultive offenses, intoxication manslaughter, and intoxication assault when a pregnant woman is involved.<sup>194</sup> By creating an enhancement statute the Texas Legislature’s goal of protecting a woman’s right to carry her pregnancy to term would still be achieved.<sup>195</sup> First, the enhancement would acknowledge the injury to the pregnant woman and the loss

---

(Michie Supp. 2003); CAL. PENAL CODE § 187(a) (West 1999); FLA. STAT. ANN. § 782.09 (West 2000); 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2002); 720 ILL. COMP. STAT. ANN. 5/9-2.1 (West 2002); 720 ILL. COMP. STAT. ANN. 5/9-3.2 (West 2002); MO. ANN. STAT. § 1.205 (West 2000); OHIO REV. CODE ANN. §§ 2903.01 to 2903.06 (Anderson 2003); S.D. CODIFIED LAWS § 22-17-6 (Michie 1998) UTAH CODE ANN. §§ 76-5-201 to 76-5-207 (2003 & Supp 2004); WIS. STAT. ANN. § 940.04 (West Supp. 2003).

188. See, e.g., 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2002); 720 ILL. COMP. STAT. ANN. 5/9-3.2 (West 2002); MO. ANN. STAT. § 1.205 (West 2000); OHIO REV. CODE ANN. §§ 2903.01 to 2903.06 (Anderson 2003); S.D. CODIFIED LAWS § 22-17-6 (Michie 1998); UTAH CODE ANN. §§ 76-5-201 to 76-5-207 (2003 & Supp. 2004); WIS. STAT. ANN. § 940.04 (West Supp. 2003). Further, Congress signed the “Unborn Victims of Violence Act” also known as “Laci and Conner’s Law,” into law on April 1, 2004. Press Release, Office of the Press Secretary, President Bush Signs Unborn Victims of Violence Act of 2004 (April 1, 2004), available at <http://www.whitehouse.gov/news/releases/2004/04/print/20040401-3.html> (on file with the Texas Wesleyan Law Review); see also Unborn Victims of Violence Act of 2004, H.R. 1997, 108th Cong. (2d Sess. 2004).

189. See S.D. CODIFIED LAWS § 22-17-6 (Michie 1998).

190. See 720 ILL. COMP. STAT. ANN. 5/9-1.2 (West 2002); 720 ILL. COMP. STAT. ANN. 5/9-2.1 (West 2002); 720 ILL. COMP. STAT. ANN. 5/9-3.2 (West 2002).

191. See, e.g., MO. ANN. STAT. § 1.205 (West 2000); OHIO REV. CODE ANN. §§ 2903.01 to 2903.06 (Anderson 2003); UTAH CODE ANN. §§ 76-5-201 to 76-5-207 (2003 & Supp. 2004); WIS. STAT. ANN. § 940.04 (West Supp. 2003).

192. See, e.g., ARK. CODE ANN. § 5-1-102(13)(A) (Michie Supp. 2003); CAL. PENAL CODE § 187(a) (West 1999); FLA. STAT. ANN. § 782.09 (West 2000).

193. See *supra* Part IV.A–B.

194. See *supra* Part IV.A–B.

195. See *supra* Part IV.A.



that she suffers.<sup>196</sup> At the same time, the enhancement would increase the criminal penalty for this loss of potential life. No longer would a killed or injured pregnant woman be recognized as just a woman. She would be recognized as a pregnant woman. Next, the enhancement statute would still protect the mother's conduct in cases of abortion and would protect the doctor's conduct by allowing him to provide treatment in the pregnant woman's best interest without fear of prosecution for harm caused indirectly to the fetus. Finally, an enhancement statute would remove the direct conflicts between maternal and fetal rights. As opposed to treating the pregnant woman and the fetus as two separate persons, the pregnant woman would still be recognized as a pregnant woman and an offender would still be punished for inflicting harm upon her unborn child.

### B. *Amending the Statute to Protect the "Individual"*

On the other hand, if the statute is not repealed and an enhancement created, then it should at least be amended to protect the "individual."<sup>197</sup> While the statute must retain the exception for abortion due to the Supreme Court's prior holdings that have labeled abortion as a woman's fundamental right under the Fourteenth Amendment, there should be no exception for other harmful conduct to the fetus that is committed by the mother if it is not a licensed medical procedure.<sup>198</sup> In this way the statute would hold the mother just as accountable as a third party for inflicting injuries to a fetus, especially in the case of intoxication manslaughter.<sup>199</sup> If the fetus is truly to be considered an "individual," then any direct actions taken by the mother for the purpose of harming the fetus, except for abortion, should not be permitted.<sup>200</sup>

While Texas seeks to punish third parties for offenses against a pregnant woman that cause her unborn fetus harm or death, the statute that it developed diminishes the rights of the pregnant woman and creates a direct conflict with the fetus.<sup>201</sup> In order to remove this conflict, the Prenatal Protection Act should either be repealed or amended.<sup>202</sup> Texas can either directly protect the existing rights of a pregnant woman through an enhancement statute or can create new rights for the fetus without providing exceptions for the mother, but as the law stands now, it harms both parties by putting the rights of each in direct conflict with each other.<sup>203</sup>

---

196. *See supra* Part IV.A.

197. *See supra* Part IV.B.

198. *See supra* Part IV.B.

199. *See supra* Part IV.B.

200. *See supra* Part IV.B.

201. *See supra* Part IV.A.

202. *See supra* Part IV.A-B.

203. *See supra* Part IV.

## VI. CONCLUSION

No one would deny that a woman has a right to carry her pregnancy to full term. Nor would anyone deny that the State has an interest in protecting human life. However, when the State attempts to achieve that goal by pitting the rights of the pregnant woman against the rights of the unborn fetus, the result can be harmful to both woman and fetus. The Prenatal Protection Act seeks to protect the pregnant woman and the unborn fetus, but its enforcement, at times, will succeed in harming both. Labeling the fetus as an "individual" elevates it to the same status as the pregnant woman. Yet, there will be occasions when the rights of the pregnant woman and the rights of the fetus conflict with each other and the rights of one prevail over the rights of the other. In instances where the pregnant woman is harmed by the actions of a third party, but does not want her pregnancy revealed, she loses. Alternatively, in instances where the pregnant woman's own actions, which would be illegal if conducted by a third party, cause harm to the fetus, then the fetus loses. If Texas's true goal is to protect a woman's right to carry her pregnancy to term and protect the potential life of the unborn fetus, then the Prenatal Protection Act is not the answer.

*Michelle Haynes*