

Prenatal Legal (Non)Persons and Their Rights

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Abstract - The conventional notion of legal personhood (the ‘Traditional View’) comes in many forms. However, its most popular formulations equate legal personhood with either the holding of legal rights and/or duties, the capacity to hold legal rights and/or duties, or the capacity to be a party to legal relations. Therefore, if these concepts are interconnected with one’s personhood status, then defining who is a legal person is of utmost importance. The importance of this issue is further emphasized where one’s recognition of personhood, or the lack thereof, justifies their termination. However, is there a necessary link between personhood and moral standing as argued by Peter Singer? No, not from a historical legal assessment. This is demonstrated when unborn children were seen neither as persons nor as actual human beings and were, however, protected and deemed victims of homicide in an illegally obtained abortion under the *New York Penal Law (1965)*.

The above scenario, therefore, creates an inconsistency with the Traditional View when assessed against the New York statute, the *Reproductive Health Act (2019)* and the United States’ federal statute – the *Unborn Victims of Violence Act (2004)*. We must therefore adjust either our rights theories, our beliefs regarding who or what is a legal person, or our definition of legal personhood. I argue that legal personhood, but foetal personhood in particular, is a cluster property. A legal person is not simply a right-holder or a duty-bearer; rather, legal personhood consists of divisible but interconnected incidents of legal personhood. I also argue that legal personhood entails natural law propositions – I coin this theory *Foetal Bundle Theory*.

Keywords – Foetal rights, abortion, abortion rights, moral status, foetal victimhood, personhood, bundle theory, natural law, Aquinas, foetal bundle theory

I.

INTRODUCTION

Peter Singer in *Rethinking Life and Death* states that ‘the term person is no mere descriptive label. It carries with it a certain moral standing’.[1] However, is this necessarily true? From a historical legal assessment, this proposition is incorrect when assessed in light of the *New York Penal Law (1965)* (*NYPL*) when pre-natal human beings were neither seen as persons or *actual* human beings and were, however, protected and deemed victims of homicide in an illegally obtained abortion (‘Former View’).[2] The fact that these ‘non-persons’ were provided with victimhood in a homicide, demonstrates that personhood is not a necessary component to obtain ‘certain moral standing’. While this may not sound controversial in and of itself, an inconsistency arises with this recognition of victimhood when contrasted with popular formulations that equate legal personhood with either the holding of legal rights and/or duties, the capacity to hold legal rights and/or duties, or the capacity to be a party to legal relations. This concept is coined the Traditional View. This view will be explained in section III, while section II will explain the various concepts of personhood that are held. Section IV will highlight the apparent inconsistency in trying to harmonise the Traditional View with the Former View. Finally, section V will demonstrate that personhood is not a necessary requirement for victimhood and therefore, Section VI will provide an alternative view of personhood coined *Foetal Bundle Theory*. In this section, I argue that legal personhood is a cluster property and that a legal person is not simply a right-holder or a duty-bearer; rather, legal personhood consists of divisible but interconnected incidents of legal personhood. Therefore, *Foetal Bundle Theory* best explains how fetuses were/are seen as legal non-persons in general but could nevertheless acquire legal standing as a victim of a homicide – a concept difficult to harmonise on the Traditional View.

II.

VIEWS OF PERSONHOOD

The literature is beset with a myriad of views of personhood,[3] most of which could be captured in two categories: moral (or metaphysical) and legal. One could argue that all moral persons should be legal persons, but not all legal persons should be moral persons. A *priori* position is commonly held that human beings with legal personhood also have moral personhood, and that human beings who have moral personhood possess it because they are thought to have sufficient moral status.[4] In other words, without moral status, there can be no legal and moral personhood. However, whether corporations, which are ordinarily regarded as legal persons,[5] also have moral personhood is debated in the fields of law and legal philosophy[6] and extends beyond the scope of this paper. This paper will focus on legal personhood.

There are two classes of legal persons: natural persons and juridical persons.[7] Natural persons are human beings[8] while juridical persons are non-human person[9] entities who are recognised by law as bearing rights and, if appropriate, obligations.[10] For instance, a company has the right to sue and be sued[11] and has obligations to, where applicable, pay taxes.[12]

The question then arises, is a foetus a natural or juridical person? An argument for the former could be as follows:

- (1) A human being is a natural person;
- (2) A foetus is a human being;
- (3) Therefore, a foetus is a natural person. ('Argument')

While this argument may be logically valid, there are *some rights* that one may argue a foetus does not hold because it is not a legal person until they are born alive. The law of England and Wales notes that legal personality is provided to all persons born alive.[13] Before birth, a foetus has no legal personality, whereas following birth, it is afforded all the protections and rights of a child.[14] For instance, even the historic United States case of *Roe v Wade* (1973) that made abortion a woman's constitutional right noted that, even though foetuses were not considered persons under the *Fourteenth Amendment* – which provides persons with the right to life - they could, however, be recognised as a person in tort if it is injured or for inheritance.[15]

The born alive rule is an 'archaic' common law legal principle that maintains that victimhood in a criminal act, such as homicide or assault, only applies to a child that is 'born alive' for they are not viewed as a legal person until this point. This rule was first formulated in the 16th Century by William Staunford and penned by Edward Coke in his *Institutes of the Laws of England*. [16] Coke wrote:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the child dyeth in her body, and she is delivered of a dead childe, this is great misprision, and no murder; but if he childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.[17]

Determining live birth troubled the courts, since the key question in cases concerning the killing or death of an unborn child was whether it was born dead or was born alive and then died.[18] There have been numerous tests and decisions involving this doctrine, however, none were decisive. For instance, in 1833, the proposition that live birth was present because an infant had breathed was rejected as proof by an English court. The court held that establishing 'independent circulation' was a necessary condition for the conviction of murder as this would establish for live birth.[19] Nonetheless, the issue of personhood transcends questions of law and into other disciplines, such as philosophy. Similarly in law, debates within philosophy have also tried to establish two questions. First, what is a person? Secondly, when is X have a person?

Although there is no necessary link between moral personhood and legal personhood, one's view of personhood aids in establishing whether some 'thing' should receive legal personhood status ('Position'). For instance, if one's view of personhood encompasses moral status, then they are more likely to argue for this Position. Peter Singer argues that a necessary condition for moral personhood is rationality and self-awareness'. [20] Given that Singer holds that

personhood encompasses moral status, then those which are not moral persons have no moral status. Therefore, this view leads him to support infanticide for he believes that infants are not moral persons and thus, should not be protected by the rule of law in the same way as ‘normal human beings’. He writes:

The fact that a being is a human being, in the sense of a member of the species *Homo sapiens*, is not relevant to the wrongness of killing it; it is, rather, characteristics like rationality, autonomy, and self-consciousness that make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings, or any other self-conscious beings.[21]

As problematic as this position may seem, Singer provides a consistent applicability of his view of a moral person and their treatment and recognition under law. An inconsistent view arises when one holds that, for instance, a foetus is a metaphysical person, however, should not be a legal person. This proposition will not be defended in this paper.

This section has established that there are two kinds of persons: Moral persons and legal persons, with the latter view possessing two sub-categories – natural persons and juridical persons. Although there is no necessary connection between moral personhood and legal personhood, one’s view of the former may influence the latter.

III.

THE TRADITIONAL VIEW

The Traditional View of personhood maintains that the definition of ‘legal person’ is ‘someone or something that holds rights and/or bears duties’.[22] Although this view differs in form, its most prevalent expressions associate legal personhood with either the holding of legal duties and/ or rights, the ability to hold legal duties and/ or rights, or the capacity to be a party to legal interactions.[23] Personhood is thus understood in ‘all-or-nothing’ terms. However, as will be highlighted in Section IV, this view is problematic because this is not always so, personhood comes in degrees and can be function specific. I maintain that the Traditional View cannot account for the widely accepted extension of the concept.[24] The argument against the Traditional View can be summarized as, ‘an all-or-nothing notion of legal personhood ... [that] is not well adapted to the variety of the law’s purposes’.[25] The difficulties of the Traditional View can best be revealed by demonstrating that prenatal life were/are seen as legal persons in some circumstances but not in others. If the Traditional View is correct, then this approach is inconsistent for if a foetus is a person in one instance, it ought to be a person in all instances.

IV.

THE INCONSISTENCY OF THE TRADITIONAL VIEW

As mentioned above, the Traditional View takes an ‘all or nothing’ approach to personhood. That is, if X has rights, they are therefore a person. However, there are numerous instances whereby X would be treated as a person in C¹, but not in C². This treatment is unexplainable with a consistent application of the Traditional View. For instance, under the *RHA*, a foetus is not a victim of homicide in an abortion. However, under the *Unborn Victim of Violence Act* (2004) (*UVVA*), a *child in utero* is a victim in a non-consented termination. A consistent application of the Traditional View would provide legal personhood to the unborn child in both scenarios. Therefore, the unborn child would be a victim of homicide in an abortion. This dilemma was recognized in *Roe*. The court held: ‘If this suggestion of personhood [that prenatal life] is established, the...case [for legalising aborticide], of course, collapses, for the f[o]etus’ right to life is then guaranteed specifically by the [*Fourteenth*] *Amendment*’.[26] The court therefore highlighted, for this reason, amongst others, the unborn child is not captured under the definition of a ‘person’ in light of the *Fourteenth Amendment*.

The fact that prenatal life were legal non-persons in general but could nonetheless be provided with victimhood is difficult to explain if legal personhood is described as the possession of any rights and/ or the bearing of any duties.[27]

V.

THE NON-NECESSITY OF PERSONHOOD

It has been commonly asserted that personhood is a necessary condition to be a victim of a crime.[28] However, a historical legal assessment highlights the invalidity of this argument. Before its repeal by the *RHA*, the *NYPL*, which was enacted in 1869, held that an unborn child was a victim of homicide if it was terminated in two circumstances. First, if it was not necessary to save the mother’s life and secondly, if it was terminated after twenty-four weeks

gestation.[29] At the time of the *NYPL*'s enforcement, the foetus was not viewed as an actual human life, but a potential human life. This rationale was illustrated in *Roe*:

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. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the *potentiality of human life*. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling." [30]

The 1973 United States case of *Roe v Wade* ('*Roe*') [31] established that abortion was a woman's constitutional right [32] and held that abortions could be undertaken for any reason within the first 20 weeks however, for abortions after this period, states could limit the reasons that enable a woman to have an abortion. [33] The *Roe* court held that the abortion decision and its effectuation must be left to the medical judgement of the pregnant woman's attending physician. Thus, abortions within the first trimester were 'free of interference by the State'. [34] Furthermore, the *Roe* court ruled that 'the word 'person,' as used in the *Fourteenth Amendment* [35] – which provides a person with the right to life, does not include the unborn'. [36] Therefore, prenatal life do not receive victimhood in an abortion. However, *Roe* acknowledged that unborn children are deemed as 'persons' for the purposes of tort or inheritance. [37]

Although the foetus was not seen as a person *tout court*, the *NYPL* still provided unborn children with legal standing as a victim of homicide in an abortion. This position was reflected in United States' courts where they held that the definition of a 'person' does not include the abortive killing of an unborn child. [38] and was reflected in the in s 125.05 of the *NYPL*. The *NYPL* defined as person as follows, 'when referring to the victim of a homicide, means a human being who has been born and is alive'. [39] This suggests that the victim of homicide does not need to be a person or a 'person in the whole sense'. [40] This scenario therefore establishes that personhood is not a necessary condition for foetal victimhood.

Although abortion was a constitutional right, it is now a state right (where applicable) since being overturned by the recent decision in *Dobbs v Jackson Women's Health Organization* ('*Dobbs*'). [41] The decision in *Dobbs* does not affect this thesis, for the problem of the Tradition View still exists. This is best illustrated when comparing laws that provide the right to an abortion and those which endow prenatal life with legal standing in a homicide, in particular New York's *Reproductive Health Act* (2019) ('*RHA*') and the United States' federal statute, the *UVVA*.

The *RHA* allows women to terminate their pregnancy up until birth [42] while the *UVVA* provides punishment for anyone that terminates a woman's pregnancy without her consent. [43] Importantly, the *UVVA* disallows the prosecution 'of any woman with respect to her unborn child'. [44] Therefore, the *RHA* does not recognise prenatal life as persons with legal standing in a crime, while the *UVVA* does. It is also important to note that the *UVVA* defines a *child in utero* as 'a member of the species homo sapiens, at any stage of development, who is carried in the womb'. [45] This definition highlights the validity of the above Argument. Therefore, there seems to be an inconsistent treatment when endowing prenatal life with personhood. Even though the foetus is viewed as a human being at law, it is not considered to be, or at least treated as, a natural person. However, is the notion of legal personhood a necessary requirement to receive victimhood? The following section will answer in the negative, using the *NYPL* as an illustration.

VI.

FOETAL BUNDLE THEORY

Foetal Bundle Theory is derived by applying Kurki's Bundle Theory of legal personhood and natural law propositions to unborn children, specifically in circumstances where they are terminated. This Theory can account for the fact that unborn children held some claim-rights but were not legal persons. Similarly, assertions such as 'unborn children were not legal persons in the United States in the twentieth century' may be correct, but any position claiming that unborn children of that time held no legal positions that are classifiable as rights or duties, is clearly incorrect. It would be similarly ridiculous to argue that awarding unborn children with just one duty or right would have transformed them into legal persons *tout court*. The entire problem can be better understood by considering prenatal legal personhood as a cluster property, whereby one can progressively achieve personhood-

associated benefits and obligations.[46] Foetal Bundle Theory allows unborn children to be legal non-persons and still hold legal rights.[47]

A. *Main Tenets of Foetal Bundle Theory*

The main tenets of Foetal Bundle Theory are threefold:

1. The legal personhood of prenatal life is a cluster property and comprises of incidents which are distinct but interconnected.
2. These incidents involve primarily endowing prenatal life with particular types of claim-rights.[48]
3. This Theory entails natural law propositions.

I. Incidents of Personhood

Bundle Theory designates two types of incidents to personhood: Active and Passive.

a. *Active Incidents*

Active incidents are principally, though not entirely, pertinent to entities that have cognitive capacities that roughly akin to those of an adult human being of sound mind and a grouped into two categories: (i) Legal competences and (ii) Onerous legal personhood. Legal competences include the capacity to use the other incidents without a representative while Onerous legal personhood includes legal responsibilities in criminal law, tort law and other forms of responsibilities.[49]

b. *Passive Incidents*

Passive incidents are distributed into two groups: (i) Substantive and (ii) Remedial.

The substantive incidents have mainly concerned with the non-procedural claim-rights and liabilities that are held or could be acquired by an entity ('E'). If E is provided with protection to its personal integrity, life, and liberty, then the quantity of duties owed to E by 'the world' is greater than otherwise. If E has the capability to own property and be the recipient of special rights, then E may obtain ownership- related claim- rights 'against the world' and special rights against determinate parties. Finally, E can concurrently be the property of A and bestowed with several incidents of legal personhood. However, Kurki notes that there is a tension between these two attributes. It is outside the scope of this paper to address this tension.[50]

Substantive passive incidents include (i) fundamental protections: protection of life, liberty, and bodily integrity; (ii) capacity to be the beneficiary of special rights; (iii) capacity to own property; and (iv) insusceptibility to being owned.[51]

Remedial incidents relate to the legal remedies available to X if the obligations and duties towards X are not regarded. These comprise of (i) legal standing; (ii) victimhood; and (iii) capacity to undertake legal harms.[52]

Given the flexibility of Foetal Bundle Theory, it is not necessary for unborn children to receive all the above incidents. Since prenatal life do not have the appropriate cognitive faculties to receive Active Incidents, they can, however, hold-claim rights which stems from the received passive incidents. It is also superfluous for unborn children to be legal persons to receive these passive incidents. Therefore, unborn children can be legal non-persons and still hold legal rights.[53]

As it relates to victimhood, unborn children receive the following passive incidents:

1. Substantive Incidents: Protection of life, liberty, and bodily integrity; and
2. Remedial Incidents: Legal standing, victimhood, and the capacity to undertake legal harms.
(‘Passive Incidents’)

II. Natural Law Propositions

Natural law propositions relate to two goods of natural law: (a) the preservation of human life[54] and (b) that good is to be done and evil avoided[55] ('Goods'). Given that:

- a. Unborn children are human beings from the moment of conception; and
- b. The Goods of natural law apply to all human beings

It therefore follows that the treatment of unborn children should align with these Goods. In the same way that human rights are protected, or at least should be protected, by the rule of law,[56] these Goods are likewise protected; especially considering that natural law propositions are engrained in international law protecting human rights[57] such as, 'everyone has the right to life, liberty and security of person'[58] ('Right').

One manner of protecting this Right is to provide punishment for perpetrators and legal standing for the victim of a crime. Therefore, to protect the Goods that are applied to unborn children, claim-rights are provided to them. For this reason, Foetal Bundle Theory endows unborn children with Passive Incidents to enforce those Goods.

Since Foetal Bundle Theory does not hold to an 'all or nothing' view of personhood, this Theory best explains how foetuses were/are seen as legal non-persons in general but could nevertheless acquire legal standing as a victim of a homicide – a concept difficult to harmonise on the Traditional View.

VII. CONCLUSION

In conclusion, there is a distinction between metaphysical personhood and legal personhood. However, although they may be interrelated, they are not necessarily related. Therefore, one may hold that X is a metaphysical person, but not a legal person. Given that personhood is not a necessary condition for victimhood, then non-persons may hold claim-rights. This further demonstrates that there is no necessary relationship between personhood and moral standing. Whether this link *should* be necessary falls outside of the scope of this paper.

Given that unborn children were seen as legal non-persons in general however, (i) were still provided with victimhood in an abortion and (ii) are currently viewed as victims in a non-consented termination; creates a difficult dilemma for the Traditional View to resolve. However, Foetal Bundle Theory allows for an adequate explanation of how foetuses were/are seen as legal non-persons in general but could nevertheless acquire legal standing as a victim of a homicide. This explanatory power rests on the view that personhood is a cluster property and that a legal person is not simply a right-holder or a duty-bearer; rather, legal personhood consists of divisible but interconnected incidents of legal personhood.

Foetal Bundle Theory provides prenatal life with Passive Incidents for this Theory entails natural law propositions. The endowment of these Incidents reflects the conformity to the Goods of natural law.

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