

- SUBJECT:** Criminal and civil penalties for death or injury of an unborn child
- COMMITTEE:** State Affairs — favorable, without amendment
- VOTE:** 7 ayes — Marchant, Madden, J. Davis, B. Cook, Elkins, Gattis, Goodman
1 nay — Villarreal
1 absent — Lewis
- SENATE VOTE:** On final passage, May 22 — voice vote (Barrientos, Gallegos, Wentworth, Whitmire recorded nay)
- WITNESSES:** *(On House companion bill, HB 246:)*
For — MerryLynn Gerstenschlager, Texas Eagle Forum; Beverly Nuckols, Texas Physicians Resource Council; Teresa Collett; Jan Barstow; *(Registered, but did not testify:)* about 290 individuals

Against — Mike Hull, Texas Alliance for Patient Access, Texas Medical Association, and Texas Hospital Association; Kae McLaughlin, Texas Abortion and Reproductive Rights Action League; Hannah Riddering, Texas National Organization for Women; Peggy Romberg, Women’s Health and Family Planning Association of Texas; *(Registered, but did not testify:)* about 70 individuals
- BACKGROUND:** Under Penal Code, ch. 19, a person commits criminal homicide if he or she intentionally, knowingly, recklessly, or with criminal negligence causes an individual’s death. The statute defines individual as a human being who has been born and is alive. Murder, capital murder, manslaughter, and criminally negligent homicide are the individual offenses of criminal homicide. Penalties for criminal homicide range from a state-jail felony (punishable by 180 days to two years in a state jail and an optional fine of up to \$10,000) to a capital felony (death or life in prison).

Penal Code, ch. 22 deals with assaultive offenses, including assault, aggravated assault, sexual assault, aggravated sexual assault, and injury to a child or an elderly or disabled person. Penalties for these offenses range from

a Class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) to a first-degree felony (life in prison or a sentence of five to 99 years and an optional fine of up to \$10,000).

Penal Code, sec. 49.07 deals with intoxicated assault, a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000). Sec. 49.08 deals with intoxication manslaughter, a second-degree felony (two to 20 years in prison and an optional fine of up to \$10,000).

Civil Practice and Remedies Code, ch. 71 deals with civil lawsuits brought for wrongful death. Under sec. 71.003, the subchapter applies only if the person who was injured by another's actions would have been entitled to bring an action for the injury if the person had lived.

DIGEST:

SB 319 would allow criminal and civil penalties to be imposed for the death or injury of an unborn child.

Individuals would be defined in the civil statutes dealing with wrongful death to include an unborn child at every state of gestation from fertilization until birth and in the criminal statutes as human beings who are alive, including unborn children at every state of gestation from fertilization until birth. Death, for an individual who was unborn, would be defined in both statutes to include the failure to be born alive.

Criminal penalties. SB 319 would make an exception to the application of the criminal homicide statute that the death was the death of an unborn child and that the conduct was:

- committed by the mother of the unborn child;
- a lawful medical procedure performed by a doctor or other licensed health-care provider who had the required consent, and the death of the unborn child was the intended result of the procedure; or
- the lawful dispensation or administration of a drug.

Similarly, it would be an exception to the application of assaultive offenses that the conduct was committed against an individual who was an unborn child and that the conduct was:

- committed by the mother of the unborn child;
- a lawful medical procedure performed by a doctor or other licensed health-care provider who had the required consent; or
- the lawful dispensation or administration of a drug.

It would be an exception to the application of intoxication assault and intoxication manslaughter that the injury or death was the injury or death of an unborn child and that the conduct was committed by the mother of the unborn child.

Civil remedies. SB 319 would make the Civil Practice and Remedies Code subchapter dealing with wrongful death apply if individuals — defined to include unborn children from fertilization to birth — who were injured would have been entitled to bring an action for their injury if they had been born alive. The subchapter on wrongful death would not apply to a claim for the death of an unborn child brought against:

- the mother of the unborn child;
- a doctor or other licensed health-care provider, if the death was the intended result of a lawful medical procedure performed by the doctor or health-care provider who had the required consent;
- a person who lawfully dispenses or administers a drug, if the death was the result of the drug; or
- a doctor or other licensed health-care provider, if the death was caused by or associated with, arose out of, or was related to a lawful medical or health-care practice or procedure.

The bill would take effect September 1, 2003.

**SUPPORTERS
SAY:**

SB 319 would close a gap in current law by allowing criminal and civil penalties for a third party who wrongfully injured or killed an unborn child against the wishes of the mother through actions such as murder, assault, or drunk driving. The bill would ensure that a woman's right to have her child was protected.

Currently, Texas criminal law does not protect an unborn child from harm inflicted by a third party against the wishes of the mother, and civil law does not give parents a cause of action to sue for the wrongful death of their

unborn child. Texas prosecutors have been unable to bring criminal charges for the death of unborn children because the Penal Code defines “individual” as a human being who has been born and is alive. Parents have been unable to recover civil damages on behalf of their unborn children because the unborn child does not qualify as a person on whose behalf a lawsuit can be brought.

For example, a Texas woman who was shot in the head and abdomen by an ex-boyfriend in 1985 survived, but her baby died, and murder charges against the ex-boyfriend had to be dropped when the prosecutor determined that Texas law would not allow the prosecution. In 1992, a pregnant woman stopped with her husband to help a motorist and was struck by a drunk driver. The woman suffered extensive injuries, and her unborn daughter died, but the driver never was charged with a crime. In other cases, mothers have been unable to recover civil damages after their unborn children have died in the womb.

SB 319 would remedy these situations by including unborn children in the definition of individuals in the Penal Code and placing in the wrongful death statutes a definition of individuals that includes unborn children and defines “death” as including the failure to be born alive. This would allow criminal penalties to be imposed on people who caused death or injury to unborn children whose parents had hoped and planned for a live birth, and it would allow parents to sue for the wrongful death of their unborn children. People who cause harm to unborn children should be held legally responsible for their actions, because the injuries and suffering are real.

SB 319 would not infringe in any way on a women’s constitutional right to abortion or the right to any other legal medical procedure to which the mother had consented. Concerns that the bill is designed to limit abortions or lay the groundwork to limit abortions are unfounded. The bill would make clear, specific exceptions to the applications of the law for any action to which a pregnant woman consented, including abortion. Physicians performing legal abortions would fall under the exceptions of the bill. Courts in other states consistently have upheld similar laws, ruling that a woman’s right to an abortion does not protect a third party who would harm or kill her unborn child against her wishes. Laws allowing civil and criminal penalties for the wrongful death of unborn children in other states have not limited a woman’s right to abortion.

A majority of states allow civil and criminal penalties along the lines of SB 319. Thirty-seven states and the District of Columbia allow parents to sue for the wrongful death of an unborn child, and 27 states recognize the killing of an unborn child against the mother's wishes as a form of homicide.

Concerns that SB 319 would expose people to criminal prosecutions even if they did not know that a woman was pregnant are red herrings. If a drunk driver hits a car and kills the driver along with two children in the back seat, the driver can be held criminally liable for the death of all the passengers, including the children, whether or not the driver knew the children were in the car. Under SB 319, the death of an unborn child would be treated exactly like the death of children in the back seat. Criminal prosecutions under the law would have to meet all current requirements for culpable states.

SB 319 would be only a modest change to Texas law because other, existing laws recognize unborn children independently of their mothers and give them certain protections and rights. For example, under the Family Code, an unborn child's best interests must be considered in custody suits filed before a child's birth. Under the Property Code and the Probate Code, unborn children can inherit property and, through representatives, can disclaim existing property interests, and a court can appoint a guardian ad litem to represent an unborn child's interests. Court rulings also recognize unborn children, with one decision having found that a child injured in the womb and born alive could be considered a patient for purposes of a health-care liability claim.

Strong public support exists for SB 319. In a Scripps Howard Texas Poll conducted in January and February 2001, 78 percent of those surveyed said they would support a law establishing criminal and civil penalties for a third party who killed an unborn child in the womb against the mother's wishes, such as in the case of drunk driving.

Predictions that SB 319 would deepen the tort-reform crisis or limit health care because doctors would be exposed to increased liability are unfounded. Doctors and health-care providers work under similar laws in 38 states without these doomsday scenarios occurring, and there is no reason to think they would occur in Texas. The bill's specific, clear exceptions for lawful medical procedures performed with a woman's consent would protect health-care providers from frivolous lawsuits.

SB 319 would not create a new cause of action in cases of wrongful death but simply would expand the class of people on whose behalf the suits could be brought. Liability should not be limited when it comes to pregnant women and their unborn children. Courts could weigh whether lawsuits were frivolous and could throw out those determined to be so.

A planned floor amendment would address concerns about the bill's language creating "exceptions to the application of" criminal statutes.

**OPPONENTS
SAY:**

SB 319 could establish a statutory foundation to restrict a woman's right to abortion. The bill could result in a fetus being elevated to the legal status of personhood, resulting in a back-door approach to restrict women's access to abortion. The bill could be used to bring endless lawsuits or criminal charges against abortion providers, making them reluctant to perform the legal procedure and reducing access to abortion for women. It also could result in overly broad criminal statutes, because people could be subject to criminal prosecutions for actions committed without the knowledge that a woman was pregnant.

SB 319 would make the already serious tort-reform crisis worse by exposing doctors to increased liability for medical malpractice suits. It could result in higher malpractice insurance rates for doctors and in doctors restricting or limiting the medical procedures they were willing to perform on pregnant women. For example, a doctor could refuse to operate on a pregnant woman in an coma if the fetus would have to be lost to save the woman's life. This could increase the costs of an already overburdened health-care system and could result in less access for women to obstetricians and gynecologists. This would be especially problematic since more than half of Texas counties have no obstetricians-gynecologists.

SB 319 unwisely would create a new cause of action for civil lawsuits and could lead to increases in frivolous litigation and to criminal penalties in inappropriate situations. For example, a pregnant woman walking on a sidewalk who tripped, fell, and later miscarried could sue because of the uneven sidewalk, or a woman who miscarried after being struck from behind in an automobile collision could bring a lawsuit. The bill also would raise questions about whether people who destroyed frozen embryos would face criminal or civil penalties.

**OTHER
OPPONENTS
SAY:**

It would be better for SB 319 to make the exceptions to the criminal situations it describes defenses to prosecution instead of “exceptions to the application” of certain criminal laws. As written, the bill would require prosecutors to plead and disprove the exceptions in the bill in every criminal case in which a defendant was charged with a criminal homicide offense, assaultive offense, intoxication assault, and intoxication manslaughter, regardless of whether the case involved a pregnant woman. This would be confusing to jurors and could lead to mistrials or acquittals. Changing the language to defenses would not alter the burden of proof but would limit the defense for lawful medical procedures to cases in which a defendant wished to rely on it.

A better approach to protecting pregnant women would be to enhance penalties for attacks on them.

NOTES:

The companion bill, HB 246 by Allen, et al., was reported favorably, as substituted, by the House State Affairs Committee on April 10.