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Texas Fetal Rights: Is There a Future for the Rights of Future Texans.

S. Jeffrey Gately

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Texas Fetal Rights: Is There a Future for the Rights of Future Texans?

S. Jeffrey Gately

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I. INTRODUCTION

On October 22, 1983, Alice Langford, who was then eight-and-a-half months pregnant, was involved in a tragic automobile accident in which she lost her unborn baby.¹ Subsequently, Mrs. Langford and her husband sued the driver who had negligently caused this accident.² At the trial, the Langfords showed that the unborn child, Robert, was a fully developed and viable fetus at the time of the accident.³ Summary judgment was granted against the Langfords, denying them any recovery for the loss of their child.⁴ The court of appeals reversed the part of the trial court's decision disallow-

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

2. *See id.* (outlining basic facts of case).

3. *See id.* at 130 (appellate court holding that child was viable).

4. *See id.* at 127 (summary judgment granted for defendant).

ing recovery for Robert's death.⁵ This reversal was based on the fact that the fetus was viable and therefore "a person and an individual human being" for purposes of the Texas wrongful death and survival statutes.⁶

However, on September 19, 1990, in a thirty-two line per curiam opinion, the Texas Supreme Court denied Mrs. Langford any recovery whatsoever for the loss of her baby.⁷ In reversing the lower court's decision, the court held that Texas does not recognize a wrongful death cause of action for a viable fetus which is later stillborn.⁸ This holding was based on two previous cases in which similar recovery was denied.⁹ These decisions expressly held that because the fetus was unborn, it was not an "individual" for purposes of the wrongful death statute.¹⁰

Actions for wrongful death are just one area in which Texas courts have passed judgment on the rights and protections of unborn children.¹¹ Other areas include property law, family law, criminal law, constitutional law, and tort law. Many areas of Texas law have been affected by rapid changes relating to fetal rights.¹² Yet rights of unborn children vary greatly depending upon which area of Texas law controls the action involving the fetus.¹³ One area of law may protect fetal rights from the point of birth,¹⁴ while another

5. *Langford*, 790 S.W.2d at 130.

6. *Id.* The court reasoned that previous cases denying wrongful death actions for fetuses had not addressed the issue of viability. *Id.* at 128.

7. *See Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex. 1990) (reversing appellate court's decision granting the Langfords recovery in wrongful death).

8. *Id.*

9. *See id.* (citing *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 506 (Tex. 1987) and *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23, 23 (Tex. 1987)).

10. *See Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 506 (Tex. 1987) (holding that no cause of action exists for fetal death); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23, 23 (Tex. 1987) (holding that no cause of action exists for wrongful death of fetus).

11. *See, e.g., Langford*, 790 S.W.2d at 130 (court finding violation of constitutional rights in failing to recognize viable fetus as person under wrongful death statute); *Aguilar v. Barker*, 699 S.W.2d 915, 917 (Tex. App.—Houston [1st Dist.] 1985, no writ) (family law case granting retroactive child support from time of birth); *Showery v. State*, 690 S.W.2d 689, 693-94 (Tex. App.—El Paso 1985, writ ref'd) (criminal case finding that viable fetus unsuccessfully aborted and then suffocated is individual under Texas' murder statute); *James v. James*, 164 S.W. 47, 47 (Tex. Civ. App.—San Antonio 1914, writ dism'd) (probate case allowing unborn child to take under will).

12. *See Leal v. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 822 (Tex. 1967) (noting rapid changes in law relating to recovery for injuries to viable infants).

13. *Compare Yandell v. Delgado*, 471 S.W.2d 569, 570 (Tex. 1971) (allowing recovery for negligence causing injuries to unborn child) with *Blackman*, 795 S.W.2d at 743 (disallowing recovery for negligence causing death of unborn child).

14. *See, e.g., Blackman*, 795 S.W.2d at 743 (no recovery for wrongful death without live birth); *Showery*, 690 S.W.2d at 692 (murder statute applies from point of live birth); *Adams v.*

gives rights from the point of conception,¹⁵ while yet another confers rights on the fetus from the point of viability.¹⁶ This comment seeks to point out the inconsistencies which have resulted from varied views of the rights of unborn children and analyzes the need for a synthesized view of fetal rights in Texas.

II. HISTORY AND BACKGROUND OF FETAL RIGHTS IN TEXAS

In order to understand the inconsistencies present in the various approaches to fetal rights under Texas law, it is important to first examine the background of fetal rights in several areas of Texas law. Some areas have adopted common law views of fetal rights¹⁷ while others have created or denied fetal rights statutorily.¹⁸ Some areas have even been influenced by medical science.¹⁹

A. *Fetal Property Rights*

The right of a fetus to inherit property was first recognized in Texas as early as 1914.²⁰ However, decisions allowing an unborn child to inherit are rooted in the common law and date back much further.²¹ This right of in-

Stotts, 667 S.W.2d 798, 800 (Tex. App.—Dallas 1983, no writ) (holding Family Code legitimates child from birth for purposes of child support payments).

15. See *James*, 164 S.W. at 47 (allowing unborn child to recover under will); *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 626, 14 S.W. 1021, 1023 (1890) (allowing recovery in wrongful death action by child conceived but unborn at time of father's death).

16. See, e.g., TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(b) (Vernon Supp. 1991) (with exceptions, no one may knowingly or intentionally perform abortion on woman pregnant with viable fetus in third trimester); TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (penalty for destroying child which would otherwise have been born alive is five years to life); *Brady v. Doe*, 598 S.W.2d 338, 339 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.) (woman and her doctor have decision on abortion during first trimester based on *Roe v. Wade* decision), *cert. denied*, 449 U.S. 1081 (1981).

17. See *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 624-25, 14 S.W. 1021, 1022-23 (1890) (relying on English common law to find that child conceived but unborn at time of father's death could recover for wrongful death).

18. See, e.g., TEX. FAM. CODE ANN. § 13.06 (Vernon Supp. 1991) (providing for payment of prenatal health care expenses of child in paternity suit); TEX. PROB. CODE ANN. § 34A (Vernon Supp. 1991) (providing for representation of unborn persons in probate proceedings); TEX. PROP. CODE ANN. § 115.014(a) (Vernon 1984) (providing for representation of unborn persons in suits involving trusts).

19. See TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(a)(3) (Vernon Supp. 1991) ("viable" defined based on physician's judgment). *But see Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 505 (Tex. 1987) (although scientific advancements have been made, legislature creates rights of action).

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

21. See *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 624-25, 14 S.W. 1021, 1022-23 (1890) (citing common law decisions allowing unborn child to inherit as early as 1798).

heritance is recognized from the time of conception.²² Further, the rule against perpetuities²³ provides for a period of gestation, thus allowing an extra period from conception to birth for a property interest to vest before the rule would be violated.²⁴ Although a fetus may inherit property under Texas law, the fetus is not itself property and therefore parents cannot recover property damages for the destruction of their fetus.²⁵

Certain portions of the Texas Probate and Trust Codes even make provisions for unborn children in suits which would affect their property rights.²⁶ These statutes provide for representation of the unborn child by others.²⁷ The Trust Code also provides a method for notice to be given to the unborn child,²⁸ and both the Trust and Probate Codes provide a method for disclaiming property interests on behalf of the child.²⁹

B. *Family Law Affecting the Fetus*

Family law is another area which affects the rights of the unborn. Although the Texas Family Code does not identify exactly when a fetus

22. See *James*, 164 S.W. at 47 (recognizing children *en ventre sa mere* as persons in being who may inherit under a will). *En ventre sa mere* is defined as: "In its mother's womb. A term descriptive of an unborn child. For some purposes the law regards an infant *en ventre* as in being. It may take a legacy; have a guardian; an estate may be limited to its use, etc." BLACK'S LAW DICTIONARY 534 (6th ed. 1990).

23. The rule against perpetuities renders void any attempt to create an interest which does not vest within twenty-one years of a life in being at the time of the grant plus a period for gestation. *Foshee v. Republic Nat'l Bank of Dallas*, 617 S.W.2d 675, 677 (Tex. 1981). This is based on a Texas constitutional prohibition of perpetuities. TEX. CONST. art I, § 26.

24. See, e.g., *Foshee*, 617 S.W.2d at 677 (Tex. 1981) (citing rule against perpetuities with period of gestation language); *Henderson v. Moore*, 144 Tex. 398, 401, 190 S.W.2d 800, 801 (1946) (stating rule as twenty-one years with period of gestation if necessary; then stating that when lives in being form no part of grant, period is merely twenty-one years).

25. *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 506 (Tex. 1987) (no cause of action for destruction of chattel where fetus destroyed).

26. See TEX. PROB. CODE ANN. § 37A (Vernon Supp. 1991) (providing method for representative to disclaim interest of unborn beneficiary taking under a will); TEX. PROP. CODE ANN. § 115.013(d) (Vernon 1984) (notice requirements for unborn persons in suit involving trust).

27. See TEX. PROB. CODE ANN. § 34A (Vernon Supp. 1991) (probate judge may appoint guardian and/or attorney ad litem to represent unborn persons in probate cases); TEX. PROP. CODE ANN. § 115.014(a) (Vernon 1984) (providing for appointment of guardian ad litem for unborn persons in suits involving trusts).

28. See TEX. PROP. CODE ANN. § 115.013(d) (Vernon 1984) (providing for notice to unrepresented unborn beneficiaries in suit involving a trust by giving notice to those with similar interests in the trust).

29. See TEX. PROB. CODE ANN. § 37A (Vernon Supp. 1991) (provision for method of disclaiming interest under a will by representative of unborn person); TEX. PROP. CODE ANN. § 112.010(c)(2) (Vernon Supp. 1991) (allowing representative of unborn person to disclaim interest in trust with court approval).

gains rights, it does make several provisions for the unborn.³⁰ Under the Texas Family Code, a mother has no right to receive child support until the child is actually born.³¹ However, she does have the right to recover expenses for prenatal care of the child from the father.³² In addition, the Family Code allows a suit for the termination of the parent-child relationship to be filed before the child is born.³³ The code also provides for termination of the parent-child relationship in a situation where an attempted abortion proves unsuccessful and the child survives.³⁴

C. *Fetal Protections Through Criminal Sanctions*

Prior to the United States Supreme Court decision in *Roe v. Wade*,³⁵ unborn children were strictly protected by Texas' criminal abortion statutes.³⁶ However, in *Roe*, the Court determined that these statutes were an unconstitutional violation of a woman's right to privacy.³⁷ Subsequently, the Texas Penal Code has been stripped of all criminal abortion laws.³⁸

Likewise, other criminal statutes do not provide any protection for the unborn child from criminal acts.³⁹ The definition of an "individual" in the Texas Penal Code is limited to "a human being who has been born and is alive."⁴⁰ Thus, Texas' homicide statutes have been interpreted to exclude an unborn fetus from their protection.⁴¹ Only if the fetus is born alive does it

30. See TEX. FAM. CODE ANN. §§ 13.42(a), 15.021(a) (Vernon Supp. 1991), § 15.022(a) (Vernon 1986) (prenatal health care expenses recoverable retroactively).

31. See TEX. FAM. CODE ANN. § 13.42(a) (Vernon Supp. 1991) (alleged father not required to make child support payment until paternity is established); see also *Aguilar v. Barker*, 699 S.W.2d 915, 917 (Tex. App.—Houston [1st Dist.] 1985, no writ) (family law case granting retroactive child support from time of birth); *Adams v. Stotts*, 667 S.W.2d 798, 800 (Tex. App.—Dallas 1983, no writ) (parental responsibilities begin at birth of child).

32. See TEX. FAM. CODE ANN. § 13.06(f) (Vernon Supp. 1991) (submission of medical bill copy is prima facie evidence of prenatal expenses for recovery from father); TEX. FAM. CODE ANN. § 13.42(a) (Vernon Supp. 1991) (providing for retroactive payment of prenatal expenses on finding of paternity).

33. TEX. FAM. CODE ANN. § 15.021(a) (Vernon Supp. 1991).

34. See *id.* § 15.022(a) (Vernon 1986) (termination petition may be granted if abortion resulted in live birth of child).

35. 410 U.S. 113 (1973).

36. See *id.* at 117-18 n.1 (listing arts. 1191-1194, and art. 1196 of the Texas Penal Code which prohibited abortion except to save the mother's life).

37. See *id.* at 166 (holding Texas criminal abortion laws unconstitutional).

38. See TEX. REV. CIV. STAT. ANN. arts. 4512.1-4512.4, 4512.6 (Vernon 1976) (former Penal Code provisions which outlawed abortion held unconstitutional).

39. See, e.g., *Showery v. State*, 690 S.W.2d 689, 692 (Tex. App.—El Paso 1985, writ ref'd) (murder statute required child be alive as defined by traditional concepts); *Ogas v. State*, 655 S.W.2d 322, 325 (Tex. App.—Amarillo 1983, no writ) (unborn fetus not a "person" under defense of third person statute).

40. TEX. PENAL CODE ANN. § 1.07(a)(17) (Vernon 1974).

41. See *Showery*, 690 S.W.2d at 692 (murder statute does not apply to nonviable fetus).

gain a protected status under the murder statute.⁴² This does mean, however, that if a fetus survives an abortion, its destruction is considered murder.⁴³ Furthermore, a fetus is not considered a "person" for purposes of defense of a third party.⁴⁴ Decisions excluding the unborn from the protections of third-party defense statutes are based on statutory interpretations requiring a live birth before one becomes a "person."⁴⁵

D. *Constitutional Law: Fetal Rights and Abortion*

As previously mentioned, the Supreme Court's decision in *Roe v. Wade* sounded the death knell for Texas' abortion statutes.⁴⁶ *Roe* proscribed state laws prohibiting abortion prior to viability of the fetus.⁴⁷ This decision was based on a balancing of the mother's right to privacy and the state's interest in the protection of potential life.⁴⁸ The Court reasoned that a state's interest in potential life did not become compelling until the point of viability, and therefore, laws prohibiting abortion prior to viability were an unconstitutional incursion into a woman's right to privacy.⁴⁹

In response to this Supreme Court mandate declaring the Texas abortion laws unconstitutional, the legislature replaced the abortion statutes with a new one conforming to the restrictions of *Roe*.⁵⁰ Currently, the Texas abortion law makes abortions legal in all cases up to the point of viability of the fetus.⁵¹ Beyond that point, abortion in Texas is still legal where the child would be born with an abnormality or where the life of the mother is endan-

42. See *id.* (discussing Penal Code's definition of "individual" as one born alive).

43. See *id.* at 694 (upholding defendant's murder conviction based on jury finding of live birth after unsuccessful abortion and taking of life by defendant after live birth).

44. See, e.g., *Bobo v. State*, 757 S.W.2d 58, 63 (Tex. App.—Houston [14th Dist.] 1988, writ ref'd) (defense-of-third-party statute does not include unborn fetus), *cert. denied*, 490 U.S. 1066 (1989); *Ogas*, 655 S.W.2d at 325 (third-party-defense statute's definition of "person" does not include unborn fetus).

45. See *Ogas*, 655 S.W.2d at 325 (statutory definition of person is a "human being who has been born alive.>").

46. See *Roe v. Wade*, 410 U.S. 113, 166 (1973) (declaring Texas abortion laws unconstitutional).

47. See *id.* at 163-64 (state may protect fetal life by prohibiting abortion after point of viability except when needed to preserve maternal health).

48. See *id.* at 154 (right to privacy must be considered in light of state regulatory interests).

49. See *id.* at 163 (compelling point of state's interest is at viability).

50. See TEX. REV. CIV. STAT. ANN. arts. 4512.1-.4, .6 (Vernon 1976) (declared unconstitutional); TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(b) (Vernon Supp. 1991) (current abortion statute).

51. See TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(b) (Vernon Supp. 1991) (protecting viable fetus in third trimester); TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (protecting viable child through criminal sanctions).

gered by the pregnancy.⁵²

The United States Supreme Court's decision in *Webster v. Reproductive Services*⁵³ has expanded the rights of a state to protect potential life.⁵⁴ The *Webster* plurality opinion upheld a Missouri statute requiring viability tests on fetuses twenty weeks old or more.⁵⁵ The plurality opinion also allowed the Missouri statute's preamble to stand which stated that "the life of each human being begins at conception."⁵⁶ The *Webster* dissent argued that *Roe* had been effectively overruled.⁵⁷ Texas has not taken any legislative action in response to *Webster*.

E. Tort Law and the Fetus

The most rapidly changing area of the law concerning fetal rights is tort law.⁵⁸ Before 1967, Texas did not allow any recovery whatsoever for injuries sustained by a child in utero.⁵⁹ In contrast, Texas now allows actions based on prenatal injuries to the fetus⁶⁰ and wrongful birth.⁶¹

All Texas tort actions involving the unborn are predicated on the live birth of the child.⁶² Thus, a fetus which is born alive and perishes within its

52. See TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(d) (Vernon Supp. 1991) (listing exceptions for prevention of mother's death, prevention of serious physical and mental health risks, and irreversible abnormalities of the fetus).

53. 492 U.S. 490 (1989).

54. See *id.* at 519 (opinion by Rehnquist, C.J., Kennedy, J., and White, J.) (recognizing state interest in protecting unborn before point of viability).

55. *Id.* at 519-20.

56. *Id.* at 506-07. The Court refused to pass on the preamble's constitutionality. *Id.* at 507.

57. See *Webster*, 492 U.S. at 538 (Blackmun, J., dissenting) (*Roe* would not pass muster under plurality's analysis).

58. See *Leal v. C. C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 822 (Tex. 1967) (noting overwhelming trend toward recovery for prenatal injuries in short time period). See generally Rickhoff & Cukjati, *Protecting the Fetus From Maternal Drug and Alcohol Abuse: A Proposal for Texas*, 21 ST. MARY'S L.J. 259, 277 (1989) (discussing dramatic change in fetal tort law over past one hundred years); Comment, *Unborn Child: Can You be Protected?*, 22 U. RICH. L. REV. 285, 286-87 (1988) (discussing great changes in laws affecting fetuses).

59. See *Leal*, 419 S.W.2d at 822 (overruling *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 78 S.W.2d 944 (1935)). *Jordan* denied recovery to parents of an unborn child in wrongful death stating that no duty was owed to the child. *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 360, 78 S.W.2d 944, 950 (1935). See generally White, *The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383, 397-99 (1952) (discussing the *Jordan* case).

60. See *Yandell v. Delgado*, 471 S.W.2d 569, 570 (Tex. 1971) (allowing recovery for injuries occurring at any prenatal stage prefaced on live birth and survival of child).

61. See *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975) (court finding no public policy for denying parents wrongful birth cause of action).

62. See *Yandell*, 471 S.W.2d at 570 (allowing recovery where "child is born alive and survives"); *Leal*, 419 S.W.2d at 821 (holding where child born alive action for wrongful death existed).

first few days outside the womb constitutes a person and recovery is allowed to the parents in a wrongful death action.⁶³ Furthermore, a child born alive may recover for the wrongful death of a parent which occurs while the child is yet unborn.⁶⁴ However, the live birth requirement negates any wrongful death action by parents on behalf of a fetus which is not born alive.⁶⁵

III. INCONSISTENCIES IN TEXAS LAW

This background demonstrates the confused nature of fetal rights in Texas, and yet it is only the tip of the iceberg. Hence, most of the confusion supporting these chilling inconsistencies lies deeper. The quandary understandably results from questions which have roots in philosophy, theology, medical science, and the like.⁶⁶ Courts are loath to answer such questions.⁶⁷

A. *The Texas Fetus: Person, Nonperson or Property?*

A fetus is not considered property according to the Texas case of *Witty v. American General Capital Distributors*.⁶⁸ Yet, under *Witty*, judicial interpretation of Texas' wrongful death and criminal statutes shows that a fetus is not considered a person either.⁶⁹ Therefore, if a Texas woman loses her child due to the negligent act of another, she is allowed absolutely no recovery for that loss.⁷⁰ However, under the Texas Uniform Commercial Code, she has an enforceable property interest in any unborn livestock she owns.⁷¹

63. See *Leal*, 419 S.W.2d at 820-21 (allowing wrongful death action where child was born alive, but died two days later).

64. See *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 626, 14 S.W. 1021, 1023 (Tex. 1890) (wrongful death recovery allowed because unborn child was "in being" at time of father's death).

65. See *Blackman v. Langford* 795 S.W.2d 742, 743 (Tex. 1990) (no wrongful death action for death of fetus until legislature says so); *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 506 (Tex. 1987) (no cause of action for fetal death); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23, 23 (Tex. 1987) (wrongful death statute does not apply to death of a fetus).

66. Cf. *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 505 (Tex. 1987) (recognizing accomplishments in science, philosophy, and theology but denying their influence in creating a cause of action).

67. See, *Roe v. Wade*, 410 U.S. 113, 159 (1973) (declining to decide when life begins); *Witty*, 727 S.W.2d at 505 (declining to express opinion on fetal personhood based on philosophy or science).

68. 727 S.W.2d 503, 506 (Tex. 1987).

69. See *id.* (no fetal wrongful death cause of action under wrongful death statute).

70. See, e.g., *Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex. 1990) (following prior cases holding no cause of action exists under statute for wrongful death of fetus); *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 506 (Tex. 1987) (holding that no wrongful death action exists for life of fetus); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23, 23 (Tex. 1987) (following prior case disallowing fetal wrongful death action).

71. See TEX. BUS. & COM. CODE ANN. § 2.105(a) (Tex. UCC) (Vernon 1968) (including

Thus, according to judicial interpretation of these Texas Statutes, unborn cattle are of greater value than an unborn human.⁷²

Many times a fetus is considered a person under Texas law.⁷³ For instance, a fetus can inherit and hold property.⁷⁴ Also, under the wrongful death statute, the fetus is a person for purposes of recovering for the death of a parent who died while the child was in utero.⁷⁵ This determination was based on an interpretation of legislative intent.⁷⁶ This is not surprising since even a fictional entity is considered a person under the Wrongful Death Act.⁷⁷ However, under the same statute, Texas courts have found a fetus not to be a person if the parents attempt to recover for the child's in utero death.⁷⁸ This finding was based on a lack of legislative intent to consider a fetus a person.⁷⁹ Thus, the Supreme Court of Texas has decided that the legislature intended a fetus to be both a person and a nonperson under a single statute.⁸⁰

Comparison of cases allowing recovery for prenatal injuries with cases disallowing recovery for prenatal death also demonstrates the inconsistency in Texas' approach to fetal rights. Texas allows recovery for prenatal injuries contingent upon a live birth.⁸¹ However, it disallows recovery for prenatal

unborn animals in definition of "goods"); TEX. BUS. & COM. CODE ANN. § 2.501(a)(3) (Tex. UCC) (Vernon 1968) (absent agreement, buyer obtains an insurable interest in unborn animal at conception); TEX. BUS. & COM. CODE ANN. § 9.105(a)(8) (Tex. UCC) (Vernon Supp. 1991) (definition of "goods" includes unborn animals).

72. *Cf. Witty*, 727 S.W.2d at 506 (no evidence of legislative intent to protect fetus under wrongful death statute).

73. *Cf. James v. James*, 164 S.W. 47, 47 (Tex. Civ. App.—San Antonio 1914, writ *dism'd*) ("in being" includes unborn child); *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 626, 14 S.W. 1021, 1023 (1890) (though unborn, fetus was "in being" at time of father's death).

74. *See James*, 164 S.W. at 47 (allowing unborn child to take under will).

75. *See Nelson*, 78 Tex. at 626, 14 S.W. at 1023 (allowing posthumous child recovery for father's wrongful death); *Missouri Pac. Ry. Co. v. Lehmborg*, 75 Tex. 61, 68-69, 12 S.W. 838, 840-41 (1889) (affirming wrongful death award to mother and children, one of which was unborn at time of father's death). *See generally White, The Right of Recovery for Prenatal Injuries*, 12 LA. L. REV. 383, 395-96 (1952) (discussing problems with arguments regarding an unborn child as not in being).

76. *See Nelson*, 78 Tex. at 626, 14 S.W. at 1023 (concluding legislature intended to include unborn child in those having cause of action for father's wrongful death).

77. *See Hugo, Schmeltzer & Co. v. Paiz*, 104 Tex. 563, 567, 141 S.W. 518, 520 (1911) (corporation is person under wrongful death statute).

78. *See Witty*, 727 S.W.2d at 504 (holding fetus not included as person or individual under statute).

79. *See id.* at 506 (no legislative intent to include fetus in protection of wrongful death statute).

80. *Compare Nelson*, 78 Tex. at 626, 14 S.W. at 1023 (child unborn at time of father's death was "in being" under wrongful death statute) *with Witty*, 727 S.W.2d at 504 (unborn child is not "person" under Wrongful Death Act).

81. *See Yandell v. Delgado*, 471 S.W.2d 569, 570 (Tex. 1971) (action exists for injuries at

injuries resulting in destruction of the fetus.⁸² This invokes the tragic results of the old common law adage that "it is more profitable for a wrong-doer to kill than to maim or injure."⁸³

B. *When Does a Texan's Life Begin?*

This is a question which the courts attempt to avoid.⁸⁴ Even as judges are making this determination, they disclaim that they are doing so.⁸⁵ Yet they are forced to impliedly answer the question every time they determine when protection of fetal rights should begin.⁸⁶ Texas lawmakers have implicitly found life to begin at several points, thus leading to inconsistencies in fetal protection.⁸⁷

At one extreme, life has been found to begin at conception. This is so for purposes of inheritance,⁸⁸ appointment of a representative,⁸⁹ the rule against

any prenatal stage contingent on live birth); *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 821 (Tex. 1967) (wrongful death statute allows cause of action for infant born alive).

82. See *Blackman*, 795 S.W.2d at 743 (no cause of action for fetal death); *Witty*, 727 S.W.2d at 506 (no wrongful death action for life of fetus); *Lobdell*, 726 S.W.2d at 23 (disallowing wrongful death action for unborn child); *Magnolia Coca Cola Bottling Co. v. Jordan*, 124 Tex. 347, 360, 78 S.W.2d 944, 950 (1935) (no recovery allowed for death of unborn child).

83. *Langford v. Blackman*, 790 S.W.2d 127, 130 (Tex. App.—Beaumont), *rev'd*, 795 S.W.2d 742 (Tex. 1990). See generally Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 BAYLOR L. REV. 131, 147-151 (1979) (discussing arbitrariness of prohibiting tort recovery for fetus not born alive).

84. See, e.g., *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 800 (1986) (White, J., dissenting) (describing question of when life begins as "unanswerable"); *Roe v. Wade*, 410 U.S. 113, 159 (1973) (judiciary not currently in position to resolve question of when life begins); *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 413 S.W.2d 825, 832 (Tex. Civ. App.—San Antonio) (question of when life begins is nonjusticiable), *rev'd*, 419 S.W.2d 820, 821 (Tex. 1967). See generally Note, *The Killing of a Viable Fetus is Murder—Keeler v. Superior Court*, 30 MD. L. REV. 137, 137-38 (1970) (discussing historical legal views of when life begins).

85. Compare *Langford v. Blackman*, 790 S.W.2d 127, 132 (Tex. App.—Beaumont) (no attempt to declare when life begins), *rev'd*, 795 S.W.2d 742 (Tex. 1990) with *Langford*, 790 S.W.2d at 132 (holding viable fetus to be a "person").

86. Cf., e.g., *Showery v. State*, 690 S.W.2d 689, 692 (Tex. App.—El Paso 1985, writ *ref'd*) (only human being born alive protected by murder statute); *James v. James*, 164 S.W. 47, 47 (Tex. Civ. App.—San Antonio 1914, writ *dism'd*) (children *en ventre sa mere* or, in the mother's womb, are "in being"); *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 626, 14 S.W. 1021, 1023 (1890) (unborn fetus is "in being").

87. Compare *Yandell v. Delgado*, 471 S.W.2d 569, 570 (Tex. 1971) (injuries sustained at any prenatal stage recoverable contingent on live birth) with *Showery*, 690 S.W.2d at 692 (live birth is point where protection of murder statute accrues). See generally Gordon, *The Unborn Plaintiff*, 63 MICH. L. REV. 579, 586-88 (1965) (discussing inconsistencies of defining fetal personhood in property and tort law).

88. See *James*, 164 S.W. at 47 (children in being includes those *en ventre sa mere* for purpose of inheritance).

89. See TEX. PROB. CODE ANN. § 37A (Vernon Supp. 1991) (appointment of representa-

perpetuities,⁹⁰ and fetal recovery for the wrongful death of a parent.⁹¹ At the other extreme, there are situations where life does not begin until birth. Such is the case in criminal law,⁹² most of tort law,⁹³ and family law.⁹⁴ Between these two extremes lies the category where Texas law sometimes defines the genesis of life at the elusive point of viability. This is the point where Texas abortion laws facially draw a line for protection of the fetus⁹⁵ which, in and of itself, creates inconsistency.

An inconsistency results due to the facial nature of this definition. On its face, the abortion statute prohibits abortions after the point of viability.⁹⁶ Exceptions arise in situations where the mother's health is at risk, the fetus would be born with an irreversible abnormality, or where the pregnancy is not in the third trimester.⁹⁷ The statute defines "viable" as the point where the doctor determines that the unborn child can live outside of the womb.⁹⁸ The definition goes on to limit itself to only those fetuses whose biparietal diameter, or BPD, a measurement of the head,⁹⁹ is sixty millimeters or

tive for disclaimer on behalf of unborn); TEX. PROP. CODE ANN. § 112.010(c)(2) (Vernon Supp. 1991) (representation of unborn person to disclaim trust interest).

90. See *Foshee v. Republic Nat'l Bank of Dallas*, 617 S.W.2d 675, 677 (Tex. 1981) (rule against perpetuities includes period of gestation).

91. See *Nelson*, 78 Tex. at 626, 14 S.W. at 1023 (unborn child considered "in being"); *Missouri Pac. Ry. Co. v. Lehmborg*, 75 Tex. 61, 67, 12 S.W. 838, 840 (1889) (fetus eight months old at time of father's death participated in wrongful death recovery).

92. See, e.g., *Bobo v. State*, 757 S.W.2d 58, 63 (Tex. App.—Houston [14th Dist.] 1988, writ ref'd) (fetus not person under defense-of-third-party statute), *cert. denied*, 490 U.S. 1066 (1989); *Showery*, 690 S.W.2d at 692 (murder statute only applies to a human being born alive); *Ogas v. State*, 655 S.W.2d 322, 325 (Tex. App.—Amarillo 1983, no writ) (fetus is not within Penal Code definition of "person").

93. See, e.g., *Witty*, 727 S.W.2d at 505 (no fetal cause of action until live birth); *Yandell*, 471 S.W.2d at 570 (where child born alive and survives, action for prenatal injuries exists); *Leal*, 419 S.W.2d at 821 (allowing wrongful death recovery where child born alive later died). *But see Nelson*, 78 Tex. at 626, 14 S.W. at 1023 (child *en ventre sa mere* at time of father's death was "in being" under Wrongful Death Act).

94. See *Aguilar v. Barker*, 699 S.W.2d 915, 917 (Tex. App.—Houston [1st Dist.] 1985, no writ) (care of child from point of birth is within Family Code's purpose).

95. See TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(b) (Vernon Supp. 1991) (absent exception, viable third trimester fetus may not be intentionally or knowingly aborted); TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (protecting child against destruction who would otherwise be born alive). See generally Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 BAYLOR L. REV. 131, 141-44 (1979) (discussing problems with drawing line of fetal protection at the point of viability).

96. See TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(b) (Vernon Supp. 1991) (prohibiting abortion of viable third trimester fetus).

97. See *id.* § 4.011(d) (Vernon Supp. 1991) (listing exceptions to abortion prohibition).

98. See TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(a)(3) (Vernon Supp. 1991) (defining the term "viable").

99. The biparietal diameter is a frequently used measurement which represents "the

more.¹⁰⁰ Thus, viability is limited to a point after the third trimester where the BPD of the fetus is greater than or equal to six centimeters.¹⁰¹ However, it is common for a normal child to be born with a BPD of less than sixty millimeters.¹⁰² Furthermore, many premature infants born prior to the third trimester of pregnancy develop into normal children.¹⁰³ Thus, the abortion statute, while facially purporting to protect potential life at the point of viability, actually denies protection to many viable fetuses. This runs counter to the United States Supreme Court's holding in *Webster* that a state's interest in protection of potential life begins even prior to the point of viability.¹⁰⁴

It would also appear that the use of a biparietal measurement leads to inaccurate and discriminatory results. Studies show that in obtaining the fetal BPD through the use of ultrasound technology, age determinations based on multiple measurements of the same fetus made the same day may vary by two to four weeks.¹⁰⁵ Also, scientific studies show that white fetuses generally have larger BPDs than non-whites.¹⁰⁶ Further, males have larger BPDs

greatest traverse diameter of the head." EASTMAN & HELLMAN, WILLIAMS OBSTETRICS 196 (13th ed. 1966).

100. See TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011(a)(3) (Vernon Supp. 1991) (statutory definition of viable).

101. *Id.*

102. See J.M. TANNER, FOETUS INTO MAN, PHYSICAL GROWTH FROM CONCEPTION TO MATURITY 47-48 (1989) (tables showing fetus with biparietal diameter of sixty millimeters to be twenty-three to twenty-seven weeks old); J. WILLKE & B. WILLKE, ABORTION QUESTIONS & ANSWERS 60-62 (1985) (listing instances of premature live births resulting in normal child as early as twenty weeks gestation); Sabbagha, Barton & Barton, *Sonar Biparietal Diameter, I. Analysis of Percentile Growth Differences in Two Normal Populations Using Same Methodology*, 126 AM. J. OBSTETRICS & GYNECOLOGY 479, 480 (1976) (showing fetus with biparietal diameter of six centimeters to be of gestational age of approximately twenty-two to twenty-five weeks); Sabbagha & Hughey, *Standardization of Sonar Cephalometry and Gestational Age*, 52 OBSTETRICS & GYNECOLOGY 402, 403 (1978) (studies placing fetus with biparietal diameter of six centimeters at age of approximately twenty-four weeks).

103. See J. WILLKE & B. WILLKE, ABORTION QUESTIONS & ANSWERS 60-62 (1985) (showing cases of premature birth resulting in healthy normal child well within the second trimester; one occurring at San Antonio's Brooke Army Hospital and another in Victoria, Texas).

104. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (opinion by Rehnquist, C.J., Kennedy, J., and White, J.) (state's interest in protecting unborn accrues prior to viability).

105. See Sabbagha & Hughey, *Standardization of Sonar Cephalometry and Gestational Age*, 52 OBSTETRICS & GYNECOLOGY 402, 403-04 (1978) (assessment of gestational age in same fetus made on same day varied from two to four weeks); see also ASSESSMENT AND CARE OF THE FETUS, PHYSIOLOGICAL, CLINICAL AND MEDICOLEGAL PRINCIPLES 526 (R. EDEN & F. BOEHM eds. 1990) (biparietal diameter can be influenced by fetal position and amniotic fluid volume).

106. See EASTMAN & HELLMAN, WILLIAMS OBSTETRICS 197 (13th ed. 1966) (showing average fetal biparietal diameter of whites to be greater than non-whites).

than females.¹⁰⁷ Therefore, by basing viability on an infant's BPD, the Texas abortion statute considers a white male fetus more viable than either a female or non-white fetus. However, the statute cannot be said to violate constitutional equal protection guarantees because the Fourteenth Amendment does not apply to fetuses.¹⁰⁸

IV. COMPARISON WITH OTHER JURISDICTIONS

In shaping fetal rights law, other jurisdictions are also faced with these same tough questions. However, they often reach very different answers. Comparison of other states' laws in major areas affecting the unborn further illustrates the infirmity of certain Texas positions affecting fetal rights.

A. *Property Law*

Texas follows the majority view which recognizes the right of a fetus to inherit property.¹⁰⁹ This view is held not simply by the majority, but universally¹¹⁰ and recognizes the rights of the fetus from conception.¹¹¹ Historical roots in the common law and general policies of allowing people to dispose of their property as they wish account for the uniformity in fetal inheritance rights.¹¹²

B. *Criminal Law*

In contrast, criminal law obtains the widest range of state views in the protection of fetal rights.¹¹³ While some states protect fetal life through the

107. *See id.* (males' heads generally larger than females').

108. *See Roe*, 410 U.S. at 158 (unborn child not person under Fourteenth Amendment).

109. *See James v. James*, 164 S.W. 47, 47 (Tex. Civ. App.—San Antonio 1914, writ dismissed) (allowing unborn child to take under will).

110. *See Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 505 (Tex. 1987) (describing fetal inheritance rule as "universal").

111. *See James*, 164 S.W. at 47 (child in mother's womb was in being and took under will).

112. *See Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 624-25, 14 S.W. 1021, 1022-23 (Tex. 1890) (discussing common law basis of right of posthumous child to take under will). *See generally* Rickhoff & Cukjati, *Protecting the Fetus From Maternal Drug and Alcohol Abuse: A Proposal for Texas*, 21 ST. MARY'S L.J. 259, 276 (1989) (discussing historical development of fetal property rights).

113. *Compare* IND. CODE ANN. § 35-42-1-6 (Burns 1985) (statute defining crime of feticide as knowing or intentional termination of human pregnancy with exceptions of statutory abortion or intent to produce live birth) *with* *Showery v. State*, 690 S.W.2d 689, 692 (Tex. App.—El Paso 1985, writ refused) (Texas murder statute does not protect a child prior to live birth). *See generally* Rickhoff & Cukjati, *Protecting the Fetus From Maternal Drug and Alcohol Abuse: A Proposal for Texas*, 21 ST. MARY'S L.J. 259, 282 (1989) (discussing irregular growth of criminal law affecting fetal rights).

use of special criminal statutes,¹¹⁴ others offer protection under general homicide statutes.¹¹⁵ On the other hand, some states offer no protection for potential life under their criminal statutes.¹¹⁶

Some states protect the unborn through feticide statutes.¹¹⁷ Feticide statutes generally impose criminal sanctions for knowing or intentional destruction of the fetus through acts which would constitute murder if they had resulted in the death of the mother.¹¹⁸ These statutes protect fetal life beginning at conception or from the point of viability.¹¹⁹ Other states simply place the fetus under the protection of their homicide statutes.¹²⁰ A major difference between these two approaches is that feticide statutes generally impose lighter penalties than the general homicide statutes.¹²¹

Texas falls within that group of states which offers the weakest protection of the fetus under its criminal statutes.¹²² Texas has no feticide statutes and excludes unborn children from the protection of its homicide statutes.¹²³ Texas does have an abortion statute which imposes criminal sanctions for

114. See, e.g., GA. CODE ANN. § 16-5-80 (1988) (Georgia criminal feticide statute); IND. CODE ANN. § 35-42-1-6 (Burns 1985) (Indiana feticide statute); IOWA CODE § 707.7 (1979) (Iowa feticide law); LA. REV. STAT. ANN. §§ 14:32.5-8 (West Supp. 1991) (Louisiana feticide statute); N.M. STAT. ANN. § 30-5-3 (1978) (New Mexico criminal abortion law).

115. See, e.g., ARIZ. REV. STAT. ANN. § 13-1103 (1989) (causing death of fetus by knowing or reckless injury to mother proscribed under Arizona manslaughter statute); CAL. PENAL CODE § 187 (Deering 1985) (California statute defining murder as "unlawful killing of a human being, or a fetus."); N.Y. PENAL LAW § 125.00 (McKinney 1987) (including unborn child of twenty-four weeks gestational age or more within New York statutory definition of homicide); UTAH CODE ANN. § 76-5-201 (1990) (including unborn child within protections of Utah criminal homicide law).

116. See *Showery*, 690 S.W.2d at 692 (no fetal protection under Texas murder statute until live birth); accord *Hollis v. Commonwealth* 652 S.W.2d 61, 62 (Ky. 1983) (live birth required for conviction under Kentucky murder statute).

117. E.g., GA. CODE ANN. § 16-5-80 (1988); IND. CODE ANN. § 35-42-1-6 (Burns 1985); LA. REV. STAT. ANN. §§ 14:32.5-8 (West Supp. 1991); see also ILL. REV. STAT. ch. 38, para. 9-1.2 (Supp. 1990) (Illinois "Intentional homicide of an unborn child" statute).

118. See IND. CODE ANN. § 35-42-1-6 (Burns 1985) (knowing or intentional termination of pregnancy other than for purposes of live birth or statutory abortion is felony).

119. See, e.g., GA. CODE ANN. § 16-5-80 (1988) (feticide is willful killing of child "quick," or, alive in mother's womb); ILL. REV. STAT. ch. 38, para. 9-1.2 (Supp. 1990) (Illinois statute protecting unborn child from fertilization to birth); MICH. STAT. ANN. § 28.554 (Callaghan 1990) (Michigan statute prohibiting "wilful killing of an unborn quick child").

120. See CAL. PENAL CODE § 187 (Deering 1985) (California murder statute including fetus within its protections); *Commonwealth v. Cass*, 467 N.E.2d 1324, 1326 (Mass. 1984) (fetus is "person" under Massachusetts vehicular homicide law).

121. Compare IND. CODE ANN. § 35-42-1-6 (Burns 1985) (feticide is class C felony) with *id.* (voluntary manslaughter is class A or class B felony).

122. See *Showery*, 690 S.W.2d at 692 (Texas homicide statute offers no protection until child born alive).

123. *Id.*

violators.¹²⁴ However, any potential protection offered by the statute is apparently negated by a lack of enforcement.¹²⁵

C. *Abortion Law*

Due to the fact that *Roe* remains the "supreme law of the land," it has dramatically affected state abortion legislation over the past several years.¹²⁶ However, even after *Roe*, many states have made attempts to provide greater protection to unborn children.¹²⁷ In fact, Missouri's efforts to provide greater fetal protections brought about the *Webster* decision.¹²⁸ Since *Webster*, some states have attempted to broaden fetal rights through legislative restrictions on abortion.¹²⁹ Even though *Webster* now allows states to protect potential life by restricting abortions from a point prior to viability, Texas continues to deny fetal protection under its abortion law even after the point of true viability.¹³⁰

D. *Tort Law*

Texas is anything but a trendsetter in the area of fetal tort remedies. In fact, Texas was the second-to-the-last jurisdiction to allow a cause of action for prenatal injuries.¹³¹ Texas also remains in the small and decreasing minority of jurisdictions which disallow a wrongful death cause of action for an unborn fetus.¹³²

In 1987, in *Witty v. American General Capital Distributors*,¹³³ the Texas Supreme Court addressed the issue of recovery for the wrongful death of an

124. TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976).

125. *See id.* (no notes of decision interpreting statute).

126. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 521 (1989) (opinion by Rehnquist, C.J., Kennedy, J., and White, J.) (modifying *Roe* in some respects but leaving it undisturbed as to others).

127. *See MO. REV. STAT. § 188.015* (Supp. 1983) (amended in 1979 and 1986 adding definition of conception and defining unborn child from point of conception).

128. *See Webster*, 492 U.S. at 499 (appeal to determine constitutionality of Missouri abortion laws).

129. *See* 1991 La. Sess. Law Serv. 26 (West) (new Louisiana statute stating that life begins at time of conception).

130. *See TEX. REV. CIV. STAT. ANN. art. 4495b, § 4.011* (Vernon Supp. 1991) (allowing abortion up to point of viability but limiting viability by statutory definition based on gestational age and fetal head size).

131. *See Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 822 & n.3 (Tex. 1967) (at time Texas granted action for prenatal injuries only Alabama had not allowed such an action).

132. *See Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 512 (Tex. 1987) (Kilgarlin, J., dissenting) (at time of case thirty-six jurisdictions allowed fetal wrongful death action while eight did not).

133. 727 S.W.2d 503 (Tex. 1987).

unborn child for the first time.¹³⁴ The Court denied any wrongful death recovery based on the language of the wrongful death statute which disallows any cause of action for wrongful death where no cause of action exists for injuries.¹³⁵ At the time *Witty* was written, the District of Columbia and thirty-five states allowed a wrongful death recovery for a viable unborn fetus.¹³⁶ Of the remaining states, only eight did not allow such recovery and the rest had not considered the issue.¹³⁷

Since *Witty*, Colorado, which had not considered the issue, now allows a fetal wrongful death action, and Maine, which had also not addressed the issue, does not allow recovery.¹³⁸ This leaves a minority of nine states which do not allow such an action while a thirty-seven jurisdiction majority allows recovery.¹³⁹ By reversing well-reasoned court of appeals decisions,¹⁴⁰ the Texas Supreme Court has consistently refused to join the modern trend toward allowing fetal wrongful death recovery. This means that Texas "will again merit the dubious distinction of being one of the last states, if ever, to accept . . . a wrongful death action for the death of a fetus at the hands of a negligent tortfeasor."¹⁴¹

V. A PROPOSAL FOR REFORM

The recognition of fetal rights in Texas has been plagued by inconsistent answers to tough questions put before its courts.¹⁴² This problem is further compounded by legislative and judicial tardiness in recognizing the majority trend toward preservation of fetal rights.¹⁴³ The result is a system of protection for the rights of unborn children which cries out for reform. By recog-

134. See *id.* at 504 (*Witty* sued under Wrongful Death Act for damages resulting from death of her fetus).

135. See *id.* at 505 (under statute no cause of action exists for death where no cause of action exists for injuries).

136. *Id.* at 512 (Kilgarlin, J., dissenting).

137. *Witty*, 727 S.W.2d at 512 (Kilgarlin, J., dissenting).

138. See *Espadero v. Feld*, 649 F. Supp. 1480, 1484 (D. Colo. 1986) (allowing wrongful death recovery for viable fetus under Colorado wrongful death statute); *Milton v. Cary Medical Center*, 538 A.2d 252, 256 (Me. 1988) (disallowing fetal wrongful death action).

139. See *Witty*, 727 S.W.2d at 512 (Kilgarlin, J., dissenting) (eight jurisdictions denying fetal wrongful death action at time of case); *Milton*, 538 A.2d at 256 (Maine now disallows wrongful death action for unborn child).

140. See *Blackman v. Langford* 795 S.W.2d 742, 743 (Tex. 1990) (reversing lower court's decision which allowed fetal wrongful death recovery); *Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23, 23 (Tex. 1987) (reversing appellate court's decision to allow wrongful death recovery for fetus).

141. *Witty*, 727 S.W.2d at 507 (Kilgarlin, J., dissenting).

142. Compare *Witty v. American Gen. Capital Distribs.*, 727 S.W.2d 503, 505 (Tex. 1987) (no cause of action for injury resulting in fetal death) with *Yandell v. Delgado*, 471 S.W.2d 569, 570 (Tex. 1971) (cause of action exists for prenatal injury where fetus survives).

143. See *Leal v. C.C. Pitts Sand & Gravel, Inc.*, 419 S.W.2d 820, 822 (Tex. 1967) (Texas

nizing fetal rights in some situations while refusing to recognize them in others, Texas continues to maintain positions on fetal rights which are irreconcilable.¹⁴⁴

Steps which will bring about both consistency among Texas laws and bring Texas in line with the current majority view need to be taken.¹⁴⁵ One such step is the recognition of the unborn child as a person under the Wrongful Death Act. Inconsistent recognition of the fetus as both a person and nonperson under this statute signifies the need for change.¹⁴⁶ This could easily be brought about by either judicial¹⁴⁷ or legislative action.¹⁴⁸

The judiciary has said that the job of changing the Wrongful Death Act is one for the legislature.¹⁴⁹ However, a change to the statute is not necessary. The judiciary could interpret the statute to allow recovery for a fetal death in accord with precedent which allows the unborn child to recover for a parental death under the Wrongful Death Act.¹⁵⁰ This would not violate any legislative function in light of the fact that entire causes of action have been judicially created in the past.¹⁵¹

Similarly, protection of the fetus under criminal statutes is ripe territory for either judicial or legislative action. Currently Texas courts interpret

was second-to-last state to allow action for fetal injuries); *Witty*, 727 S.W.2d at 512 (Kilgarlin, J., dissenting) (Texas remains in minority by rejecting fetal wrongful death action).

144. Compare *Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex. 1990) (recent Texas case disallowing recovery for fetus under Wrongful Death Act) with *Nelson v. Galveston, H. & S. A. Ry. Co.*, 78 Tex. 621, 626, 14 S.W. 1021, 1023 (1890) (unborn child can recover for father's demise under Wrongful Death Act).

145. See *Witty*, 729 S.W.2d at 507 (Kilgarlin, J., dissenting) (expressing concern over Texas' tardiness in following the majority).

146. Compare *Witty*, 727 S.W.2d at 504 (fetus is not "person" under Wrongful Death Act) with *Nelson*, 78 Tex. at 626, 14 S.W. at 1023 (unborn child is "in being" under Wrongful Death Act). See generally *Frey, Injuries to Infants En Ventre Sa Mere*, 12 ST. LOUIS L. REV. 85, 85-86 (1927) (discussing goal of consistency in the law and the inconsistent state of laws affecting fetal rights).

147. See TEX. CONST. art. II, § 1 (setting up judicial branch of government); TEX. CONST. art. V, § 1 (granting judicial power to the courts); *Texas v. Smith*, 434 S.W.2d 342, 350 (Tex. 1968) (Smith, J., dissenting) (chief judicial function is interpretation).

148. See TEX. CONST. art. II, § 1 (setting up legislative branch of government); TEX. CONST. art. III, § 1 (giving state legislative power to House of Representatives and Senate); *City of Weatherford v. Parker County*, 794 S.W.2d 33, 35 (Tex. 1990) (legislature has plenary power to pass laws).

149. See *Blackman*, 795 S.W.2d at 743 (no cause of action for wrongful death of fetus until legislature says so).

150. See *Smith*, 434 S.W.2d at 350 (Smith, J., dissenting) (judiciary has power to interpret statutes); *Nelson*, 78 Tex. at 626, 14 S.W. at 1023 (recognizing existence of fetus under Wrongful Death Act).

151. See *Nelson v. Krusen*, 678 S.W.2d 918, 923 (Tex. 1984) (recognizing prior case judicially creating "wrongful birth" cause of action).

criminal statutes as not including a fetus as a "person."¹⁵² This exclusion is based on the Penal Code's statutory definition of "person"¹⁵³ which includes "an individual, corporation, or association."¹⁵⁴ The statutory definition of "individual" includes only those born and alive.¹⁵⁵ Therefore, under the judicial interpretation of these definitions, a corporation may be protected by the use of deadly force, while an unborn child may not.¹⁵⁶ Contrarily, the legislature has clearly expressed its intent to protect the unborn through criminal sanctions of imprisonment.¹⁵⁷ Yet this intention remains unenforced.¹⁵⁸ Texas courts could simply rely on this manifestation of intent to protect unborn children when interpreting criminal statutes instead of focusing on the semantics of codified definitions. This would bring Texas in line with the majority of jurisdictions protecting the unborn through criminal sanctions.¹⁵⁹

152. See *Ogas v. State*, 655 S.W.2d 322, 325 (Tex. App.—Amarillo 1983, no writ) (fetus not included in statutory definition of "person").

153. See *id.* (interpreting defense-of-third-person statutes by statutory definition of "person").

154. TEX. PENAL CODE ANN. § 1.07(27) (Vernon 1974).

155. *Id.* § 1.07(17) (Vernon 1974).

156. Compare *Ogas*, 655 S.W.2d at 325 (fetus not protected by defense-of-third-party statute because not included in statutory definition of "person") with TEX. PENAL CODE ANN. § 1.07(27) (Vernon 1974) (placing corporation within statutory definition of "person").

157. See TEX. REV. CIV. STAT. ANN. art. 4512.5 (Vernon 1976) (destroying unborn viable child results in penalty of five years to life).

158. See *id.* (no cases interpreting statute).

159. See, e.g., ARIZ. REV. STAT. ANN. § 13-1103 (1989) (in Arizona manslaughter includes causing fetal death knowingly or recklessly); CAL. PENAL CODE § 187 (Deering 1985) (killing fetus with malice aforethought is murder in California); FLA. STAT. ANN. § 782.09 (West 1976) (Florida law prohibiting killing unborn child); GA. CODE ANN. § 16-5-80 (1988) (Georgia feticide statute); ILL. REV. STAT. ch. 38, para. 9-1.2 (Supp. 1991) (Illinois law prohibiting "Intentional homicide of an unborn child"); IND. CODE ANN. § 35-42-1-6 (Burns 1985) (Indiana feticide statute); LA. REV. STAT. ANN. §§ 14:32.5-.8 (West Supp. 1991) (Louisiana feticide law); MICH. STAT. ANN. § 28.554 (Callaghan 1990) (Michigan criminal law prohibiting killing of "quick" fetus); MINN. STAT. § 609.2661 (1987) (Minnesota murder of unborn child statute); MISS. CODE ANN. § 97-3-37 (1972) (Mississippi homicide statute applying to unborn "quick" children); NEV. REV. STAT. § 200.210 (1989) (Nevada law setting up penalty for willful killing of unborn "quick" child); N.M. STAT. ANN. § 30-5-3 (1984) (New Mexico criminal abortion statute); N.Y. PENAL LAW § 125.00 (McKinney 1987) (homicide law applies to twenty-four week or older fetus); OKLA. STAT. ANN. tit. 21, § 713 (West 1983) (Oklahoma homicide law prohibiting willful killing of "quick" fetus); S.D. CODIFIED LAWS ANN. § 22-17-6 (1988) (South Dakota law setting up penalty for intentional killing of fetus); TENN. CODE ANN. § 39-13-214 (Supp. 1990) (Tennessee including viable fetus within protection of criminal homicide laws); UTAH CODE ANN. § 76-5-201 (1990) (homicide law protects unborn fetus); VA. CODE ANN. § 18.2-71 (1988) (Virginia criminal abortion law); WASH. REV. CODE ANN. § 9A.32.060 (1988) (Washington law defining intentional killing of unborn "quick" child as first degree manslaughter); see also, e.g., *Commonwealth v. Lawrence*, 536 N.E.2d 571, 576 (Mass. 1989) (viable unborn child is protected by murder law); *Goodman v.*

Finally, the Texas legislature should reform its abortion laws to bring Texas up to date in light of the Supreme Court's holding in *Webster*.¹⁶⁰ Even the old *Roe* standard would allow the Texas abortion standard to be moved up to the point of true viability.¹⁶¹ Furthermore, Texas law could be updated to reflect the current constitutional standard under *Webster* which allows protection of potential life prior to viability.¹⁶²

VI. CONCLUSION

Inconsistent recognition of the rights of the unborn in Texas has resulted in nothing short of a melee of statutes and statutory interpretations. The courts place the burden of change on the shoulders of the legislature while the legislature appears to still be reeling from the blow dealt to it in 1973 by the United States Supreme Court decision in *Roe v. Wade*. This leaves parents who have suffered the loss of their unborn child without remedy or recourse against those responsible for the loss of their child. A woman who has borne a child for eight-and-a-half months with all the attendant discomfort and pain of pregnancy is refused compensation and told that she has lost nothing when the fetus within her is destroyed. Interestingly, this message comes from nine men who are utterly incapable of ever experiencing what she has been through.

This problem is compounded by the fact that parents in many other states faced with the same loss have a remedy. They may be able to recover monetarily from a negligent tortfeasor. They may also see justice done for a criminal act perpetrated against their unborn child. Yet in Texas, relief in either form is unavailable unless their child survives the acts of the tortfeasor or criminal.

Changes in Texas' laws affecting fetal rights could bring forth rewards of consistency and predictability which are currently lacking in this area. Furthermore, they could be brought about without any danger whatsoever of violating modern constitutional standards. These changes would also bring Texas in line with modern legal trends which provide stronger protections for the unborn. Therefore, it would be in the best interest of the citizens of Texas, both present and future, for our lawmakers to work toward such reforms.

State, 601 P.2d 178, 185 (Wyo. 1979) (Wyoming case allowing prosecution for killing of unborn child).

160. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 519 (1989) (state's interest in protecting unborn accrues prior to point of viability).

161. See *Roe v. Wade*, 410 U.S. 113, 163 (1973) (state's interest in potential life becomes compelling at point of viability).

162. See *Webster*, 492 U.S. at 519 (finding state's interest in protecting unborn begins before viability).