

**PERSONHOOD AND PROPERTY
IN THE JURISPRUDENCE OF PREGNANCY**

MARY FORD

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SUMMARY

Courts in the United Kingdom currently employ a conflict model of adjudicating maternal / foetal issues. This thesis aims to expose the inadequacy of the current model, to evaluate alternative approaches, and ultimately to propose a property-based model of adjudicating pregnancy.

I begin by surveying some of the case-law under the conflict model and discussing the model's shortcomings. On the practical level, the conflict model leads to negative perceptions of pregnant women, fails to reflect the realities of pregnancy, and embodies legal and logical inconsistencies. On the theoretical level, problems arise from the model's necessary characterisation of the foetus as a 'sentient non-person'. This is problematic for two reasons, which are explored in chapters two and three respectively: first, because the sentience of the foetus is a matter of controversy; second, because the concept of personhood is deeply flawed and is anyway incapable of functioning as a determinant of moral status.

Later I review an alternative to the conflict model which has been proposed by Eileen L McDonagh: her 'consent model' of pregnancy which characterises pregnancy as an 'intrusion' by the foetus upon the body of the mother and views the right to terminate pregnancy as a right of 'self-defence' against this intrusion. I conclude that McDonagh's thesis fails, ultimately, to provide a satisfactory alternative to the conflict model.

My own alternative to the conflict model, developed in chapter five, proposes a departure from the metaphysical language of personhood and moral status, and a focus on the legal framework of *property* as a method of adjudicating maternal / foetal issues.

To my parents and grandparents

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Introduction: the need for a new legal paradigm of pregnancy

In the title of an article published in 1991, Celia Wells and Derek Morgan ask, provocatively, '*Whose Foetus Is It?*'.¹ In this thesis, I claim that this question is both appropriate and answerable, however unaccustomed we may be to approaching maternal/foetal issues as issues of property. Almost without exception, those who claim that fetuses have rights, and that pregnant women and others have concomitant obligations not to harm or destroy fetuses, justify their claims by reference to the *nature* of the foetus. Similarly, responses to such claims about foetal rights have ranged from outright denial that the foetus is anything of value at all to arguments focusing on the moral status of women and *their* rights, having regard to concepts such as choice, consent and autonomy. As such, what the vast majority of argumentation on both sides shares is its focus on the *nature* and *moral status* of the entities involved.

Here, I will explore the difficulties encountered by traditional comment on maternal/foetal issues, and offer my own suggestion for adjudicating pregnancy: a paradigm shift from personhood to property. I will argue that the existing legal framework of property is able to illuminate the complex dynamic at work in pregnancy, securing women's autonomy and explaining what seem to be conflicting and incoherent legislative and judicial statements, while avoiding some of the pitfalls that have hampered other models.

First, it will be necessary to justify my recommendation that we shift the emphasis away from the concept of personhood, which seems to possess such intuitive appeal, and on which so many commentators continue to pin their hopes of a resolution to the moral and intellectual hand-wringing which invariably accompanies theorising maternal/foetal issues.

It is undoubtedly the case that the legal and moral issues arising from pregnancy, such as maternal/foetal conflicts, *can* plausibly be framed as questions of moral status. It is also probably true to say that questions concerning what may and may not be done to human life in its earliest stages

¹ *Journal of Law and Society* 18(4) (1991) 431

could be resolved by arriving at a satisfactory answer to such questions as, ‘what is the moral status of the conceptus, embryo, or foetus?’. Similarly, questions about how we ought to understand the rights and obligations conferred and imposed by pregnancy can be cast in terms of the personhood of women, their moral agency and personal autonomy. But the reducibility of all such questions to the ‘fundamental question’ of the moral status of the foetus is precisely the problem with issues surrounding pregnancy, since this fundamental question is one which is possibly unanswerable, and which certainly promises to remain controversial for the foreseeable future. Some of the finest legal and philosophical minds for generations past have submitted this area of enquiry to years of scrutiny, with considerable input from experts in other relevant disciplines, such as embryology and reproductive medicine, yet the ‘clash of absolutes’ remains. Moreover, the claims of ethical relativism and other strands of moral scepticism raise the possibility that the search for the kind of ‘moral truth’ necessary to put the matter beyond the current protracted and intractable discourse is a vain one.

Despite this possibility, and the fact of profound and ongoing moral disagreement, however, the law *must* respond coherently to questions arising from maternal foetal issues.² As such, a rationale of some sort is required, and it cannot wait upon a substantial consensus as to the moral status of the foetus. I propose, therefore, to draw back from the heat and rhetoric of the moral-status debate for a time, and to concentrate instead upon the possibility of a *legal* solution.

As I will demonstrate, one clear advantage of the property model is that it allows for analysis of the *relationships* at stake without presupposing any conclusions about the nature or moral status of the *entities* involved in these relationships. This feature makes the model particularly amenable to legal analysis and adjudication, since, arguably, the *raison d’être* of law is the regulation of relationships.

Recasting the issues in terms of property does not mean abandonment of the *legal* language of personhood and rights. Such concepts are, after all,

² Contrast John Seymour, who regards coherence in the law of maternal/foetal issues to be an impossibility; it is submitted here that the very aims and nature of a legal system make coherence essential, so that Seymour’s is a defeatist claim and the property model, which satisfies the need for coherence, is preferable to alternatives which do not.

central to the very notion of property, as will be discussed later.³ Moreover, my emphasis on property is not intended as a denial of the relevance of moral status; quite the reverse. If all questions about the moral status of human life *in utero* were to be settled uncontroversially tomorrow, then of course the answers would have to be the starting point for any further moral and / or legal debate. For example, were we able to answer the question, ‘Is a thirty-six-week-old foetus entitled to any moral consideration?’ in the negative, then much of our current legal regulation would appear to be unfounded, and an unjustifiable infringement of women’s liberty. Conversely, if we were able to agree that an hour-old fertilised egg *is* morally-considerable (was even a ‘person’), then our statute books may require to be thoroughly rewritten. The paradigm shift that I propose, then, is not based upon any claim that property is the ‘correct’ way of categorising the relationships at stake in pregnancy; merely a claim that it is one reasonable interpretation, and one which is supported by existing legal authority and academic discourse.

There is, however, another, stronger reason for emphasising property over personhood. Historically, through the institutions of slavery and possessive marriage, laws have treated as property entities that are now universally acknowledged to be persons. Yet the law has always maintained its distinction between persons on the one hand and property on the other; an entity cannot be both person and property simultaneously (this goes to the heart of the standard objections to notions of ‘self-ownership’ and ‘property-in-the-person’). On the basis of this logical separation, the legal systems which allowed slaves and women to be owned by men denied the personhood of slaves and women explicitly. Now that we recognise these entities as persons, we acknowledge that they cannot also be owned – they cannot be property.

The upshot of all this is that, if we were able to arrive at a consensus that a ‘person’ exists at any stage of human development prior to birth, then *at that stage of development* the issue of property and property relationships would disappear. For all other stages, in all circumstances where no person can be agreed to exist, the possibility of property remains, and issues of

³ See *infra*, chapter five.

ownership may arise. Only in the unlikely event of a positive determination of embryonic or foetal personhood, therefore, does property cease to be an issue. Otherwise, the concept of property has potential application to pregnancy, and I will argue that it *is* applied to pregnancy, though rarely explicitly. I propose that this property element be made explicit in order to facilitate theorising and adjudication about pregnancy issues in the absence of moral consensus, or any reasonable prospect of such consensus.

I have already proposed that a property-based account of pregnancy provides us with one way (although not necessarily the *only* viable way) of describing legal reality accurately. It also affords the opportunity for the law to adopt a coherent approach to a range of reproduction-related issues by having reference to a familiar legal schema even while the meta-ethical debate on foetal status is ongoing. It offers a framework for transparent and reasonably predictable decision-making, and crucially, it does so without implying a conclusion to the interminable moral debate about foetal status versus women's rights, or an endorsement of any of the claims being presented within that debate. It treats the legal and the meta-ethical debates as parallel lines of normative reasoning, with the potential for, but not the *need* for, cross-reference between the two.

As I will demonstrate, a property framework is able to clarify issues like stem-cell research, the ownership and use of frozen embryos, and surrogacy. It also takes account of our intuitive sense of the significance of birth. Some of the questions surrounding surrogacy, for example, look like tangled and conflicting rules without any real unifying principle. What are the relationships involved in surrogacy? Are they determined by the individual surrogacy contract, or are the issues so fundamental that they cannot be contracted out of? Ought the legal response to maternal/foetal conflict be different for surrogate as opposed to non-surrogate pregnancies? What is the legal relationship of the 'commissioning parents' to the surrogated foetus during pregnancy? Do they have any legal rights? Can a father ever have rights over a foetus during pregnancy, even in surrogate pregnancies? All of these questions resolve themselves into a much more appreciable pattern when filtered through the prism of property rather than by referring to the

nature of a foetus and the rights of the woman in an attempt to resolve such issues.

In chapter one of this thesis I will examine the orthodox ‘conflict model’ of pregnancy through a survey of its case-law, discussing its shortcomings and the potential solutions offered by various academic commentators. In chapters two and three I will explore the question of the moral status of the foetus in detail, demonstrating that neither a sentience-based nor a personhood-based account of moral status is capable of resolving the ‘conflict’ inherent in the orthodox model. In chapter four I will analyse an alternative model of pregnancy, the ‘consent model’ proposed by Professor Eileen McDonagh. Having concluded that this model fails, ultimately, to break the deadlock of the conflict model, I will proceed in chapter five to present my own property-based model for adjudicating maternal/foetal issues.

1. The Conflict Model of Pregnancy

‘The maternal/foetal rights debate seems confounded by the notion that a woman may, in addition to determining whether her pregnancy is terminated, have an equally compelling interest in the preservation of her foetus.’⁴

1.1. Introduction

Consider the following scenario: Alison, a thirty-year-old woman living in London, is 18 weeks pregnant. Her relationship with the father of her child has recently ended and, after much agonising, Alison has decided to terminate her pregnancy, despite the facts that the pregnancy is in a relatively advanced stage and the foetus is healthy. Alison sets out to drive to the clinic where the termination will be performed. While waiting at a set of traffic lights, another car ploughs into the back of her stationary car. The driver, Ben, had been momentarily distracted and failed to brake in time. Fortunately, although she is somewhat shaken, Alison herself escapes with a bump on the head and minor bruising. However, the force of the impact causes the death of the foetus she is carrying, and Alison later miscarries, at exactly the same time that the termination was due to be carried out.

Ben is charged with, and convicted of, a road traffic offence (driving without due care and attention). Alison also sues him in the civil courts, seeking compensation both for the shock and minor injuries she has sustained and for the loss of what is described in the complaint as ‘her unborn child’. She is awarded a five figure sum in damages for the latter head of claim.

Predictably, the decision is greeted with public outcry. Ben gives an interview to a tabloid newspaper in which he accepts responsibility for his driving conviction and accepts the (minor) damages awarded in respect of Alison’s own injuries, but claims that it is ‘outrageous’ that he should be

⁴ Wells and Morgan, *op. cit.* at 431

penalised for causing the death of a foetus 'which was about to be destroyed anyway'. 'Why should the law punish me for doing what she is allowed to do anyway?', he fumes (misapplying the criminal law concept of punishment to civil damages). He also claims that it is 'ridiculous' for the law to suggest that the loss of Alison's foetus is a 'harm' for which she ought to be compensated, given that she was positively seeking the end of her pregnancy at the time of the accident.

Alison defends her decision to sue, saying that the decision to terminate the pregnancy had been 'my choice and mine alone', and that 'he had no right to take that choice away from me'. When asked what exactly the 'loss' to her has been in losing the foetus, she answers feebly that she may have changed her mind at the last minute, although she acknowledges that this is unlikely in the extreme.

The foregoing is, of course, merely a hypothesis, but one which could very well arise under the current law of the United Kingdom. In the hypothesis, neither Alison nor Ben seem able to articulate their strong feelings of injustice: Alison feels, intuitively, that the decision to terminate her pregnancy ought to be 'her choice', and that Ben's wrongful intervention has deprived her of something; similarly, Ben feels that there is some kind of injustice in the idea of a woman who clearly does not want to be pregnant (and who is in fact taking steps to have her pregnancy terminated) seeking damages for the loss of a foetus she did not want and had every intention of destroying on her own initiative.

In this chapter, I claim that the way the law currently adjudicates maternal/foetal issues is often conflicted and agonistic, and that this leads to incoherence. I explore some real examples of ways in which the law seeks simultaneously to ascribe value of some sort to the foetus, sometimes appearing to try to 'protect' foetal life, and yet consistently refuses to ascribe personhood at any point before birth, allowing experimentation on embryos, abortion until the second (and in rare cases, the third) trimester of pregnancy. Drawing on the work of prominent commentators on maternal/foetal issues, I

will trace these inconsistencies to the orthodox ‘conflict’ model of adjudicating pregnancy, which purports to balance the interests of the foetus against the rights and interests of the pregnant woman, examining the shortcomings of the orthodoxy and citing growing calls for a new paradigm. Finally, I will assess the viability of some of the alternatives proposed, and introduce some arguments for abandoning, rather than refining, the conflict model.

First, a clarification. An important premise of my general thesis is that legal intervention in pregnancy appears inconsistent when viewed through the prism of the conflict model and its philosophical foundations, the concepts of rights, moral status and personhood. As such, my purpose in this introductory chapter is to identify and discuss the apparent *inconsistencies* in the law. The refusal of the law to ascribe the status of ‘person’ to the foetus or embryo is, by contrast, a *consistent* feature of the United Kingdom case-law on maternal/foetal issues, and as such it is not scrutinised at this stage. This is not to say that the more fundamental questions of foetal status will not be addressed at all, however; in the following two chapters I will examine issues of moral status (and in particular, the concept of personhood) in order to demonstrate that a mere refinement or reworking of the conflict model will not satisfy the need for a clearer paradigm for adjudication, and that accordingly, the law must refocus away from the metaphysics of intrinsic moral value and adopt a completely new approach to adjudicating maternal/foetal issues.

1.2. Case law under the conflict model

1.2.1. Civil Proceedings

1.2.1.1. Wrongful death actions

In actions for damages, the ‘born alive rule’ operates. Under this rule, live birth is a prerequisite, since rights crystallize at birth with onset of legal ‘personhood’. Even if a child is born alive, but dies moments after birth, ‘no

violence is done to the “born alive” rule by allowing the action.’⁵ However, ‘when a stillbirth occurs...it is clear that the application of this rule would preclude a wrongful death action.’⁶

The operation of the rule is illustrated in the United States case of *Puhl v Milwaukee Automobile Ins Co*⁷, in which it was stated that ‘injuries suffered before birth impose a conditional liability on the tort-feasor. This liability becomes unconditional, or complete, upon the birth of the injured separate entity as a legal person. If such personality is not achieved, there would be no liability because of no damage to a legal person.’⁸ This is an accurate reflection of the common law rule. However, as John Seymour tells us, ‘some courts *have* allowed wrongful death actions to be brought following stillbirths.’⁹

In *Presley v Newport Hospital*¹⁰, for example, the court concluded that there was no sound reason to distinguish between a child who dies just prior to birth and one who dies just afterwards. This was thought to be in line with the emphasis, in the early case of *Bonbrest v Kotz*¹¹ on the significance of viability.¹² The court also approved of the following statement from the case of *Verkennes v Corniea*¹³: ‘It seems too plain for argument that where independent existence is possible and life is destroyed through a wrongful act a cause of action arises...’¹⁴ The *Presley* court didn’t stop at rejecting birth as a demarcation line, however; it went on to reject the distinction between viable and non-viable fetuses too.¹⁵ ‘As a result,’ Seymour says, ‘the court had no hesitation in ruling that the stillborn child who was the subject of the proceedings, “whether viable or nonviable”, was a “person” within the meaning of the Rhode Island Wrongful Death Act.’¹⁶

⁵ John Seymour, *Childbirth and the Law* (Oxford: Oxford University Press, 2000) at 166-167

⁶ *Ibid.* at 167

⁷ 99 NW 2d 163 (1959)

⁸ *Ibid.* at 170

⁹ Seymour, *op. cit.* at 167, emphasis added.

¹⁰ 365 A 2d 748 (1976)

¹¹ 65 F Supp 138 (1946)

¹² Seymour, *op. cit.* at 167

¹³ 38 NW 2d 838 (1949), at 841

¹⁴ Cited in *Presley* at 751

¹⁵ Seymour, *op. cit.* at 168

¹⁶ *Ibid.*

Again, in *Werling v Sandy*¹⁷ the court stated that '[a] cause of action may arise under the wrongful death statute when a viable fetus is stillborn since a life capable of independent existence has expired. It is logically indefensible as well as unjust to deny an action where the child is stillborn, and yet permit the action where the child survives birth but only for a short period of time.'¹⁸ According to Seymour, 'what was regarded as crucial here was the capacity for independent existence. Similarly, in *Chrisafogeorgis v Brandenburg*, the Supreme Court of Illinois ruled that this made the viable fetus sufficiently similar to a 'person' to allow the application of wrongful death legislation.'¹⁹ Two other cases also apply wrongful death actions prior to birth. In *White v Yup*²⁰ the court took the view that 'a viable unborn child is, in fact, biologically speaking, a presently existing person and a living human being, because it has reached such a state of development that it can presently live outside the female body, as well as within it.'²¹ In *Hall v Murphy*²² the Supreme Court of Carolina held that a viable foetus is 'a person'.²³

All of these cases (allowing wrongful death actions where the foetus is stillborn) are interesting because they embody the assumption that the foetus has a separate existence and a 'special status'. However, Seymour tells us, 'it is important not to over-emphasize their significance. As has already been noted, there is United States authority for the view that until there has been a live birth, no claim can arise in respect of antenatal injury. This view also prevails in Canada, England, and Australia.'²⁴

1.2.1.2. Negligence actions

Seymour identifies two different approaches in actions involving antenatal negligence. 'In England, Canada and Australia, courts dealing with such actions have generally confined themselves to asking whether a child born

¹⁷ 476 NE 2d 1053 (Ohio, 1985)

¹⁸ *Ibid.* at 1055

¹⁹ Seymour, *op. cit.* at 168, citing *Chrisafogeorgis v Brandenburg* 304 NE 2d 88 (1973)

²⁰ 458 P 2d 617 (1969)

²¹ *Ibid.* at 622

²² 113 SE 2d 790 (SC, 1960)

²³ *Ibid.* at 793

²⁴ Seymour, *op. cit.* at 170

suffering the effects of antenatal injury should be permitted to recover damages. When the question is posed this way, there is no need to speculate about the nature of the fetus... [a]ll that must be asked is whether the child was a member of a class of persons who would foreseeably suffer harm as a result of the negligence. Its legal status while a fetus is of no interest.’²⁵ Essentially, this is the application of the celebrated ‘neighbourhood principle’ first articulated by Lord Atkin in the watershed case of *Donoghue v Stevenson*.²⁶ ‘By contrast, in the United States courts the focus in negligence actions arising from antenatal injury has been primarily on whether the fetus is an entity of a kind that can possess rights and to which a duty of care can be owed.’²⁷ The difference between the approaches is clear: in the former case, the principle being applied is *relational*, concerning itself with questions not of nature or status, but of proximity; in the latter case, the focus is on the *nature* of the foetus.

In the case of *State v Merrill*²⁸, which in some aspects approaches the hypothesis outlined at the beginning of this chapter, ‘the defendant had argued that it was unacceptable for him to be exposed to a conviction for the murder of a non-viable fetus when a woman and her doctor who intentionally destroyed such a fetus would escape liability.’²⁹ In this case, ‘the majority held that the analysis offered in *Roe v Wade* had no relevance to the issue of an assailant’s liability for the murder of a fetus... “*Roe v Wade* protects the woman’s right of choice, it does not protect, much less confer on an assailant, a third-party unilateral right to destroy the fetus.”’³⁰ In *Gentry v Gilmore*³¹ the court held that ‘*Roe* is not implicated when...*both the State and the mother have congruent interests in preserving life and punishing its wrongful destruction.*’³²

According to Seymour, ‘analysis of the kind seen in *Merrill* and *Gentry v Gilmore*...allows distinctions to be made on the basis of contextual

²⁵ *Ibid.* at 176

²⁶ [1932] AC 562

²⁷ Seymour, *op. cit.* at 176

²⁸ 450 NW 2d 318 (Minn., 1990)

²⁹ Seymour, *op. cit.* at 179

³⁰ *Ibid.*, citing *Merrill* at 322

³¹ 613 So 2d 1241 (Ala, 1993)

³² *Ibid.*, Maddox, J at 1247, emphasis in original

differences and differences in the scope and purpose of the relevant laws. By focusing on these differences it is possible to accept the inconsistency of which the defendants in *Smith* and *Merrill* complained: namely, that between laws which punished a third party's destruction of a fetus and those which permitted abortion.^{'33}

1.2.1.3. Child protection proceedings

The general rule seems to be that, 'just as the homicide laws come into operation only when a "person" has been killed, the child protection laws operate only when a "child" or "person" is threatened and neither term applies to a fetus.'³⁴ As this rule suggests, 'courts have had no difficulty accepting that evidence of a pregnant woman's drug taking can be taken into account in determining whether intervention is desirable *after* a child has been born.'³⁵ Nevertheless, 'there have occasionally been decisions in which courts have been willing to extend the operation of child protection laws to fetuses...these decisions have occasionally led to legislative action in the form of amendments to child protection statutes making it clear that they apply to fetuses. In the jurisdictions in which this legislative activity has occurred...there has thus been a recognition of the fetus as a distinctive entity entitled to protection. [However, it] must be emphasized that such developments have been rare. A review of the operation of child protection laws provides only limited support for the view that a fetus has legal status.'³⁶

1.2.1.4. Proceedings to impose medical treatment

Seymour writes that 'in the United States the courts have, in the past, shown a willingness to override women's decisions. A 1987 survey of legal proceedings relating to obstetrical interventions indicated that court orders were granted in 17 of the 21 cases in which they were sought.'³⁷ Many of the

³³ Seymour, *op. cit.* at 180

³⁴ *Ibid.* at 152

³⁵ *Ibid.* at 154, emphasis added.

³⁶ *Ibid.* at 174

³⁷ *Ibid.* at 21

relevant cases have involved enforced blood transfusions. In *Raleigh Paul-Fitkin Morgan Memorial Hospital v Anderson*³⁸ the Supreme Court of New Jersey stated: ‘we are satisfied that the unborn child is entitled to the law’s protection...’³⁹

Similarly, in the case of *Re Jamaica Hospital*⁴⁰ it was considered that, ‘if [the pregnant woman’s] life were the only one involved here, the court would not interfere...Her life, however, is not the only one at stake. The court must consider the life of the unborn fetus...In this case, the state has a highly significant interest in protecting the life of a mid-term fetus, which outweighs the patient’s right to refuse a blood transfusion on religious grounds.’⁴¹ The judgment continued, ‘for the purposes of this proceeding...the fetus can be regarded as a human being...whom the court has an obligation to protect.’⁴² The court in *Crouse Irving Memorial Hospital Inc v Paddock*⁴³ also permitted a blood transfusion against the wishes of a pregnant patient.

Other cases have involved enforced caesarean deliveries. In *Jefferson v Griffin Spalding County Hospital Authority*⁴⁴ the court ‘weighed the right of the mother to practise her religion and to refuse surgery on herself, against her unborn child’s right to live. We found in favour of her child’s right to live.’⁴⁵ In authorising the caesarean section, the court referred to *Roe*’s recognition of a state interest in the potential lives of viable foetuses. In *Re Madyun*⁴⁶ the court held that: ‘Given the significant risks to the fetus versus the minimal risk to the mother, the Court concludes that there is a compelling interest to intervene and protect the life and safety of the fetus.’⁴⁷

The case of *Re AC*⁴⁸ signalled a change of attitude in stating that ‘a competent woman’s decision to decline medical intervention should be respected’.⁴⁹ The court held that the right of a woman to refuse medical

³⁸ 201 A 2d 537 (1964)

³⁹ *Ibid.* at 538

⁴⁰ 491 NYS 2d 898 (Sup, 1985)

⁴¹ *Ibid.* at 899-900

⁴² *Ibid.* at 900

⁴³ 485 NYS 2d 443

⁴⁴ Ga, 274 SE 2d 457 (1981)

⁴⁵ *Ibid.* at 460

⁴⁶ Reported in an annexe to *Re AC* 573 A 2d 1235 (DC App, 1990)

⁴⁷ *Ibid.* at 1264

⁴⁸ 573 A 2d 1235 (DC App, 1990)

⁴⁹ Seymour, *op. cit.* at 26

treatment was of ‘constitutional magnitude’⁵⁰ and emphasised the need to uphold her ‘liberty and privacy interests and bodily integrity.’⁵¹ The new attitude continued in *Re Baby Boy Doe*⁵² where it was held that a balancing of interests was not appropriate: ‘a woman’s competent choice in refusing medical treatment as invasive as a caesarean section during her pregnancy must be honoured, even in circumstances where the choice may be harmful to her fetus.’⁵³ The court criticised the *Jefferson* and *Madyun* decisions for failing to recognise ‘the constitutional dimension of the woman’s right to refuse treatment, or the magnitude of that right.’⁵⁴ It also rejected the notion of balancing the woman’s interests against those of the foetus, saying that courts ‘should not engage in such a balancing’.⁵⁵ It concluded: ‘[A] woman’s right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy. The woman retains the same right to refuse invasive treatment, even of lifesaving or other beneficial nature, that she can exercise when she is not pregnant. The potential impact upon the fetus is not legally relevant; to the contrary, the *Stallman* court explicitly rejected the view that the woman’s rights can be subordinated to fetal rights.’⁵⁶

In a Canadian case, *Re Baby R*⁵⁷, a welfare official had ‘apprehended’ a foetus *in utero* and assumed authority to consent to emergency medical treatment. The issue was whether or not the foetus was ‘child’ within meaning of the relevant legislation. The court held that it was not, with the consequence that the welfare official lacked necessary authority: ‘the powers of the superintendent to apprehend are restricted to living children that have been delivered.’⁵⁸

A comparable pattern of case law has emerged in United Kingdom case law. In *Re S (Adult: Refusal of Treatment)*⁵⁹ the court authorised the

⁵⁰ *Re AC* at 1244

⁵¹ *Ibid.* at 1248

⁵² 632 NE 2d 326 (Ill App 1 Dist, 1994)

⁵³ *Ibid.* at 330

⁵⁴ *Ibid.* at 333

⁵⁵ *Ibid.* at 330

⁵⁶ *Ibid.* at 332

⁵⁷ (1988) 53 DLR (4th) 69

⁵⁸ *Ibid.* at 80

⁵⁹ [1992] 3 WLR 806

performance of a caesarean delivery without the woman's consent, relying on medical evidence that baby would not be born alive otherwise. In the event, the operation went ahead and the child was born dead. *Re MB (Medical Treatment)*⁶⁰ overturned *Re S*; in this case, the woman was prepared to give her consent to the caesarean procedure itself, but refused to consent to the necessary anaesthesia because of an 'irrational fear of needles'. She was found to be 'temporarily incompetent', and the court held that the caesarean, and the anaesthesia necessary for it, could proceed despite the lack of consent. The finding of incompetence was crucial, as the court held that 'a competent woman who has the capacity to decide may, for religious reasons, other reasons, for rational or irrational reasons or for no reason at all, choose not to have medical intervention, even though the consequence may be the death or serious handicap of the child she bears, or her own death...'⁶¹

This conclusion was confirmed by the Court of Appeal in *St George's Healthcare NHS Trust v S*⁶²: 'In our judgment while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment. Although human, and protected by law in a number of different ways set out in the judgment in *In re MB*...an unborn child is not a separate person from its mother. Its need for medical assistance does not prevail over her rights. She is entitled not to be forced to submit to an invasion of her body against her will, whether her own life or that of her unborn child depends on it.'⁶³

Seymour notes that 'in the 1990s courts in the United States and England appear to have changed their attitude to medical intervention and rejected the argument that the interests of the fetus can justify resort to invasive medical procedures to which the woman has not consented. In reaching these decisions, the courts took as their starting-point the right of a pregnant woman – as a competent adult – to decline medical treatment. In so doing, they shifted the focus from questions about the interests of the fetus to questions about maternal autonomy.'⁶⁴ Referring to cases such as *Re AC*, *Re*

⁶⁰ [1997] 2 FLR 426

⁶¹ *Ibid.* at 436

⁶² [1998] 3 WLR 936

⁶³ *Ibid.* at 957

⁶⁴ Seymour, *op. cit.* at 156

Baby Boy Doe, Re MB and St George's Healthcare NHS Trust v S, Seymour says that 'more recent decisions in the United States and England have expressed disapproval of coercive medical treatment designed to protect the fetus. In these decisions, the primary focus has been on the interests of the woman, rather than on the nature of the foetus.'⁶⁵

It may be a mistake, however, to assume that the judicial position with regard to enforced medical treatment is completely settled. Seymour points to an inconsistency which may mean that there are still important issues to be resolved. In *Re MB* the court accepted foetus is not a 'person' and has no interests of its own until birth gives it a separate existence from the mother.⁶⁶ In *St George's Healthcare NHS Trust v S*, on the other hand, the court held that 'whatever else it may be a 36-week foetus is not nothing: if viable it is not lifeless and it is certainly human.'⁶⁷ Seymour thinks these statements are 'possibly conflicting'⁶⁸, so it could be argued that there is some tension in the law in this area. The property model I elaborate in the final chapter of this thesis is able to resolve this tension by recognising the distinctiveness of the foetus while acknowledging that it lacks personhood and has no interests.

1.2.2. Criminal proceedings

In the law of homicide, as in civil actions for wrongful death, the 'born alive rule' operates. Seymour writes that 'the courts of England, the United States, Canada and Australia have generally held that an assailant who injures a fetus (with the result that it is stillborn) cannot, under the common law, be guilty of murder or manslaughter. This reflects an adherence to the "born alive" rule. Only a "person", an "individual", or a "human being" can be the victim of homicide and to fit any of these descriptions a child must be born alive.'⁶⁹ However, the case of *Commonwealth v Cass*⁷⁰ held that the foetus was a 'person' for the purposes of homicide law, and two other cases, *State v*

⁶⁵ *Ibid.* at 175

⁶⁶ See *supra*, note 60 at 440, 444

⁶⁷ See *supra*, note 62 at 952

⁶⁸ Seymour, *op. cit.* at 175

⁶⁹ *Ibid.* at 137

⁷⁰ 467 NE 2d 1324 (Mass, 1984)

*Merrill*⁷¹ and *Brinkley v State*⁷², take the same view. In *Merrill*, a pregnant woman was shot and killed, and her attacker was found guilty of murder of both the woman and her ‘unborn child’, a foetus of 4-5 millimetres long. In *Brinkley* there was a conviction of feticide because the stillborn foetus had been ‘quick’. Similarly, following criminal proceedings for child neglect and endangerment, the court in *Whitner v State of South Carolina*⁷³ ruled that a woman who had taken cocaine during pregnancy, and whose child was born affected by the drug, had been properly charged under a statute that punished a person who endangered the life or health of a ‘child’.⁷⁴ However, Seymour notes that ‘this view has gained little judicial support’.⁷⁵

1. 3. Criticism of the conflict model

The current model has been attacked on a number of grounds; however, most of the criticism can be organised under one of four main strands of critique.

1.3.1. Negative implications for the legal and moral status of women

Many commentators criticise the conflict model on the basis of the ‘violent’ image of pregnancy that the model promotes. For some writers, this is problematic because it presents an *inaccurate* portrait of maternal / foetal relations (discussed below at 1.3.2.), and for others, the problem consists in what that imagery means for the public perception of pregnant women. In the words of Jane Mair, the notion of the maternal / foetal conflict ‘is a violent image which disrupts the coexistence of mother and foetus. It is an emotive phrase which suggests unmotherly feelings and a grotesque perception of the struggling foetus.’⁷⁶ The fact that under the model the rights of the woman are pitted against those of the foetus ‘enables the presentation of the woman as

⁷¹ See *supra* note 28

⁷² 322 SE 2d 49 (Ga, 1984)

⁷³ 492 SE 2d 777 (SC, 1997)

⁷⁴ Seymour, *op. cit.* at 18

⁷⁵ *Ibid.* at 140

⁷⁶ Jane Mair, ‘Maternal / Foetal Conflict: Defined or Defused?’ in Sheila A. M. McLean (ed.), *Contemporary Issues in Law, Medicine, and Ethics* (Dartmouth Publishing, 1996), at 79

selfishly pursuing her own desires while denying that the foetus has any meaning to her at all.’⁷⁷

Moreover, as Dawn Johnsen has observed, ‘[b]y creating an adversarial relationship between a woman and her fetus, the state provides itself with a powerful means of controlling women’s behaviour during pregnancy, thereby threatening women’s fundamental rights.’⁷⁸ It is not necessary here to catalogue the litany of ways in which the ‘rise of foetal rights’ has eroded the rights of pregnant women to privacy and autonomy, as this has been done extensively elsewhere.⁷⁹ It suffices to say that strident statements of the individual rights of women which place them in opposition to the perceived ‘rights’ of the foetus are thought by many feminist commentators to be counterproductive in that they invite a backlash against the ‘unmotherly’, ‘self-interested’ view of the pregnant woman. As Anne Morris notes, ‘[a]ttempts to cast this debate as a conflict highlight a fear of women’s autonomy...’.⁸⁰

1.3.2. Failure to reflect the realities of pregnancy

For some commentators, the main disadvantage of the conflict model is the notion of ‘conflict’ itself. They question whether the characterisation of pregnancy as inevitably consisting in a conflict, between the rights and interests of the woman and those of the foetus, is an accurate reflection of the maternal / foetal relationship. As Wells and Morgan observe, ‘[t]he evolving literature on foetal and maternal rights has been mesmerized by the potential conflicts between them. Sometimes these interests do clash, but often they

⁷⁷ Jo Bridgeman, ‘A Woman’s Right To Choose?’ in Ellie Lee (ed.) *Abortion Law and Politics Today* (Macmillan, 1998) at 83

⁷⁸ Dawn Johnsen, ‘The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy and Equal Protection’ (1986) 95 *Yale Law Journal* 599-625 at 599

⁷⁹ See, for example, Dawn Johnsen, ‘The Creation of Fetal Rights’ (*supra*, note 78); Cynthia R. Daniels, *At Women’s Expense: State Power and the Politics of Fetal Rights* (Cambridge; Harvard University Press, 1993); Lynn M. Morgan and Meredith W. Michaels, *Fetal Subjects, Feminist Positions* (Philadelphia: University of Pennsylvania Press, 1999); and Rachel Roth, *Making Women Pay: The Hidden Costs of Fetal Rights* (London: Cornell University Press, 2000).

⁸⁰ Anne Morris, ‘Once Upon a Time in a Hospital...the Cautionary Tale of St George’s NHS Trust v S., R. v Collins and Others ex parte S. [1998] 3 All ER 673 *Feminist Legal Studies* 7 (1) 1999 75 at 84

may coincide.’⁸¹ Accordingly, they claim, ‘[t]he assertion of a simple dichotomy between foetal and female interests is a mistake.’⁸² The mistake, according to Jane Mair, is that any *legal* conflict between woman and foetus would ‘[require] the recognition of each as having legal rights.’⁸³ Since the courts in the United Kingdom have consistently refused to ascribe personhood to the foetus, she asks, ‘[w]here is the legal conflict?’⁸⁴

For some of those who question the accuracy of the conflict model, the problem is simply that it does not chime with the actual experience of a majority of women; in the words of Anne Morris, the conflict model reflects ‘an ignorance of what it means to be pregnant’.⁸⁵ For others, the model is too narrow, focusing as it does exclusively on the ‘pregnant woman-fetus pair’⁸⁶, and so operating to exclude consideration of other morally-relevant factors, such as the network of relationships surrounding pregnancy and birth. Still other writers consider that framing the maternal / foetal relationship as a conflict is unhelpful and does nothing to further the resolution of legal problems: as Mair remarks, ‘[t]he conflict is presented as woman or child, all or nothing, life or death: a model of polarization which *contributes* to the legal dilemma.’⁸⁷ In her view, ‘the issues involved are much more complex than the easy label of maternal / foetal conflict suggests... instead of seeking to resolve maternal / foetal conflicts by defining more clearly the individual legal rights of the pregnant woman and the foetus, should we not question the construction of these so-called conflicts?’⁸⁸

Of course, such criticisms could also be levelled at the property model which I will propose in chapter five of this thesis. How many women really experience pregnancy as an instance of ownership? Do women really *think* of their foetuses as ‘my property’? If a third party causes injury or death to a foetus, does the woman whose foetus it is feel aggrieved just as if someone had damaged or destroyed her car, her necklace, or her work? Surely, it might

⁸¹ Wells and Morgan, *op. cit.*, at 431

⁸² *Ibid.* at 433

⁸³ Mair, *op. cit.*, at 86

⁸⁴ *Ibid.* at 80

⁸⁵ Morris, *op. cit.* at 84

⁸⁶ Lisa H. Harris, ‘Rethinking Maternal-Fetal Conflict: Gender and Equality in Perinatal Ethics’ *Obstetrics and Gynecology* Vol. 96 No. 5 Part 1, November 2000 at 789

⁸⁷ Mair, *op. cit.* at 93, emphasis added.

⁸⁸ *Ibid.* at 93

be argued, a woman in such circumstances feels that something far more destructive and hurtful than that has taken place: that someone has injured her future *child*? And surely it is common knowledge, even to those who have never been pregnant, that pregnant women usually form close bonds with their foetuses during pregnancy, and take a strong interest in their welfare?

To all this it can be responded that such criticisms need not be fatal to the property model. They are less damaging to the property model than to the conflict model *precisely because* the property model is presented and defended as a framework for adjudication in the *absence* of moral consensus – nowhere does it claim to encapsulate or reflect an ethical truth. At the very heart of the conflict model, by contrast, is the attempt to ascribe the ‘correct’, or ‘appropriate’, legal rights to the pregnant woman and perhaps also to the foetus on the basis of some understanding of their *moral* status. If this is not so, and the evaluation of moral status plays no part in adjudication under the conflict model, then we are entitled to ask, with Mair, ‘where is the legal conflict?’ This is one of the chief differences between the current model and the property model being proposed, and it is, in my view, a great strength of the latter.

1.3.3. Inconsistency

The hypothesis at the beginning of this chapter illustrates the inconsistency at the heart of the conflict model. That a pregnant woman may choose (within the limits set out in the Abortion Act 1967) to destroy the foetus, but a third party may be liable in civil or criminal law for doing so, cannot readily be justified through an enquiry about the nature and status of the foetus. Two United States cases, *State v Merrill*⁸⁹ and *Gentry v Gilmore*⁹⁰, provide real life examples of this inconsistency. In *Gentry*, as we have seen, it was held to be relevant that both the state and the mother had ‘congruent interests in preserving life and punishing its wrongful destruction’.⁹¹ As Seymour has remarked, these cases show the willingness of the U.S. courts to adjudicate

⁸⁹ See *supra* note 28

⁹⁰ See *supra* note 31

⁹¹ See *supra* note 32

maternal/foetal cases differently ‘on the basis of contextual differences’ and that this different treatment reveals ‘the inconsistency...between laws which [punish] a third party’s destruction of a fetus and those which [permit] abortion.’⁹² Two other cases, *Commonwealth v Cass*⁹³ and *Whitner v State of South Carolina*⁹⁴ have held, respectively, that foetuses are ‘persons’ for the purposes of homicide law, and ‘children’ for the purposes of criminal proceedings for child neglect and endangerment.⁹⁵

This inconsistency had led one U.S. commentator to complain that ‘our judiciary is dishonest in its treatment of fetuses, their rights, and specifically, their legal status as persons. On the one hand, courts routinely consider unborn fetuses to be “persons” and thereby protect them from criminal assault, allow them to maintain tort actions, and recognize their property rights. On the other hand, courts consider fetuses non-persons when their rights conflict with their mothers’ privacy interests.’⁹⁶ A similar point could be made in the United Kingdom context, since, although the courts here have determined that the foetus lacks personhood *throughout* pregnancy (adhering resolutely to the principle that personhood attaches at birth), the general right to seek a termination applies only until the twenty-fourth week of pregnancy. The Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990) restricts termination of pregnancy after the twenty-fourth week to cases of foetal disability or those where the continuation of the pregnancy would threaten the life or health of the mother. Thus, from twenty-four weeks’ gestation until term, the foetus is not a person, but there is nonetheless no general right to seek a termination. If, as the law currently holds, late-term foetuses are not persons, what justifies the current statutory restriction of abortion? This too has the appearance of inconsistency.

What, then, has given rise to these inconsistencies in adjudicating pregnancy? Seymour pinpoints the cause when he tells us that the law tries to respond to the foetus ‘in a way that recognizes its distinctiveness and intrinsic

⁹² Seymour, *op. cit.*, at 180

⁹³ See *supra* note 70

⁹⁴ See *supra* note 73

⁹⁵ See *infra* at 16-17

⁹⁶ William E. Buelow, ‘To Be and Not To Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus’ (1998) 71 *Temple Law Review* 963 at 994

value.’⁹⁷ He explains: ‘[w]hen asking how the law views the fetus, the courts’ starting-point has frequently been to determine whether the fetus is a “person”. The most widely accepted view is that it is not. This conclusion, however, is unhelpful. While the law is adept at indicating what the fetus is *not*, it throws little light on what the fetus *is*. It is clear that it is not a non-entity. Whatever it is, in the words of the English Court of Appeal, it is “not nothing”.’⁹⁸

The property model I will set out in chapter five of this thesis succeeds in resolving the inconsistency. By treating the foetus as the property of the pregnant woman, it allows us to understand why the law should only protect the foetus against the actions of third parties, and not against the actions of the woman herself. Within a property framework, she is entitled to dispose of her property without legal interference, and she is also entitled to seek compensation from - and criminal sanctions for - those who interfere with her property. The ‘distinctiveness and intrinsic value’ of the foetus is recognised in the property model: as an object of property, it is a separate entity, distinct from the pregnant woman, and its intrinsic value is the value of property to the owner. Property thus allows us *both* to recognise a strong abortion right for the pregnant woman *and* to accept that the foetus is ‘not nothing’, but something of value. Under such a model, the defendants in such cases as *People v Smith*⁹⁹ and *State v Merrill* are liable because they have wrongfully caused damage to the valued property of another, rather than because they have murdered a child or taken the life of a person. As such, the property model allows recovery for foetal injury or death without casting doubt on the right of a woman to terminate her pregnancy; reading between the lines in many of the U.S. cases in particular, it seems that the fear of undermining abortion rights has been an influential factor in preventing many civil and criminal cases for foetal harm from succeeding.

⁹⁷ Seymour, *op. cit.*, at 184

⁹⁸ *Ibid.* at 183

⁹⁹ App, 129 Cal. Rptr 498 (1976). This was a homicide case involving the destruction of a non-viable foetus by the father. The California Court of Appeal took the view that for a homicide conviction it was necessary to show that a human life had been taken, and concluded that the destruction of a non-viable foetus did not represent the taking of life. The defendant had complained that it would be inconsistent to regard the destruction of a non-viable foetus by a third party as ‘homicide’ when such destruction by the mother was lawful under *Roe v Wade*.

1.3.4. The foetus as a 'sentient non-person'

The conflict model of adjudicating maternal / foetal issues relies upon a characterisation of the foetus as a sentient non-person. This is so because under the conflict model a foetus possesses interests, but not rights, and (as I have emphasised several times already) certainly not personhood – at least under United Kingdom law. The foetus must be understood as possessing certain interests, otherwise the notion of balancing the interests of the foetus against those of the pregnant woman (the 'conflict' at the heart of the conflict model) is meaningless. On the other hand, despite this implicit acknowledgment of foetal *interests*, the courts (and many commentators) are resistant to the idea of foetal *rights*, since these would limit the exercise by the pregnant woman of *her* rights. As such, the conflict model posits the foetus as an entity with interests, in other words a *sentient* being, capable of experiencing pleasure and pain. At the same time, the model denies foetal personhood, so that the foetus of the conflict model is best described as a sentient non-person.

This characterisation is problematic, as chapters two and three of this thesis will demonstrate. First, because there is widespread disagreement about whether and to what extent fetuses are sentient: there are three main schools of thought, 'early onset', 'late onset' and 'sceptical' approaches to foetal sentience respectively, each with its supporters. The issue of when and if fetuses become sentient during pregnancy is thus far from conclusively established. The concept of *personhood* is also contentious. As chapter three explains in some detail, personhood is arguably incapable of functioning as a basis on which to ascribe moral and legal status and rights. As such, both of the concepts – sentience and personhood – which are integral to the conflict model's understanding of the foetus are controversial. This is a major problem for the conflict model and will be developed over the course of the two following chapters.

1.4. Alternatives to the conflict model?

1.4.1. Refining the conflict model

The response of some commentators to the problems encountered by the conflict model is to propose refinements. One such suggestion is that it may be possible to clarify the status of the foetus in order to illuminate the nature of the conflict and the way the courts ought to adjudicate maternal / foetal cases.¹⁰⁰ It is submitted here that this approach, if followed, is likely to prove fruitless, for the following reason: in United Kingdom law it is not the *legal* status of the foetus that is problematic (its status as a legal non-person is clear); rather, the confusion surrounds the issue of what *moral* status we ought to accord life before birth. Is it really possible to settle these ‘moral unanswerables’? In chapters two and three I shall argue that it is not, not least because the frameworks currently available to us for determining moral status are themselves deeply contentious and, in the case of personhood theory, fundamentally flawed. In the absence of any clear and uncontroversial means for settling questions of intrinsic moral status, the courts simply cannot wait upon answers to such questions. A deeper question still is that of whether or not our laws even *ought* to embody, or attempt to embody, moral ‘truths’. The scope of this discussion does not allow for an analysis of this fundamental jurisprudential question.

Another approach to refining the conflict model is considered by Mair when she writes: ‘it may be that...by defining and refining legal elements of the conflict model, a set of concepts could be formulated by which the courts could adjudicate between mother and foetus.’¹⁰¹ Ultimately, Mair herself rejects this approach, preferring a more relational model of pregnancy to the conflict model, as discussed below. It is difficult to imagine, in any case, that concepts such as ‘duty of care’, ‘best interests’, and so on hold the key to making sense of the conflict model. As Mair herself has observed, there is no *legal* conflict. Why should we attempt to perfect a model that is founded on so basic an error? Furthermore, is such an attempt really necessary? A more

¹⁰⁰ Buelow, *op. cit.* at 993

¹⁰¹ Mair, *op. cit.*, at 92-93

straightforward approach is to abandon the notion of pregnancy as conflict altogether and replace it with a property model which is based not upon a legal error, but rather upon a point of certainty in the law (that the foetus is not a legal person) and, as will be shown in chapter five, can readily be justified by reference to accepted definitions and theories of property; which fits well with the developing case-law regarding the disposal of frozen embryos; and which offers greater clarity than we can hope for from any refined version of the conflict model.

1.4.2. A more 'relational' approach

As mentioned above under heading *1.2.1.2*, Seymour identifies two possible approaches to adjudicating pregnancy. The *definitional* approach, which is the approach reflected in the orthodox conflict model, involves focusing on the *nature* of the fetus, trying to identify its essential characteristics, asking, in Seymour's words, 'whether it is a "person", a "body part", a "potential life", or a "life"'.¹⁰² Many courts, particularly in the United States, have adopted definitional approaches in cases involving foetal harm, and 'in answering these questions, they have frequently drawn and then discarded distinctions.'¹⁰³ In fact, says Seymour, a feature of the US courts' analysis has been 'the courts' willingness to establish significant criteria and then to reject them.'¹⁰⁴

'The alternative approach', according to Seymour, 'is to avoid definitional questions and to inquire about the nature and purpose of a particular law and the consequences of applying it. This method can be described as the *relational* approach. It focuses not upon the characteristics of the fetus, but upon the relationship between the woman, her fetus, and, in some situations, a third party. While this approach accepts that a fetus is a distinctive entity with intrinsic value, it recognizes that in some contexts it is appropriate for the law to intervene to protect fetal interests, but not in

¹⁰² *Ibid.* at 185

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.* at 176

others.’¹⁰⁵ Note that the focus here is on *context* and *relationships*; in this important respect, the relational approach identified by Seymour comes quite close to the property model I propose in the final chapter of this discussion.

The following cases can be viewed as examples of the relational approach: in *State v Merrill* ‘the court implied that the fact that the state permits the destruction of potential life in one context (abortion) does not mean that it will permit in another (an attack on a pregnant woman).’¹⁰⁶ Similarly, in *Gentry v Gilmore*, the dissenting judgment insisted that the issue at stake in a wrongful death action (whether damages were recoverable on behalf of a foetus) and the issue of when a woman should be free to choose an abortion were separate.¹⁰⁷

According to Seymour, there are compelling reasons to prefer the relational approach. He writes that ‘it is necessary to go beyond the conclusion that the fetus is not a legal nonentity and, because it represents potential life, has intrinsic value [the definitional approach]. It must also be recognized that the fetus does not have a uniform value in the eyes of the law. The law makes choices as to the situations in which it will take account of actual or threatened antenatal harm. This raises an obvious question. In what circumstances – and against whom – should the law protect the fetus?’¹⁰⁸ He continues: ‘To adopt the relational approach is to redefine the nature of the problem. The goal is no longer agreement as to the essential characteristics of the fetus and consequent agreement as to the rights possessed by an entity with those characteristics.’¹⁰⁹

Seymour tells us that, in his view, ‘there are two reasons for abandoning this goal.’¹¹⁰ First, he says, ‘consensus on the categorization of the fetus is unlikely.’¹¹¹ Moreover, ‘a system of classification aims to produce certainty. Given the normative character of the law, certainty is unattainable. The relational approach recognizes this and thus accommodates the inconsistencies in the law’s perception of the legal status of the fetus. This

¹⁰⁵ *Ibid.* at 185

¹⁰⁶ *Ibid.* at 186

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.* at 187

¹⁰⁹ *Ibid.* at 186

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

approach does not seek consistency. It acknowledges that lawmakers will respond differently to claims made on behalf of the fetus, depending on the context, the actors involved, their relationships, and the techniques and purposes embodied in the particular law invoked. Some observers will regard the law's lack of consistency as a strength. It allows for flexibility of response when there is the possibility of legal intervention to protect the foetus or to provide recompense for harm done to it.¹¹²

Another call for greater emphasis on relationships comes from Jane Mair, who suggests that improved communication between pregnant women and the medical profession would remove many 'apparent conflicts'. Of the guidelines issued by the Royal College of Obstetricians and Gynaecologists following *Re S*, Mair says: 'Their tone represents a positive and co-operative approach. Where there is an apparent conflict, attempts to resolve it should be made by means of communication between the doctor and the woman, with the involvement of her family where appropriate. The emphasis is on both doctor and woman trying to explain and to understand each other's position. The doctor is reminded that the medical evidence on which he or she relies is "seldom infallible" and that ultimately the choice of the woman should be respected.'¹¹³

Mair's preferred solution would emphasise communication and the centrality of relationships; as she observes: 'Pregnancy and childbirth do not exist in isolation. They are events in a series of relationships – personal relationships, relationships between women and the medical profession, relationships between women and society...'¹¹⁴ Mair seems to take the view that, if any resolution to maternal / foetal issues is possible, it will come through greater communication and co-operation between women and doctors.

While the content of the RCOG guidelines and their tone should be welcomed with caution, however, they certainly do not provide any guarantees for pregnant women who find themselves in conflict with healthcare professionals, for several possible reasons. Sometimes, as Mair

¹¹² *Ibid.* at 186-187

¹¹³ Mair, *op. cit.* at 95

¹¹⁴ *Ibid.*

acknowledges in her reference to ‘hurried judgements’, there is simply *no time* for sensitive discussion between doctor and patient; in cases involving a refusal to consent to a caesarian section, for example, the patient may already be in labour by the time the disagreement emerges. In other cases, a medical emergency may render the resolution of the ‘conflict’ similarly urgent. Second, to suggest that disagreements between doctors and pregnant patients are ‘apparent’ conflicts which will in most cases be resolved by discussion (which, inevitably, the doctor will dominate on account of his learning, his experience, and the power he has to have the patient declared incompetent) seems at best naïve and at worst insulting. As the case of *Re MB* shows, the concept of capacity can indeed be invoked to ensure that what the doctor ‘knows’ to be best for the woman will be given effect, whatever legal rhetoric about patient autonomy is employed.

While the guidelines can be regarded as a demonstration of the goodwill of the medical profession toward its pregnant patients, the law surely needs to go further, and actually *guarantee* that the fundamental rights of female patients be given effect. Finally, is it really enough for a doctor to be able to say that he ultimately respected the wishes of a pregnant patient *after* arguing with her (however politely and sensitively) and bringing the full force of his professional expertise and status to bear on her decision-making? Surely to allow the doctor any scope whatsoever to ‘negotiate’ with the patient is to take him out of the role of trained, experienced advisor and elevate him to the role of *participant* in the decision-making process – a notion which many feminist writers, at least, would presumably wish to challenge.

In the final chapter, I will claim that a property model of pregnancy is preferable to Seymour’s notion of a ‘relational approach’, because it allows the law to dispose of maternal / foetal issues in different ways depending on the context *without* inconsistency. It is also preferable to Mair’s version of relationality, which focuses on the relationships between women, the medical profession, and perhaps also members of the extended family, rather than on the relationships that exist in respect of the foetus. The most promising relational approach is that of Wells and Morgan, who urge that more attention

be paid to the ‘inter-connectedness of a woman and her foetus’.¹¹⁵ This paves the way for my analysis of the nature of the relationship between woman and foetus, in chapter five, as a property relationship, and my claim that the nature of the *legal* ‘interconnection’ between a woman and her foetus is the interconnection, not between two entities each possessing interests and rights, but rather between a person and a thing that she owns.

Despite some reservations about the relational approaches proposed by other writers, the property model that I propose is unquestionably a relational, rather than a definitional approach, in the sense that, rather than attempting to discover the ‘true nature’ of the foetus, it takes as its starting point the legal certainty that the foetus lacks personhood. It then claims that, as a non-person, the foetus can be treated as property, *whatever* else it might be. As such, it is concerned with the *property relationships* that exist in respect of the foetus, making it a relational approach rather than an attempt to define foetal nature.

1.5. Conclusion: the need for a new paradigm of pregnancy

From all of the above, the problems with adjudicating pregnancy can be seen to flow from the fact that, currently, the issues at stake are formulated in terms of a conflict between the rights of the pregnant woman – to bodily privacy / integrity and freedom of choice – and the foetus’s right to life (some commentators have even suggested that the foetus may have second-order rights, such as the right to due process).¹¹⁶

The need for a new paradigm of adjudicating maternal / foetal issues is clear. As Jane Mair observes, ‘[i]f the situation is perceived as a conflict of interests or a case of competing rights of woman and foetus, the judge, if he or she is to be the arbiter, must develop some legal method for dealing with the conflict and for deciding in favour of one or other of the parties.’¹¹⁷ She continues, ‘it is clear that there are many unconsidered and unanswered issues. The hurried judgements suggest a frantic attempt to find some legal base for

¹¹⁵ Wells and Morgan, *op. cit.*, at 431

¹¹⁶ This possibility is raised by Judith A. M. Scully in ‘Breaking The Abortion Deadlock: From Choice To Consent by Eileen L. McDonagh’ (Book Review) 8 *UCLA Women’s Law Journal* (1997) 125 at 145; see *infra*, under heading 4.4.1.4.

¹¹⁷ Mair, *op. cit.* at 86

what is in effect *a moral and personal decision*. If the courts are to continue, and perhaps to increase, their involvement in the resolution of such disputes, *there is an urgent need for greater consideration and clarification of the legal rules which they are to apply.*¹¹⁸

‘Rights talk’ has been subjected to general criticism.¹¹⁹ The specific problem with its application to maternal / foetal issues, however, is that when an issue arising from pregnancy is presented as a clash of fundamental rights (a ‘clash of absolutes’, to use Laurence Tribe’s famous phrase), those interested in resolving the issue are forced to look deeper at the philosophical and ideological foundations of the ‘rights’ at stake. Claims of right are not, after all, self-explanatory or self-justifying; they are invariably underpinned by deeper moral and political claims that attempt to explain or justify why the right ought to be recognised or respected. To this extent, rights (and claims about rights) can be described as symbols or emblems – a kind of legal shorthand for, or summary of, the mass of moral and political factors involved in an issue. Returning to the context of pregnancy: if we take the example of abortion, we are presented with a clash between a pregnant woman’s claimed ‘fundamental right’ to choose a termination and the foetus’s claimed ‘fundamental right’ to life. These claims are irreconcilable, of course, and it is necessary to look beyond the slogans of the ‘right to choose’ and the ‘right to life’ in order to determine which of the two claims should be given priority. This is the crux of the problem. When we look beyond the legal shorthand in the context of pregnancy, the more fundamental issues underlying the claims – issues of intrinsic moral status, of personhood and non-personhood – do not clarify them; they merely add to the confusion.

As I shall demonstrate in chapters two and three, arguments over the intrinsic moral status of the foetus and over its status as a person or non-person are inherently and unavoidable interminable; moreover, I will claim that the concept of personhood is in itself incapable of providing guidance regarding the moral status of entities in hard cases (of which pregnancy is perhaps the paradigm example). For the moment, it is enough to say that, far

¹¹⁸ *Ibid.* at 92, emphasis added.

¹¹⁹ See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (The Free Press, 1994)

from clarifying and helping adjudicate claims about rights, appeals to underlying principles in the pregnancy context actually complicate matters further since the principles underpinning the rights-claims are as controversial as are the claims themselves.

As such, the 'conflict model' of maternal/foetal issues is no less of a conflict at its foundations; where we have a conflict of rights on the face of things, we have a metaphysical mess underneath. The claims of right being articulated in the courts and in the public arena are premised (often implicitly) on notions of personhood and moral status which are in themselves highly controversial and – I will argue – intractable.

2. The Conflict Model: Sentience

In this and the following chapter I examine whether any consensus on the moral status of the embryo / foetus is possible, by reference to two of the most promising criteria for moral status to emerge from moral philosophy: sentience and personhood. My main concern is with the concept of personhood, because of the preponderance of the language of personhood – and in particular, the frequent references to whether or not the foetus is ‘a person’ - to be found in academic, judicial and lay discourse on maternal / foetal issues. First, however, I discuss sentience, primarily because it can be regarded as more fundamental than personhood in the sense that ‘personhood relevant qualities’ all presuppose consciousness, of which sentience may be said to be the most primitive form.

2.1. Introduction

Some philosophers believe that the moral status of an entity derives from its sentience – its capacity to *feel*, to experience pleasure and pain. On what Mary Anne Warren calls the ‘sentience only’ (SO) view sentience is both necessary and sufficient for full and equal moral status. She distinguishes the ‘sentience plus’ view (SP), which she says regards sentience as a valid criterion for moral status, but not the *only* valid criterion. SP views will be considered later, after a discussion of the concept of sentience itself. Warren makes a distinction between sentience and consciousness, although some writers use the terms interchangeably¹²⁰:

Sentience is the capacity to have, not just experiences of some sort or other, but experiences that are felt as pleasurable or painful...Because not all conscious experiences are pleasurable or painful, evidence of consciousness is not necessarily evidence of sentience. It seems likely, however, that most naturally evolved organisms that are capable of

¹²⁰ For example, Ingmar Persson in his article, ‘Harming The Non-Conscious’ *Bioethics* 13 (3/4) (1999) 294

having conscious experiences are capable of experiencing (among other things) pain and pleasure.¹²¹

This expresses a view that will shortly be examined in greater detail, namely that sentience is a basic level of consciousness, although there are higher levels. Although Warren states that most conscious beings are likely to be sentient, and that in fact we know of no real-life examples of non-sentient conscious entities, she attempts nevertheless to show that we can at least *conceptualise* a kind of being which, although conscious, lacks sentience – the example she uses is the character of Data, the advanced android in *Star Trek: The Next Generation*: '[a]lthough he is conscious, rational, morally responsible, and highly self-aware, his programming includes no capacity to experience pain, pleasure or emotion.'¹²² To argue that an entity devoid of emotion can indeed be morally-responsible seems to me to be to espouse a very Kantian, rationalistic conception of morality, rejecting the Humean notion of 'moral sentiment'. Moreover, surely the essence of morality is choice, rather than programming? These are interesting questions; however, my immediate task is to enquire about the varying degrees of sentience of some real-life beings.

2.1.1. Degrees of sentience

Warren identifies four major criteria that she says are 'indications of sentience'. These are: the structure and function of the nervous system; the presence of sense organs; behavioural indicators; and the presence of neurochemicals. 'The more of the usual indications of sentience are present', Warren tells us, 'the more confident we may be about the attribution of sentience.'¹²³ She then helpfully lists the major classifications of terrestrial organisms, stating for each how sentient she thinks they are likely to be. As far as 'higher vertebrates' (mammals and birds) are concerned, 'given the strength of the behavioural and physiological similarities between human

¹²¹ Mary Anne Warren, *Moral Status: Obligations to Persons and Other Living Things* (Oxford: Clarendon Press, 1997) at 55

¹²² *Ibid.* at 56

¹²³ *Ibid.* at 61

beings and these other vertebrate animals, the most plausible hypothesis is that these animals can experience pleasure and pain.’¹²⁴ For ‘lower vertebrates’, including fish, reptiles and amphibians, Warren claims, ‘the neurophysiology and behaviour of fish, reptiles and amphibians are somewhat less similar to our own than are those of mammals and birds...Nevertheless, the similarities between their behaviour and neurophysiology and our own are sufficient to place the burden of proof upon those who deny that these animals are sentient.’¹²⁵ Similarly, with regard to ‘complex invertebrates’ like cephalopods and arthropods, Warren opines that ‘many of these animals are highly mobile, and possessed of sophisticated sense organs and nervous systems: moreover, their behaviour when injured is often strongly suggestive of pain. Thus I think it reasonable to conclude that many of these complex invertebrate animals are sentient.’¹²⁶ On the other hand, she claims, ‘plants, bacteria and viruses are almost certainly non-sentient...[a]s far as we can tell, these organisms have neither sense organs nor nervous systems; and their behaviour rarely seems indicative of a capacity for pleasure and pain...This argument applies even more strongly to most inorganic objects...’¹²⁷

These claims are at odds with classical philosophy’s approach to the sentience of non-human animals. As Warren reminds us, ‘Descartes held that all non-human animals are automata...His primary argument for this is that animals do not use language, and that only language users can think or feel.’¹²⁸ There are contemporary proponents of this kind of view, notably Peter Carruthers, who is sceptical about the ability of animals to feel anything, including pain.¹²⁹ Warren thinks this is a strange view:

As Joseph Lynch points out, it is difficult to understand how the capacity to experience pain could have survival value for animals, if animals never felt their pains...‘The process of conditioning is

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.* at 62

¹²⁷ *Ibid.* at 63

¹²⁸ *Ibid.* at 57

¹²⁹ Peter Carruthers, *The Animals Issue: Moral Theory in Practice* (Cambridge: Cambridge University Press, 1992) esp. at 181.

utterly mysterious unless it is presupposed that stimuli can be felt.’¹³⁰

Questionable logic is only one potential problem with denying the sentience of non-human animals, however. Other problems include the vulnerability of such positions to charges of simplicity and subjectivity, at best, and baseless ‘speciesism’ and anthropocentrism at worst.

[A]s Donald Griffin points out...it is often impossible to say anything illuminating about what an animal is doing, without presupposing that it has conscious experiences. Griffin cites as an example the behaviour of some species of plovers, which appear deliberately to lead predators away from their nests by pretending to have a broken wing.¹³¹

Similarly,

The difficulty of knowing, or even imagining, exactly what other animals experience...must often deter a careful observer from speculating at any length about those experiences. But this pragmatic difficulty lends no credence to the conclusion that no non-human animal has conscious experiences.¹³²

I turn now to consider a famous defence of sentience as a determinant of moral status.

2.1.2. Peter Singer’s ‘Preference Utilitarianism’

Peter Singer defends his sentience-based approach to moral status in his celebrated book, *Practical Ethics*.¹³³ Warren tells us that ‘Singer argues that all and only sentient beings have moral status, because all and only sentient beings

¹³⁰ Warren, *op. cit.* at 58

¹³¹ *Ibid.* at 59

¹³² *Ibid.* at 60

¹³³ (Second Edition) (Cambridge: Cambridge University Press, 1993).

have interests.’¹³⁴ So what counts as an ‘interest’? Bernard Rollin writes that an entity’s needs can be regarded as interests according to

our ability to impute some ‘mental life’, however rudimentary, to the animal, wherein...it seems to care when certain needs are not fulfilled. Few of us humans can consciously articulate all of our needs, but we can certainly [sometimes] know when these needs are thwarted and met. Pain and pleasure are...the obvious ways these facts come to consciousness, but they are not the only ones. Frustration, anxiety, malaise, listlessness, boredom [and] anger are among the multitude of indicators of unmet needs, needs that become interests in virtue of these states of consciousness.¹³⁵

Utilitarianism, of course, is the consequentialist moral theory that ascribes value to actions according to their ‘good’ or ‘bad’ consequences. In identifying pleasure and pain as the morally-relevant determinants of utility, Singer follows the example of Jeremy Bentham, often regarded as the ‘father’ of utilitarianism. Of course, to insist upon the moral centrality of pleasure and pain is not uncontroversial:

This classical utilitarian definition of utility is subject to the objection that pleasure and freedom from pain are not the only things that people value. Some people choose to spend time in ways that are evidently less pleasurable than some of the alternatives, but that they consider more worthwhile.¹³⁶

Singer seeks to avoid this objection by refining his utilitarianism to take account of personal preferences (hence ‘preference utilitarianism’):

¹³⁴ Warren, *op. cit.* at 66

¹³⁵ Bernard Rollin, *Animal Rights and Human Morality* (Buffalo, NY: Prometheus Books, 1981) at 40-41

¹³⁶ Warren, *op. cit.*, at 64

Preference utilitarians respond to this objection by defining happiness as the satisfaction of preferences. This amendment permits the good of individuals to be determined by their own values...¹³⁷

For Singer, all valid moral claims derive from the principle of equal consideration of interests. 'This principle requires that the comparable interests of all sentient beings be given equal weight in our moral deliberations.'¹³⁸ As such, preference utilitarianism claims to avoid speciesism:

Singer argues that the moral equality of all sentient beings follows from the general principle that "ethical judgments must be made from a universal point of view".¹³⁹

Singer does not deny that sentient beings may be more or less sentient than one another, or embody other qualities, such as intelligence, physical strength or virtue, to a greater or lesser extent. He claims, simply, that sentience alone is sufficient to establish some moral status.

Similarly, 'the fact that other animals are less intelligent than we are does not mean that their interests may be disregarded.' If it did, then we would be equally entitled to disregard the interests of less intelligent human beings, such as infants and those who are mentally impaired.¹⁴⁰

This is not radical biological egalitarianism, obviously, because life that is non-sentient is devoid of interests and therefore of intrinsic value, according to Singer. Moreover, although Singer believes that we are morally obliged to consider the interests of all sentient animals, we need not value all of these interests, or lives, equally. Although Warren observes that Singer believes in 'the moral equality of all sentient beings', she acknowledges that in practice,

¹³⁷ *Ibid.* at 65

¹³⁸ *Ibid.*

¹³⁹ *Ibid.* at 66

¹⁴⁰ *Ibid.* at 68, citing Singer, *Practical Ethics* at 56

he differentiates between the *subjective* moral value of ‘persons’ and ‘non-persons’.¹⁴¹ Singer defines ‘persons’ as ‘rational and self-conscious being[s]’,¹⁴² and argues that the lives of such beings are more valuable *to them* than the lives of non-persons ‘since persons are highly future-oriented in their preferences’.¹⁴³ Singer also argues that some non-human animals may be classed as persons (he is famously involved in the ‘Great Ape Project’, which argues that personhood ought to be extended to great apes and perhaps other nonhuman animal species).¹⁴⁴

It should be clear from the above that Singer’s view is not a strictly SO view, since although it regards sentience as a necessary criterion for moral status, it recognises the additional value of personhood as a ground for ascribing greater moral status to the beings who qualify as ‘persons’. This being the case, I would suggest that Singer’s position is properly described as a ‘sentience plus’ view¹⁴⁵.

2.1.3. Objections to Sentience Only

Warren identifies four potentially-fatal objections to theories of moral status based solely on sentience. If these seem not to apply to Singer’s preference utilitarianism, it is important to remember that, at least in my own view, Singer is a proponent of SP, not SO. First, there is what Warren calls the ‘environmentalist objection’:

Many environmental ethicists reject the Sentience Only view because it denies moral status to plants, species, and other non-sentient elements of the biosphere. On the Sentience Only view, we may have morally sound reasons to protect these things, but these reasons can only be based upon the interests of sentient beings, since non-sentient entities have no interests that can enter directly into our moral

¹⁴¹ *Ibid.* at 69

¹⁴² Singer, *op. cit.* at 87.

¹⁴³ *Ibid.* at 95

¹⁴⁴ *Ibid.* at 87

¹⁴⁵ More specifically, I understand Singer’s ethical theory as being a *personhood* theory of moral status, and it is assessed as such in the following chapter, where such theories are analysed in detail.

calculations. Species, Singer says, 'are not conscious entities and so do not have interests above and beyond the interests of the individual animals that are members of the species.' We have, therefore, no moral obligations to species as such.¹⁴⁶

This position is rejected by proponents of 'deep' environmentalism, who argue for the theoretical and practical benefits of recognising the relationships between human beings and all other biological life and 'lifelike processes'.¹⁴⁷

Another objection comes from feminism. Many feminist writers emphasise the importance of relationships in determining moral status, although unlike deep environmentalists, 'they have usually emphasized social and emotional relationships rather than ecological ones.'¹⁴⁸ Following Carol Gilligan's seminal book, *In A Different Voice*,¹⁴⁹ some feminists employ the notion of an ethic of care to argue that 'moral obligations are rooted in specific social relationships, rather than in general rules and principles.'¹⁵⁰ For example, 'Nel Noddings...maintains that our moral obligations cannot be understood in isolation from "our human intuitions and feelings".'¹⁵¹

The conviction that human infants have a moral status different from that of pigs is, in Noddings's view, an entirely appropriate consequence of the fact that human beings care for infants in ways they do not usually care for pigs; and that infants respond to human caring in ways that pigs usually do not. Noddings recognizes that many people care for animals, and she holds that this caring creates moral obligations. She argues, however, that active concern for the interests of animals is ethically optional, whereas concern for children

¹⁴⁶ Warren, *op. cit.*, at 71-72

¹⁴⁷ For examples of 'deep environmentalist' writing, see: Edward O. Wilson, *The Diversity of Life* (Cambridge, Mass: Harvard University Press, 1992); Stephen R. Kellert and Edward O. Wilson, (eds.) *The Biophilia Hypothesis* (Washington, DC: Island Press, 1993); and J. Baird Callicott, 'On the Intrinsic Value of Nonhuman Species' in Bryan G. Norton (ed.) *The Preservation of Species* (Princeton, NJ: Princeton University Press, 1998).

¹⁴⁸ Warren, *op. cit.*, at 74

¹⁴⁹ Cambridge, Mass: Harvard University Press, 1982

¹⁵⁰ Warren, *op. cit.*, at 75

¹⁵¹ *Ibid.*

is morally basic: to abandon or weaken it is to undermine the human capacity for moral response.¹⁵²

Citing yet another feminist author, Warren continues:

It is not always irrational for human beings to show special concern for members of their social communities...As Lori Gruen points out, "...humans are not just humans; they are friends and lovers, family and foe. The emotional force of kinship or closeness to another is a crucial element in...moral deliberations. To ignore the reality of this influence in favor of some abstraction such as absolute equality may be not only impossible, but undesirable."¹⁵³

The third 'potentially fatal objection' to SO views is what Warren refers to as 'the human rights objection', the claim that utilitarianism generally 'provides no basis for ascribing strong moral rights to individual human beings.'¹⁵⁴ Instead of treating individuals as having ends of their own, utilitarianism treats them as instruments that may be manipulated towards the ends of the majority. This is traditionally a charge against classical utilitarian theory, and Singer has described himself as a 'preference utilitarian' in the hope of avoiding this type of objection. Warren remarks that 'other philosophers have pointed out that this argument does not show that persons are not receptacles on the preference utilitarian theory; what it shows is that they are receptacles for both pleasure and preference-satisfaction, rather than merely for pleasure.'¹⁵⁵ While Singer may accept that classical utilitarianism is guilty of treating people as mere instruments, however, he is confident that his theory's willingness to distinguish a higher category of 'persons' absolves it of guilt in this respect.

My response to this would be simply to say that it is Singer's reference to persons, and not to preferences, which shields him from the usual

¹⁵² *Ibid.* at 76

¹⁵³ *Ibid.* at 76-77, citing Lori Gruen, 'Dismantling Oppression: An Analysis of the Connection Between Women and Animals' in Greta Gaard (ed.), *Ecofeminism: Women, Animals, Nature* (Philadelphia, PA: Temple University Press, 1993) at 79

¹⁵⁴ *Ibid.* at 77

¹⁵⁵ *Ibid.* at 78

challenges to utilitarianism, but which also takes his theory away from utilitarianism and SO altogether, and towards SP and ‘personhood theory’). As such, most of what can be said about Singer will be in response to the personhood element of his theory, and since personhood will be examined fully in the following chapter, a comprehensive discussion of the difficulties with this aspect of Singer’s preference utilitarianism will be postponed until then. The final immediate objection that Warren discusses is the ‘comparable interests dilemma’:

Singer’s principle of equal consideration requires us to weigh equally the equally strong interests of all sentient beings. Yet it does not require us to attribute to all sentient beings an equally strong interest in life, pleasure, freedom from pain, or any other specific good. Moreover, it does not require us to regard each sentient being as possessing an “interest package” with the same total value as that of any other sentient being.¹⁵⁶

So Singer maintains that the lives of sentient non-persons are less valuable than the lives of persons; but he also makes the claim that only self-aware beings can have any form of interest at all in their own continued existence. Warren says:

this stronger claim is difficult to justify. Non self-aware beings may not consciously *take* an interest in their own survival, but it does not follow that they cannot *have* such an interest. Having an interest in something does not require a conscious desire for it, but only the potential to experience some benefit from it.¹⁵⁷

It is potentially problematic for the comparable interests thesis that Singer believes many invertebrates to be sentient.¹⁵⁸ While Warren agrees that this is

¹⁵⁶ *Ibid.* at 78-79

¹⁵⁷ *Ibid.* at 80

¹⁵⁸ Peter Singer, *Animal Liberation: A New Ethic for Our Treatment of Animals* (New York: Avon Books, 1975)

likely – and goes so far as to suggest that some invertebrate animals may even be self-aware – she notes that ‘sentience is probably the only plausible criterion of strong moral status that most common sentient invertebrate animals meet.’¹⁵⁹ They do not usually fulfil relational criteria for moral status; Warren accepts that ‘most invertebrates tend not to arouse human sympathies’ and ‘they rarely become members of our social communities, or we of theirs.’¹⁶⁰ On a strict SO view, however, sentient invertebrates must qualify for full moral status (since, unlike Singer’s theory, strict SO does not distinguish between persons and non-persons).

Yet SO cannot coherently claim that sentience alone is a sufficient criterion for the ascription of full moral status while simultaneously excluding a certain category of sentient beings, seemingly at random or on the basis of subjective human preference. However, if we *do* accord full moral status to all sentient invertebrates, as the consistency of SO demands, then we inevitably find that SO begins to encounter many of the same difficulties that have plagued ‘life only’ approaches (those ethical frameworks which take the sanctity of life, or reverence for life, as their core value). As Warren says: ‘any human society which seriously sought to accord equal moral status to all sentient beings would severely endanger its own survival.’¹⁶¹ In other words, strict SO, like ‘reverence for life’, is too onerous and impractical.

2.2. What guidance, if any, does sentience provide?

Can the sentience criteria offer us any real, practical guidance in determining the moral status of the foetus? It is to this question that I now address my attention. The first step will obviously be to ask whether the foetus is, in fact, sentient. Although, as I have shown, sentience is concerned with both pleasure *and* pain (and possibly also preference-satisfaction), in the context of the foetus, this question is usually expressed in terms of whether the foetus can ‘feel pain’. There is an obvious reason for this – the question of foetal sentience arises most often in contexts wherein the foetus might suffer pain if

¹⁵⁹ Warren, *op. cit.* at 83

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.* at 84

it is, indeed, sentient, such as foetal surgery and other intra uterine procedures, and of course, in the context of abortion. The question of foetal ‘pleasure’, as such, simply does not arise with any regularity in a medico-legal context (although, of course, pregnant women and their partners may well be interested in investigating any possible ways to engage positively with the foetus during pregnancy). After investigating whether or not the foetus might reasonably be regarded as sentient I will go on to argue what my conclusions with regard to this initial question permit or require, if anything.

2.2.1. Is the foetus sentient?

There are three views which may all be regarded in some sense as ‘mainstream’: the view that the foetus becomes sentient early in pregnancy (in the first and second trimesters); the view that the foetus becomes sentient late in pregnancy (in or just before the third trimester); and the view that the foetus does not become sentient at any stage during pregnancy. I will examine these views, introducing ‘expert witnesses’ in support of each. I will begin with what seems to be the most widely-held view, the ‘late onset’ or ‘third trimester view’ of foetal sentience.

2.2.1.1. A ‘late onset’ view of foetal sentience

In their comprehensive article *When Did You First Begin To Feel It? – Locating The Beginning Of Human Consciousness*,¹⁶² J. A. Burgess and S. A. Tawia distinguish between two kinds or levels of conscious experience: experiences with *sensational* content and experiences with *representational* content (a ‘higher’ level of consciousness).¹⁶³ The authors declare that their purpose is only to assert that the foetus has the capacity for sensational content. The authors call this most basic level of consciousness, which is essentially the same as sentience, consciousness in the ‘most liberal sense’.¹⁶⁴

¹⁶² *Bioethics* 1996 10 (1) 1

¹⁶³ *Ibid.* at 4

¹⁶⁴ *Ibid.* at 5

The authors begin by acknowledging the claims of other experts that the fetus is sentient in the first trimester of pregnancy, claims which are usually based upon observations of foetal movement, either spontaneous or in response to sensory stimuli:

Since the fetus moves in response to being touched, it might appear to follow that the fetus can feel the stimulus. (We shall soon see, however, that this appearance is quite deceptive.)¹⁶⁵

They go on to argue that 'it is...possible to account for a variety of spontaneous and reflex activities of the fetus as a consequence of spinal cord and brainstem activity in the absence of higher brain centre development.'¹⁶⁶ However, according to Burgess and Tawia, all genuine human consciousness depends upon *cortical* activity:

If widespread and severe cortical damage is enough to deprive a subject of consciousness, then this would indicate that the content of consciousness is at least largely a product of – perhaps even identical with – some kind of activity in the cortex.¹⁶⁷

So what kind of cortical activity is relevant for this purpose? The authors outline two ways of understanding the concept of a 'functioning brain'.

Brain (cortical) functioning might be said to occur when there is identifiable activity – just *any* old activity – in what recognisably is (or will become) the brain (cortex).¹⁶⁸

Alternatively, 'The brain (cortex) might be said to function when there is identifiable activity of the kind that normal adult brains (cortices) have

¹⁶⁵ *Ibid.* at 12

¹⁶⁶ *Ibid.* at 15

¹⁶⁷ *Ibid.* at 8

¹⁶⁸ *Ibid.* at 18

evolved to indulge in, or at least activity identifiable as a crude, undifferentiated ancestor of mature activity of this kind.’¹⁶⁹ With reference to the latter sense of ‘functioning’, the authors point out that ‘Clearly no brain (cortex) can function in this sense until (a) it has attained a critical minimal level of structural organisation, (b) the functional components are not only “in place” but are mature enough to perform...and (c) there is clear evidence that they are “up and running”.’¹⁷⁰ Evidently, this is the authors’ preferred understanding of ‘brain function’, as they make clear in the following passage:

Cortical ‘life’ does not begin while the cortex is getting organised, nor does it begin even then until everything is ‘settled’, ‘feels at home’ and has ‘limbered up’, as it were. (A football match has not begun while a team is being gathered together, no matter how frantic the activity involved.)¹⁷¹

Burgess and Tawia proceed to describe some aspects of cortical development that might be relevant in determining at the likely onset of foetal sentience. The first is that cortical development is ‘so gradual that it might seem more accurate to speak of functional “evolution” rather than [cortical] birth.’¹⁷² In addition, ‘EEG [electro encephalogram] data make it clear that the stream of consciousness begins not suddenly, nor as a trickle, but as a series of *isolated discontinuous puddles*.’¹⁷³ Furthermore, in normal, full-term babies, neonatal EEG activity can be discontinuous ‘for several seconds, and, in extreme cases, for hours – for some weeks after birth’.¹⁷⁴ The cumulative effect of these factors, according to the authors, is that we are left with two plausible options. First, we could locate the beginning of conscious experience (the authors call it ‘cortical birth’) at the occurrence of the first ‘puddle’ of cortical EEG

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.* at 19

¹⁷¹ *Ibid.* at 18

¹⁷² *Ibid.* at 19

¹⁷³ *Ibid.* at 20

¹⁷⁴ *Ibid.* at 22

activity (normally at around 20 weeks gestational age). The problem with this is that ‘we can see no reason to suppose that these states have sensational content; in short, we do not think it plausible to claim that a fetus at this gestational age is yet conscious.’¹⁷⁵ The authors go on:

The second possible answer is to locate the beginning of consciousness at the time when the first waking –state EEG readings appear, or, better, the first EEG readings appear that indicate states that could plausibly be regarded as ancestors of adult waking states. This varies from fetus to fetus but occurs somewhere between 30-35 weeks of gestation...at about this time, the periods of continuous EEG activity are considerably longer than the periods of inactivity...this is also the period in which something recognisable as the precursors of sleep/ wake cycles develop. These landmarks in cortical development are undeniably significant. But we do not rest our case for locating the beginnings of consciousness at this point on either of these features. Rather, what we regard as significant is the emergence of *waking states*. Surely, it is states of this kind that we *really value*...If this is not the only notion of consciousness that can be isolated, it is certainly the most important to us, and, at least in the current state of scientific knowledge, it is here that we are inclined to locate the beginnings of consciousness, *properly so called*.¹⁷⁶

The authors cite previous evidence in support of the view that arousal (the presence of states of wakefulness in addition to sleeping states) is a necessary precondition for even the most *basic* form of consciousness,¹⁷⁷ but they are also at pains to point out that they ‘cannot be certain’ of their conclusions, and that ‘all we claim for our proposal is that it seems vastly more plausible than any other we know of.’¹⁷⁸ They make no definite moral claims, saying that ‘It

¹⁷⁵ *Ibid.* at 23

¹⁷⁶ *Ibid.* at 23-24

¹⁷⁷ *Ibid.* at 8

¹⁷⁸ *Ibid.* at 24

is no part of our project to defend the interest view of moral status',¹⁷⁹ but add that they hope their findings and conclusions might be valuable to anyone engaged in debating philosophical questions of foetal status and human consciousness:

In the absence of a tolerably clear and carefully argued answer to the question we have been addressing, it is simply impossible to apply the interest view to the question of the moral status of fetuses. We have attempted to produce both a proposal that is sufficiently explicit, and an argument for that proposal that is sufficiently rigorous, to provide both proponents and opponents of the interest view with a plausible working hypothesis about the onset of human consciousness.¹⁸⁰

2.2.1.2. A sceptical view of foetal sentience

In his article *Locating The Beginnings Of Pain*,¹⁸¹ Stuart W. G. Derbyshire disagrees with the thesis that the foetus is sentient during pregnancy, and specifically, with the conclusions reached by Burgess and Tawia:

Not surprisingly, the medical literature has also discussed the question of whether the fetus can feel pain. Unlike Burgess and Tawia, medical researchers largely concluded that the fetus could not feel pain, regardless of gestational age. This conclusion was based upon an understanding of what pain is, rather than upon an understanding of the biological development of the fetus.¹⁸²

¹⁷⁹ *Ibid.* at 25

¹⁸⁰ *Ibid.* at 26

¹⁸¹ *Bioethics* 1999 13 (1) 1

¹⁸² *Ibid.* at 2

If we presume for a moment then, that the nature of pain, rather than foetal development, is decisive, how ought we to define ‘pain’? Derbyshire suggests that there has been a recent shift in the way we understand pain:

Pain is no longer regarded as merely a physical sensation of noxious stimulus and disease, but is seen as a conscious experience which may be modulated by mental, emotional and sensory mechanisms and includes both sensory and emotional components. Pain has been described as a multidimensional phenomena for some time and this understanding is reflected in the current IASP [International Association for the Study of Pain] definition of pain as ‘an unpleasant sensory and emotional experience associated with actual or potential tissue damage, or described in terms of such damage’.¹⁸³

He goes on to express his opinion that the onset of pain is not a sudden experience, but rather that our capacity to experience pain ‘is gradually formed as a consequence of general conscious development. Thus pain requires the support of a sophisticated neurological and cognitive architecture.’¹⁸⁴ This leads him to refute Burgess’s and Tawia’s identification of the cortex as the ‘seat of pain’ in the body:

In summary, the conscious appreciation of pain cannot be explained as the consequence of an active “pain centre”. Instead a “neuromatrix”...is proposed as necessary for the experience of pain. Parallel interacting areas...each of which add a component to the experience of pain but none of which define it in its entirety...¹⁸⁵

The upshot of all of this for the foetus obviously depends upon when Derbyshire regards such a ‘neuromatrix’ as being in place:

¹⁸³ *Ibid.* at 4

¹⁸⁴ *Ibid.* at 5

¹⁸⁵ *Ibid.* at 15

It can be said with confidence that at 30 weeks gestation the human fetus has a well-developed system for the projection of noxious information from the periphery (the skin) to the central nervous system. It is known that activation of this system results in coordinated behavioural responses, regulated neural discharge and up-regulation of the endogenous anti-inflammatory agent cortisol and the endogenous pain analgesic β -endorphin. However, while there are similarities between the fetal nervous system and the adult, it is important to remember that the real explosion of events in the cortex occurs postnatally between the third and sixth months of life.¹⁸⁶

According to Derbyshire, it is all too often the case in literature about foetal sentience that 'the complexity of pain is being underestimated while the biological development of the fetus is being exaggerated.' He also argues that, while conclusions in *favour* of foetal sentience (such as those arrived at by Burgess and Tawia) may well create an impetus for change to current practices (for example, the introduction of analgesic and anaesthetic use in foetal procedures), we ought to resist the pressure for such change:

At this stage it would be inappropriate for the debate about fetal pain to affect clinical practice involving the fetus. Only when it is shown to be clinically beneficial should analgesic and anaesthetic intervention be carried out during fetal operations. The seminal paper by Anand and Hickey clearly demonstrated that analgesic intervention during neonatal operations improves clinical outcome. This is in itself sufficient to place an ethical premium upon the use of analgesics during invasive procedures with the neonate. Although it is likely that similar mechanisms may be operative in the fetus, meaning that the

¹⁸⁶ *Ibid.* at 21

fetus may also benefit clinically from analgesic practice, this should not be assumed.¹⁸⁷

Several difficulties arise from Derbyshire's position. First, he declares that the benefits of analgesic use in neonates have been demonstrated to his satisfaction, and concedes that it is *likely* that the foetus could derive similar benefits, yet maintains despite these admissions that we ought not to 'assume' this, or even err on the side of caution.

Perhaps because he focuses on the nature of pain rather than on the physiology of the foetus, Derbyshire does not address the question of why a near-term foetus should be so different in terms of sentience from a neonate as his theory seems to require. Surely, unless *birth itself* triggers 'an explosion of events in the cortex' (a claim that Derbyshire never makes) we have no reason to differentiate, *either* in terms of our assumptions about the levels of sentience these entities possess, or in terms of clinical practice? The fact that the evidence which has convinced Derbyshire of the value of neonatal pain relief¹⁸⁸ was conducted upon neonates rather than late-term foetuses is surely irrelevant; if we have no scientific basis for distinguishing between the cortical and nervous capacities of neonates and late-term foetuses, then what is the clinical basis for failing to extend the conclusions of the research in question to beings falling within the latter category?

To all this, Derbyshire might of course respond with the claim that he advocates the use of analgesic and anaesthetic drugs not from birth onwards, but from three months after birth (since this is the earliest point at which he claims the cortical 'explosion' can take place). This would clearly contradict the passage in which he recognises 'an ethical premium upon the use of analgesics during invasive procedures with the neonate', but let us consider it for a moment. If we permit Derbyshire to claim that by 'neonate', he means an infant of three months or older, then he is able to avoid contradicting himself in differentiating unjustifiably between the foetus and the 'neonate'

¹⁸⁷ *Ibid.* at 28-29

¹⁸⁸ The article to which Derbyshire refers is K.J.S. Anand and P.R. Hickey, 'Pain and its effects in the human neonate and fetus', *New England Journal of Medicine* 317 (1987) 1321-1329

(as speculatively redefined). However this reinterpretation of Derbyshire's claim has an obvious, shocking implication; it would mean that analgesics and anaesthetics need not be administered during invasive surgical procedures on neonates under three months of age.

There is an obvious 'yuck-factor' associated with this interpretation, but it would not be the first time a medical practitioner had denied neonatal sentience. In his challenging paper *Babies Don't Feel Pain: A Century of Denial in Medicine*,¹⁸⁹ David B. Chamberlain catalogues the experiments performed on newborns up until as recently as 1974 in American hospitals and universities, and accuses the researches involved of dehumanising these newborns, and depriving them of their cries, tears, smiles, memories and experiences by reclassifying all of these things as 'reflexes', 'grimaces', 'fantasies' or even simply the result of 'gas'.¹⁹⁰ Chamberlain speaks of 'painful encounters between physicians and newborns',¹⁹¹ infants having 'head-on collisions with physicians, typically male physicians',¹⁹² and claims that 'generally, doctors have not been concerned about babies' pain'.¹⁹³ He tells us:

Babies have had a difficult time getting us to accept them as real people with real feelings having real experiences. Deep prejudices have shadowed them for centuries: babies were sub-human, prehuman, or as Luis de Granada, a 16th-century authority put it, 'a lower animal in human form'.¹⁹⁴

As Derbyshire indicates, Anand and Hickey make a persuasive case for neonatal sentience, without reference to the three-to-six-month age specification which Derbyshire himself would appear to favour. As it stands, therefore, Derbyshire's position is either incoherent (if he accepts Anand and

¹⁸⁹ Paper presented by Dr. Chamberlain to The Second International Symposium on Circumcision, San Francisco, California, May 2, 1991

¹⁹⁰ *Ibid.* at 1

¹⁹¹ *Ibid.* at 2

¹⁹² *Ibid.* at 1

¹⁹³ *Ibid.* at 4

¹⁹⁴ *Ibid.* at 1

Hickey's findings *and* fails to distinguish between the neonate and the foetus, yet refuses to extend their recommendations on analgesic use to the late term foetus) or disingenuous (if he really wishes to refute Anand and Hickey and argue against pain relief for neonates, but shrinks from making such an argument for fear of the yuck-factor). I suspect that the former is the case, but either way, the sceptical approach to foetal sentience is problematic - at least, Derbyshire's version is.

2.2.1.3. An 'early onset' view of foetal sentience

Some writers have claimed that the human foetus is sentient as early as the first trimester (weeks 0-12 of pregnancy) or early in the second (weeks 12-24). This view is usually based upon observations of foetal movement *in utero*. Burgess and Tawia note that studies have shown foetal movement as early as 5.5 weeks gestational age, and that patterns of movement, both spontaneous and in response to external stimulation, have been detected from this point onwards.¹⁹⁵ They tell us that 'between 5 and 6.5 weeks of gestation...the lips are the only region on the surface of the fetus which elicit a reflex response on stimulation. Stimulation of this kind consistently causes the head to bend or move away from the side of the mouth being stimulated...by 6.5 weeks gestational age the contralateral flexion reflex involves movement of the head, trunk and pelvis away from the stimulus...more isolated movements of the head and limbs are detected *in utero* from about 8 weeks of gestation.'¹⁹⁶ Later in the first trimester:

Stimulation of the palm of the hand results in partial finger closure by 9 weeks of gestation; stimulation of the sole of the foot results in flexion of the toes by 9.5 to 10 weeks; and stimulation of the lips elicits reflex swallowing at 10.5 weeks. Isolated respiratory movements and respiratory reflexes are observable at 11 and 12 weeks

¹⁹⁵ Burgess and Tawia, *op. cit.*, at 10

¹⁹⁶ *Ibid.* at 11

of gestation, respectively, and by 16.5 weeks, spontaneous chest contractions are detectable.¹⁹⁷

Burgess and Tawia consider that the spontaneous movement detected must be ‘a result of some sort of intrinsic activity of the developing nervous system’;¹⁹⁸ as we saw above, they do not regard this, or movement in response to external stimuli as evidence of foetal sentience at this early stage of pregnancy. So on what basis do other commentators favour the ascription of sentience to the foetus at a very young gestational age?

Proponents of early-onset approaches tend not to rely upon the positive claim that there is *strong evidence* of foetal sentience in the first or second trimesters of pregnancy. Instead, this type of approach is characterised by *caution* and typically emphasises two things: the relative lack of available scientific knowledge on foetal pain, and the appropriate response to this lack of knowledge.

2.2.1.3.1. Lack of knowledge

The early-onset approach was advocated in a 1996 report by the UK Parliament’s All Party Pro-Life Group entitled *Foetal Sentience*.¹⁹⁹ The authors acknowledge that ‘considerations about the capacity of the foetus to experience pain should be based on the best scientific information currently available’, but they emphasise the lack of scientific certainty regarding foetal sentience. The authors insist that claims that sentience occurs late in gestation (if at all) ‘can only be sustained if we can confidently exclude beyond reasonable doubt that the stimulus which brought about the reflex movement does not also reach any centre in the brain concerned with pain awareness. To claim that a foetal movement in response to noxious stimulus is not accompanied by pain is warranted only if this exclusion can be firmly

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ Published in the *Catholic Medical Quarterly* XLVII no. 2 November 1996 at 6

established.’²⁰⁰ Contrary to Burgess’s and Tawia’s claim that their proposal is ‘vastly more plausible than any other we know of’, the report points out that:

Current information suggests that many functions which were originally assumed to be exclusively located in the cerebral cortex can be undertaken by lower centres in the brain. Those who claim that ‘sentience is a function of the cerebral cortex’ seem to overlook this scientific evidence.²⁰¹

The authors refer to instances where sentience or probable sentience has been detected in neonates and infants born with hydrocephalus and even anencephaly (a condition where large parts of the brain, including the cortex, are undeveloped or even absent). They also cite research based upon a post-mortem examination carried out on the corpse of an adult, Karen Quinlan, who had lived in a persistent vegetative state (PVS) for more than ten years.²⁰² On examination of the brain, it was determined that while the cortex was only slightly damaged, damage to the thalamus (a region of the brain normally associated with ‘lower’ functioning) was ‘very substantial’. The Parliamentary report concludes: ‘These findings suggest that the thalamus plays a more crucial role in consciousness than was previously thought.’²⁰³ Clearly, the authors interpret this research as suggesting that much of the ‘higher brain function’ commonly attributed to cortical activity may in fact be sustainable by ‘lower’ areas of the brain.

This is problematic in at least two ways. One very practical difficulty with this interpretation arises from the notorious frequency with which medical practitioners misdiagnose PVS.²⁰⁴ In one study of a group of 40 patients diagnosed as ‘vegetative’, this diagnosis was later found to have been

²⁰⁰ *Foetal Sentience* at 9

²⁰¹ *Ibid.*

²⁰² H. C. Kinney, J. Korein, A. Panigraphy et al, ‘Neuropathological Findings in the Brain of Karen Quinlan’, *New England Journal of Medicine* (1994) 330: 1469-75

²⁰³ *Foetal Sentience* at 10

²⁰⁴ See for example C. Borthwick, ‘The Permanent Vegetative State; ethical crux, medical fiction?’ *Issues in Law and Medicine* 1996 12 (2) 167-188

incorrect in 17 of the patients.²⁰⁵ This is an alarming level of error, although the facts that the vegetative state is uncommon (only occurring in up to 1500 patients in the United Kingdom²⁰⁶) and that medical practitioners therefore have few opportunities to become proficient in its management and diagnosis may be thought to mitigate. Alternatively, the *Quinlan* research might equally be viewed as evidence in support of Derbyshire's 'neuromatrix' thesis – the view that pain and other manifestations of sentience arise *not* from any one area of the brain (a 'pain centre') but from various areas functioning in concert. Thus, Derbyshire might argue that the 'reasonable doubt' cast on the 'cortical' understanding of sentience by the *Quinlan* research might just as plausibly form the basis for denying sentience altogether up until the third month after birth (the time by which he claims all of the relevant cerebral areas are functioning at the requisite level).

That all of our current knowledge regarding foetal neurological and neuropsychological development leaves room for reasonable doubt, however, is a difficult claim to dispute. This brings me to the second strand of the early-onset argument: what ought our practical response to be in the face of reasonable doubt?

2.2.1.3.2. Methodology

The authors of *Foetal Sentience* favour the approach adopted by Professor Christopher Hull, the Vice President of the Royal College of anaesthetists and a Professor of Anaesthesia at the University of Newcastle, when he says:

So far as I am concerned I would be prepared to accept that the foetus does not feel pain when somebody proves to me that they don't feel pain. But until that time I would have to assume that they do.²⁰⁷

²⁰⁵ K. Andrews, L. Murphy, R. Munday, C. Littlewood, 'Misdiagnosis of the vegetative state' *British Medical Journal* 1996; 313: 13-16

²⁰⁶ N. Craft, 'Looking living death in the face' *British Medical Journal* 1996; 313: 1408

²⁰⁷ Prof. Christopher Hull, interviewed on BBC World At One on 29th April 1996

In 1991, such concerns prompted scientific advisers to the German Federal Medical Council to advise the use of analgesia and anaesthesia in foetal procedures, and this ‘cautious’ approach also characterises current UK practice regarding *neonatal* anaesthesia (until 1986, only *minimal* analgesia and anaesthesia were used in neonatal surgical procedures). One of the main factors cited by early-onset proponents is the concern that ‘[a]t the very least... [the burden of proof] should match the standards in relation to burden of proof that apply to experimental use of animals.’²⁰⁸ Animal experimentation is currently regulated in the UK by the Animal (Scientific Procedures) Act 1986, which provides that any ‘protected animal’²⁰⁹ (this category includes the embryos and foetuses of birds, reptiles and all mammals ‘except man’ throughout the second half of the gestational period) must only be killed ‘humanely’ in the course of experimental procedures.²¹⁰ Ultimately, then, for early-onset proponents, the central question concerns the burden of proof:

[T]he question of whether a subject, who lacks the capacity to communicate, is feeling pain can only be deduced. Essentially then, any decision about the likelihood that any subject (animal or human) feels pain requires society to decide what is an acceptable risk of error. How confident must we be that our actions will not inflict pain on a sentient creature? In this type of situation, it is generally required that the burden of proof (of non-sentience) rests on the person who is undertaking the action.²¹¹

What we treat as an ‘acceptable risk of error’ will depend in turn upon what obligations we consider might arise from a presumption in favour of foetal sentience. I consider the potential moral and ethical implications next.

²⁰⁸ *Foetal Sentience* at 11

²⁰⁹ The category of ‘protected animal’ is defined in s1 of the Act, and s1(2) extends the protections in the Act to vertebrates in their ‘foetal, larval and embryonic’ forms.

²¹⁰ Schedule 1 of the Act sets out the requirements for human killing.

²¹¹ *Foetal sentience*, at 11

2.3. Conclusions: sentience and the foetus - an overview

If the foetus can feel pain, what ethical conclusions might follow from this? More specifically, if we were *either* to establish *or* to presume that the foetus is capable of experiencing pain, would this fact impose any general moral obligations *vis à vis* the sentient foetus? One possibility is that foetal sentience might be regarded as imposing a general obligation not to inflict harm upon fetuses needlessly, incorporating a duty to use anaesthesia / analgesia during invasive surgical procedures involving the foetus. What about abortion? Does the fact that the foetus is not intended to survive such a procedure make any moral difference? Ought we still to minimise the pain of the foetus being deliberately killed? The answers to questions such as these will depend upon whether, and to what extent, we think sentience is relevant to moral status.

On a SO view, the establishment of sentience would constitute, in itself, sufficient grounds for the ascription of *full* moral status. As such, on this view, were we to prove (or presume) that the foetus is sentient, we would thereby accept a prohibition, not only on inflicting unnecessary foetal pain and suffering, but also on ending the life of the foetus. This would require the use of pain-minimising drugs during foetal surgery, and would forbid abortion altogether. But these are not reasons to resist the SO view and the extension of its moral implications to the foetus; I have already provided an explanation, above, of some of the reasons why the SO position is problematic.

If we adopt an SP approach (taking sentience as relevant to, but not decisive of moral status) we are able to regard any determination or presumption of foetal sentience as a strong reason not to cause the foetus pain or distress, such that pain-minimising drugs would be morally-necessary in foetal procedures. To justify any prohibition on abortion *with* anaesthetic, it would be necessary to demonstrate that the foetus is *not only* sentient, but also possesses whatever quality is necessary, under the particular SP view in question, for the ascription of *full* moral status. The sorts of additional criteria required for full moral status under a SP view might include, for example, a

conscious will-to-live, a subjective valuing of one's own life, or even the group of qualities and capacities that some philosophers call 'personhood'. In the following chapter, I conduct a detailed examination of the concept of personhood as a criterion for full moral status.

3. The Conflict Model: Personhood

3.1. Introduction

The unrealistic and overly-burdensome breadth of moral obligation under sentience- based accounts of moral status has led many commentators to look for alternative accounts in which the range of beings to whom we owe moral obligations is narrower. One possibility is to adopt an account in which we distinguish between ‘persons’ and ‘non-persons’, and to claim that we owe strong moral obligations only to persons. Before explaining what a ‘personhood only’ account of moral status involves, it is necessary, first of all, to distinguish between this use and the *ordinary language* use of ‘person’. In ordinary usage, it is sometimes claimed, ‘person’ is used to mean the same thing as ‘human being’. For those who treat the terms synonymously, the question is not ‘*what* is a person?’ but ‘*when* is a person?’: in other words, ‘at what stage of *human* development can we say that a human *being* has come into existence?’ Several events which take place (or are thought to take place) during early human development have been suggested as alternative points for the coming-into-existence of ‘human beings’: birth, viability, conception and ensoulment.

Birth is perhaps the most obvious event to choose, since unlike the others, it is observable. The problem in identifying it as the point at which a human being comes into existence is, essentially, the difficulty in differentiating between the foetus immediately prior to birth, and the neonate. As Christian Perring writes, ‘there is no sudden change in the intrinsic capacities of the fetus. The metaphysical concept of personhood depends only on the intrinsic properties of the individual. Therefore personhood cannot be determined by the location of the individual, inside or outside the womb.’²¹² Others disagree that birth lacks real significance; Liam Clarke tells us that birth ‘is not only a question of geography or indeed of biology; it is a social condition in that issues and problems pertaining to the fetus/mother may,

²¹² Christian Perring ‘Degrees of Personhood’, *Journal of Medicine and Philosophy*, 22(2) 173 at 181

before birth, be discussed only in the context of their unity. The fetus does not inhabit the mother but is inherent of the mother.’²¹³

Viability was the standard adopted by the United States Supreme Court in the celebrated case of *Roe v Wade*.²¹⁴ The effect of that decision was that before viability, the state had no interest in restricting the right of a woman to terminate her pregnancy. After viability, however, state laws restricting access to termination would not be unconstitutional. But viability is a problematic threshold. Firstly, as Clarke notes, ‘the Court failed to elaborate on *why* the capacity to exist outside the womb should be the deciding factor. They used the language of “potential” life, failing to note that the nonviable is as potential as the viable. Another drawback is that viability is dependent on medical technology. At a time when babies of six and even five months gestation can now survive, and taking account of the geographical differences in the availability of technology, are moral judgements to be contingent upon that availability?’²¹⁵

The ‘arbitrariness’ of birth and viability has led others, like Peter Kreeft, to place the beginnings of personhood at the earliest stage, *conception*.

No other line than conception can be drawn between pre-personhood and personhood. Birth and viability are the two most frequently suggested. But birth is only a change of place and relationship to the mother and to the surrounding world (air and food); how could these things create personhood? As for viability, it varies with accidental and external factors like available technology (incubators). What I am in the womb – a person or a non-person cannot be determined by what machines exist outside the womb. But viability is determined by such things. Therefore personhood cannot be determined by viability.’²¹⁶

That ‘birth is only a change of place’ can of course be disputed quite vigorously, and in the following chapter I will analyse one particular feminist

²¹³ Liam Clarke, ‘The Person in Abortion’, *Nursing Ethics* 1999 6(1) at 39

²¹⁴ *Roe v Wade* 410 US 113; 35 L Ed 2d 147 (1973)

²¹⁵ Clarke, *op. cit.* at 39

²¹⁶ Peter Kreeft, ‘Human Personhood Begins at Conception’ *Journal of Biblical Ethics in Medicine* 4(1) (1990) 9, at 15

challenge to this notion; for the time being, however, it is necessary only to note that the idea that personhood begins at birth is not uncontroversial.

Yet another ‘event’ criteria for personhood is *ensoulment* – the view that what makes us persons is our possession of an immortal, immaterial soul. Theologians and moral philosophers have disagreed, historically, about when this event occurs, and nowadays there is a great deal of scepticism about whether it occurs at all: ‘most philosophers now agree that positing the existence of a soul runs into huge explanatory and epistemological problems, and so reject metaphysical substance dualism. The option of believing in a soul has largely been dropped from modern philosophical discussion, and the debate focuses instead on what is the best form of substance monism.’²¹⁷ The widespread rejection of the notion of ensoulment notwithstanding, however, much of our contemporary discourse about personhood is traceable to Cartesian thought, as we shall see.

Whatever other problems we can identify in these sorts of criteria for personhood, one difficulty shared by them all is that they are all events in the course of *human* development. While it may well be true that in ordinary language we use the terms ‘person’ and ‘human being’ coextensively (and I will dispute this assumption later when I reject, with DeGrazia, Mary Midgley’s proposal that we allow the ordinary usage of ‘person’ to delineate the parameters of the *moral* sense of personhood), many theorists claim that ‘person’ can be used in another way, to denote beings with ultimate, or radically superior, moral status. This is neither a new nor a minority usage of ‘person’; indeed, ‘the concept of personhood is generally assumed to have a central place in morality. Nearly every moral theory in the history of (at least Western) philosophy has held that persons possess exclusive or radically superior moral status, that nonpersons have no or radically inferior moral status, and that there are no beings existing between the categories of person and nonperson.’²¹⁸

Used in this way, personhood is ascribed to beings not on the basis of the *species* to which they belong, but rather on the basis of the qualities, or

²¹⁷ Perring, *op. cit.* at 180-181

²¹⁸ David DeGrazia, ‘Great Apes, Dolphins, and the Concept of Personhood’, *The Southern Journal of Philosophy* (1997) vol 35(3) 301-320 at 301

characteristics, which they possess. Obviously, then, this moral sense of ‘personhood’ requires us to decide which qualities are relevant, and which are not, in determining personhood.²¹⁹ Whatever we decide the personhood-relevant properties to be, ‘person’ in the moral sense is not coextensive with ‘human being’, since ‘human life is no longer respected *per se*, but in terms of its possession of these features.’²²⁰

Moreover, since it is the relevant qualities themselves which are morally-important, and not mere humanity, it follows that, if we observe the presence of these features in beings *other* than humans, we ought to recognise such beings as non-human persons. One of the leading proponents of personhood for nonhumans is Peter Singer, and I will explore his arguments later on in this chapter.

As such, personhood theory goes beyond the traditional notion of the ‘sanctity of life’ which has long been accorded a central (and arguably, a privileged) place in the law of the United Kingdom, and which has been influential in such landmark judgments as those in *Airedale NHS Trust v Bland*²²¹ and, more recently, *Re A (Children) (Conjoined Twins: Surgical Separation)*²²², among many others. Later, I will consider how personhood theory runs up against a ‘paradox’ in the context of end-of-life decision-making - a paradox created by the tension between the nature of such decisions, on the one hand, and the nature of the ‘personhood-relevant properties’ on the other. I turn now to consider what these personhood-relevant properties are, and how the concept of personhood has developed historically.

3.2. Personhood-relevant properties

Many attempts have been made to produce a list of the features relevant to personhood. In *Brainstorms*,²²³ Daniel Dennett identifies the following six qualities as particular to persons: rationality; consciousness; the ability to be

²¹⁹ Clarke, *op. cit.* at 38

²²⁰ *Ibid.*

²²¹ [1993] AC 789

²²² [2000] 4 All ER 961

²²³ Daniel Dennett, *Brainstorms: Philosophical Essays on Mind and Psychology* (Penguin, 1997)

considered a person by others, and the ability to reciprocate this recognition; the capacity for verbal communication; and a particular kind of consciousness only possessed by persons.²²⁴ The last criterion seems somewhat vague, but could refer to *self*-consciousness, self-awareness, or the ‘freedom from causal determination’ required by Kant (see below). The Protestant theologian Joseph Fletcher made a similar attempt to list the relevant criteria in his article *Indicators of Humanhood: A Tentative Profile of Man*²²⁵, wherein he identified self-awareness, self control, an awareness of the future, an awareness of the past, concern for others, the capacity to relate to and communicate with others, and curiosity. Although he listed these as features of what he called ‘humanhood’, there is nothing *necessarily* human about the qualities he identifies, and there is no reason for thinking that he is making the prescriptive claim that personhood is coextensive with genetic humanity.

Christian Perring notes that ‘the capacity for rationality, consciousness, self-consciousness, language, membership in a community of persons, or the possession of personality, emotions, and beliefs’ have all been suggested as criteria for personhood²²⁶, whereas Laurence Locke takes the view that ‘it is the very nature of our self-awareness that justifies persons reserving for ourselves and for no other entities the honor (or burden) of moral responsibility’²²⁷. Bernard Williams defines a person as having ‘a character, in the sense of having projects and categorical desires with which he is identified’²²⁸ and ‘which are closely related to his existence and...to a significant degree give a meaning to his life.’²²⁹ Cranford & Smith discuss personhood in the end-of-life context, concluding that ‘*consciousness* is the most critical moral, legal and constitutional standard, not for human life itself, but for human personhood...In our view, consciousness is the most important characteristic that distinguishes humans from other forms of animal life, going

²²⁴ *Ibid.*, chapter 14, ‘Conditions of Personhood’ at 269-271

²²⁵ (1972) 2 *The Hastings Center Report* no. 5

²²⁶ Perring, *op. cit.* at 181

²²⁷ Laurence Locke ‘Personhood and Moral Responsibility’ (1990) 9 *Law and Philosophy* 39-66 at 41

²²⁸ Bernard Williams, ‘Persons, Character and Morality’ in A.O.Rorty (ed.), *The Identities of Persons* (University of California Press, 1976) at 210

²²⁹ *Ibid.* at 209

beyond the vegetative functions of heartbeat and respiration.’²³⁰ It is difficult to understand this choice. If personhood means something more than sentience-only, then consciousness, in the sense of wakefulness, is surely insufficient for personhood. Admittedly, the Cartesian/Lockean notion of personhood discussed below takes ‘consciousness’ as its starting point, but upon closer examination it is clear that Locke is referring to something more than *mere* consciousness – *self-consciousness* perhaps. Moreover, can we really agree with Cranford & Smith that non-human animals are *not* conscious? Perhaps the confusing conclusion results from the context in which the question is considered: the authors are more concerned with when personhood *ends* than with how we ought to go about establishing it in the first place, and as such their focus is on discovering the point at which clinicians may judge a *loss of personhood* to have occurred. This methodology has led them to identify a *necessary* rather than a *sufficient* condition for personhood.

What is evident from the foregoing is that most proponents of personhood conceive of the person as consisting in *psychological* qualities, rather than as something necessarily physical. I will now consider two influential strands in personhood, one Kantian, and the other Cartesian/Lockean, before considering the dominance of the psychological element in contemporary personhood theory, and the marginalisation of the notion that persons are essentially embodied.

3.3. Kantian Personhood: Autonomy

Kant’s definition of ‘person’ is a maximalist one; he holds that personhood consists in rational moral agency. His theory is that being a moral agent is (1) a necessary condition for any moral status; and (2) a necessary and sufficient condition for full moral status.²³¹

²³⁰ Ronald E. Cranford and David R. Smith, ‘Consciousness: The Most Critical Moral (Constitutional) Standard for Human Personhood’ *American Journal of Law and Medicine* Vol. XIII No. 2-3, 233 at 233-234, emphasis added.

²³¹ Warren, *op. cit.* at 90

In a famous passage in the conclusion to his *Critique of Practical Reason*²³², Kant writes, 'Two things fill the mind with ever new and increasing admiration and awe, the oftener and more steadily we reflect upon them: the starry heavens above me and the moral law within me.' This 'moral law within' is what separates persons from non-persons in Kant's view. Warren explains what Kant means by the 'moral law within': 'For Kant, the moral agency of persons is evidence of a metaphysical difference between persons and all other entities. Persons are, in his view, the only earthly beings that are free of causal determination...As long as we regard ourselves solely as part of the sensible world, our actions will appear to be governed by causal laws, and thus to be unfree. Yet we know that, as moral agents, we are free to act upon the deliverances of reason, rather than merely from natural causes. Unlike other animals, we are not motivated solely by emotion, instinct, and other non-rational forces.'²³³

Only beings who possess the capacity for autonomy, or 'moral agency', are morally valuable, are 'persons' in the Kantian sense. Such beings can have moral obligations toward one another. The rest are non-persons, and have 'only a relative value as means, and are consequently called things'.²³⁴ Unlike non-persons, persons must not be treated as means or manipulated toward the achievement of ends which are not their own. They must at all times be treated as ends-in-themselves. Kant's model is unicriterial and categorical; all and only persons count, and personhood matters in an all-or-nothing way.

This Kantian freedom or *autonomy* forms the basis for modern understandings of personhood, for example that described by Harry Frankfurt.²³⁵ Frankfurt tells us that human beings like other animals, possess certain desires which motivate them towards action. These desires may arise out of deliberation, or they may derive from non-rational feelings including hunger, fear, discomfort, or the subconscious. 'According to Frankfurt',

²³² Immanuel Kant, trans. Lewis White Beck, *Critique of Practical Reason* (Bobbs-Merrill, 1956) at 166 [162]

²³³ Warren, *op. cit.* at 100

²³⁴ Immanuel Kant, trans. H.J. Paton, *The Moral Law: Kant's Groundwork of the Metaphysics of Morals* (Hutchinson, 1948) at 41

²³⁵ Harry Frankfurt, 'Freedom of the Will and the Concept of a Person' (1971) 86 *Journal of Philosophy* 5

Laurence Locke writes, ‘what is special about the consciousness of persons is the capacity to become reflectively aware of, and evaluate, first-order desires. Through this capacity persons determine whether they want those desires to be effective, i.e. to constitute their will. “No animal other than man...appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires”, but it is having second order volitions, and not second order desires generally, that he regards as essential to being a person.’²³⁶

Unlike animals, then, persons can form second-order volitions and use these to affirm or deny their first-order desires rather than simply being stuck with them, as animals are. Whereas animals and other non-persons are *victims* of their desires, persons are the *masters* of theirs. This is what Kant means by freedom from causal determination. ‘An interesting implication of this point is that a person can possess all sorts of reprehensible first-order desires and yet in no way have a reprehensible character. The character would not be reprehensible unless the person identifies with the reprehensible desires and formed second-order volitions that they be effective.’²³⁷

Another Kantian approach to moral status is that found in the work of John Rawls. Rawls characterises persons (he refers to them as ‘moral persons’) as ‘rational beings with their own ends and capable of a sense of justice.’²³⁸ This definition is firmly in the Kantian mould, emphasising moral agency, autonomy (in the determining of one’s own ends) and the moral law (entailed by the capacity for a ‘sense of justice’).

3.4. Self-consciousness: the development of personhood theory from Locke to Parfit

3.4.1. Personhood as a purely psychological property

Jerry Goodenough traces one strand of personhood theory back to ‘Descartes’ conclusion that he was essentially a thinking thing, non-essentially an

²³⁶ L. Locke, *op. cit.* at 60, citing Frankfurt, *op. cit.* at 7

²³⁷ *Ibid.* at 61

²³⁸ John Rawls, *A Theory of Justice* (Oxford University Press, 1999)

embodied thing, and therefore potentially capable of continuing to exist after the destruction of his body. This underlies much of Locke's (entirely non-physical) definition of a person.²³⁹ John Locke famously defined 'person' as '[a] thinking intelligent being, that has reason and reflection, and can consider it self as it self, the same thinking thing in different times and places; which it does only by that consciousness, which is inseparable from thinking, and as it seems to me essential to it.'²⁴⁰ For Locke, then, a 'person' is a *psychological* entity, conscious of its own thought processes. Locke defined a person and his experiences by reference to the 'reflective consciousness': 'as far as this consciousness can be extended backwards to any past action or thought, so far reaches the identity of that person; it is the same self now as it was then; and 'tis by the same self with this present one that now reflects on it, that action was done.'²⁴¹ Elsewhere, he states that the term person 'belongs only to intelligent agents capable of law, happiness and misery.'²⁴²

Locke's purely psychological definition of personhood is clearly based upon the concept of *memory*, as it states that personhood depends upon reflective consciousness extending backwards through time. For Locke, then, a person is the same person who performed a past action only if he can remember performing that action. Laurence Lock points out that: 'Locke's concept of a person is simplistic, but it introduces several intuitions which, fleshed out one way or another, remain in the literature today: that persons are essentially non-physical entities, that psychological criteria are sufficient to identify them, that persons are temporally limited by psychological features, and, as has been mentioned, that persons are the rightful bearers of responsibility.'²⁴³

An important feature of Locke's view is that it does not take embodiment in a human physiology to be a necessary component of personhood, since Locke maintains that it is 'not the same body, but the same continuing consciousness, which constitutes the criterion for the identity of

²³⁹ Jerry Goodenough, 'The Achievement of Personhood', *Ratio (New Series)* X 1997 141 at 143

²⁴⁰ John Locke, *An Essay Concerning Human Understanding*, ed. Roger Woolhouse (Penguin, 1997) at 302

²⁴¹ *Ibid.*

²⁴² *Ibid.* at 312

²⁴³ L. Locke, *op. cit.* at 44

persons.’²⁴⁴ Laurence Locke considers this unembodied-memory definition to have a certain appeal: ‘There is a strong attractiveness to the idea that bodily integrity is not a necessary condition for personal identity...Suppose I have total and irreversible amnesia and forget all my past experiences, including those upon which I draw for my beliefs, values, and goals. Those who knew me might well feel that the person they came to know when they came to know me “as a person” bears little relation to the person existing in the wake of this amnesia. They seem to have reason to claim that they are not confronted with the same person even though confronted with the same live human body. For the above sorts of reasons, philosophers have tried to appeal to psychological continuity as the criterion of personal identity...what we are really interested in finding, when we are interested in finding the same person, is someone psychologically continuous with him...psychological continuity has often been analysed in terms of memory, and memory criteria have been offered as criteria for personal identity.’²⁴⁵

The purely psychological character of Lockean personhood encounters two significant problems, however. One is a problem of circularity created by the reliance on memory, and the other is the problem that psychological continuity defines personhood too broadly. The problem of circularity is described as follows: ‘An account of personal identity in terms of memory is necessarily circular, because memory “presupposes and so cannot constitute personal identity”...for a person to really remember a past action, he must be the person who performed the action. To claim that a person’s memories are real memories, then, we must first know that he is the same person who performed the action or who had the experience. Therefore, when we use memory criteria, we are presupposing personal identity.’²⁴⁶ Both this problem and the problem of the definition’s breadth are addressed by more recent psychological analyses of personhood. In a significant strand of development, Derek Parfit and John Perry reformulate the survival of personhood in terms of *psychological connectivity*, rather than psychological continuity. They do so ‘by requiring a causal link between successive psychological stages of a

²⁴⁴ B. A. Rich ‘Postmodern Personhood: A Matter of Consciousness’ *Bioethics* 11 (1997) 206 at 209

²⁴⁵ L. Locke, *op. cit.* at 46

²⁴⁶ *Ibid.* at 47

person. The causal link is provided by the embodiment of the successive psychological stages within the human brain. Embodiment is thought to solve the circularity problem since it allows persons to be identified along a spatio-temporal path, thus preventing persons who have exactly similar memories from becoming counterexamples to the psychological theory.’²⁴⁷

3.4.1.1. Parfit: psychological connectivity

Laurence Locke explains that, for Parfit, it is not psychological continuity, but rather psychological *connectedness* that is crucial to personal survival. Parfit defines psychological connectedness, or ‘*connectivity*’ as ‘the holding over time of particular “direct” psychological relationships’²⁴⁸ and Locke gives, as examples, the relationships between an intention and an action, or between an experience and the memory of that experience. We are psychologically connected with that temporally extended stretch of our psychological continuity with which we are connected by memories, present experiences, future ‘projects’ and so on. Psychological *continuity*, on the other hand, is defined as a ‘chain of overlapping “direct” psychological relationships’.²⁴⁹ Thus, while we are psychologically continuous with our infant selves, we are not, to any significant degree, psychologically *connected* to them. So what justifies positing connectedness as the key to personal identity? Laurence Locke says that the importance of connectedness lies in the fact that it is ‘a necessary condition for our past experiences to contribute to our present experience and for our present experience, via projects extending into the future, to be connected with the future.’²⁵⁰ Put simply, ‘[t]hose periods of our psychological continuity with which we are not “connected” are felt to be, in Bernard Williams’ phrase, “beyond the horizon of our interest”.’²⁵¹

This emphasis on connectedness rather than continuity also seems to solve the problem of breadth: whereas we are psychologically *continuous* with our infant, and perhaps even our *foetal* selves, we are not psychologically

²⁴⁷ *Ibid.*

²⁴⁸ Derek Parfit, ‘Lewis, Perry and What Matters’ in A.O. Rorty (ed.) *The Identities of Persons* (University of California Press, 1976) at 98

²⁴⁹ *Ibid.*

²⁵⁰ L. Locke, *op. cit.* at 55

²⁵¹ *Ibid.* at 54-55

connected to these stages of our lives. They are ‘beyond the horizon of our interest’, as described above, unlike ‘those stages of ourselves with which we are closely enough connected that they bear some significant relationship to our present characters, to our reasons for acting, to what we are as persons.’²⁵² In extreme cases, ‘[w]here two person-stages are sufficiently disconnected (the story goes) we might, if we wish, consider them to be stages of different persons. So a life, given radical changes in character, can be viewed, if we wish, as a series of selves.’²⁵³ I will consider this point concerning the notional separability of persons and their lives more fully in due course.

Locke goes on to consider some interesting implications of this proposition for the notion of moral responsibility, particularly as it operates within the criminal justice system. He argues that we already take connectivity into account in determining issues of moral responsibility, as evidenced both in our everyday language and in current legal practice. Many of our ordinary phrases, like ‘that was a long time ago’, and ‘but I was only sixteen’, seem to reflect the intuition that degrees of psychological connectedness are relevant to moral responsibility.

With regard to the legal context, Locke writes: ‘By the suggestion that we should take degrees of connectedness into account, it seems reasonable to simply mean something like this: When we have lost a significant amount of the character-reasons why a person was morally-culpable, then we should take that into account in our thought about justice, responsibility, and punishment. This would not call for radical changes in our behaviour or thought. We already recognize that justice demands this. Evidence of positive character change is already a mitigating factor in myriad situations. Evidence of character impairment is often a mitigating or even an exonerating factor.’²⁵⁴ This suggests another potential argument in favour of a psychological connectivity account such as Parfit’s; namely, that it might satisfy the Dworkinian tests of fit and justification.

Continuing in this vein, Locke sketches the following scenario: ‘Suppose, for example, that a remorseless, sociopathic, habitual criminal

²⁵² *Ibid.* at 65

²⁵³ *Ibid.* at 56

²⁵⁴ *Ibid.* at 64

contracted a rare disease that left him with irreversible amnesia, to the extent that his mind became a virtual blank slate. He was thereafter nurtured, properly socialized and educated; he now has all the characteristics of a solid citizen...there is no psychological connectivity at all, and we might as well consider him to be a different person.'²⁵⁵ Surprisingly, Locke concludes that 'we are inclined to find such persons blameworthy and deserving punishment even under the above science fiction circumstances. The inclination is even stronger in the following cases: (a) *A* brutally kills *B*, knowing and relying on the fact that the horror of the experience will radically transform his character in all the appropriate ways; (b) *A* brutally kills *B* and then cleverly chooses to undergo the proper sort of radical character reconditioning in order to avoid punishment and accountability. We are inclined to feel that *A* should not be off the hook in either case.'²⁵⁶

Locke's explanation for why we would (in his opinion) be inclined to punish in the above cases rests on the acknowledgement that 'we have reasons for imposing criminal sanctions besides moral desert.'²⁵⁷ These other reasons might include the wish to 'make a social statement', to deter others, or to satisfy demands for revenge or retribution (although Locke notes that such motives are 'understandable but inappropriate' in the absence of moral desert). All of these reasons treat the person instrumentally, however, manipulating them in order to achieve social goals. I fail to see the need for utilitarian 'justifications' in this case, since I would argue that the notion of psychological connectivity is perfectly capable of explaining the inclination to punish *A*, since it allows us to distinguish between the first case, that of the sociopathic criminal who experiences severe amnesia, and the latter two cases involving *A* and *B*. In each of the latter two cases, there is psychological connectivity between the individual, *A*, before and after the character changes, because *A* is linked to his 'subsequent self' in each case insofar as (a) he had the *intention* to become that later self, and (b) his transformation is an application of his authentic *will*. In other words, if *A* has the intention to become *A'*, then such intention is a bridge of connectivity between the former

²⁵⁵ *Ibid.* at 63

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.* at 64

and latter selves, and while not a high degree of connectivity, it is nonetheless sufficient by virtue of its *relevance*, in particular its *causal nature*.

My minor disagreement with Locke on this point serves only to emphasise the strength of his argument that connectivity plays a role in our intuitions about moral responsibility, however, and to bolster his conclusion that ‘for moral responsibility as well as for other subjects of concern about persons, numerical identity has no intrinsic importance.’²⁵⁸ Instead, what matters is Parfitian connectivity between person-stages. Whereas the Lockean view took personhood to extend backwards through time via psychological continuity, Parfit’s analysis takes personhood to extend to the present person-stage and to other person-stages sufficiently connected with it that they bear substantially upon our present character and motivations.

Any attempt to conduct a critical analysis of the development of the concept of personhood in the direction of connectivity is hampered by the fact that so much of the writing in this area resembles nothing so much as pure science-fiction. So rarified has the personhood debate become, and so frequently do the academic commentators invoke abstruse hypothetical thought-experiments involving clones, mind-melds, cell-by-cell duplicates etc., that at one point Laurence Locke refers (seemingly without irony) to a ‘garden variety brain transplant case’, which surely makes as much sense as talking about a garden variety lottery win, out-of-body experience, or virgin birth.

3.4.1.2. ‘Parfitian Persons’ and their lives

Laurence Locke writes that ‘a “person-stage” (like Quinton’s “soul-phase”) defines the entire composition of a person at a given moment. Where two person-stages are sufficiently disconnected (the story goes), we might, if we wish, consider them to be stages of *different* persons. So a life, given radical changes in character, can be viewed, if we wish, as a *series of selves*.’²⁵⁹ This

²⁵⁸ *Ibid.* at 65

²⁵⁹ *Ibid.* at 56, emphasis added.

amounts to a conceptual requirement that persons and their lives be regarded as conceptually separable, and it is problematic.

In the first place, is the notion of a 'series of selves' really the exception and not the rule in Parfit's model? Is not every adult person sufficiently disconnected from, e.g., their infant self to qualify as a separate person? If so, then 'radical changes in character' do not appear necessary in order to bring about the circumstances where one life is lived by different persons at different times! Alternatively, perhaps Locke and Parfit would rather say that an infant (and, for that matter, a patient with severe dementia) is not sufficiently self-aware to count as a person at all, so that infancy and senile dementia would not qualify as 'person-stages' under the Parfitian model, and accordingly, lack of connectivity with such phases is inevitable and thus irrelevant for personhood purposes.

Another difficulty concerns the role of the physical body in the Parfitian account. Parfit and Perry make embodiment in the human brain a 'background criterion' for personal identity, and rely upon this requirement for embodiment to avoid the circularity inherent in *purely* psychological accounts of personhood. The effect of this is to treat the human brain as the seat, if not the sum, of personhood. Alternatively, we might say that the brain provides the 'equipment' for personhood, although it cannot be said to *contain* 'the person'. This can be queried using a rather prosaic analogy. When I say that there is 'baking in the oven', the noun 'baking' refers to the food cooking inside the oven, and not to the oven itself. However, it would be inaccurate to refer to the food as 'baking' were it *not in* the oven. In other words, the oven is not part of the baking, yet it is a necessary part of the *definition* of the noun, 'baking'. Without the oven, there would be no 'baking', just a bowl full of raw ingredients; when I talk about 'the baking' I mean something *situated*, something which is necessarily in the oven (all of which confirms that the oven is not *part* of the baking, since the oven cannot be located within itself!) To claim that the human brain is *constitutive* rather than *supportive* of personhood, then, is not to claim that the brain is *part* of the person, but that the meaning of personhood includes the physical component, the brain, rather than existing separately from it although supported by it.

If we accept that a person is an entity consisting chiefly in *psychological states*, but is also necessarily – and constitutively - embodied, then we can sketch an account of the Parfitian ‘series of selves’ as follows: Let A represent the relevant physical component (the brain/ cortex/ neocortex), and B the personhood-relevant psychological states. We may then give different numbers to those ‘person-stages’ which are so disconnected from the other person-stages that they might potentially represent different ‘personhoods’. Let us imagine three such disconnected ‘person-stages’, represented by B1, B2, and B3. We can then let AB to represent ‘normal’ personhood (in the absence of disconnected person-stages). Such an example would involve a case where only one ‘person’ or ‘self’ could be said to exist during the course of one lifetime. In a case where substantial changes occur giving rise to 3 periods of disconnectivity (B1, B2, and B3), we can see that throughout the course of such a life the same body (or its neurological workings) combines, at different times, with at least three discrete psychological packages (probably more, since presumably there would be some connectivity at other times!). So the psychological side of personhood would alter substantially enough that the resulting ‘whole person’ (consisting of both the physical and the psychological components) would alter, with physical structure A supporting B1, B2, and B3 at different times, such that the ‘person’ would change from AB1 to AB2 to AB3.

As such, ‘personhood’ might be viewed as a union – a ‘marriage’ – between the physical and psychological components of an entity. Whereas the ‘stuff of personhood’, what ‘matters’ about it, mainly consists in the relevant psychological states, these must be supported by neurological equipment, otherwise no person can exist. However, while it is possible to conceive of disembodied personhood (John Locke conceived of this, as do theological conceptions of the soul, and religious doctrines which hold that life continues after the death of the body), it is not only conceivable, but also arguably possible to have the relevant neurological equipment in place, yet lack the necessary psychological states for personhood (e.g. conscious fetuses, neonates and infants). In most cases of the personhood ‘marriage’, the neurological and psychological aspects mate for life; however, the physical

body can be a ‘serial monogamist’ as in the cases of disconnectivity described above. It is potentially-possible (although highly unlikely) that the same body (or more accurately, the same part of the same brain) could support a plurality of ‘persons’ or ‘selves’ consecutively. If a disconnecting event or process occurs whereby one psychological package is replaced by another sufficiently-disconnected one, the neurological ‘seat’ of personhood can be said to have been simultaneously ‘widowed’ and ‘remarried’. In the case of a final, person-extinguishing event or process, like the progress of dementia, the body may be regarded as having been widowed once-and-for-all, since no new personality can form to replace that which has been extinguished.

Neither A (physical) nor B (psychological) or any B-variant (B1, B2, etc.) is the person on this account, only AB or AB1, or some such combination of the physical and psychological elements. Of course, this depends upon our taking a contributory or ‘*constitutive*’ view of the body (a view that physical elements help make up or constitute personhood) rather than a *supportive* view (a view that physical structures support personhood-relevant psychological states without themselves forming constituent parts of ‘the person’). If we take a supportive view, then ‘the person’ is B, B1, B2 or B3.

From the above, we can identify at least 3 possible approaches to the role of the body in personhood: *purely psychological* approaches, which suffer from the problem of circularity; *constitutive* approaches, which avoid the circularity problem; and *supporting* approaches, which accept that embodiment is a necessary support to personhood, but is not constitutive of it.

An important distinction can be made at this point between theories of *general personhood* (theories that ask what makes an entity ‘a person’) and theories of *particular personhood* (theories that try to discover the criteria for what makes a particular individual who they are, for their personal identity). With this distinction in mind, it should now be possible to identify Kant, Frankfurt, Fletcher and Rawls as concerned with *general* personhood, and Parfit and Perry as concerned with *particular* personhood. Both senses of ‘personhood’ are relevant to the present discussion. General personhood has obvious relevance, since if we can establish criteria for full moral status and

take the term ‘person’ to signify a particular level of moral status, then this will have implications in the maternal/foetal context. Theories about particular personhood are salient here too, insofar as they are concerned with establishing the criteria for continuing personal identity over time; such theories may be able to shed light on whether persons are sufficiently connected, in a morally-relevant way, to their predecessor-selves in the early stages of human development, that we can extend their current personhood. Since the most robust theories of particular personhood build on Parfit’s contention that the criterion for continuing personal identity is *psychological connectivity*, and since, on this analysis, it is unlikely that we could establish sufficient connectivity between an adult and the foetus it developed from to call the foetus ‘the same person’ as the adult, any attempt to claim that the foetus *is* a ‘person’ would have to overcome this difficulty, as well as successfully arguing against the criteria for *general* personhood which would exclude the foetus.

Even if we decide ultimately that personhood is inadequate as a basic sortal term and unable to determine the moral status of beings, and even if we conclude that anyway, the foetus cannot qualify as a ‘person’ in any meaningful sense, these two senses of ‘personhood’ are helpful nonetheless in focusing our attention on questions which help us arrive at a better understanding of how helpful the concept of personhood really is, and what function it is capable of performing in our analysis of moral status issues.

3.4.1.3. Personhood-relevant properties and the concept of a ‘life worth living’

The question of whether and how the *body* is significant in personhood theory hints at another, related question: the question of the relationship between persons and their *lives*. As we have seen, most proponents of personhood as a determinant of full moral status posit rationality, autonomy, self-awareness, or consciousness (by which they usually mean something more than mere sentience) as ‘personhood-relevant properties’. It is possible to reveal the circularity of such concepts now, by considering a familiar question involving

personhood at the end of life: does a terminally-ill patient who is still rational, autonomous and self-aware have the right to voluntary euthanasia?

According to personhood theory itself, anyone who still possesses the qualities of rationality, autonomy and self-awareness is unequivocally 'a person'; to suggest otherwise would constitute what Warren would term a 'personhood plus' position – a departure from the thesis that possession of the 'personhood-relevant properties' alone is sufficient to endow an entity with ultimate value. Accordingly, then, personhood proponents are obliged to recognize the ultimate moral value of the entity in the situation described above. Is that entity's wish to exercise a 'right' that will cause her death a reasonable position? More specifically, is the right claimed a morally-defensible one? On the face of it, it would seem that an entity which is rational, autonomous and self-aware is unreasonable in wishing for its own demise, since (according to personhood theory at least) in wishing for this it is wishing for the destruction of something of ultimate value. It would appear objectively-unreasonable, then, that anyone who could reasonably be considered a '*locus* of rights' would wish to die, and to claim that such a desire could be the subject of a 'right' would appear equally unreasonable, since such a 'right' is incapable of moral justification.

Nevertheless, personhood theorists often do talk of a 'right to die', apparently without perceiving any incoherence or contradiction in the juxtaposition of the rationality and autonomy inherent in the very notion of a 'right' with the idea of a 'life not worth living'. One possible explanation is that personhood theorists are assuming the conceptual separability of persons and their lives. Although personhood theorists do not offer explicit arguments for this dualism, it seems to underlie the very notion of a 'right to die', which simultaneously accords the status of rights-bearer in recognition of the *ultimate value* of the person, and acknowledges as reasonable that person's belief that their life is significantly *lacking in value*. A conceptual dualism between the person and their life could achieve this without incoherence; however, the question remains of whether such a conceptual separation can be sustained.

The renowned case of Mrs. Dianne Pretty²⁶⁰ is a particularly pertinent case in point. Mrs. Pretty was terminally ill with a neurological illness (motor neurone disease) which left her rationality and mental acuity unaffected, yet claimed a right to assistance in ending her life based upon other, admittedly severe, impairments to her quality of life. Personhood-based approaches to moral status cite a variety of factors, usually any or a combination of rationality, autonomy and self-awareness, as the characteristics that demarcate the category of beings to whom we may accord the ultimate level of moral status, that of *person*. That Dianne Pretty possessed all of these characteristics was not in question. Any claim that her life was not worth living was obliged accordingly to cite other criteria as *sine qua non* for a life worth living. It is probably safe to assume that no one would claim that someone in Dianne Pretty's position lacks moral status, or even ultimate moral status; indeed, claims like those about Mrs. Pretty's right to die frequently appeal for their justification to the notion that a person in her position must be allowed to be master of his or her own destiny *by virtue of* their ultimate moral status. So far, then, we can say that on a 'personhood only' account of moral status, Dianne Pretty qualified as a person. If such a life may be ended, then, it is not for lack of moral value. Perhaps we may even say that the converse is true. But this position is contradictory and gives rise to what I will term 'the personhood paradox', consisting of two distinct contradictions.

The first contradiction can be summarised as follows: can we say that if a being possesses criteria x, y, and z, it is of ultimate value and deserves the utmost protection, yet simultaneously claim that we ought not to interfere if such a being wishes to destroy itself? First, I will examine the problems this question poses for voluntary euthanasia (and assisted suicide) and then I will consider what it may mean in cases where a competent adult patient wishes to refuse life-sustaining medical treatment.

Voluntary euthanasia cannot avoid the first contradiction, since authentic voluntariness cannot exist in the absence of rationality, autonomy and self-awareness, and the presence of these characteristics is sufficient, on most accounts, to denote personhood, or ultimate value. What if we attempt to

²⁶⁰ *Pretty v United Kingdom* [2002] 2 F.L.R. 45

circumvent the problem using the rationale that a being of ultimate value ought to have complete freedom to determine the parameters of his or her own existence, including the authority to determine the conditions under which it deems life to be intolerable? This must also fail, for the following reasons.

First, none of us has such absolute and unfettered freedom. Even on a day-to-day basis we are forced to compromise regularly and frequently upon a range of issues ranging from the mundane (we cannot purchase the brand of toothpaste we prefer because the local supermarket has run out, or cannot express ourselves as we would wish to because the clothes we want to wear are too expensive for us to afford) to the more serious (we may oppose abortion vehemently on moral grounds, but be forced, nonetheless, to facilitate its provision through payment of our taxes because we live in a democracy).

Second, there is a circularity involved in defining what qualifies as ‘rational choice’. Certain choices which an adult of otherwise sound mind may wish to make will be deemed irrational, and the adult’s freedom may even be curtailed on the grounds that he or she is not competent to choose. As such, rationality is a fragile state, and, should it produce an unwelcome or unpopular choice, may instantly be revoked, the ‘undesirability’ of the choice in question weighing as evidence that rationality was absent in the first place. In the context of legalised voluntary euthanasia or assisted suicide, this may mean that, where judges *agreed* that the patient’s quality of life was truly intolerable, the request would be granted; conversely, where the court *disagreed* with the patient’s subjective valuing of his or her own quality of life, the request would be denied.

It may of course be argued that all of this is mere speculation, since neither voluntary euthanasia nor assisted suicide is yet lawful in the United Kingdom, and indeed it *is* speculation; however, suspicions that courts would resort to ‘objective’ judgments about quality of life in adjudicating requests for voluntary euthanasia or assisted suicide are substantiated when we look at the case law regarding the rights of patients to refuse medical treatment.²⁶¹

²⁶¹ I describe value-judgments by the courts about quality of life as ‘objective’ only in the sense that they are not value-judgments made by patients themselves about the quality of their

The comparatively recent case of ‘Ms. B’²⁶² seems to clarify and confirm the legal position regarding refusals of life-sustaining treatment. In that case, a woman who was left tetraplegic and unable to breathe independently following a spinal haemorrhage, and who wished effect to be given to her withdrawal of consent to the artificial ventilation which was keeping her alive, won the right to have her wishes enacted. In that case, the patient had lost none of her mental acuity – she was clearly ‘a person’ in the sense that she was rational, self-aware, and capable of making and expressing decisions autonomously. The judge in the case, Dame Elizabeth Butler-Sloss, said of Ms. B:

‘Her wishes were clear and well-expressed. She had clearly done a considerable amount of investigation and was extremely well-informed about her condition. She has ... a considerable degree of insight into the problems caused to the Hospital clinicians and nursing staff by her decision not to remain on artificial ventilation. She is, in my judgment, an exceptionally impressive witness. Subject to the crucial evidence of the consultant psychiatrists, *she appears to me to demonstrate a very high standard of mental competence, intelligence and ability.*’²⁶³

Under the present law, then, it may seem that we *can* and *do* say, in some circumstances – certainly with regard to the refusal of medical treatment - that we ought not to interfere if a being of ultimate value wishes to destroy itself. Ms. B was clearly such a being, yet her subjective valuing of her quality of life as ‘intolerable’ was given effect by the court. The crucial question is why: was it simply because the court, irrespective of its own value judgment, was determined to respect the autonomous wishes of a competent adult patient? If so, then we could expect the court to give effect to any life-threatening treatment decision taken by a competent adult patient. A reading of the case-law, however, reveals that, although courts *purport* to enshrine patient

lives to them; I do not mean to imply that there is necessarily anything *qualitatively* ‘objective’ about such value-judgments by the courts.

²⁶² *B v An NHS Hospital Trust* (2002) 2 All E.R. 449

²⁶³ *Per* Dame Elizabeth Butler-Sloss at paragraph 53, emphasis added.

autonomy as a central value in medical law – capable of trumping even the privileged ‘sanctity of life’ doctrine²⁶⁴ – in practice, the fact that autonomy depends necessarily upon the concept of capacity allows the courts to avoid ‘undesirable’ outcomes.

Despite Lord Donaldson’s ringing endorsement of patient autonomy in the case of *Re T (Adult: Refusal of Medical Treatment)*²⁶⁵, where he upheld the ‘absolute right’ of adult patients to refuse consent to medical treatment irrespective of ‘whether the reasons for making that choice are rational, or irrational, unknown or even non-existent’²⁶⁶, the right to refuse treatment is contingent, inevitably, on the crucial concept of capacity, and subsequent case law has demonstrated the willingness of the courts to manipulate this concept in order to avoid giving effect to decisions which are felt to be *too* irrational. In the now-notorious ‘enforced caesarian section’ cases of the 1990s, the courts showed themselves to be alarmingly willing to order caesareans despite a patient’s refusal to consent²⁶⁷. This often involved questioning the mental capacity of the women involved.

Although the case of *St George’s Healthcare NHS Trust v S*²⁶⁸ appears to resolve the controversy in favour of patient autonomy by holding that ‘while pregnancy increases the personal responsibilities of the pregnant woman it does not diminish her entitlement to decide whether or not to undergo medical treatment’²⁶⁹, this is still assuming that the patient in question possesses the capacity to give or refuse her consent. In *Re MB*, where the rhetoric in support of patient autonomy was equally strong, the caesarian was ordered anyway on the grounds that *this* patient lacked the necessary capacity. As Margaret Brazier has observed, ‘[i]n practice the temptation to seek grounds to find her capacity to be impaired is great...In *Re MB* Butler-Sloss LJ suggested a woman might suffer temporary incapacity induced by fear, confusion, shock, pain or drugs. Finding any of these factors in childbirth

²⁶⁴ Hoffmann L.J.’s judgment in *Airedale NHS Trust v Bland* [1993] A.C. 789 at 827-827 suggests that, in a conflict between the two principles (sanctity of life and patient autonomy), patient autonomy ought to prevail.

²⁶⁵ [1993] Fam. 95

²⁶⁶ *Ibid.* at 113

²⁶⁷ See, in particular, *Re S* [1992] 4 All ER 671, and *Re MB (Medical Treatment)* [1997] 2 FLR 426

²⁶⁸ See *supra* note 62

²⁶⁹ *Ibid.* at 692

will not be hard.’²⁷⁰ I would suggest that the same, or similar, could be said of the end-of-life context. Patients who are terminally ill, in chronic pain, or facing a life of vastly reduced quality – the circumstances in which requests for the withdrawal of life-sustaining treatment are most likely to be made – we are also likely to find one or all of fear, confusion, pain or drugs. Moreover, we may be *more* likely to encounter certain additional factors affecting capacity, such as depression, in the end-of-life context than in the context of childbirth.

What all of this suggests is that, despite the rhetoric of patient choice, autonomy and self-determination which characterises personhood proponents’ advocacy of voluntary euthanasia, the rights which are theoretically ascribed to persons are, in practice, either observed or withheld on the basis of ‘objective’ judgments about quality of life. In adjudicating end-of-life cases involving *either* refusal of treatment, *or* (in the future) voluntary euthanasia and assisted suicide, such ‘objective’ judgments are inevitable. We may therefore wish to consider whether it is desirable to have court-endorsed views about quality of life. What might the impact of this be for those who have the same or similar quality of life to patients whose subjective valuing of their lives as ‘intolerable’ has been objectively ‘approved’ by the courts? To have a quality of life which the courts have declared it is reasonable not to value, and yet to wish the continuation of one’s own existence, might prove a dangerous position to occupy. Faced with treating patients who have ‘lives that it is reasonable not to value’, is it not likely that hospital trusts might raise questions regarding the rationing of scarce resources and the desirability of expending them on the maintenance of such lives? If one is actually *living* an ‘objectively’ valueless life, is it far-fetched to suppose that one may experience this as a kind of pressure tantamount to a ‘duty to die’?

The second contradiction is the erroneous assumption of the conceptual separability of a subject and his or her life. Personhood-only accounts of moral status can support Dianne Pretty’s ‘right-to-die’ only by separating the value of the person from the value of the life she wishes to end. This is so because, as shown above, Dianne Pretty’s personhood could be

²⁷⁰ Margaret Brazier, *Medicine, Patients and the Law* (3rd edn.) (London: Penguin, 2003) at 395

established clearly by reference to all of the central criteria of mainstream personhood models; but more than this, her personhood was presumed by the very notion that she could be the bearer of a right which depends on the autonomous exercise of a deliberate and informed choice. As such, unless we abandon ‘personhood only’ and progress to some form of ‘personhood plus’ model, we are faced with a schism – a dichotomy between the value of a being and the value of that being’s life. Is this dichotomy supportable?

3.4.1.4. Persons and their lives

The attempt at separation implicit in the concept of a ‘right to die’ seems inherently problematic, since it seems unlikely that a person can exist except in the context of a biological life. As we have seen, John Locke’s conception of personhood as a purely psychological construct has been superseded by the work of Parfit, Perry and others, since purely-psychological theories of personhood encounter grave problems of circularity which are solved only by conceiving of persons as essentially embodied. In any case, notions that the ‘person’ could survive the end of the physical body’s biological life occur only in the context of theological theories of ensoulment, and religious doctrines of life-after-death; it is doubtful that any contemporary proponent of personhood as a purely-psychological phenomenon could advance any claim that biological life is not necessary for the survival of ‘the person’, without recourse to ensoulment and related concepts. As such, therefore, all mainstream theories of personhood accept that the person depends, for its survival, upon the persistence of biological life, and this is true whether such theories regard the body as constituent, or merely supportive, of personhood.

If we accept that persons cannot exist outwith the context of their lives, then we can proceed to ask: what are the implications of the ultimate value of the *person* for the value of the *life* on which it depends for existence? I propose that if (as personhood theory claims) the person has ultimate *intrinsic* value, then the life of a person must have ultimate *instrumental* value, even if it has minimal intrinsic value. Thus, although the circumstances of living may be painful, difficult, unhappy, or even miserable, the life itself

must as a matter of logical consistency be of ultimate value if the person is of ultimate value. Unless personhood proponents accept this, they commit themselves to scalar version of personhood. We will see, under heading 3.5. below, that some personhood theorists argue for degrees or gradations of personhood. This position usually proceeds from the basis that ‘personhood-relevant properties’, whatever we take these to be, themselves admit of degrees, such that ‘threshold’ approaches to personhood will inevitably be arbitrary. But scalar notions of personhood make sense only when they argue for recognizing differing degrees of personhood according to the presence of personhood-relevant properties in differing degrees.

Unless proponents of personhood are prepared to argue for the conceptual separability of persons and their lives – an argument which will be very difficult to make convincingly, for the reasons set out above – they are forced to make the claim that a life which possesses all of the ‘personhood-relevant properties’ might nonetheless be *reasonably* judged to be valueless by the person whose life it is. This is what I have termed the ‘personhood paradox’. That the courts are equally susceptible to the paradox is illustrated in the case of Ms. B. The only way to defend the decision in that case against the charge that it is paradoxical is to cast the net more widely so that the process of valuing life takes into account *not only* the personhood-relevant properties themselves, but other, extrinsic ‘quality of life’ considerations – in other words, to adopt a ‘personhood plus’ approach to moral status.

To argue that we ought to regard some persons as more intrinsically-valuable than others on the basis of non-intrinsic properties like quality of life, rather than on the basis of the degree to which such entities possess rationality, autonomy, self-awareness, or whatever the personhood-relevant properties are taken to be, is not only bad philosophy (ascribing intrinsic value on the basis of extrinsic factors), it is also at odds with personhood theory itself. Moreover, it may make for dangerous jurisprudence. It may well be argued that these are not reasons to resist moves to legalise euthanasia or assisted suicide. Rather, it may be claimed, they are reasons to take such decision-making out of the hands of the judiciary, by enacting legislation which sets clear parameters within which the ‘right to die’ can operate, rather than leaving the courts to set such limits.

I would respond by saying that the ‘personhood paradox’ is as relevant a consideration in legislating such issues as it is in adjudicating them. Any statutory right to voluntary euthanasia or assisted suicide must avoid the paradox in one of the only two ways possible: either by making the highly problematic claim that persons and their lives can be evaluated separately, or by claiming that ‘personhood’ is not sufficient to establish that a life has ultimate value, but that other, extrinsic factors are also necessary before it would be unreasonable to regard a life as being of minimal value, or no value at all. I have already indicated that it would be dangerous (in the sense that it would be difficult to avoid arbitrary line-drawing), and incompatible with personhood theory itself, to introduce ‘extra’ criteria for an ‘ultimately valuable life’ over and above the personhood-relevant properties themselves. If judicially-endorsed conceptions of what counts as a ‘life worth living’ are undesirable, then conceptions endorsed by the legislature can hardly be less so. But there is also a practical problem: since no legislation, however well-drafted, could possibly anticipate all of the various circumstances that the end-of-life context can yield, it would inevitably fall to the courts to interpret the legislation in ‘hard cases’, of which there would undoubtedly be many. As such, legislation would not alter the fact that much of the job of deciding whether or not a particular person was reasonable in wishing an end to his or her life would still be undertaken by the courts.

3.4.1.5. Rights and non-persons

Any being that does not possess personhood-relevant properties is not an appropriate bearer of rights, including the ‘right to die’, according to personhood theory. It would therefore be inappropriate to withdraw or withhold treatment, or indeed to intervene deliberately to end life, on the basis of any ‘rights’ - to respect, dignity, or suchlike. Personhood theory provides that non-persons are not the kind of entities to which such terms can properly be applied. Although transitivity of respect for the feelings and moral beliefs of relatives and loved ones might be morally-significant in such cases, it is unlikely that such concerns could be sufficiently weighty to justify the continued use of resources which might otherwise be redirected toward the

care and treatment of persons. Admittedly, it is unclear how all of the various morally-relevant considerations which pertain in such a case ought to be calculated and weighed; however, the one thing which does seem clear according to theories of personhood is that the value of a person's life outweighs the needs and interests of non-persons in the case of conflict.

As such, there should be no agonizing about whether to withhold or withdraw treatment from non-persons; according to personhood proponents' own moral schema, treatment should routinely and habitually be refused or discontinued, since medical staff have a moral duty to those patients who are still persons not to waste scarce resources on non-persons. Moreover, if intervention to end life is more cost-effective than ending life 'passively', and if it causes less suffering to patients who, although non-persons, are still sentient to some degree, then there is also a moral duty to end life deliberately and actively. Such action is not only morally-permissible, but morally-*obligatory*.

3.4.1.6. Implications of the inseparability of persons and their lives

The interrelatedness of persons and their lives, as well as their bodies, lends appeal to what may be termed *situated-agency theories*; theories which attach ultimate moral status, not to persons, but to 'subjects-of-a-life' (Tom Regan), 'biographical life' (James Rachels), 'authors of a narrative' (Alasdair MacIntyre), and so on. Such theories do not idolise a group of mental capacities in isolation, but emphasize the continuity of the personal and social context as inextricable from the value of the entity it contextualizes. The 'subject' or 'author' is unimaginable without the 'life' or 'narrative'. One advantage of such an approach might be continuity, since the life/narrative/biography is ongoing even when the entity is not rational/autonomous/ self-aware. Disadvantages might include that some of these categories expand the moral community in a way that is impractical and intuitively unacceptable; subjecthood-of-a-life could include not only 'higher mammals', but probably *all* mammals and perhaps even lower vertebrates! Authorship-of-a-narrative, on the other hand, seems to imply personhood-relevant qualities, and might offer a more 'situated' version of personhood

theory, a middle ground between personhood and subjecthood-of-a-life. However, all such accounts may, like personhood, be open to criticisms of functionalism (failure to separate the ontological status of 'being' from the activity of functioning-as).

I do not wish at this point to advocate any particular situated-agency theory as an approach to answering important questions of moral status (many such notions, such as MacIntyre's concept of authorship, were not expounded as such). I mean only to suggest that such approaches may be on the right vector insofar as they provide a basis for theorizing the moral status of entities in the context of the lives such entities inhabit.

3.5. Degrees of Personhood

Both the general and particular senses of personhood can be shown to be *scalar* in nature, in other words, they admit of degrees. With regard to general personhood, many commentators have noted that the various properties taken by personhood theorists to be 'personhood-relevant' are all scalar properties. As David DeGrazia says: 'At least most personhood-relevant properties are not all-or-nothing; indeed some of them (e.g., self-awareness) admit not only of different degrees, but also of different kinds. Many nonpersons possess some personhood-relevant properties to some extent.'²⁷¹ Specifically, 'self-awareness...is multidimensional and gradational. In other words, there are different kinds of self-awareness, and they come in degrees.'²⁷² Similarly, 'other personhood-relevant properties that are no plausibly regarded as all-or-nothing are rationality, sociability, and the capacity for language; I would also add, more debatably, moral agency.'²⁷³

Although DeGrazia obviously regards moral agency as less clearly a scalar concept than other personhood-relevant properties, we can find evidence elsewhere that it is regarded as such. John Rawls, for example, posits criteria for personhood which are undeniably Kantian, describing persons as

²⁷¹ DeGrazia, *op. cit.*, at 316

²⁷² *Ibid.* at 305

²⁷³ *Ibid.*

rational beings with their own ends and a sense of justice.²⁷⁴ It is difficult to find any point on which this description differs from the ‘moral agency’ envisaged by Kant, yet Rawls has no hesitation in identifying his own criteria as scalar, or as he says, ‘range properties’.

Christian Perring also acknowledges that ‘rationality, capacity for language, and the possession of personality or emotions all admit of degrees.’²⁷⁵ He considers that of all the personhood-relevant properties, it is most difficult to demonstrate scalarity in the case of self-consciousness: ‘there is some plausibility in the idea that it is an all-or-nothing category.’²⁷⁶ Nevertheless, he recognises different kinds of self-consciousness. ‘Some notions equate self-consciousness with an almost sensory ability to perceive one’s self, as if one’s self were some kind of internal entity to be perceived with the mind’s eye. Other notions are richer, demanding an ability to reflect on one’s character and interactions with others.’²⁷⁷ He concludes that ‘whatever version of the criterion one adopts, the amount of self-knowledge that one is capable of will vary with insight, experience and intellectual abilities. It is very hard to see how anyone might argue that the capacity for self-knowledge or self-awareness is all-or-nothing.’²⁷⁸

Given that none of the relevant qualities can reasonably be regarded as categorical, Perring argues, it makes no sense to continue treating personhood as an all-or-nothing status; we would do better to think about *degrees* of personhood. He reasons that ‘if we were to insist that general personhood is all-or-nothing, and that there is some point in the spectrum which separates the two sides, with all cases on one side involving full personhood, and all cases on the other side involving zero personhood, then there are familiar problems with selecting where in the spectrum that transition point must be. I have already argued that all the plausible criteria of general personhood admit of degrees, so these will not provide any way to make the choice of the threshold any less arbitrary. So using an all-or-nothing concept of general

²⁷⁴ Rawls, *op. cit.*

²⁷⁵ Perring, *op. cit.*, at 181

²⁷⁶ *Ibid.* at 182

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

personhood would require inevitable arbitrariness. We can avoid such problems if we instead move to a graded notion of general personhood.²⁷⁹

So how useful *is* this notion of scalar, or graded personhood? Perring argues that it revitalises the concept of personhood altogether by enabling it to avoid the problem of arbitrary thresholds. This avoidance is only achieved, however, if we ring-fence the whole *spectrum* of personhood for protection, granting moral status and the protections it brings with it to every entity which rates more than zero on the continuum of general personhood. We are accordingly on the horns of a dilemma: either we must decide when zero personhood evolves or crosses into minimal personhood, avoiding arbitrariness as we do so (for example, birth simply will not do as the point of transition, according to Perring, because it has nothing to do with the intrinsic properties of the entity in question), *or* we extend ‘full moral status’ to ‘full persons’ and lesser status (and less protection) to those entities with less general personhood (which could mean any of a number of things, from possession of fewer indicators, to possession of many of the relevant characteristics at a lower level than some other people – how restricted the scope or level of personhood-relevant properties would have to be before lesser moral status was granted remains cloudy).

However, each of these alternatives involves simply relocating, not eliminating, the problem of arbitrariness. If the difference between full and partial personhood demarcates differences in moral status, and ultimately in rights and treatment, then what difference will it make to a being whether it lacks rights and status because it is ‘not a person’ or because it is ‘not enough of a person’? Here, the case of the foetus is illuminating. Given that there are those who currently argue for foetal personhood from the conception argument or some such, it is at least conceivable – indeed, highly likely - that there would be plenty of commentators minded to place the foetus *somewhere* (i.e. above zero) on any continuum of graded personhood. Indeed, those writers who advocate according respect or even rights to the foetus would undoubtedly find it easier to argue that the foetus has *some* of the relevant characteristics or qualities relevant to personhood, *to some extent*, than to

²⁷⁹ *Ibid.* at 185

argue what they currently do – namely, that the foetus has enough in common with the human adult that it ought to be regarded as belonging to the same moral category, or moral community. Finding vestiges of personhood, precursors of full personhood, early human qualities, organic human individuality, genetic distinctiveness and so on, is undoubtedly an easier project, and while such findings frequently fail to persuade political and philosophical opponents that these characteristics render the foetus a ‘person’ in the all-or-nothing sense, they would undoubtedly succeed in propelling the foetus ‘onto the moral spectrum’ as it were; onto the continuum of personhood.

What would this success really accomplish, however? What rights or protections would ‘partial personhood’ afford? Even the *sentient* foetus has very little scope to suffer harm or enjoy benefit. Even if we construe ‘benefit’ to include long-term benefit rather than immediate pleasure or enjoyment, and ‘harm’ to mean something not restricted to immediate pain, suffering, or feeling of loss, then the only way the foetus can receive benefit is to avoid physical harm or injury (other ‘benefits’ to the foetus such as reading stories and playing music to the foetus *in utero* are disputed, and the results cannot be observed until after birth, although when observed they may point to Parfitian connectivity between foetus and child). As such, many rights and protections would be meaningless to the foetus – democratic rights, for example, or the right to refuse medical treatment. Based upon the limited capacity for benefit and harm described above, the only ‘rights’ appropriate to the foetus in any meaningful sense are rights not to be killed or injured, expressed positively as the right to life and the right to bodily integrity respectively.

It would seem that a scalar approach to personhood would lead, therefore, to a right to life for the foetus, *either* if the line-drawing involves ring-fencing the whole continuum of personhood (which seems at odds with the very notion of – and indeed, the *point* of – scalar personhood), *or* if we take ‘partial persons’ to have ‘partial moral status’. To do otherwise would be to ignore whatever moral status a ‘partial person’ has. If the right to life is not extended to the foetus under a scalar model of personhood, then this calls into question the validity of grading personhood at all, as it would appear that there are no implications for practice. But the recognition of such a right need

not mean that the life of the foetus is inviolable. Perring tells us that ‘almost no deontologists think that a right to life is absolute. There are circumstances under which the right can be trumped... I would claim that a way to factor in the degree of personhood is the circumstances under which the right can be trumped. The higher the degree of personhood, the more demanding those circumstances should be.’²⁸⁰ The adoption of a deliberately graded concept of personhood may help both to illuminate and to codify these circumstances, enabling us better to understand the nature of the right itself and its operation.

In the maternal/foetal context, this might mean turning our attention to determining which are the permissible *reasons* for terminating the life of a foetus. However, this gives the intrinsic properties of the foetus at best an indirect role in determining what may and may not be done to it. This seems to offend our intuitions about moral status in the same way as attempts to treat birth and viability as the criteria for personhood offend them; how can external factors such as reasons or motivations in the mind of the mother be central in determining what may or may not be done to another being, any more than other extrinsic factors such as the location of the foetus or the state of advancement of medical technology can determine such issues?

In the final analysis, therefore, even a scalar concept of personhood cannot seem to avoid the pitfall of arbitrary thresholds which dogs the all-or-nothing version of the concept. The two routes to implementing the gradation – ring-fencing or graduated status – each bring their own arbitrary thresholds, as the example of the foetus demonstrates. Ring-fencing the entire spectrum of personhood is philosophically incoherent within a scalar approach to personhood, as in reality it resembles nothing so much as a ridiculously wide all-or-nothing version of personhood. A gradation of entitlements and immunities in line with the differing grades of moral status is the only alternative. Although it does not suffer from the philosophical incoherence of the former approach, it is problematic nonetheless. Moreover, in the context of the maternal/foetal relationship and termination of pregnancy, it is hardly advancing the debate to claim that termination is morally-permissible because

²⁸⁰ *Ibid.* at 190-191

the foetus is not *enough* of a person rather than making the familiar claim that it is not a person at all.

3.6. Additional Problems with the Concept of Personhood

We have already encountered several difficulties with the concept of personhood: the arbitrariness of all-or-nothing versions of the concept; the inability of ‘scalar’ models to avoid this pitfall; also, the problems inherent in particular applications of the concept, such as ‘right to die’ cases, and in the notional separability of persons and their lives generally. Now, I consider some of the other familiar criticisms of the concept, beginning with three of the main criticisms levelled by David DeGrazia.

3.6.1. The concept of personhood is arbitrary and unanalysable

This is the problem at which Peter Kreeft hints when he asks, ‘[w]hich features count as proof of personhood? Why? How do we decide? Who decides? What gives them that right? And how much of each feature is necessary for personhood? And who decides that, and why?’²⁸¹

DeGrazia claims that the concept of personhood resists any kind of classical analysis: ‘Personhood is a vague concept that is not analyzable into necessary and sufficient conditions.’²⁸² Singling out one quality for centrality in a unicriterial account of personhood ‘seems arbitrary’ to DeGrazia²⁸³, and also to Clarke, who writes that ‘seemingly, singular concepts of “what is a person” are implausible.’²⁸⁴ Nevertheless, DeGrazia considers the possibility that one ‘superproperty’ *may* be able to draw together everything that matters about persons. If any property has this ability, he ponders, it is autonomy, which incorporates notions of self-awareness, free will and intentional agency. DeGrazia goes on to reject the pre-eminence accorded to autonomy in Kantian theories of personhood which emphasis autonomous (moral) agency: ‘Autonomy does not seem necessary. No-one in the presence of a normal two

²⁸¹ Kreeft, *op. cit.* at 15

²⁸² DeGrazia, *op. cit.* at 301

²⁸³ *Ibid.* at 303

²⁸⁴ Clarke, *op. cit.* at 43

or three year old human doubts their status as persons, but presumably many of them lack the sort of critical self-reflection needed for autonomy. Humans with moderate mental retardation also impress us as being persons but may well lack autonomy.’²⁸⁵

Given the failure to discover a satisfactory *unicriterial* account of personhood, how ought we to analyse a *multicriterial* version of the concept? DeGrazia identifies three options. ‘Another strategy within the traditional spirit is to state a *small number* of allegedly necessary and sufficient conditions. But this approach also invites the charge of arbitrariness, for no short list of conditions seems authoritative. An alternative move would be to require *all* of these [personhood relevant] properties. But this is surely too strong a requirement...At the other extreme, we might hold that having *any one* of these traits suffices for personhood. But this is far too inclusive.’²⁸⁶

Following from these conclusions, DeGrazia decides, ultimately, that personhood is a Wittgensteinian *cluster concept*: ‘One might hold that a cluster of properties...are closely associated with personhood, but that the content of this concept is too imprecise for us to say that all, or some specified set, of them are strictly necessary.’²⁸⁷ But how does this help us to decide issues of moral status? DeGrazia considers the merits of a ‘pluralistic approach’ to using the cluster concept of personhood to decide such issues: ‘A pluralistic approach would be to require *most* of these properties for personhood (pluralistic because it allows each of several different clusters of properties to count as jointly sufficient). The idea driving this approach is that although personhood is unanalyzable, it is determinate in that there is an answer in every case as to whether someone is a person. This strategy quickly leads to trouble. For again, many of the properties in question admit of degrees and some even admit of different kinds.’²⁸⁸ The issue of the personhood-relevant properties as range properties, admitting of degrees, is something I will explore presently, but it is clear for now that DeGrazia regards the concept of personhood not only as unanalyzable, but as fatally indeterminate.

²⁸⁵ DeGrazia, *op. cit.* at 303

²⁸⁶ *Ibid.* at 304

²⁸⁷ *Ibid.* at 306

²⁸⁸ *Ibid.*

3.6.2. The concept is vague and indeterminate

Another problem is the problem of deciding just how to apply the cluster concept pluralistically, yet in a deterministic way: ‘how should we understand the idea that a being must satisfy *most* of the conditions in the cluster? More than half? That would feel as ad hoc as any other possible interpretation....It is difficult to imagine a satisfactory interpretation of satisfying most of the conditions.’²⁸⁹ In another attempt to render personhood deterministic, DeGrazia considers Mary Midgley’s proposal that we adopt an ordinary-language approach. Midgley claims that in ‘ordinary’, i.e. unreflective, linguistic usage, the term ‘person’ is used coextensively with ‘human being’.²⁹⁰ To attempt to stretch the concept beyond this ordinary meaning, Midgley argues, is to rob it of much of its force. DeGrazia regards this as regressive, a ‘philosophical backpedal’, and resists such a move. ‘Even if it is true that most people use the term “person” only in referring to human beings, it does not follow that “person” means “human”; this usage might reflect the limited real-life contexts in which one has applied the concept, rather than the concept’s boundaries.’²⁹¹

In support of this, DeGrazia offers examples of non-human beings to whom the term ‘person’ might be applied without robbing it of meaning. The examples he gives include Spock from *Star Trek*, the apes in *Planet of the Apes*, the extraterrestrial in *E.T.*, and supernatural beings like God, the Devil, angels, and so on. Not all of his examples of non-humans who might reasonably be regarded as persons are fictional or supernatural, however; he points out that:

it is beyond dispute that there have existed some very human-like individuals who were not members of our species – most obviously, members of the hominid species *Homo erectus*. Whether they were (definite) persons or instead borderline persons intuitively seems to be

²⁸⁹ *Ibid.* at 306-307

²⁹⁰ Mary Midgley, ‘Born Free, but Everywhere in Zoos’ (review of Paola Cavalieri and Peter Singer (eds.) *The Great Ape Project* (New York: St. Martin’s Press, 1993), *New York Times Book Review*, 6/2/94 at 33

²⁹¹ DeGrazia, *op. cit.* at 307

a matter of what they were like, not a matter of which side of the species line they fell on... 'Person' cannot mean 'human' for at least the reason that some logically possible – and perhaps some actual – persons are not humans.²⁹²

This is, at first glance, a very persuasive set of counterarguments to Midgley's ordinary-language approach to personhood. Note, however, that all of DeGrazia's rebuttals could simply be interpreted as evidence that our ordinary usage of the word 'person' is wider than Midgley claims it is. It is not unlikely that people *already* speak quite ordinarily of Spock, God, and the Devil as 'persons', and think of them as such. If we accept this, then DeGrazia has failed to show that the ordinary language use of 'person' is incapable of recognising personhood-relevant properties in non-human beings. He has, however, achieved something even better – he has inadvertently shown that the ordinary language use of 'person' is *not* restricted to human beings, although it may place great emphasis on 'human-like' qualities and features. As such, it offers no greater determinism than any other version of the concept, and indeed it may be said to embody an unreflective speciesism that more deliberative accounts would either avoid or seek to justify.

This finding of indeterminacy corroborates DeGrazia's earlier argument that our ordinary use of 'person' tells us only about the term's usual application, and not about the boundaries of the concept of personhood. We have no reason, therefore, to believe that Midgley's account of personhood as coextensive with humanness would help us to determine the answers in borderline cases. We might well ask what the point would be in adopting as our moral standard a concept which is of no practical help precisely when we need guidance.

Furthermore, Midgley's approach seems unconcerned with 'what really matters', morally, about ourselves and other beings. However difficult and unwieldy the concept of personhood might seem at times, it is surely no solution simply to conflate the troublesome concept of personhood with a more familiar, more accessible one, despite strong arguments that the two are

²⁹² *Ibid.* at 308



conceptually quite different? If Midgley believes that it is humanity, and not personhood, which is morally-relevant, then surely she must hold that the term 'person' has no moral significance other than that of 'human being' and present her arguments in favour of restricting the moral community to humankind. It is difficult to see how, in the context of such a theory, the concept of personhood could have any independent moral significance at all, or could perform any role other than as an honorific term, or a synonym. As such, Midgley's theory cannot properly be understood as a theory of personhood at all, and DeGrazia is right not to treat it as a realistic solution to the indeterminacy of personhood.

Next, DeGrazia considers S. F. Sapontzis's contention that we can distinguish between a descriptive use of 'person' – denoting all and only humans – and a prescriptive sense which 'identifies beings whose interests matter morally in their own right'²⁹³. Sapontzis argues that all sentient beings are 'persons' in the prescriptive sense, including fish. For Sapontzis, therefore, the concept of personhood does not denote a category of being with full, or superior, moral status; rather, all beings with *any* moral status are persons on his account.²⁹⁴ Since Sapontzis takes the prescriptive use of 'person' to identify beings with 'moral rights', his account draws the moral community very widely indeed. DeGrazia agrees with Sapontzis that sentience entails some amount of moral status, but ultimately denies that the descriptive and prescriptive uses of the term 'person' are separable, as Sapontzis claims:

Even if the term 'person' is often used prescriptively, it is also at the same time used descriptively – to designate a certain kind of being. If so, then we cannot tear apart the descriptive and prescriptive functions of this word as radically as Sapontzis does when he allows that metaphysical persons are just humans whereas moral persons are the entire set of sentient beings. To speak of actual fish or snakes...as persons just seems *incorrect*, regardless of our views about these

²⁹³ DeGrazia, *op. cit.* at 309

²⁹⁴ S. F. Sapontzis, 'A Critique of Personhood', *Ethics* 91 (1981) 608

animals' moral status. This suggests that there is no purely prescriptive sense of the term 'person'.²⁹⁵

Just as Midgley's thesis really takes humanity, not personhood, as the basis for ascribing moral status, Sapontzis's is really a sentience-only, not a personhood-only, approach. I have already examined the merits of a sentience-based approach to moral status, and all of the same considerations apply. It is difficult not to agree with Kreeft's opinion that 'all the performance-qualifications adduced for personhood are difficult to measure objectively and with certainty. To use the unclear, not universally accepted, functionalist concept of personhood to decide the sharply controversial issue of who is a person and who may be killed is to try to clarify the obscure by the more obscure, obscuram per obscurius.'²⁹⁶

3.6.3. Personhood is descriptively redundant

DeGrazia contends that the concept of personhood performs no meaningful descriptive function. 'Because personhood is closely associated with a cluster of properties the assertion that X is a person adds no descriptive content to the assertion that X has certain properties (to a sufficient degree); that is, personhood is *descriptively* redundant.'²⁹⁷ Although he regards the concept of personhood as vague, DeGrazia acknowledges that there may nevertheless be 'clear cases' in which personhood is present unequivocally. Referring to personhood in such cases is not problematic, according to DeGrazia, but in borderline, or problematic cases, where the issue of the moral status of the entity in question is controversial, he urges us to abandon the idea that references to personhood will help to solve the controversy, and instead refer to those properties which are taken to be constitutive of personhood: 'In confronting moral issues regarding borderline persons – such as apes,

²⁹⁵ *Ibid.*

²⁹⁶ Kreeft, *op. cit.* at 15

²⁹⁷ DeGrazia, *op. cit.* at 316

dolphins and certain humans – appealing to personhood is unhelpful; often it is helpful instead to appeal to specific personhood-relevant properties.’²⁹⁸

3.6.4. Personhood is functionalistic

Peter Kreeft defines functionalism as ‘defining a person by his or her functioning, or behavior.’²⁹⁹ Kreeft seems to suggest that the mistake of functionalism stems from an erroneous attempt to capture the essence of what makes us valuable by reference to the characteristics or qualities we possess. These characteristics and qualities may be significant insofar as they reveal us to *be* ultimately or intrinsically valuable beings, but it is a mistake to go on, on the basis of this observation, to attempt to construct a descriptive moral schema on the basis of them; to treat them as capable of sustaining a system of sorting and categorising beings’ moral status:

Common sense distinguishes between what one is and what one does, between being and functioning, thus between ‘being a person’ and ‘functioning as a person’...Functioning as a person is a sign and an effect of being a person. It is because of what we are, because of our nature or essence or being, that we can and do function in these ways.³⁰⁰

On this argument, personhood is a *sign* of our moral status rather than a determinant of it; it is something we can observe rather than something we can establish, case-by-case, by the systematic application of criteria.

3.6.5. Personhood is relativistic

One of the criticisms levelled against sentience-based theories is Albert Schweitzer’s charge that human beings cannot be objective in their deliberations about the moral status of other species. Is personhood really any

²⁹⁸ *Ibid.*

²⁹⁹ Kreeft, *op. cit.* at 12

³⁰⁰ *Ibid.*

more of an objective standard than sentience? An animal rights proponent might well complain that requirements for features like rationality, self-awareness, and autonomous agency simply reflect human beings valuing our own characteristics above all others, and practising speciesism. The fact that many proponents of personhood (most famously Peter Singer) are keen to ascribe personhood also to nonhuman animals does not necessarily refute this charge; a possible response could be that there is nothing overly-objectivistic about ascribing status and value to those nonhuman animals who are closest to human beings in behaviour and characteristics, *because and insofar as they resemble us in some way(s)*. This kind of relativism can lead to dangerous narcissism, as Kreeft warns: ‘When it is in the self-interest of certain people to kill certain other people...the killers will simply define their victims as non-persons by pointing out that they do not meet certain criteria. Who determines the criteria? Those in power, of course. Whenever personhood is defined functionally, the dividing line between persons and non-persons will be based on a decision by those in power, a decision of will. Such a decision, given the fallenness of human nature, will inevitably be based on self-interest. Where there is an interest in killing persons, they will be defined as non-persons.’³⁰¹

3.6.6. Personhood is abstract and overly-rationalistic

The concept of personhood is open to criticism from those who claim that it is too heavily dependent on rationality, at the expense of intuitive, relational and emotional dimensions of morality. Feminists, for example, may claim that personhood embodies the masculinist ‘ethic of right’ rather than the feminine ‘ethic of care’. Kantian notions of ‘rational, autonomous agency’ are particularly vulnerable to this claim. An associated claim might be that personhood is isolated not only from ‘moral sense’, the intuitive and emotional dimension of morality, but it is also abstracted in the sense that it fails to correspond to ordinary moral situations, debated largely in terms of far-fetched thought experiments, and as such is more an academic fetish than a reliable source of normative guidance.

³⁰¹ *Ibid.* at 7

3.6.7. Personhood accounts of moral status restrict the membership of the moral community too severely

Warren objects to Kant's maximalist theory of personhood on the basis that, 'If we take literally Kant's claim that only rational beings are ends in themselves, then it would seem to follow that human beings who are not moral agents are not ends in themselves, and do not have moral rights.'³⁰² On a strict interpretation, Kant's community of moral equals would exclude all nonhuman animals, infants and young children, and severely mentally-disabled human beings. Warren concludes, therefore, that "rational moral agency is unsatisfactory in practice as the sole criterion for full moral status, because it can all too readily be used to deny moral status to persons whom others consider less than fully rational."

Many similar objections revolve around the exclusion of infants, young children and human beings with mental impairment from the moral community: "The person argument makes difficult the question of *why* it would be wrong to kill newborn babies; yet, without quite knowing why, somehow the idea of injuring the newborn is not acceptable.'³⁰³

3.7. Peter Singer: personhood and preference utilitarianism

Peter Singer is one theorist for whom the idea of injuring a newborn human being is not necessarily morally repugnant. Singer takes 'person' to mean something other than 'human being', insisting that the two terms are not coextensive. 'There could be a person who is not a member of our species. There could also be members of our species who are not persons. The word "person" has its origin in the Latin term for a mask worn by an actor in classical drama. By putting on masks the actor signified that they were acting a role. Subsequently "person" came to mean one who plays a role in life, one who is an agent. According to the Oxford Dictionary, one of the current meanings of the term is "a self-conscious or rational being". This sense has

³⁰² Warren, *op. cit.* at 101

³⁰³ Clarke, *op. cit.* at 41

impeccable philosophical precedents. John Locke defines a person as “A thinking intelligent being that has reason and reflection and can consider itself as itself, the same thinking thing, in different times and places.” This definition makes “person” close to what Fletcher meant by “human”, except that it selects two crucial characteristics – rationality and self-consciousness – as the core of the concept.’³⁰⁴

Singer goes on to ask, ‘is there special value in the life of a rational and self-conscious being, as distinct from a being that is merely sentient?’³⁰⁵ He answers his own question in the affirmative: ‘For preference utilitarians, taking the life of a person will normally be worse than taking the life of some other being, since persons are highly future-oriented in their preferences. To kill a person is therefore, normally, to violate not just one, but a wide range of the most central and significant preferences a being can have. Very often, it will make nonsense of everything that the victim has been trying to do in the past days, months, or even years. In contrast, beings who cannot see themselves as entities with a future cannot have any preferences about their own future existence.’³⁰⁶

Later, Singer distinguishes his own position, preference utilitarianism, from other theories that value the lives of persons. He seeks in particular to distinguish between his own theory, which values preferences, and Kantian theories of personhood, which value autonomy: ‘There is a strand of ethical thought, associated with Kant but including many modern writers who are not Kantians, according to which respect for autonomy is a basic moral principle. By “autonomy” is meant the capacity to choose, to make and act on one’s own decisions. Rational and self-conscious beings presumably have this ability, whereas beings who cannot consider the alternatives open to them are not capable of choosing in the required sense and hence cannot be autonomous.’³⁰⁷

Singer makes clear that autonomy is not the deciding criterion in his own ethical framework: ‘Not everyone agrees that respect for autonomy is a basic moral principle or a valid moral principle at all. Utilitarians do not

³⁰⁴ Peter Singer, *Practical Ethics*, at 87

³⁰⁵ *Ibid.* at 89-90

³⁰⁶ *Ibid.* at 95

³⁰⁷ *Ibid.* at 99

respect autonomy for its own sake, although they might give great weight to a person's desire to go on living, either in a preference utilitarian way, or as evidence that the person's life was on the whole a happy one. But if we are preference utilitarians we must allow that a desire to go on living can be outweighed by other desires, and if we are classical utilitarians we must recognise that people may be utterly mistaken in their expectations of happiness. So a utilitarian, in objecting to the killing of a person, cannot place the same stress on autonomy as those who take respect for autonomy as an independent moral principle.³⁰⁸

Upon analysis, these passages reveal the tension at the heart of Singer's exposition of personhood. As the name suggests, preference utilitarianism is a consequentialist ethical system. The concept of personhood, on the other hand, is inescapably objectivistic, and as such is arguably more at home in deontological frameworks like those of Kant and his heirs. There is a difficulty inherent in Singer's attempt to marry the objectivism of personhood with preference utilitarian-consequentialism, and this becomes compelling when we come to examine the precise role of personhood, and its operation, within Singer's theory.

The tension derives from Singer's attempt to utilise the concept of personhood to include some entities, and exclude others, from the community of moral equals, and to found this appeal to personhood on interests, rather than on the usual values of autonomy, rationality, and self-awareness/self-consciousness. Although Singer does not say so explicitly, his regard for personhood seems to derive from the view that only persons can have the strongest type of interests in his particular utilitarian framework, namely *preferences*. Highly sentient non-persons *may* also be more or less capable of holding preferences, but it seems clear that the preferences of persons will be given the most weight, since these preferences generally reflect subtler and more reasoned interests.

In any case, Singer does not conceive of personhood as anything other than an objective value; this can be deduced from his insistence upon 'the notion of universality': 'When we are reasoning about ethics, we are using

³⁰⁸ *Ibid.* at 99-100

concepts that...take us beyond our own personal interest, or even the interest of some sectional group.³⁰⁹ Elsewhere, he tells us that: '[e]thics takes a universal point of view...Ethics requires us to go beyond "I" and "you" to the universal law, the universalizable judgment, the standpoint of the impartial spectator or ideal observer, or whatever we choose to call it.'³¹⁰ If personhood has any moral significance for Singer at all, then (and he claims that it does), it has the significance of an objective and universal status-marker, deduced (in Singer's philosophy) from the strength of the preferences of highly- or maximally-sentient beings, and our according moral obligation not to interfere with such beings' attempts at preference-satisfaction.

Singer gives an example to illustrate his support of euthanasia for some very severely-disabled infants. In it, he argues that parents may be justified in killing a neonate or infant born with haemophilia, if the child's death would mean that the parents were more likely to bear another, healthier child, born without haemophilia, which would live a less limited life and would thus have the potential for greater overall preference satisfaction than would the haemophiliac. A couple of points arise from this. First, however, it is worth considering the following: if it could somehow be demonstrated that the act of euthanasia proposed in this example would (or would be significantly likely to) substantially increase overall preference satisfaction in the manner described, then surely the killing would be required, not merely justified, by the morality of preference utilitarianism, since it takes overall preference-satisfaction to be the ultimate moral value?

Singer is arguing, in effect, that the life of an existing human being (albeit a non-person incapable of preferences) should (although admittedly he only says *can*) be sacrificed in order to advance the interests of another, as yet nonexistent, being. The justification is said to be the achievement of greater overall preference-satisfaction. However, what we are really dealing with in this example is the *potential* for greater preference-satisfaction, since the individual whose preferences might better be satisfied is not yet conceived, so is arguably not even a 'potential person' – surely a 'future person' at best. In any case, since it has no physical existence we are not dealing with a being-

³⁰⁹ *Ibid.* at 79

³¹⁰ *Ibid.* at 11-12

with-potential-for-personhood, as in the case of the cytotblast, conceptus, embryo, or foetus; the 'future person' whose interests Singer seems to be regarding as prematurely morally-significant has *no existence yet at all*, except in the imagination of a preference utilitarian. This is problematic for a couple of reasons.

First, Singer's treatment of preborn human life does not attach moral relevance to potential/future personhood. This is not simply because preborn human entities are presumed to lack the level of consciousness necessary for inferences of 'interest', or even because the 'interests' of a conscious foetus may conflict with those of an adult human female whose personhood is unquestionable. Rather, Singer's treatment of preborn entities proceeds upon the insistence, central to all mainstream theories of personhood, that ascriptions of moral status must refer to an entity's *current nature* in terms of its current features and/or capabilities, and not rely upon projections or predictions about future characteristics or capacities. Is not this widely-accepted intuition even more compelling in the above example, where we are discussing an *imagined* entity which has no present existence of any kind?

Second, future children may never be born. All kinds of external factors may come into play, affecting the possibility of future conception and birth. For example, what if future children are also born haemophiliac (the condition is hereditary, after all)? Should the parents continue killing their children until they get a healthy one? Or does the possibility that they might bear haemophiliac children and be morally-obliged to kill them oblige them to avoid producing children at all? Does it matter whether any of these factors are mere possibilities, or real likelihoods?

Preference utilitarianism suffers from some of the same difficulties as other brands of utilitarianism, among these being lack of moral guidance (perhaps the point most graphically-illustrated by the above example) and lack of applicability to real life because of a failure to take account of emotional/intuitive dimensions of morality. The latter is poignantly illustrated in an example from Singer's own life; his elderly mother developed Alzheimer's disease and, in Singerian terms, gradually moved out of personhood. Despite the demands of his avowed preference utilitarianism, Singer could not bring himself to treat his mother as a non-person and arrange

the painless death which would enable the resources wasted on her personal care to be redirected, as his morality required. Singer regarded this as a failure, his prejudice in favour of a (former?) family member representing moral weakness. Other philosophers might welcome the introduction of normal caring responses into Singer's experience, and hope that he incorporates such experience into his future philosophising on ethical matters, considering that it improves preference utilitarianism's chances of real-life applicability by providing a hitherto missing ingredient of moral sentiment.

Another difficulty with preference utilitarianism is its apparently contradictory conclusions. Singer, a vegetarian, believes that even those animals which are non-persons (he proposes that great apes and other higher mammals *are* persons) have interests in not being caged and slaughtered (irrespective of additional cruelty, or the nature of the slaughtering method) which are sufficiently strong to generate an obligation on persons not to use them in this way (for food, clothing, etcetera). So whereas *these* interests of non-persons are sufficient to place moral obligations on persons which undoubtedly conflict with certain preferences of persons for eating meat or wearing fur or leather, the interests of other non-persons, for example, the interest of a haemophiliac infant in not being killed, are *not*, in Singer's opinion, sufficient to obligate parents who would prefer not to raise such a child, or who would prefer another, healthier child. This notwithstanding, as we have seen, the projected, potential interests of as yet unconceived (i.e. nonexistent) 'future children' *are* cited in the preference utilitarian 'calculus' (a calculus at least as unscientific as the 'greatest happiness' calculus of classical utilitarianism), and may even be considered sufficient to justify (or *oblige*) the killing of an existing human being.

Surely this is a profound inconsistency – perhaps even a fatal one? It might even be considered justification-after-the-fact, designed to accommodate whichever preference suits the parents. Surely 'preference utilitarianism', if it is to qualify as an ethical theory at all, must mean something more than simply 'do whatever you prefer'? If an entity is a person, all of his or her preferences would seem to be morally-relevant, as we might expect. However, the interest of non-persons in life itself is only occasionally capable of placing obligations on persons. All of this hints at an

inequality in Singer's theory – a form of 'reverse speciesism' wherein nonhuman non-persons are treated preferentially to human non-persons!

Although the subject will be addressed comprehensively in the chapters to follow, it is interesting to ask at this stage how the Singerian position would deal with the claim that wide-ranging access to abortion is a necessary part of a woman's right to control over their own bodies. Such claims hold that women, as persons with rationality and autonomy, ought to be able to make choices about their bodies and to control their own fertility and reproduction without being curtailed by the supposed interests of fetuses, embryos, or products of conception. Singer, as we have seen, is not committed to valuing autonomy as an independent moral value. With regard to bodily integrity, he holds that persons ought not to be free to wear or eat anything which has necessitated the killing of nonhuman animals, destroying lives in which (Singer believes) the beings killed had some kind of interest. Singer is prepared, therefore, to recognize some limits to the premise that we can do whatever we want with our own bodies – but on what basis? Perhaps the basis is the belief that the sheer *numbers* of animals destroyed by the meat and fashion industries is such as to generate interests of a quantity (although not of a quality) sufficient to impose moral obligations on persons. Since Singer believes there is nothing morally wrong in killing an infant (so long as the killing advances the cause of overall preference-satisfaction), it is unsurprising to learn that he also sees nothing wrong in the destruction of an embryo or fetus (even a healthy, late-term fetus) providing that precautions appropriate to the likelihood of sentience are in place (for example, to render the procedure as painless as possible for a sentient fetus), and once again, that overall preference-satisfaction will be advanced (or is reasonably likely to be advanced).

3.8. 'Person' as an honorific term

In *Brainstorms*³¹¹, Daniel Dennett ponders: 'It might turn out...that the concept of a person is only a free floating honorific that we are all happy to

³¹¹ Dennett, *op. cit.*

apply to ourselves, and to others as the spirit moves us, guided by our emotions, aesthetic sensibilities, considerations of policy and the like.’³¹² Ultimately, Dennett dismisses the notion of ‘person’ as an honorific title, but other philosophers have pursued it. We know that there are many problems with the notion of personhood as a sortal term, able to resolve difficult questions of moral status. For this reason, some commentators have wondered whether we ought to abandon the idea that the concept can provide right answers in hard cases, and use the term ‘person’ only in cases where it applies clearly and uncontroversially. David DeGrazia, for example, writes: ‘I suggest that we *drop* the concept of personhood, *except where who counts as a person is not in question*.’³¹³ DeGrazia advocates abandoning personhood as a sortal concept, instead appealing *directly* to the relevant properties or qualities in borderline cases where moral status is an issue. However, he says, ‘there *is* a use of “person” that is helpful or at least innocuous: the equation of persons with humans for real-life situations where who counts as persons is not in question.’³¹⁴

In *The Achievement of Personhood*, Goodenough explains the rationale for the use of ‘person’ as an honorific: ‘To regard a candidate entity as a person is to regard it as a participant in the “network of rights and duties” on a par with oneself. Dennettian notions of rationality, linguistic ability, etc. could support or justify the admission of a candidate into our community but are not themselves strictly definitional in the matter. One way of viewing this use of “person” is indeed to see it as a kind of honorific. Perhaps it might more accurately be regarded as a status- or achievement-term, a kind of confirmation of membership.’³¹⁵

This treats personhood as a term of confirmation or validation, applied *a posteriori*, with rights, moral status etc. already established, rather than as a basic sortal term describing a basis upon which status and rights are ascribed. This honorific, or confirmatory sense of ‘person’ would avoid many of the problems associated with personhood as a sortal; ‘if person is not a genuine sortal then we have no need to look for any exact sets of necessary and

³¹² *Ibid.* at 268

³¹³ DeGrazia, *op. cit.* at 315

³¹⁴ *Ibid.*

³¹⁵ Goodenough, *op. cit.* at 148

sufficient conditions. Conditions for the application of a membership- or achievement-term can be much looser without the term ceasing to have any practical use.’³¹⁶ This honorific use also acknowledges that when we call another being a person, we are recognising their similarity to ourselves in terms of shared characteristics or relationships. Although this might be regarded as undesirable narcissism if it were being taken as a basis for ascribing or withholding moral status, it is rendered benign in the context of the honorific use of ‘person’, since no being will suffer as a result of its lack of similarity. ‘Most of us intuitively reach for examples of our fellow human-beings when we consider the notion of personhood. This intuition is respected without being allowed to define our usage here.’³¹⁷

Moreover, although the traditional connection between personhood and humanity is accommodated, and although use of the honorific inevitably entails recognition of some similarity between oneself and the entity under consideration, Goodenough claims that ‘person’, in the honorific sense, can be applied to non-humans, providing that they are ‘sufficiently like us’, and exhibit ‘forms of behaviour that we can sensibly regard as intentional and which manifest some sense of regarding us and our behaviour in the same way.’³¹⁸ Certain creatures may, of course, fail to meet whatever criteria *are* employed for determining moral status, but this will have nothing to do with the honorific use of ‘person’.

Goodenough explains how the honorific sense of ‘person’ would operate by referring to another familiar honorific term, that of ‘genius’:

‘[P]erson’ may be applied to that entity which satisfies personhood-conditions (in paradigm cases, a human being) or more loosely to the set of properties, the psychology or personality, which in some sense defines or makes obvious of something that it is a person. It does not follow that ‘person’...has any kind of ontological independence, any

³¹⁶ *Ibid.* at 154

³¹⁷ *Ibid.* at 155

³¹⁸ *Ibid.*

more than a genius for musical composition could exist independently of someone or something being or having such a genius.³¹⁹

A possible response to this might be the following: if a person produces one (or a few) examples of genius, but cannot do so consistently, then we may be reluctant to call that person a genius, saying instead that what they had done or produced *was* genius, or an example of it. As such, genius would be an activity rather than an honorific. Could personhood be viewed similarly?

The notion of ‘person’ as an honorific title also helps to clarify the issue of embodiment. We know that, following Locke, many proponents of personhood regard the person as an essentially-psychological entity, and view the physical body as supportive, rather than constitutive of personhood. In its honorific sense, at least, personhood is necessarily embodied, as Goodenough acknowledges:

if ‘person’ denotes a status like ‘genius’ then we cannot grant it separate identity-conditions. Whatever has separate identity-conditions has a separate ontological status, and personhood cannot exist without that which is a person any more than geniushood could exist without that which is a genius. Whatever ontological status persons have is entirely parasitic upon the ontological status of human beings.³²⁰

In a fascinating article entitled *Paradigms and Personhood*³²¹, Edmund Erde adopts a highly illuminating alternative to *both* the sortal *and* the honorific uses of ‘person’. Adopting a Wittgensteinian analysis, he distinguishes between different uses of the term ‘person’ in different ‘language games’ – law, psychology and medicine. This enables him to explain why there are so many different accounts of personhood, why we are concerned with both general and particular personhood, and why ‘person’ has different meanings in different contexts. The ‘legal model’ of personhood identified by Erde most

³¹⁹ *Ibid.* at 149

³²⁰ *Ibid.* at 150

³²¹ Edmund Erde, ‘Paradigms and Personhood: A Deepening of the Dilemmas in Ethics and Medical Ethics’ *Theoretical Medicine and Bioethics*, 20:141-160, 1999

closely resembles Kantian ‘rational autonomous agency’. The ‘psychological model’ turns out, unsurprisingly, to be concerned with particular personhood, and with the subjective psychological states of individuals. Erde’s analysis does not treat personhood as a mere honorific or achievement-marker – rather, it acknowledges that the term has real descriptive meanings particular to the contexts in which it is used. Neither does he treat personhood as a basic sortal term, or expect it to carry the normative burden of resolving controversies about moral status. The language-game analysis has intuitive appeal, at least for me. It manages to reconcile the intuition that ‘person’ means *something* with the awareness that it is woefully inadequate as the basis for a theory of moral status. It allows us to say that a ‘person’ is different things in different contexts, and that this plurality of meanings does not rob it of its descriptive force.

4. The Consent Model of Pregnancy

4.1. Introduction

In the first chapter, I identified the need for a new legal paradigm of pregnancy and examined the problems inherent in the current orthodox view of pregnancy as a ‘maternal/foetal conflict’. The second and third chapters looked behind the rhetoric of conflict to the conflict model’s philosophical foundations, demonstrating that the model’s dependence on issues of intrinsic moral status – and particularly, theories of ‘personhood’ – renders it incapable of providing a coherent approach to adjudication of pregnancy issues. In this chapter, I examine the most comprehensive attempt so far to discover an alternative to the orthodox conflict model. Eileen McDonagh’s ‘consent model’ is essentially a refined version of the orthodox model, but it is remarkable in that it claims to provide a legal justification for abortion rights while conceding the issue of foetal personhood.

Having claimed, in previous chapters, that attempts to adjudicate maternal/foetal issues by referring to moral and metaphysical notions of status and personhood are bound to result in inconsistency and contradiction, I now ask whether it is possible, as McDonagh claims it is, to adopt a purely *legal* approach to ‘foetal personhood’ which is capable of sustaining a framework for adjudication without collapsing into metaphysics and all of the problems that would entail.

4.2. Eileen McDonagh’s consent-based approach

In her groundbreaking book, *Breaking the Abortion Deadlock: From Choice to Consent*,³²² Eileen McDonagh claims that the analysis of abortion rights which she proposes is able to resolve the troublesome question of the moral status of the foetus by focusing not on what the foetus *is*, but rather on what the foetus *does* in pregnancy.³²³ McDonagh’s first major claim is that the

³²² Eileen L. McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: OUP, 1996)

³²³ *Ibid.* at 5-6

foetus *causes* pregnancy when it implants in the woman's uterus.³²⁴ McDonagh uses this a starting point from which to claim that the right to abortion is not, as has traditionally been thought, simply an example of a woman's right to decisional autonomy; while decisional autonomy is certainly an element of the right, McDonagh claims, the key element in abortion rights is the right to bodily integrity.³²⁵ Thus, for McDonagh, abortion rights are important *not only* because they are an example of a woman's right to make autonomous decisions about her life, *but also*, and more centrally, because the right to seek an abortion is essential in order to protect women's bodily integrity – the control they have over what happens to their bodies. In other words, for McDonagh, the abortion issue is not only about choice, it is primarily an issue of consent.

The fatal error which has dogged the abortion debate so far, according to McDonagh, has been a failure to identify the foetus as the coercer in pregnancy.³²⁶ It is the foetus that actually *makes* the woman pregnant when it implants itself in her uterus. Abortion is not, therefore, about expelling the coercive imposition of *masculine* force on the body of a woman; rather, what is rejected and expelled in the act of abortion is *foetal* force, since the foetus is the coercive agent:

A woman seeking to terminate her pregnancy does not wish to expel the coercive imposition of a man on her body. On the contrary, she seeks to expel the coercive imposition of the one and only agent capable of making her pregnant: the fetus.³²⁷

McDonagh claims that the foetus is the *direct cause* of pregnancy, whether or not the act of sexual intercourse which preceded the pregnancy was consensual. In other words, if a woman consents to have sexual intercourse with a man and subsequently becomes pregnant, the direct and immediate cause of pregnancy is not the act of sexual intercourse but the foetus' implantation in her uterus. Accordingly, neither the woman nor the man can

³²⁴ *Ibid.*

³²⁵ *Ibid.* at 6

³²⁶ *Ibid.*

³²⁷ *Ibid.*

be said to have ‘caused’ her to become pregnant. Similarly, if pregnancy occurs subsequent to an act of nonconsensual intercourse (a rape), the rapist has not caused the woman’s pregnancy on McDonagh’s model – he has inflicted a grave harm on her, but the additional harm of any resulting pregnancy is not his responsibility, but that of the foetus. Clearly, in such circumstances, the woman cannot be held responsible at any stage of the sequence of events from conception to implantation; certainly not on McDonagh’s model and arguably not on any other. McDonagh writes:

Founding abortion rights on the conditions under which sexual intercourse occurs prior to pregnancy misses the point. The fetus is the direct cause of pregnancy, and if it makes a woman pregnant without her consent, it severely violates her bodily integrity and liberty.³²⁸

McDonagh’s second and third major claims are (i) that pregnancy constitutes a massive intrusion on a woman’s body, even where the pregnancy is ‘medically normal’ (i.e. not subject to any of the additional medical risks which may accompany pregnancy), and (ii) that woman have a right to state assistance in exercising their right to refuse consent to such an invasion of their bodies.

Even in a medically normal pregnancy, the fetus massively intrudes on a woman’s body and expropriates her liberty. If a woman does not consent to this transformation and use of her body, the fetus’s imposition constitutes injuries sufficient to justify the use of deadly force to stop it.³²⁹

Of paramount importance here is the point McDonagh makes about the use of ‘deadly force’. The severity and scale of the intrusion which pregnancy represents entitles women to take extreme measures to bring it to an end, even where the only way to do so is by killing the foetus-intruder. McDonagh

³²⁸ *Ibid.*

³²⁹ *Ibid.* at 7

claims that in so arguing, she is simply regarding the foetus the way any other intruder would be regarded, even those intruders who are, irrefutably, persons.

Since no born people have a right to intrude massively on the body of another...to the extent that the state stops people from harming others by intruding on their bodies and liberty, including the mentally incompetent or those in dire need of the body parts of others, similarly the state must stop fetuses that intrude on women's bodies without their consent.³³⁰

This, according to McDonagh, is how her thesis is able to 'break the abortion deadlock'; she is prepared to *concede* the issue of foetal personhood to the anti-abortion lobby, believing that she can construct an argument for abortion rights which holds good *even if* we accept, for the sake of argument, that foetuses are persons and ought to be treated by the law in the same way that born persons are treated. 'Even if the fetus were a person', she writes, 'a woman is justified in killing it because of what it does to her when it imposes wrongful pregnancy'.³³¹ This is so because 'even if the fetus is constructed to be a person, it gains no right to take over a woman's body against her will. And if and when it does, she has a right to say no, whatever might be her reasons for activating that right.'³³²

Throughout, McDonagh's focus is on what the foetus *does*, not what the foetus *is*.³³³ It is the foetus's *action* in causing pregnancy which justifies the right of a woman to terminate its life in order to terminate its intrusion/violence.³³⁴ The 'fundamental liberty' at stake in all of this, according to McDonagh, is the right of a woman to *consent* to any pregnancy relationship she might become involved in.³³⁵ McDonagh suggests that the reason this right has been ignored, both historically and more recently in the legal and political debates over abortion right, is that our culture has traditionally reserved norms of self-defence for men, while simultaneously ascribing norms

³³⁰ *Ibid.* at 9

³³¹ *Ibid.* at 10

³³² *Ibid.*

³³³ *Ibid.* at 15

³³⁴ *Ibid.* at 17

³³⁵ *Ibid.* at 18

of self-sacrifice to women,³³⁶ such that the extreme physical subjugation and coercion that pregnancy represents has been ‘normalised’ and has not been recognised for what it is – a massive violence justifying the use of deadly force in self-defence.

Having introduced McDonagh’s arguments briefly, I now propose to draw out certain strands in order to subject her claims, and the counter-claims of her critics, to critical analysis. Despite the use of these headings for the purpose of analysis, however, it is helpful to observe here that McDonagh’s argument is reducible to two broad stages: in the first stage, she claims that women have a right to *consent* to the pregnancy relationship; in the second stage, she claims that the state should intervene to protect women from the massive intrusion of non-consensual pregnancy. These stages provide the basis for McDonagh to argue that not only do women have a fundamental right to abortion, based on the right to bodily integrity; they also have a fundamental right to state assistance (primarily in the form of funding) to enable them to exercise the first right, and this second fundamental right is based upon (indeed, is an example of) the right to self-defence.

In the meantime, however, the main headings under which I will conduct the main body of my examination are: causation & the separation of pregnancy from sexual intercourse; consent; wrongful pregnancy and self-defence; and finally what McDonagh calls the ‘politics of consent’. It will then be possible to consider the main advantages and disadvantages of the consent-based approach, as articulated by McDonagh and her critics.

4.2.1. Causation and the separation of pregnancy from sexual intercourse

McDonagh describes the association between pregnancy and sexual intercourse as ‘virtually a cultural icon’,³³⁷ implying that it is a mere construct born of our traditional ways of thinking about gender and reproduction. She notes that the Supreme Court has maintained the view that sex *causes* pregnancy, ‘or more specifically, that a man’s impregnation of a woman

³³⁶ *Ibid.* at 19

³³⁷ *Ibid.* at 26

causes her pregnant condition’³³⁸ – a view which, as we know, McDonagh wishes to challenge and replace with her own view that the ‘direct cause’ of pregnancy is the foetus, the ‘agent’ which causes a woman to become pregnant when it implants itself in her body.

Whereas a man can cause a woman to engage in a sexual relationship with him, a man cannot cause a woman’s body to change from a nonpregnant to a pregnant condition; the only entity that can do that is a fertilized ovum when it implants itself in a woman’s uterus.³³⁹

The action of the man in ‘moving sperm into a woman’s body’ during the act of intercourse, McDonagh says, certainly represents one of the ‘factual sequential links’ leading to pregnancy.³⁴⁰ However, she maintains, this action ‘is not the legal, or most important, cause of a woman’s pregnant condition. It is merely a preceding factual cause that puts her *at risk* for becoming pregnant.’³⁴¹ This is so because ‘pregnancy is a condition that follows absolutely from the presence of a fertilized ovum in a woman’s body’³⁴². This being the case, she continues, ‘we can identify the fertilized ovum to be the cause of the woman’s pregnancy state.’³⁴³ In the eyes of the law, too, therefore, ‘the fertilized ovum should be the legal cause of a woman’s pregnancy.’³⁴⁴

One of the most striking features of McDonagh’s model is her extensive use of analogy to illustrate and support her claims, and she makes one such analogy when she remarks that ‘men and women who contribute to a situation in which it is foreseeable that a fertilized ovum might be conceived and make a woman pregnant against her will contribute no more to the woman’s harm than does a woman who walks down a street late at night contribute to her own rape...men and women who engage in sexual intercourse, therefore, cannot be held as contributing to the harm imposed on

³³⁸ *Ibid.* at 27

³³⁹ *Ibid.* at 40

³⁴⁰ *Ibid.* at 42

³⁴¹ *Ibid.*, emphasis added.

³⁴² *Ibid.* at 41

³⁴³ *Ibid.*

³⁴⁴ *Ibid.* at 43

a woman by a fertilized ovum making her pregnant without consent.’³⁴⁵ However, it is clear that this likening of pregnancy to rape is more than *just* a useful analogy for McDonagh. She clearly regards the two scenarios, rape and pregnancy, as sharing significant factual and legal similarities when she writes that ‘a fetus making a woman pregnant without consent is similar to a rapist intruding upon and taking another’s body in pursuit of his own interest, to the detriment of the woman’s interests...’³⁴⁶

McDonagh believes that one of the strengths of this approach is that it treats the foetus as an agent, an individual with an existence separate from that of the pregnant woman – a point over which advocates and opponents of abortion rights have traditionally clashed:

Many advocates for abortion rights stoutly claim that there is no body other than the woman’s to consider in the abortion issue. They adamantly reject depictions of the fertilized ovum as an entity separate from the woman, much less as an entity with the full status of a person. Their assumption is that such a construction of the fetus undermines women’s autonomy by implying that fetuses have interests separate from their mothers and that those interests are grounds for restricting abortion, which destroys the fetus.³⁴⁷

McDonagh points out, however, that ‘the view of the fetus as an entity separate from its mother, with its own interests, already is solidly embedded in Supreme Court reasoning about abortion rights.’³⁴⁸ She cites the case of *Roe v Wade*,³⁴⁹ in which the Court ruled that the foetus is not a *born* person (but not that it is not a person at all) and that when a woman becomes pregnant, her privacy is ‘no longer sole’, thus granting the foetus ‘an identity and body separate from the pregnant woman’s’³⁵⁰, and also the case of *Planned Parenthood of Southeast Pennsylvania v Casey*³⁵¹, in which it was

³⁴⁵ *Ibid.* at 44

³⁴⁶ *Ibid.*

³⁴⁷ *Ibid.* at 47

³⁴⁸ *Ibid.*

³⁴⁹ 410 U.S. 113 (1973)

³⁵⁰ McDonagh, *op. cit.* at 47, citing *Roe* at 159

³⁵¹ 112 S. Ct 2791 (1992)

held that the state has ‘legitimate interests from the outset of the pregnancy in protecting the life of the fetus’.³⁵²

The case law shows, according to McDonagh, that insofar as the consent model countenances the possibility of foetal personhood, it does nothing new constitutionally, since a strong argument could be advanced, on the basis of existing authority, that a foetus is already effectively a person under the Constitution. As I shall discuss when I come to consider criticisms of the consent-based model, McDonagh may have difficulty convincing abortion-rights advocates that her model does not compound what most of them would presumably regard as the jurisprudential ‘mistake’ of treating the foetus as a person, thereby threatening to entrench a legal view of the foetus which may damage the ‘fundamental liberty’ at stake in the abortion debate.

McDonagh will also face challenges from others who claim that her approach treats the foetus merely as a cipher which is burdened with all the negative features and consequences of personality and individuality, without attracting any of the positive entitlements or protections which ought to accompany personhood. Still more criticism will centre on the fact that, by separating pregnancy from the sexual act, McDonagh severs the connection between men and reproduction, thereby removing any legal basis for holding them socially or financially responsible for the children that are genetically ‘theirs’. But, as I will show, causation is far from the only controversial part of McDonagh’s thesis.

4.2.2. Consent

McDonagh complains that the persistent failure of commentators and judges to identify the foetus as the cause of pregnancy has meant that the right of a woman to consent to a pregnancy relationship with a fertilized ovum is ‘the one type of consent that is completely missing from the abortion debate’.³⁵³ Since the notion of ‘consent to pregnancy’ is so new to the debate, it requires a definition, and McDonagh obliges with the following:

³⁵² McDonagh, *op. cit.* at 47, citing *Casey* at 2804

³⁵³ McDonagh, *op. cit.* at 60

In the context of pregnancy, consent means a woman's explicit willingness, based on her choice between resistance and assent, for the fertilized ovum to implant itself and cause her body to change from a nonpregnant to a pregnant condition.³⁵⁴

One major difference between a consent-based approach and the traditional, choice-based approach to abortion rights is that 'whereas choice refers to only one individual, consent necessarily refers to a relationship between two entities, both of whom have at least some attributes of a person.'³⁵⁵ However, choice and consent are complementary, not rival elements in the justification of abortion rights, as McDonagh acknowledges, saying that 'consent is...built on choice. There can be no valid consent unless there is valid choice; when choices are undermined, so, too, is the value of consent.'³⁵⁶ In other words, consent must be authentic, and not coerced, if it is really to protect bodily integrity and sovereignty in the way McDonagh envisages.

So how is 'consent to pregnancy' to be constituted? We must be able to distinguish between consensual and nonconsensual ('wrongful') pregnancy in order to know when the use of deadly force is justified, so it will be necessary to have a definition not only of consent, as seen above, but also of its expression. This definition will be crucial, since without it there is no way to distinguish between justified and wrongful uses of deadly force in abortion. McDonagh tells us that 'the act of seeking abortion stands for a woman's lack of consent to be pregnant since abortion is a procedure that terminates pregnancy. A woman who chooses abortion, therefore, is not submitting to a pregnancy caused by a fetus. To the contrary, she is stopping a fetus from making her pregnant by having an abortion.'³⁵⁷ On McDonagh's analysis, then, we need no other evidence than that a woman is seeking an abortion in order to reach the conclusion that the pregnancy is 'wrongful' and the use of deadly force is justified. Definitionally, the *wish* to abort equals lack of consent, which in turn equals the *right* to abort. The wish to abort and the right to abort are the same thing for McDonagh, therefore, because of the way

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid.* at 62

³⁵⁶ *Ibid.* at 64

³⁵⁷ *Ibid.*

the concept of consent operates in her analysis. She justifies this by reprising her likening of pregnancy to rape:

A woman must have a right to consent to the way in which a man necessarily intrudes on her body and liberty when he has a sexual relationship with her, and so, too, must she have a comparable right to consent to how a fetus necessarily intrudes on her body and liberty when it has a pregnancy relationship with her.³⁵⁸

Developing her earlier argument that the foetus, and not the act of sexual intercourse, is the real, 'direct' cause of pregnancy, McDonagh explains what this discovery means in the context of consent:

Sexual intercourse merely causes the risk that pregnancy will occur, and consent to engage in sexual intercourse with a man, for any and all fertile women, implies consent to expose oneself to that risk. Consent to expose oneself to the risk that one will be injured by a private party, however, is not a legal proxy for consent to the actual injuries...consent to jog alone in Central Park does not stand as a proxy for consent to be mugged and raped, should others so attack you.³⁵⁹

The view that women who have sex 'cause' their own subsequent pregnancies, and thereby consent to them, is not only factually wrong, according to McDonagh; it is also pernicious, a reflection of 'our Puritan heritage or our dominant, bourgeois middle-class morality' within which the notion of purely recreational sex is anathema.³⁶⁰ On such a view, she explains, 'enabling a woman who has consented to sexual intercourse to have an abortion does nothing more than facilitate her escape from the utterly just punishment of a subsequent pregnancy.'³⁶¹ Among the advantages of the

³⁵⁸ *Ibid.* at 64

³⁵⁹ *Ibid.* at 66

³⁶⁰ *Ibid.* at 65

³⁶¹ *Ibid.*

consent-based model is that it allows us to free ourselves from this oppressive, patriarchal view of sexuality.

The *nature* of the foetal ‘attack’ in pregnancy is also relevant to the notion of consent, since McDonagh’s approach depends not only on establishing the need for consent, but also on justifying the use of the kind of deadly force which the law permits us to use in order to repel an attack by a born person. On pages 69-73, McDonagh describes in some detail the ‘aggression’ perpetrated by the foetus upon the woman during pregnancy, and the extent to which the presence of the foetus alters and debilitates her body, which is of course compounded if the pregnancy is medically complicated or abnormal. This ‘quantitative intrusion’ would in itself justify the use of deadly force, since the law would permit citizens to refuse to submit their bodies to such intrusion by a born person, even where refusal would mean that person’s death.³⁶²

However, McDonagh also identifies what she calls ‘qualitative intrusion’³⁶³, the way in which even a medically-normal pregnancy curtails the freedom of the pregnant woman, arguing, in effect, that even without the transformations and intrusions that occur *internally*, causing medical risk to the woman, the ‘intrusion’ constituted by the curtailment of the woman’s freedom would suffice equally well to justify the use of deadly force. ‘Qualitative intrusion’ means that the foetus ‘wholly controls her body, her freedom of movement, and her reproductive services. When a woman is pregnant, as the Court noted [in *Roe*], her privacy is no longer sole. She can go nowhere without the fetus; every action she takes necessarily includes the fetus. The circulation of her blood, her endocrine system, and her menstrual cycles are now controlled by the fetus. As long as it maintains a pregnant condition in her body, for up to nine months she is decidedly not let alone, and she is anything but free.’³⁶⁴ McDonagh explains what she sees as the legal significance of this feature of pregnancy by way of another analogy:

³⁶² See Judith Jarvis Thomson, ‘A Defense of Abortion’ in *Philosophy and Public Affairs* 1 (1971) 47-66. This is the celebrated ‘violinist’ article in which Thomson argues that just as we have the right to be ‘bad samaritans’ and refuse to donate our bodies to sustain other born individuals, women have a similar right to refuse to sustain a foetus.

³⁶³ McDonagh, *op. cit.* at 73

³⁶⁴ *Ibid.* at 74-75

If a woman does not consent to pregnancy, the fetus has intruded on her liberty in a way similar to that of a kidnapper or slave-master.³⁶⁵

Continuing the slavery analogy, McDonagh tells us that ‘without consent, the totality of the fetus’s appropriation of a woman’s body is...involuntary servitude if not enslavement...it becomes the master of her body and her liberty, putting her in the position of its slave.’³⁶⁶

Because the ‘harms’ / ‘intrusions’ inherent in pregnancy are ongoing throughout the gestation of the foetus, the consent required to render pregnancy benign, rather than wrongful, must also be ongoing. Thus, on the consent-based account of abortion rights, not only does the right to consent enable a woman to refuse consent upon the initial discovery that she is pregnant; it also entails an ongoing right to withdraw her consent at any stage during the pregnancy:

Pregnancy is an ongoing condition, defined by a series of ways in which the implanted, fertilized ovum initiates and maintains massive bodily changes in the woman. As such, it requires not just a woman’s initial consent but also her ongoing consent in tandem with the ongoing bodily changes involved.³⁶⁷

The many criticisms of McDonagh’s analysis of consent, her contrasting of consensual/benign and non-consensual/wrongful pregnancy, and her various analogies will be discussed fully later in this chapter. At this point I will address only the problem which McDonagh herself has anticipated with the operation of consent in her model, namely the claim that the woman’s right to withhold or withdraw her consent to the pregnancy relationship is undermined by the existence of a duty of care owed to the foetus. Her pre-emptive response begins with the persuasive point that, ‘though parents do have a duty to care for their children, that duty does not include the use, or taking, of a

³⁶⁵ *Ibid.* at 75

³⁶⁶ *Ibid.* at 76

³⁶⁷ *Ibid.* at 79

parent's body.'³⁶⁸ For example, a parent could not be compelled by law, on the basis of his or her parental duty, to donate a kidney – or even to give blood – in order to save the life of one of her children. Such an intrusion on the parent's body could not be both coercive and legitimate, even for such a worthy cause. Accordingly, McDonagh argues, 'a woman is thus not bound by parental duty to give the kind of care that includes donating her body to a fertilized ovum, as its parent, even if the fertilized ovum is thought to have the same status as a born child.'³⁶⁹ McDonagh concludes from all this analogising that, 'rather than a duty of care, [a woman] has a right to defend herself against the fetus's serious injury.'³⁷⁰

It is worth noting here, almost as an aside, that McDonagh complicates her argument unnecessarily when she writes that 'before assessing a woman's duty of care, we must first assess whether she has consented to the pregnancy initially'.³⁷¹ This is a somewhat anomalous statement, given that McDonagh has already posited the right of a woman to withdraw her consent at any stage during pregnancy. This is corroborated later, when she tells us that 'a woman who initially consents to be pregnant might change her mind as the pregnancy progresses and she experiences its bodily alterations.'³⁷² If she *does* change her mind, she can exercise the right to withdraw her consent at that point, since 'even if a woman has consented to be pregnant at one time, this does not bind her to continue to consent in the future, given the changing conditions defining the experience of pregnancy.'³⁷³

As McDonagh formulates the right to consent, therefore, the existence of prior consent would seem to be completely irrelevant to the question of ongoing consensuality; if prior consent might imply a duty of care, then the right to withdraw consent at any time is undermined, inevitably. Since the problematic statement is anomalous, I will take McDonagh's authentic meaning to be that which is overwhelmingly suggested by the vast majority of her argument; namely, that pregnancy imposes no duty of care, and that a previously-consenting pregnant woman need only seek an abortion in order

³⁶⁸ *Ibid.* at 78

³⁶⁹ *Ibid.*

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

³⁷² *Ibid.* at 79

³⁷³ *Ibid.*

for the withdrawal of consent to be established and for the right to abortion as self-defence to be justified.

4.2.3. Wrongful pregnancy and self-defence

The term ‘wrongful pregnancy’ is not an invention of McDonagh’s; it is already a well-established legal concept, which usually refers to the imposition of pregnancy on a woman against her will – although the defending party is usually a rapist, sometimes a doctor who has performed a failed sterilisation procedure, and never a foetus. Nonetheless, the U.S. case law on wrongful pregnancy seems to support McDonagh’s claim that the law ought to regard pregnancy as an injury. In the case of *Stressel v Stroup*³⁷⁴, which involved a failed sterilisation, pregnancy was held to be a legal injury. A Wisconsin rape statute lists pregnancy along with disease as a factor indicative of the ‘extent of injury’ suffered as a result of rape.³⁷⁵ Most notably, a series of Californian cases upholds the idea that a medically-normal pregnancy is sufficiently harmful to a woman’s interests to be regarded as a legal injury if it occurs as a consequence of rape. These cases describe pregnancy variously as ‘great bodily injury’³⁷⁶, ‘a high level of injury’³⁷⁷, ‘significant and substantial bodily injury or damage’³⁷⁸, and ‘injury significantly and substantially beyond that necessarily present in the commission of an act of [rape]’³⁷⁹. Elsewhere, pregnancy has been included in a category of ‘personal injury’ alongside pain, disease, and disfigurement.³⁸⁰

As mentioned above, all of this case law blames a man, not a foetus, for inflicting the injury of nonconsensual pregnancy. According to McDonagh’s argument on causation, the law has failed for a long time to identify the foetus as a cause of pregnancy at all, let alone *the* direct cause, or the cause of *wrongful* pregnancy in particular. McDonagh uses the language of coercion to emphasise the culpability of the foetus in wrongful pregnancy,

³⁷⁴ 316, S.E. 2d 155 (Ga. 1984) at 85-86

³⁷⁵ Wisconsin Rape Shield Law, § 972.11

³⁷⁶ *People v McIlvain* 130 P. 2d 131 (1942) at 137

³⁷⁷ *People v Caudillo* 146 Cal Rptr. 859 (1978) at 870-871

³⁷⁸ *People v Sargent* 150 cal Rptr. 113 (1978) at 115

³⁷⁹ *People v Superior Court (Duval)* 244 Cal. Rptr. 522 (1988) at 527

³⁸⁰ *People v Brown* 495 N.W. 2d 812 (1992) at 814

referring to ‘what the fetus does to a woman when it coerces her to be pregnant’, and talking of the foetus ‘forcing pregnancy on her against her will’.³⁸¹ Repeatedly, she describes lack of consent as ‘the key component of all injuries’ and the ‘defining component of all injuries within human relationships’³⁸², adding that, from the legal point of view, the important factor in defining an ‘injury’ is not so much *what* is done to one party by another, but ‘whether the other person *consents* to it.’³⁸³

Seeking to justify the use of deadly force in self-defence against the intrusion of a foetus, McDonagh begins by distinguishing between two different types of privacy. First, there is *privacy as decisional autonomy*, or freedom from state interference.

As established in *Roe*, a woman’s right of personal privacy as defined by her decisional autonomy is governed and limited by what the fetus is, not by what it does. As long as the fetus is previable, justification for a woman’s right to an abortion rests simply on whether she chooses to have one or not. Once the fetus is viable, however, a woman no longer has the right to exercise personal privacy by choosing an abortion, and a state may prohibit her right to choose one.³⁸⁴

There is another form of privacy, also acknowledged by the *Roe* Court, namely *privacy as self-defence*. McDonagh explains this type of privacy as follows:

The law also recognizes the right of people to use deadly force when threatened with qualitative injuries that intrude on their basic liberty or bodily integrity even while threatening no objective physical injuries per se, much less threatening their lives. Thirty-six states explicitly affirm a person’s right to use deadly force when threatened with forcible rape, even when that rape is not aggravated by physical

³⁸¹ McDonagh, *op. cit.* at 89

³⁸² *Ibid.* at 90

³⁸³ *Ibid.*, emphasis added.

³⁸⁴ *Ibid.* at 92

injuries. Thirty-five states legislatively recognize the right to use deadly force against kidnapping.³⁸⁵

Whereas the first form of privacy recognised in *Roe* is limited by the burgeoning state interest in the foetus as an individual with emerging interests, the second form of privacy is not.

By contrast [with decisional autonomy], a woman's right of self-defense in relation to the fetus as established in *Roe* is governed and limited by what the fetus does, not by what it is. At any point in pregnancy, regardless of whether the fetus is or is not viable, if what it does imposes a sufficient amount of injury on the woman, no state may prohibit her from using deadly force to stop it, even if the state has a compelling interest to protect [the foetus].³⁸⁶

This leads McDonagh to conclude that 'women have always had a right to defend themselves with deadly force when sufficiently threatened by the intrusion of a fetus.'³⁸⁷ The operative phrase here is 'sufficiently threatened'; although *Roe* sets a precedent for a right to abortion based upon what the foetus *does* to a woman's body, the Court in *Roe* only applies this self-defence privacy right to *medically-abnormal* pregnancy. McDonagh would extend the right to cover *all* cases of pregnancy, whether medically-abnormal or not, since she believes that even 'normal' pregnancy constitutes a 'sufficient threat' to women's qualitative freedom insofar as it enslaves them, or at least commits them to involuntary servitude, as we have seen.

By basing abortion rights primarily on consent and the right to defend oneself against attack, McDonagh believes she has discovered a more secure basis for such rights than those who would ground them in the ideology of choice/autonomy and freedom from state interference. This is because the right to be free from state interference is far from being an absolute right. Although some state interventions have been deemed excessive by U.S. courts

³⁸⁵ *Ibid.* at 93

³⁸⁶ *Ibid.* at 92-93

³⁸⁷ *Ibid.* at 96

(for example, forcible stomach-pumping)³⁸⁸, McDonagh reminds us that ‘it is constitutional for the state to prohibit one’s choice to engage in homosexual activity, to contract for prostitution services, and to sell one’s organs. In addition, it is constitutional for the state to require people to obtain vaccinations in order to prevent the spread of disease and to be conscripted for military service.’³⁸⁹ These examples apply equally to the United Kingdom context. On the other hand, ‘courts affirm that the right of a person to be free from intrusion by another person *is* absolute. There are no exceptions.’³⁹⁰ Thus, while the state may have limited power to intrude on a person’s body, no private party has such power. Privacy, in the form of self-defence, ‘defines a sphere of individual dominion into which private parties may not intrude without consent.’³⁹¹

Privacy-as-self-defence is addressed not to the state, but to other private individuals, and so it is more wide-ranging in character. As such, basing abortion rights on the right to freedom from the intrusion of a private party (the foetus) is preferable to basing them on the more limited right to be free from interference by the state. Following *Roe*, there is already a limited element of self-defence in abortion rights, but it applies only to pregnancies that are medically abnormal. If McDonagh can successfully extend the self-defence justification to cover *all* cases of pregnancy, she would appear to have placed abortion rights beyond the reach of their opponents by elevating them to the private sphere, and removing the ‘state interest’ factor, with all its erosive potential.

In order to establish the right to abortion throughout pregnancy *and* the right to state assistance, however, citing the right to self-defence alone will not suffice; as McDonagh explains, ‘it is the job of the state to protect victims of wrongful private acts by *stopping* the perpetrators. The right of self-defense is meant to be a fall-back option for those times when the state cannot do its job...it is not a policy preference.’³⁹² She continues, ‘to the degree that it is the job of the state to protect the fetus as human life, it becomes the job of the

³⁸⁸ *Rochin v People of California*, 342 U.S. 165 (1952)

³⁸⁹ McDonagh, *op. cit.* at 100

³⁹⁰ *Ibid.* at 103, emphasis added.

³⁹¹ *Ibid.* at 101

³⁹² *Ibid.* at 105, emphasis added.

state to restrict the fetus as human life from intruding on the bodily integrity and liberty of others.’³⁹³ The Court in *Roe*, while acknowledging a woman’s right to seek abortion in order to defend herself against the risks and harms of medically-abnormal pregnancy, affirmed only her *individual* right of self defence, not any right to assistance from the state.³⁹⁴ This quest for state assistance takes us into the area of what McDonagh terms ‘the politics of consent’³⁹⁵, where I will examine the basis on which she demands state assistance for women who seek to exercise abortion rights.

4.2.4. The politics of consent

The argument over state funding for abortion has, according to McDonagh, been complicated and misleading – once again, the problem is the failure to identify the foetus as the ‘cause’ of pregnancy, coercing women to be pregnant against their will:

Failure to identify what the fetus does to a woman when it causes pregnancy has resulted in rulings that undermine women’s rights by allowing the state to establish repressive regulations, such as twenty-four-hour waiting periods, and most serious of all, prohibitions against the use of all public funds, facilities, and personnel for the performance of abortions.³⁹⁶

Until now, advocates of abortion rights have been unable to justify their demands for state funding. Judith Jarvis Thomson’s famous ‘violinist’ scenario³⁹⁷ attempted to establish that, ‘even if the fetus is a person, and even if its life hangs in the balance as a needy recipient of a woman’s body, a woman still has the right to be a bad samaritan by refusing to give her body to the fetus. This ‘bad samaritan’ argument for abortion rights still does not go

³⁹³ *Ibid.* at 106

³⁹⁴ *Ibid.* at 163

³⁹⁵ *Ibid.*, Chapter 9 (title).

³⁹⁶ *Ibid.* at 176

³⁹⁷ See *supra*, note 362

far enough. It claims only that women have a right to refuse to donate their bodies to a fetus.³⁹⁸

For McDonagh, 'the issue is not merely that women have the right to be bad Samaritans by refusing to give their bodies to a fetus. Rather, if a woman does not consent to pregnancy, the issue is that the fetus has made her its *captive samaritan* by intruding on her body and liberty against her will, and thus on the woman's right to be free from that status.'³⁹⁹ The problem is that the 'masculinized' norm of self-defence is supported by equally masculinised notions of how self-defence ought to be achieved, i.e. without external help.⁴⁰⁰ A 'real man', a 'good provider' is one who can provide adequate protection for himself and his property (including his sexual partner(s) and their children?) without recourse to outside agencies. Partly as a result of this masculine ideal, 'current abortion funding policies...strand women in a state of nature, at the mercy of fetal intrusion of their bodies without the assistance of the state to stop the fetus on women's behalf from imposing wrongful pregnancy.'⁴⁰¹ The problem with abortion funding policy, according to McDonagh, is not that the state is *too* involved; rather, 'it is not involved enough. The state stands by in order to protect the fetus as human life while it imposes serious injury on the woman.'⁴⁰²

McDonagh's argument about self-defence can be summarised as follows: (i) we need to get beyond the masculine notion of privacy as 'the right to be left alone'. *Roe* is an example of legal authority for the view that privacy also includes the right to self-defence, and specifically, for the view that abortion rights are based at least in part on this second 'type' of privacy; (ii) when considering privacy-as-self-defence, we must be aware that that right, too, is commonly understood in masculinised way, as the right to defend oneself without assistance. Establishing an ideological basis for state funding of abortion requires us to understand that self-defence includes the state duty to intervene positively to prevent or diffuse attacks by one private party upon another. McDonagh explains this point in the following way:

³⁹⁸ *Ibid.* at 171

³⁹⁹ *Ibid.* at 172

⁴⁰⁰ *Ibid.* at 179

⁴⁰¹ *Ibid.* at 183

⁴⁰² *Ibid.* at 182

If a man is raping a woman or a mugger is inflicting a severe beating on someone or one private party is killing another, of course the victims have a right of self-defense to try to stop that injury themselves, but they also have a right to state assistance to stop the private parties on their behalf....when a fetus seriously injures a woman by imposing a wrongful pregnancy, therefore, of course she has a right to stop it from injuring her, but she also has a right to state assistance in stopping it on her behalf.⁴⁰³

4.3. Advantages of the consent-based approach

The consent model accommodates the widely-held notion that the foetus is a morally-valuable entity, and allows us to acknowledge the narratives of women who experience trauma or grief over their abortions. As such, this approach can be said to be more consonant with the actual experiences of real women.

Moreover, by contrast with the individualistic notion of ‘choice’, consent is *relational*; it focuses on both the woman *and* the foetus (although as will be seen when I come to consider the disadvantages of the approach, it excludes the possibility that relationships between men and pregnant women, or even men and ‘their’ foetuses, may be relevant). A relational approach is better able to avoid criticisms that it is too individualistic or atomistic, criticisms often levelled at the ‘rights talk’ so prevalent in the rhetoric of choice. By focusing not only on individual rights (important as these are for the consent-based approach) but also on relationships, accounts like McDonagh’s can accommodate notions such as *caring*, *hospitality* and *community*, which are often regarded either as being irrelevant or even threatening to a right- or choice-based argument. According to McDonagh’s model, abortion does not contravene the ‘ethic of care’ - the notion that women are, by nature, nurturers and care-givers – since what abortion

⁴⁰³ *Ibid.* at 105

prevents is not the *giving* or bestowing of care by women, but the *taking* of women's bodies, their freedom and their care without their consent.

Another advantage of McDonagh's approach is that it no longer treats the issue of moral status as decisive, as the *Roe* Court did, so that McDonagh is able to avoid *dehumanising* the foetus. For those who claim the right to abortion on the basis of autonomy and choice, a necessary element of the justification for the right is the contrasting of the fact that the woman is a person whose freedom of choice ought to be protected, with the claim that the foetus is a non-person who has no legal rights. While McDonagh also claims that the foetus has no legal rights, she justifies her claim without needing to resort to claims about the moral status of the foetus. This means that we can acknowledge and protect abortion rights without having to regard the foetus as something other than human, a view which would run contrary to common sense and would require us either to ignore, or to dismiss as mere fantasy, the feelings of those women who felt that, in having an abortion, they had lost something of value, or even killed a human being.

McDonagh acknowledges that her model is at odds with current social assumptions about abortion; for most people, to contemplate foetal personhood (even just for the sake of argument) is to throw grave doubt on the moral and legal validity of the practice of abortion. However, McDonagh does not take this discrepancy to be indicative of any problem with her argument; rather, she is confident that it arises because our current social norms, particularly those relating to women and reproduction, derive from our cultural heritage of patriarchy, and in particular, from a combination of Puritanical and bourgeois morality which reserves norms of self-defence for men while imposing norms of self-sacrifice on women.

4.4. Difficulties for the consent-based approach

There are many criticisms of McDonagh's consent-based justification of abortion rights, and it will be helpful to categorise them under several headings. First, I will consider problems with the notion of *self-defence* as it operates in McDonagh's account. Then I will consider those criticisms which

challenge her use of the concepts of *causation* and *consent* respectively. Finally I will address some '*miscellaneous*' criticisms and difficulties.

4.4.1. Self-defence

4.4.1.1. Is pregnancy an invited attack?

Neville Cox points out that McDonagh has been challenged on the basis that 'consent to sex constitutes an implicit consent to all the natural and foreseeable consequences thereof including pregnancy'⁴⁰⁴, and that as such, a woman who becomes pregnant following consensual sexual intercourse has 'invited' pregnancy, or to borrow McDonagh's terminology, she has 'invited the foetus to make her pregnant'. Cox disagrees with this criticism, saying:

This argument is, however, rather strained. In the case, for example of a woman who has used birth control yet through some mischance has become pregnant and seeks an abortion as soon as she becomes aware of her condition, everything in her actions indicates that she does *not* consent to pregnancy and any presumption to this effect has been thoroughly rebutted.⁴⁰⁵

McDonagh would also reject the argument that pregnancy is an 'invited attack'; as we have seen, she regards the action of a woman having consensual sexual intercourse merely as 'putting oneself at risk' of pregnancy, and insists that the acceptance of a risk does not necessarily entail any acceptance of the actual injuries, should they occur. Just as a jogger who chooses to run alone through Central Park accepts a degree of risk but does not consent, by any stretch of the imagination (or the law) to be mugged or raped, a woman who engages in consensual sexual intercourse accepts the risk of pregnancy but does not consent to the actual attack of a foetus or the injury it perpetrates by invading her body and later, by effecting ever more drastic changes upon it

⁴⁰⁴ Neville Cox, 'Causation, Responsibility and Foetal Personhood', (2000) 51 *Northern Ireland Legal Quarterly* 579 at 581

⁴⁰⁵ *Ibid.* at 581-582

throughout the gestational process. It is unlikely that the fact of contraceptive use would have any relevance for McDonagh. Although whether or not someone uses contraception may hint at their intentions regarding pregnancy, or indicate that they are willing to accept a greater or lesser degree of risk, McDonagh would argue that, whatever degree of risk they accept, they are not consenting to the actual injury of pregnancy itself.

This is problematic, because the concept of 'risk' covers a wide spectrum of possibility. At one end we have the situation where it is possible, although unlikely in the extreme, that certain consequences will occur if a certain action or course of action is undertaken. At the opposite end of the spectrum of risk, we have the scenario whereby, if a person behaves in a particular way, certain consequences will follow *almost inevitably*. For example, if a man walks along a pavement, it is possible, although highly unlikely, that a car will mount the pavement and kill or injure him. If he crosses a busy road using a designated crossing-place and paying reasonable attention to the traffic, it is more likely, but still *unlikely*, that he will come to harm. There are of course varying degrees of risk associated with walking on or near roads. If the same man were to jump out on a major motorway in front of a car approaching at seventy miles per hour, we can say with some confidence that he is likely to be hurt or killed. It is still not a certainty, for any number of outlandish events could intervene to remove the danger. He is still only 'at risk' of harm. But on McDonagh's analysis, we must say, nonetheless, that he has not consented to the actual harm he will almost inevitably sustain.

This is a philosophical point; of course, the law would take a quite different view on who was responsible for the harm in such a case. What about a man who steps in front of an express train with the intention of committing suicide? His death is not guaranteed; again, unlikely events could intervene to thwart his plan. According to McDonagh, he would still be 'putting himself at risk' of injury and death, and would not have consented to any injury he sustains as a result of his actions. Moreover, if he clearly intended to bring about his own death, yet survived, horribly injured, he could claim quite plausibly, on McDonagh's logic, that he certainly did not consent to be so injured.

The differences between these examples and the pregnancy scenario are clear. First, pregnancy can be undone, which makes it more meaningful to talk about consent or lack of consent in the pregnancy context than to argue about consent in the context of an action whose consequences are irreversible. If I become pregnant despite my intention to avoid pregnancy, I can invoke the language of consent, or cite the absence of consent, in support of my claim that I ought to be able to remedy my pregnant state. I cannot seek to return to a living or intact state if I have been killed or maimed as a result of my risk-taking. Another difference is that, at least according to McDonagh, pregnancy involves the commission of a 'wrongful act' by another party, whereas my examples do not; is this difference relevant to the way we treat the issue of risk?

I would argue that it is possible to separate the actions of the two agents in McDonagh's model - the first party's assumption of risk, and the second party's wrongful act - since although the wrongfulness or harmfulness of the foetal 'attack' becomes relevant when we come to consider other issues under the heading of self-defence, it is not really important to the question of whether the pregnant woman has 'invited' the foetus into her body. If we accept this, we can use the above analogies to argue that one weakness of McDonagh's theory is her view of how an assumption of risk relates to responsibility for subsequent injury. In the above examples, McDonagh would be compelled to absolve both the man on the motorway and the man who steps in front of a speeding train of any responsibility for their subsequent injury or death. She is unable, on the basis of what she proposes in *Breaking The Abortion Deadlock*, to distinguish between different degrees of risk, and thus she is unable to ascribe responsibility to those who assume the level of risk found at one end of the spectrum while admitting that some levels of risk are very low and ought to entail no legal responsibility for consequences. It is very difficult to imagine a scenario in which a human agent, in performing an action, could actually *guarantee* a particular result, since almost nothing is certain and there is always the possibility, however slight, that unplanned events will intervene and alter the outcome. This being the case, all we can *ever* do is 'place ourselves at risk' of outcomes, so that if risk and outcome are

separated as they are in McDonagh's model, we could never hold anyone even *partly* responsible for any wrongs or injuries that they suffered.

Regarding McDonagh's discussion of risk and responsibility, Robin West asks, 'is it really the case that consent to the risk of pregnancy does not entail consent to the pregnancy?'⁴⁰⁶ Clearly, Robin West believes that the matter is by no means settled:

In contract law, clearly, consent to an assumed risk does imply consent to the risk event; if it didn't, no contract would be secure...[i]n criminal contexts, by contrast, McDonagh's argument looks sound; consent to a risk event does not by any means imply consent to the crime...[i]n tort, the situation is complicated and conflicted; consent to a risk might or might not constitute assumption of the risk and hence consent to the risk event.⁴⁰⁷

Obviously, if we could categorise abortion under one of these headings, we would have a clearer idea of how the law would treat the assumption of risk inherent in the abortion context. Unfortunately, none of these areas of law seems completely to accommodate the circumstances of pregnancy and abortion. Clearly, it would make no sense to categorise the 'attack' of pregnancy - even wrongful, non-consensual pregnancy - as a *criminal* offence, since the foetus (the direct cause of pregnancy, according to McDonagh) cannot be held criminally responsible. Moreover, as West notes, 'an attack by a born person threatens the peace - and hence threatens the state - in a way that the invasion of a woman by an unwanted fetus does not.'⁴⁰⁸ This being so, another reason for criminalising certain kinds of behaviour, namely the state's duty to maintain public order and deter offenders has no application in the context of wrongful pregnancy, since the foetus does not threaten *public* order (although it threatens the pregnant woman's internal physical, and psychological order and the order of her social functioning) and cannot be deterred from causing pregnancy by the threat of sanctions.

⁴⁰⁶ Robin West, 'Liberalism and Abortion', 87 *Georgetown Law Journal* (1999) 2117, at 2130

⁴⁰⁷ *Ibid.* at 2130-2131

⁴⁰⁸ *Ibid.* at 2126

Any attempt to regard pregnancy as a *contract*, for example a contract for services between the pregnant woman and the foetus, would founder on the absence – indeed, the impossibility – of mutuality.⁴⁰⁹ By a process of elimination, we arrive at tort – and this area of law does seem to bear the closest resemblance to McDonagh’s account of pregnancy, since she characterises pregnancy as a harm, but not a criminal assault. As West comments, the relationship between risk and responsibility is unclear; consent to a risk ‘might or might not’ imply consent to the risked harm. At the very least, then, we can say that it is by no means clear, in law, that consent to risk does not imply consent to be harmed. This raises serious doubts about one of the main premises on which the consent model of abortion rights is built.

4.4.1.2. Is pregnancy a sufficient attack to justify the use of deadly force?

As Robin West observes, ‘pregnancy, even when non-consensual, does not typically threaten death, lasting bodily injury, or even an immediate disruption of the woman’s life plans and projects the way a violent assault by a born person does.’⁴¹⁰ Because of this, some commentators have raised the issue of whether the attack represented by pregnancy is sufficiently serious to justify the use of deadly force in self-defence. Neville Cox writes:

It has been suggested that the defence of self-defence cannot apply because of the nature of the ‘attack’ within pregnancy. In order to justify the use of self-defence it must generally be shown that an attack was immediate and threatening...Hence, because pregnancy does not have the appearance of an immediate threat, the use of self-defence principles does not apply to this situation. This argument may be rejected, however, both because McDonagh would say that pregnancy is a nine month immediate threat, and also because the inexorable

⁴⁰⁹ Although pregnancy may be the subject of a surrogacy contract, such contracts are currently unenforceable in law, and are anyway contracts between the pregnant woman and the ‘commissioning couple (or individual)’; at any rate, contract cannot apply to ‘wrongful pregnancy’.

⁴¹⁰ West, *op. cit.* at 2127

nature of the harm involved means that requirements of immediacy may be dispensed with.⁴¹¹

As Cox points out, moreover, McDonagh cites rape and kidnap as examples of instances where deadly force may be used in self defence even where there is no immediate threat to life. For Robin West, however, the seriousness of the attack inherent in pregnancy does not consist solely in the threat of physical harm, either immediate or remote, or even in actual physical harm. She remarks that, although McDonagh catalogues in elaborate detail the physical effects of both medically normal and abnormal pregnancies, she ‘risks missing entirely the psychic harms such pregnancies occasion.’⁴¹² West tells us that ‘the non-consensual pregnancy, unlike the non-consensual assault, threatens not so much to end your life “from the outside”, so to speak, but to “take over” your life from the inside. The fear is not that my life will end, but that my control over its course will end.’⁴¹³

This constitutes an immediate threat, not to a woman’s life, but to what is often regarded as being important about her life, the woman’s personhood. This should be of particular concern to those states which regard themselves as (or aspire to be) modern liberal democracies since, as West reminds us, one of the central lessons of liberalism has been to establish the notion of ‘a free moral person...[as] someone who freely decides to undertake moral action. It is hard to avoid the conclusion that the woman who has no choice but to remain pregnant against her will is, from a liberal perspective, something considerably less than human.’ In other words, our ‘moral personhood’, on the liberal account, depends upon our capacity to exercise moral autonomy in our relationships with other moral agents. To be forced into a moral relationship seems to contravene this ideal:

⁴¹¹ Cox, *op. cit.* at 582

⁴¹² West, *op. cit.* at 2128

⁴¹³ *Ibid.*

The woman who is pregnant against her will embodies nonfreedom because she embodies the very act – unwilled sacrifice of one’s body for the life of others – that is freedom’s antithesis.⁴¹⁴

As such, we can (and it would seem that liberals *must*) take wrongful pregnancy seriously enough to warrant deadly force in self defence even where the pregnancy poses no immediate threat to life or health. However, this argument is unlikely to persuade nonliberals (many of whom ascribe moral value to *unchosen* projects and relationships)⁴¹⁵, and will not necessarily persuade those liberals whose liberal beliefs are grounded in consequentialist, rather than Kantian, philosophies.

4.4.1.3. *Is pregnancy really an attack at all?*

This criticism centres on the claim that McDonagh’s characterisation of pregnancy as a ‘foetal attack’ is mistaken, for several reasons. First, the foetus, far from perpetrating a deliberate attack, is innocent, both in the sense that it is innocent of any wrongful intention *and* in the sense that it is not criminally competent. Second, and more important, is the claim that it is impossible to separate what the foetus *is* from what the foetus *does*.

Remember that McDonagh has claimed that one of the main advantages of her thesis is that it corrects the previous error of attempting to decide what the foetus *is* (usually by debating its moral status) and focusing, instead, on what the foetus *does* to a woman when it makes her pregnant without her consent. If it is impossible to separate the two conceptually, two things flow: first, if McDonagh wishes to maintain her claim that previous commentators and judges were in error, she must find something else to accuse them of; second, and related to the first point, McDonagh has achieved

⁴¹⁴ *Ibid.*

⁴¹⁵ See, for example, Michael Sandel, *Liberalism and the Limits of Justice (Second Edition)* (Cambridge: Cambridge University Press, 1998), esp. at 154-64, and Michael Sandel, *Democracy’s Discontent* (Cambridge, Mass.: Harvard University Press, 1996), esp. at 17. Sandel, like other writers who can broadly be termed ‘communitarian’, complains that the Rawlsian liberal conception of the self is overly individualistic and denies the value of unchosen projects, and argues that an ‘unchosen’ background framework is a precondition of choice.

nothing by ‘refocusing’ the debate away from the nature of the foetus and onto its behaviour, except perhaps to invent a false and confusing distinction.

Is it possible, therefore, to separate foetal nature from foetal behaviour? Cox tells us that:

Whatever the impact of pregnancy, the foetus is doing nothing apart from involuntarily staying alive in the ordinary way and hence the ‘attack’ for self defence purposes comes in the form of simple foetal existence. But self defence law does not entitle me to kill another if my health or life or bodily integrity is threatened by his or her simple existence.⁴¹⁶

This last point about self defence law is somewhat precarious, since the situation rarely, if ever arises whereby one person’s health, life, or bodily integrity is threatened by the mere existence of another.⁴¹⁷ It is for precisely this reason that pregnancy is so often described as being a completely unique condition.⁴¹⁸ As mentioned earlier in this chapter, Judith Thomson wrote a famous article which claimed exactly the opposite of what Cox is saying, namely that if my life or bodily integrity is threatened by another born person, even in the course of doing what he or she must do simply to continue to exist, then the law ought to allow me to be a ‘bad samaritan’ and defend myself by withdrawing the support on which that person depends for his or her survival.

Cox anticipates this comparison, and responds by pointing out that ‘Thomson accepts the personhood of the foetus for the purposes of argument while insisting that a foetal right to life does not include a right to use its mother’s body for support through the vehicle of pregnancy. But without such a ‘sub-right’, the principle right becomes illusory.’⁴¹⁹ He puts the point slightly differently elsewhere when he says that, ‘when the law recognises rights it does so in the context in which they will operate. Thus it would not recognise a foetal right to live while rendering the act of breathing or eating a

⁴¹⁶ Cox, *op. cit.* at 582

⁴¹⁷ Although the case of *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 might be considered analogous; see the discussion *infra* at para. 4.4.1.6

⁴¹⁸ See the discussion *infra* at para. 4.4.1.5., where I consider the claim that the genuine uniqueness of pregnancy invalidates much of McDonagh’s heavily-analogical approach.

⁴¹⁹ Cox, *op. cit.* at 586

criminal offence, because the latter rule would render the former right meaningless.⁴²⁰

One obvious problem with this response is that McDonagh is not proposing a foetal right-to-life; although her model tolerates the notion of foetal personhood for argument's sake, she does not regard it as entailing any positive legal right to continue existing. This is so because the brand of personhood she ascribes is comparable to the kind of purely legal personhood which companies and other such entities possess, without having any right to exist. The difficulties inherent in this purely-legal notion of foetal personhood will become even more apparent during consideration of the next question.

4.4.1.4. Is the foetus entitled to legal due process?

Judith Scully points out that, 'if a fetus is a human being, it might be entitled to a legal hearing and legal counsel prior to being aborted.'⁴²¹ If, as McDonagh is prepared to assume for the purposes of her model, the foetus can be regarded as an agent or a legal person, then it could indeed be claimed that such an entity ought to be entitled to due process of law – a least where the pregnancy is medically-normal (i.e. where it poses no immediate threat to a woman's life or health). Failing to recognise such an entitlement, it may be argued, is to treat the foetus as a 'legal person' only in the negative sense.

It is helpful here to distinguish between two possible understandings of foetal personhood in McDonagh's model. They can be summarised as follows: (i) 'The foetus has no capacity to possess rights or owe responsibilities; nevertheless, it can be an agent of injury and cause harm to women in the pregnancy context.' This understanding treats the foetus as the legal equivalent of an animal, and if this is all McDonagh means by 'foetal personhood', it is difficult to see how her model improves upon traditional discourse about abortion. Such an understanding of 'foetal personhood' would hardly be capable of 'breaking the abortion deadlock'! (ii) 'The foetus is a person, involved in a private pregnancy relationship with the pregnant

⁴²⁰ *Ibid.* at 583

⁴²¹ Judith A. M. Scully, 'Breaking the Abortion Deadlock: From Choice to Consent by Eileen McDonagh' (Review) 8 *UCLA Women's Law Journal* (1997) 125, at 145

woman. If the relationship is non-consensual, it constitutes “wrongful pregnancy” and the woman is entitled to use deadly force to defend herself against the unwanted intrusion. This understanding does not differentiate between the foetus and a born person.’ This is a stronger version of ‘foetal personhood’, and on the face of it, much more promising. This seems to be closer to what McDonagh really means when she analogises the foetus to a rapist, and claims that deadly force is permitted in self-defence even where the attacker is a person.

However, the second, more promising way of understanding what McDonagh means by ‘foetal personhood’ is also fundamentally flawed. Use of deadly force against ‘born persons’ is only authorised in emergency situations; otherwise, the person presenting the alleged threat is entitled to due process of law. With regard to pregnancy, medically-normal pregnancy is not a ‘gunman situation’ where deadly force may be used without due process. However great the intrusion which *any* pregnancy represents, ‘emergency’ usually implies some immediate threat to life or health, so that where pregnancy is medically-normal and there is no immediate threat it seems inappropriate to speak of an emergency situation. Where pregnancy is medically-*abnormal*, and places the life or health of the woman in danger, this is *already* regarded as an emergency and abortion is provided in such cases as a matter of medical necessity. There is no need to resort to the legal right to self-defence.

This is a key problem for McDonagh’s thesis: ultimately, it fails to ‘break the abortion deadlock’ because what opponents of abortion advocate is the ascription of *moral* personhood to the foetus, and McDonagh, by offering this purely *legal* notion of personhood, is debating at cross-purposes rather than proving why their argument fails even if the issue of foetal personhood is ‘conceded’. The foetus is treated as a ‘person’ only as a heuristic device, in order that concepts such as assault and self-defence can be applied without obvious absurdity; on examination, the ‘personhood’ of the foetus is revealed to be a mere cipher.

4.4.1.5. *Is pregnancy too unique a case?*

In the course of her argument, McDonagh draws many analogies between pregnancy and other events or conditions:

The fetus...is analogised to a born person for the purposes of making out the original right to self-defense, to a natural phenomenon to highlight the irrelevance of the arguable assumption of risk involved in the original act of intercourse to the right to self-defense, and then, finally, to a criminally insane assailant to illustrate the irrelevance of the fetus's lack of agency to the woman's right to state assistance.⁴²²

'At some point', Robin West says, 'the multiplicity of analogies start to work against each other.'⁴²³ Furthermore, as McDonagh herself acknowledges, 'a possible objection to situating women who suffer harm resulting from a fetus with other victims of harm is that pregnancy is a unique condition; thus, when a fetus attacks a woman's body, it does not situate her similarly with anyone else whom the state protects from harm.'⁴²⁴

Such an objection is raised by Nancy Davis, who argues that the uniqueness of pregnancy as a condition is such that it is impossible even to characterise the issue as one where competing rights are being balanced.⁴²⁵ Davis writes, 'If the relationship between the woman and the foetus is thought to be a special one, then this undercuts the force of arguments by analogy.'⁴²⁶ This is, potentially, a very damaging criticism, given the centrality of analogical reasoning in McDonagh's model. McDonagh's response is as follows:

The flaw in this objection is the assumption that any one situation can be wholly different from another; all situations involve some

⁴²² West, *op. cit.* at 2130

⁴²³ *Ibid.*

⁴²⁴ Eileen L. McDonagh, 'My Body, My Consent: Securing the Constitutional Right to Abortion Funding' 62 *Albany Law Review* 1057 at 1110.

⁴²⁵ Nancy Davis, 'Abortion and Self-defense' 13(3) *Journal of Philosophy & Public Affairs* (1984)175, at 183-185.

⁴²⁶ *Ibid.* at 181

similarities and some differences. It is a matter of judgment, therefore, to what degree situations should be considered similar or different in relation to each other.⁴²⁷

She continues,

If the fetus were considered a person, for example, its location within and attachment to the body of another person might be considered unique to fetus's [*sic*] as a class, but the harm resulting from the fetus is not unique, since harm often results from one person's effect on another person. Under state protection, if the fetus is considered to be a living entity that is not a person, then harm resulting from it also is not unique, since harm often results from living entities that are not people. Thus, whether the fetus is a person or a nonperson, it similarly situates a woman with others who are harmed.⁴²⁸

This is, in my opinion, a disappointing and somewhat clumsy response, which fails to get to the heart of the 'uniqueness' objection. When critics claim that pregnancy is unique, they are not claiming, necessarily, that it is unique on the basis of the status of the fetus as a person or a non-person. Rather, they are making the claim that the whole set of circumstances associated with pregnancy is unique, particularly with regard to the operation and exercise of individual rights. While I agree, ultimately, with McDonagh that the objection from uniqueness must fail, I prefer Robin West's explanation of why this must be so.

Although West notes that 'McDonagh's liberal insistence on the analogical similarity between the nonconsensually pregnant woman and the assaulted victim misses the substantial payoff of a pregnancy...a healthy human baby'⁴²⁹, she also observes that 'equality and liberty both, from a liberal perspective, are dependent upon the recognition and equal treatment

⁴²⁷ *Ibid.*

⁴²⁸ *Ibid.* at 1110-1111

⁴²⁹ West, *op. cit.* at 2128-2129

accorded our universality.’⁴³⁰ As West explains, ‘liberal legalism requires a rule of law that...treats likes alike. Thus, the overpowering need for analogical thinking.’ In other words, before we can promote equality, a key value in liberal social and legal systems, we must have some method of determining which cases are ‘alike’ in the relevant sense(s), so we can then treat like cases alike. As such,

Equal regard – the heart of liberalism – requires that pregnant women be treated similarly to those with whom they are similarly situated. The imperative of equal treatment at the heart of liberal legalism animates the need to locate those to whom she is similarly situated and, therefore, the search for analogous conditions.⁴³¹

According to West, then, although it may be difficult to find situations which are ‘like’ pregnancy, it is necessary to draw parallels whenever possible, in order to be able to attain, insofar as is possible, the liberal ideal of treating like cases alike. As McDonagh points out, the practical implementation of this ideal will inevitably involve subjectivity, since judgments will require to be made about the degree to which certain sets of circumstances possess relevant similarities. The fact that ‘treating like cases alike’ will be necessarily and intrinsically subjective in practice, however, does not mean that we should not attempt to find as close an approximation to the ideal as we are able for any given case. The most basic tenets of liberal legal theory demand as much.

4.4.1.6. *A better analogy?*

Vanessa Munro has identified parallels between pregnancy and the comparatively recent case of *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961.⁴³² In this case, the English Court of Appeal was set the unenviable task of determining the interdependent fates of

⁴³⁰ *Ibid.* at 2124

⁴³¹ *Ibid.* at 2125

⁴³² Vanessa Munro, ‘Square Pegs in Round Holes: The Dilemma of Conjoined Twins and Individual Rights’ (2001) *Social & Legal Studies* 10(4) 459-482

conjoined twins ‘Jodie’ and ‘Mary’. Having referred to *Re A*, Munro writes that:

Maternal-foetal relations represent another relational context characterized by ambiguous bodily boundaries within which the law’s attempt to super-impose the highly abstract and individualist framework of rights analysis has proven manifestly inadequate.⁴³³

The ‘conjoined twins’ case corresponds to McDonagh’s model of non-consensual pregnancy in a number of important respects. Jodie (the stronger twin) was involved in a non-consensual physical relationship with the weaker twin, Mary; Jodie was suffering physical harm and facing certain death as a result of Mary’s physical dependence on her body; and Jodie’s only possible defence against the harm would be the removal of Mary, which would end the non-consensual relationship and inevitably cause Mary’s death. The relationship was beneficial only to Mary, and harmful only to Jodie, making it more similar to McDonagh’s pregnancy model than to other more ‘symbiotic’ twin conjoinments. Another similarity to McDonagh’s model is that both of the twins in *Re A* were deemed to be ‘persons’ in law. As such, it is instructive to examine the case for evidence of how the UK courts might approach a right to abortion based upon the right to self-defence

The Court in *Re A* decided to allow the surgical separation to proceed. The rationale for this decision was complex, but can be summarised by saying that the judges, faced with a choice between saving the life of one twin or losing both, preferred the option that saved the greater number of lives – a ‘quantity of life’ calculus, in effect. By this logic, if both twins would have survived in their conjoined state, it would seem that the Court would not have sanctioned the deliberate killing of Mary. While such killing was considered permissible in order to save one life instead of none, it would not appear, on the logic of *Re A*, to be justified if the choice is between one life of high quality or two lives of inferior quality. The implication of this for the model proposed by McDonagh is that, unless the life of the pregnant woman was

⁴³³ *Ibid.* at 472

actually threatened by the pregnancy, the killing of the foetus (viewed as a legal person) would be impermissible.

Of course, the facts of *Re A* do not represent a perfect analogy with pregnancy, although this is not in itself a reason to dismiss it as irrelevant; it seems to be at least as strong as any of the interchangeable analogies offered by McDonagh herself, and as noted above under heading 4.4.1.5, analogies (even if imperfect) are necessary, since to treat pregnancy as completely legally unique is to embrace a kind of particularism which is incompatible with coherent legal regulation and with the philosophical justifications underpinning the liberal legal system itself (such as non-discrimination and legitimate expectation).

4.4.2. Causation

4.4.2.1. Is the foetus really the cause of pregnancy?

In his article, *Causation, Responsibility and Foetal Personhood*, Neville Cox presents a compelling challenge to the notion that the foetus ought to be regarded as the ‘only cause of pregnancy’. He begins by pointing out that:

[A]s the American Supreme Court noted in the seminal case *Roe v Wade*, there is no clear consensus as to when life or indeed pregnancy begins. If it begins at implantation or later then McDonagh’s argument that the fertilised ovum causes pregnancy may stand a chance of working. If on the other hand it is seen to begin at the point of *fertilisation* then her arguments fail immediately because unless she aims to imbue sperm with personhood (and the anti-abortion movement does not make this argument) then she would have to accept that pregnancy is caused by the sexual act which led to fertilisation.⁴³⁴

⁴³⁴ Cox, *op. cit.* at 587

In other words, if we take pregnancy to begin at fertilisation or conception, as many do, then the foetus cannot be regarded as the cause of pregnancy, since it cannot be the cause of an event at which it comes into being. So for those who take pregnancy to begin at this earliest of stages, then, McDonagh's arguments about causation are a non-starter. Logic precludes the possibility that the foetus is the cause of pregnancy unless we take pregnancy to begin at a point, such as implantation, when the foetus is already in existence. McDonagh herself seems to take implantation as the onset of pregnancy, stating as she does that the fertilised ovum causes pregnancy 'when it implants itself in a woman's uterus',⁴³⁵ although her position is not always crystal-clear, since on the very next page she describes pregnancy as 'a condition that follows absolutely from the presence of a fertilized ovum in a woman's body',⁴³⁶ thereby implying that as soon as the foetus exists, the woman is pregnant (the view which precludes the foetus as a cause of pregnancy).

Leaving aside this apparent confusion in McDonagh's definition of when pregnancy begins, however, it is obvious that we must address the possibility that pregnancy begins with implantation in the uterus, and that it is logically possible, therefore, that the foetus can be considered to be the cause. Cox observes:

McDonagh is so concerned to find *a* generic cause of pregnancy that she fails to recognise that what is actually relevant for legal purposes is the cause of *the* particular pregnancy in any case...Most sexual acts may not result in pregnancy, and pregnancy may result from actions other than sex. But for most women seeking abortions, their specific individual pregnancies *did* result from a sexual act.⁴³⁷

This is a problematic point, since it seems to suggest that when pregnancy has *not* resulted from sexual intercourse, McDonagh's causation argument may hold good. But I am certain that this is not what Cox means to imply, since the

⁴³⁵ McDonagh, *Breaking the Abortion Deadlock*, at 40

⁴³⁶ *Ibid.* at 41

⁴³⁷ Cox, *op. cit.* at 589

non-sexual means by which pregnancy can occur – artificial insemination and embryo transfer – are, if anything, *more* deliberately aimed at bringing about a pregnancy than is the act of sexual intercourse. Sexual intercourse may be engaged in for recreation, as an act of intimacy, *or* for procreation, but people engaging in artificial insemination and embryo transfer are invariably doing so for the purpose of reproduction, not pleasure. As such, in cases where pregnancy does not follow from intercourse, the claim that pregnancy has been ‘caused’ by the actions of the parents is an even stronger one, since intention can be established with much less difficulty.

Much more convincing is Cox’s argument that McDonagh has erred in failing to distinguish between the *factual* cause(s), and the *legal* or ‘proximate’ cause of pregnancy.⁴³⁸ He tells us that the first step in determining legal cause is to ask what is (are) the factual cause(s) of the event. This is done by asking ‘but for X, would the event have occurred?’ If the answer is no, then X is a factual cause. This process is of course limited by the doctrine of *novus actus interveniens* (‘new intervening act’). Then, the law decides to which of the factual causes it will attach responsibility. Cox tells us that at this stage, the test is ‘a commonsense-based analysis of whether a particular factual cause has contributed appreciably to the coming about of the events in question.’⁴³⁹ The problem with McDonagh’s model, he says, is that she ‘looks for the legal cause of a result with the implication that at law there can be only one such cause. This is incorrect.’⁴⁴⁰

Even if we leave aside the question of the point at when pregnancy begins, then, and accept that the foetus comes into existence before that point, the foetus can only be regarded as *one of the factual causes* of pregnancy; even on this construction of the beginning of pregnancy, all pregnancies are caused by the implantation of a foetus in the uterus in the same way that ‘all human deaths are ultimately caused (in the most proximate, scientific sense) by lack of oxygen to the brain’. This certainly does not necessarily mean that it is this ‘cause’ to which the law will attach responsibility, however. When deciding the cause of death, the law will not merely conclude that the *relevant*

⁴³⁸ *Ibid.*

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.* at 590

cause is lack of oxygen to the brain; rather, the legal cause of death will look beyond the immediate, scientific cause to the surrounding circumstances, to factors such as dangerous driving, assault, and so on.⁴⁴¹

Cox offers his own view of the causes of pregnancy, claiming that ‘the move of the foetus to implantation is an *involuntary* reaction to an earlier action of its parents.’⁴⁴² His argument runs as follows:

On normal causation rules, if A causes B to do something in involuntary fashion (for example when A throws B with such force that B strikes C) then A’s action is still the cause of the harm to C...Hart and Honoré suggest that in such circumstances when we speak of B’s behaviour, *we can hardly speak of an act at all*...if A causes B to move in such a way that B collides with *him*, then A will be deemed to be the cause of his own injuries.⁴⁴³

Applying this principle to pregnancy, Cox continues:

The parents have caused the foetus involuntarily to implant itself, therefore the chain of causation between their act and the result (pregnancy) is not broken.⁴⁴⁴

Here, Cox means to establish, (i) that the foetus’s actions, so far as they are ‘actions’ at all, are involuntary, and (ii) that the actions of the parents in having intercourse (or otherwise mixing gametes) create the foetus and so ‘cause’ its involuntary and inevitable effect on the woman’s body. However, I think this is a poor way of going about it; it suffers from the same chronological problem as the assertion that the foetus ‘causes’ pregnancy where pregnancy is taken to begin at fertilisation, since it is doubtful whether we can really regard the parents as having ‘caused’ a foetus (which did not exist at the time of their actions) to do anything at all. Could not the coming-into-existence of a foetus constitute the kind of new intervening act which

⁴⁴¹ *Ibid.* at 588

⁴⁴² *Ibid.* at 591

⁴⁴³ *Ibid.* at 591-2

⁴⁴⁴ *Ibid.* at 592

would break the chain of causation? Cox wants to answer in the negative, saying that the chain of causation between the parents' act of intercourse and the foetus's act of implantation remains intact. In terms of the example he has given, the parents' behaviour simultaneously *creates* the foetus and *throws* it into the woman's uterus. This is a rather strained way of looking at the facts, however. I believe that everything Cox wants to say here is adequately accomplished by making the claim that it is impossible to separate what the foetus *is* from what it *does*; this enables us to proceed to the next claim, namely that when the parents engage in an act that can foreseeably create a foetus, they are engaging in an act which can foreseeably cause a foetus to implant (since what it 'is' and what it 'does' are conceptually inseparable).

All this theorising about the concept of causation notwithstanding, then, how would the courts actually decide on the legal cause(s) of pregnancy in practice? Cox says that 'questions of causation are answered substantially by policy considerations'⁴⁴⁵, and identifies 'two reasons for assuming that the sexual act...could be deemed to be the legal cause of pregnancy. First, because the result is a reasonably foreseeable consequence of the action (whether or not the mother consents to it) and secondly, because it is likely to be seen as good policy in the legal order to which McDonagh refers, namely one in which the personhood of the foetus is afforded legal recognition.'⁴⁴⁶

So, what about a legal order that did *not* afford legal recognition to the personhood of the foetus? This is an important question in the context of the present discussion, since what I am envisaging, in proposing a model within which the foetus is treated as the *property* of the pregnant woman, is just such a legal order. There is no reason to suppose that the whole basis upon which legal causation is determined would be any different; therefore, we can assume that the question of legal cause would still be 'answered substantially by policy'.

I believe that the most valuable part of Cox's analysis of causation and the way it operates in McDonagh's model is his account of the difference between legal and factual causes, and in particular, the analogy he draws between legal causes of death, which are never taken to be simply the most

⁴⁴⁵ *Ibid.* at 591

⁴⁴⁶ *Ibid.* at 593

precise and immediate scientific cause (lack of oxygen to the brain), and the legal cause(s) of pregnancy, making the associated claim that the law would not treat what is *arguably* the biological definition of pregnancy (implantation) as being its legal cause. In my view, this is a compelling analogy, and one that would be equally applicable within the kind of property-based analysis of pregnancy that I propose.

4.4.2.2. *Fathers' rights and responsibilities*

Many feminist commentators have complained, rightly in my view, that traditionally, theorising about pregnancy, and in particular, the rhetoric of the foetal-rights debate, has marginalised women to the point of invisibility. Such has been the focus on the emerging 'person' of the foetus and its welfare that the pregnant woman and her interests can be forgotten, or at least 'suspended' until after she has given birth.⁴⁴⁷

One of McDonagh's aims in *Breaking the Abortion Deadlock* is to redress this injustice by providing a framework for theorising, legislating and adjudicating about abortion rights which places the pregnant woman squarely at its centre. While she certainly succeeds in refocusing attention and concern upon the experience and interests of women, McDonagh achieves this mainly by eliminating men from the landscape of pregnancy and childbirth. McDonagh, of course, would argue that men ought not to be regarded as being involved in the pregnancy relationship anyway, since it is, by definition, a relationship between the pregnant woman and the foetus. Indeed, she argues that it is precisely because we have failed, in the past, to characterise pregnancy in this way (as a bilateral relationship between a woman and a foetus) that policymakers and judges have allowed external interests (for example, the interest of the state in the continuation of foetal life) to limit the right of a woman to terminate an unwanted – or to use McDonagh's term, 'nonconsensual'- pregnancy. By re-characterising pregnancy as a bilateral

⁴⁴⁷ See, for example, Rachel Roth, *Making Women Pay: the Hidden Costs of Fetal Rights* (London: Cornell University Press, 2000); Cynthia R. Daniels, *At Women's Expense: State Power and the Politics of Fetal Rights* (Cambridge: Harvard University Press, 1993); Lynn M. Morgan & Meredith W. Michaels (eds.), *Fetal Subjects, Feminist Positions* (Philadelphia, University of Pennsylvania Press, 1999).

relationship, according to McDonagh, we are able to resist such limits on the right.

There is another, less welcome outcome of this bilateralism, however. As discussed above, in order to regard pregnancy as an attack to which consent may be given or withheld (an understanding pivotal to McDonagh's thesis as a whole), it is necessary first to sever the connection, both in cultural iconography and in the law, between an act of sexual intercourse and any subsequent ('resulting') pregnancy. Unless we abandon the notion that *sex* causes pregnancy, we cannot embrace the proposition that the cause of pregnancy is the *foetus*, exercising its coercive influence to change a woman's body from a nonpregnant to a pregnant state in pursuit of its own self-interest. I have already identified some ontological and epistemological problems with the notion that the foetus can plausibly be regarded as causing pregnancy, but this element of McDonagh's theory also encounters a much more practical problem; namely, that treating pregnancy as anything other than a consequence of sexual intercourse impairs (perhaps fatally) the ability of the law to attribute responsibility for the pregnancy, and even more importantly, for the resulting child, to the genetic father:

By separating the man/woman 'sex relationship' from the foetus/woman pregnancy relationship, she is drawn to the inexorable conclusion that the man has no legal responsibility for pregnancy, not having 'caused' it in the legal sense. Despite this, however, she is prepared to require that a man owe a duty to the foetus in the sense of being required to provide financial and other assistance.⁴⁴⁸

I suspect that, in fact, McDonagh regards the duty of the man as existing *not* toward the foetus, but rather toward the born child. To understand why, it is necessary to be aware that McDonagh recognises three different sorts of parenthood: genetic parenthood, pregnancy parenthood or 'gestational parenthood', and social parenthood.⁴⁴⁹ She argues that, 'while men are critical

⁴⁴⁸ Cox, *op. cit.* at 588

⁴⁴⁹ McDonagh, *Breaking the Abortion Deadlock* at 58-59

to reproduction, their role does not extend over all phases.’⁴⁵⁰ So, although men cannot be gestational parents, they *can* be genetic and social parents, and are *not* therefore excluded from the parenting function on her model. The problem, she says, is that ‘the law is prone to elevate genetic parenthood above all other types of parenting’,⁴⁵¹ whereas in her own view ‘[of] all the ways to be a parent, none is more significant and important than producing the social bonds of care and nurturing, or social parenthood.’⁴⁵² Since men share this ability with women, ‘separating sex from pregnancy in no way impinges upon men’s interest in their empowerment as progenitors.’⁴⁵³ Rather than undermining the parental responsibility of men, therefore, ‘separating sex from pregnancy puts the reproductive picture in focus by highlighting men’s roles as genetic and social parents and underscoring the relationship between the fetus and the woman during pregnancy parenthood.’⁴⁵⁴

For McDonagh, the necessity of separating sex from pregnancy arises from the need for a woman to be able to say that, although she may have consented to the act of sexual intercourse which preceded her pregnancy, she nonetheless refuses to consent to the presence of the foetus in her body. Turning this on its head, however, a man could invoke the language of consent and the separation of sex from pregnancy to claim that, while he consented to engage in sexual intercourse with a woman, he did not consent to become either a genetic, or a social parent. If having sex should not lead to legal obligations for a woman, why should it for a man? Why should a man be obliged by law to provide financial or other support for a child that, on McDonagh’s analysis, he did not ‘cause’ or ‘create’? Why should a woman, by consenting to a pregnancy relationship with a foetus, be able thus to impose legal obligations on a man, regardless of *his* consent to parenthood? McDonagh responds to this objection rather weakly, saying that:

⁴⁵⁰ *Ibid.* at 59

⁴⁵¹ *Ibid.* at 58; see the case of *Leeds Teaching Hospitals NHS Trust v Mr & Mrs A* [2003] 1 FLR 412 for evidence that this is equally true in the UK.

⁴⁵² *Ibid.* at 59

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.*

The flaw here is the failure to recognize that the Constitution allows the state to intrude upon a person's economic assets with greater latitude than upon a person's bodily integrity and liberty.⁴⁵⁵

This is wholly unsatisfactory as an answer, however, since state intrusion must always have *some* form of justification in a liberal democracy, and McDonagh's insistence that the foetus is the only legal cause of pregnancy divorces the father's sexual act from any subsequent pregnancy and child, thereby denying the state *any* justification for impinging on his finances, since no legal link exists between the man and the pregnancy, or between the man and any child that may eventually be born.

Why insist, then, that a woman's consent is necessary before *her* legal relationship with the foetus (and later the child) can be established, if a foetus, by implanting itself in the uterus of a woman, may coerce a *man* into a legal relationship with it? The problem here is that, whereas McDonagh identifies three types of parenthood, she only recognises the relevance of consent in the context of pregnancy, or gestational parenthood. Consent is not an issue in the two sorts of parenthood which may apply to men. Following an act of consensual sexual intercourse, on McDonagh's model, women have the ongoing ability to withdraw their consent and avoid the responsibilities of parenthood. Men, on the other hand, have no corresponding opportunity to consent, or refuse to consent, to become a parent. As such, McDonagh's model is discriminatory and endows women with the power to decide, for men, whether or not they will become parents. This power incorporates *both* the right to prevent a man from developing a relationship with a child he wants, and the right to force parenthood on a man who does not wish to be a father.

Reviewing McDonagh's claim that the law 'elevates' genetic parenthood above gestational and social parenthood, it is now possible to respond that, at least for the purposes of attaching parental responsibility, genetic parenthood is the *only* stage at which both men and women can be held to have consented to become parents, without discriminating unfairly

⁴⁵⁵ McDonagh, *My Body, My Consent* at 1107

between the genders by endowing women with power over men's parental identity.

4.4.2.3. *Implications for wrongful pregnancy*

At present, actions for wrongful pregnancy can be brought against 'either a physician who incompetently sterilizes a person or a man who rapes a woman.'⁴⁵⁶ One consequence of McDonagh's approach is that the current grounds for wrongful pregnancy actions would be undermined, or even disappear; neither a man nor a surgeon can be held responsible, legally, for a pregnancy that occurs subsequent to rape or incompetent sterilisation if the foetus alone 'causes' the pregnancy in the legal sense. It is not available to McDonagh to appeal to the fact that, in each of these scenarios, the woman has not consented to expose herself to the risk of pregnancy, since McDonagh contends, elsewhere, that the fact that a woman *has* chosen to expose herself to such a risk is *irrelevant* for the purposes of establishing wrongfulness of pregnancy. As such, while the rapist may be held criminally responsible for the act of rape, and the surgeon may be liable in civil law for medical negligence, the ground of 'wrongful pregnancy' will not be available as a basis for any civil action against either of them, and nor will pregnancy be able to be considered as a factor aggravating the crime of rape. Indeed, *no-one* can be held liable for *any* instance of wrongful / nonconsensual pregnancy on McDonagh's account, since the agent which causes every pregnancy – the foetus – lacks mental competence. The foetus may be destroyed, therefore, but not held responsible. This extinction of responsibility should give cause for concern, since McDonagh is, on her own analysis, identifying a significant harm, suffered exclusively by women, for which no party may ever be held responsible.

⁴⁵⁶ *Ibid.* at 1096.

4.4.3. Consent

4.4.3.1. Is pregnancy the kind of intrusion to which the law would permit consent?

As shown earlier, McDonagh discusses at length the nature of foetal aggression and the justification of deadly force in self-defence. She does not, however, devote much of her discussion to the question of the *nature* of consent, what form it might take, and why consent to pregnancy ought to be possible despite her characterisation of pregnancy as analogous with assault, rape or slavery.

As McDonagh describes it, pregnancy is an horrific attack. Given that she characterises it as an assault, and given the severity that she ascribes to it, we are entitled to ask whether the law would in fact regard consent to such an ‘act’ as valid under any circumstances. If consent is necessary in the context of sexual intercourse, McDonagh’s argument runs, then it must be all the more necessary in the context of pregnancy, since pregnancy is even more invasive than intercourse in a number of ways. The physical impact is much more prolonged, the physical changes effected upon the body of the woman are extensive, and the woman is placed, potentially, in a health- or life-threatening situation. However, it is precisely this seriousness and enormity of effect which raises doubts about whether pregnancy, as described by McDonagh, is the kind of thing to which consent could reasonably be given.

If, as I will suggest presently, it is possible to treat all pregnancy, at least initially, as non-consensual, and therefore ‘wrongful’, on McDonagh’s model,⁴⁵⁷ then it follows that *all* fetuses are inescapably ‘rapists’, albeit without *mens rea*. Can an attack analogous to rape really be validated by *post factum* consent? If pregnancy begins as an uninvited, intrusive ‘rape’, how can the addition of consent transform it into something benign, even wonderful?

⁴⁵⁷ See *infra*, para. 4.4.3.2

In Scots criminal law, for example, courts have held that consent is no defence to a charge of assault. In Scotland, in the case of *Smart v HM Advocate*,⁴⁵⁸ Lord Justice-Clerk Wheatley held that:

If there is an attack on the other person and it does done with evil intent, that is, intent to injure and do bodily harm, then, in our view, the fact that the person attacked was willing to undergo the risk of that attack does not prevent it from being the crime of assault.⁴⁵⁹

Of course McDonagh recognises that the foetus possesses no ‘evil intent’ (as she puts it, ‘the fetus is innocent...of conscious intentions’) and does not suggest for a moment that we are dealing with *criminal* conduct.⁴⁶⁰ Nevertheless, since pregnancy is characterised in her model as a massive intrusion, it is pertinent to ask whether it is the type of intrusion which could be rendered benign by the presence of consent. McDonagh certainly does not consider her model to be incompatible with benign, ‘Good Samaritan’ pregnancy or with the moral ideals of nurturing, caring and relationships generally. She attempts to demonstrate this possibility of ‘consensual pregnancy’ by way of yet another analogy, between pregnancy and live organ donation.

McDonagh points out that the law permits persons to consent to considerable physical intrusions which will leave them permanently physically depleted and which may also place their health in great future danger, in order to benefit another person. Although the emotional benefit of knowing one has helped either to save the life of another person or to improve their quality of life dramatically cannot be ignored, nonetheless donating one’s kidney to a patient in need of a transplant is, unquestionably, of no physical benefit to the donor. Indeed, such a donor has endangered him or herself quite considerably in that any future disease or failure of the remaining kidney will now pose a much greater threat than it might have done had he or she not donated. This analogy is potentially very promising as a support for

⁴⁵⁸ 1975 SLT 65

⁴⁵⁹ *Ibid.* at 66

⁴⁶⁰ McDonagh, *Breaking the Abortion Deadlock* at 96

the idea that pregnancy *can* be consensual despite its intrinsically invasive and physically-dangerous nature.

Certainly, if the law permits us, under certain circumstances, to consent to have our bodies massively invaded and permanently depleted or endangered in order to provide sustenance to another, it seems likely also that the law will permit women to consent to donate their bodies to fetuses temporarily. However, this is where the analogy begins to break down. The law allows one person to consent to an invasion/harm (chiefly) for the benefit of another person; however, as has already been shown, McDonagh has failed to establish that the foetus is really a 'legal person' in the relevant sense of having the status, rights, and dignity of a person under law. This is where her ciphers concept of the legal personality of the foetus lets her down; she has concentrated only on the *neutral* aspects of foetal personality (how the personhood of the foetus does not negate the right of the woman to defend herself) and the *negative* aspects (how the foetus may plausibly be regarded as an 'attacker', an agent of harm). Ultimately, her accommodation of foetal personality has not been authentic, since the legal personhood of the foetus is not central to her thesis, and is not necessary for the application of the two main premises of her model: the foetus as the cause of pregnancy; and the right of the woman to refuse her consent to a relationship with the foetus, and to back up her refusal by the use of deadly force.

A brief expansion of the organ-donation analogy demonstrates this quite clearly. A woman may undoubtedly give her consent to surgery to remove one of her kidneys for donation to her daughter; however, could a childless woman with a family history of hereditary kidney disease opt to have a healthy kidney removed and kept in storage in case a future child required a transplant? It seems highly unlikely that such a procedure would be countenanced by medical practitioners, or that the woman's informed consent would be sufficient to establish its permissibility. Why? It could be argued that in the former case, there is a known need for the organ, and compatibility has been established, while this is not the case in the latter scenario. However, even if we expand the example of the childless woman such that she knows for certain that (i) she is fertile and intending to become pregnant, (ii) any child she bears will definitely be affected by the hereditary disease, and (iii)

she would be a compatible donor, it is still difficult to imagine the law supporting her in her desire to have her healthy kidney removed, thereby debilitating herself and placing her life in danger.

I would suggest that the relevant difference between the two scenarios sketched above is that in the first scenario, the intended beneficiary is an existing person, whereas in the second scenario there is no person yet in existence who could benefit from the samaritanism being proposed. McDonagh's account of pregnancy is more analogous to the second scenario than the first, since the foetus is not (yet) a legal person in the relevant, positive senses; it is not recognised as a being with a life as valuable as that of the woman donating her body to it, and thus endangering herself for its benefit.

My claim here, then, is that, although the law will occasionally allow one person to volunteer to be endangered in order that another person may benefit, this permission is based upon assumptions about the equal value of human lives and the social valuing of samaritanism when practised *between persons*. If persons attempt to practise purported acts of 'samaritanism' by endangering or disadvantaging themselves for the benefit of a creature that the law does not regard as the moral equivalent of a person, then it is doubtful whether this would be regarded as authentic samaritanism at all. Of course, the law cannot always intervene to prevent a human being from risking their life to save a pet; however, we can be reasonably sure that such behaviour would not be encouraged. It is likely that a person wishing to donate his or her kidney to an animal (were that biologically-viable), or to a child not yet in existence, would be dissuaded and ultimately thwarted by the refusal of the medical profession or the courts to support such a sacrifice, despite the presence of clear and authentic consent. In short, samaritanism must benefit someone, and it is doubtful whether the foetus would count as 'someone' on McDonagh's model, given the emptiness and negativity of the 'personality' she ascribes to it.

Although McDonagh fails in her own attempts to establish the possibility of benign pregnancy, however, there are other reasons to suppose that, even if pregnancy is a massive intrusion, it is the kind of intrusion which can be rendered benign and even valuable by consent. In the famous British

case of *R v Brown*⁴⁶¹ the issue under consideration was whether consent ought to be recognised as a defence to charges of assault in respect of injuries inflicted in the course of sado-masochistic sexual encounters. In his judgment, Lord Lowry opined that ‘it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason’⁴⁶² and that sado-masochistic activity ‘cannot be regarded as conducive to the enhancement or enjoyment of family life or conducive to the welfare of society.’⁴⁶³ However, as Lord Templeman noted, ‘the courts have accepted that consent is a defence to infliction of bodily harm in the course of some lawful activities.’⁴⁶⁴

In his article, *Consent, Sado-Masochism and the English Common Law*,⁴⁶⁵ Brian Bix discusses the kinds of activity to which, although potentially-injurious, consent may nonetheless be given:

In England, there are a variety of types of physical attacks or intrusions which, as a matter of common law, cannot constitute a criminal assault, usually because of some type of consent by the person being assaulted: boxing, “contact sports”, surgery, and rough horseplay.⁴⁶⁶

Bix analyses the ability of consent to render intrusions lawful by reference to a number of criteria, the last of which is ‘the moral or public value of the activity in question’. Although Bix cautions that this criterion is ‘susceptible to bias in its application’⁴⁶⁷ and should therefore ‘be considered only at the end, after the strong presumption in favor of liberty and autonomy have [sic] been considered’⁴⁶⁸, he concedes that it appears frequently ‘in one form or another, in the relevant judicial opinions.’⁴⁶⁹

⁴⁶¹ [1994] 1 A.C. 212 (HL)

⁴⁶² *Ibid.* at 254

⁴⁶³ *Ibid.* at 255

⁴⁶⁴ *Ibid.* at 234

⁴⁶⁵ 17 *Quinnipiac Law Review* 157 (Summer 1997)

⁴⁶⁶ *Ibid.* at 164

⁴⁶⁷ *Ibid.* at 174

⁴⁶⁸ *Ibid.* at 175

⁴⁶⁹ *Ibid.*

The 'public value' criterion does seem to go to the very heart of determining which behaviours will and will not be rendered lawful by the presence of consent, despite Bix's insistence that other criteria should predominate. Monica Pa discusses how the consent defence operates to privilege certain 'valuable' behaviours over other forms of activity which are not considered to have social value when she writes that:

If actual bodily injury occurs, no consent defence is [normally] available, because a breach of the peace occurred, and the State has a compelling interest in punishing this behaviour. The individual cannot consent to an injury inflicted against the community. The consent defense is an exception to this general rule where public policy deems it worthy to protect a socially desirable activity.⁴⁷⁰

The key element in deciding whether or not something is the kind of activity to which consent is possible, then, would seem to be the value which society attaches to it. The judges in *Brown* regarded such determinations of value as matters of policy which are for the legislature to decide.⁴⁷¹ The implications for McDonagh's model of pregnancy are clear. First, consensual pregnancy would undeniably be regarded as 'conducive to the enhancement or enjoyment of family life' and 'conducive to the welfare of society', in Lord Lowry's words. Furthermore, it would certainly be considered to be 'in the public interest' for women to consent to pregnancy at least *some* of the time. Finally, given these considerations, we can conclude with some confidence that Parliament and the courts, having recognised the 'moral and public value' of pregnancy and childbirth, would be willing to regard a woman's consent to pregnancy as rendering the pregnancy relationship lawful. As such, it is finally possible to refute the objection that McDonagh's model, in characterising pregnancy as an attack, leaves no scope for consensual, benign instances of pregnancy.

⁴⁷⁰ Monica Pa, 'Beyond the Pleasure Principle: The Criminalization of Consensual Sadoomasochistic Sex' 11 *Texas Journal of Women and the Law* (Fall 2001) 51

⁴⁷¹ See, for example, Lord Jauncey in *Brown* at 245-246

However, all of this means only that pregnancy *could* be benign *if* consent were actually possible, practically-speaking. I turn now to consider the possibility that this is not the case.

4.4.3.2. Is 'consent to pregnancy' really possible?

The case of *R v Olugboja*⁴⁷² established the difference between consent and 'mere submission':

There is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent.⁴⁷³

Since, on McDonagh's model, the woman can do nothing to *prevent* the foetus from attacking her by implanting itself in her uterus, 'consent to pregnancy' is only possible retrospectively, once the woman is already pregnant. She cannot consent to *become* pregnant, only to *remaining* pregnant. Even then, her right to withdraw consent at any moment remains, so that it will only be possible to describe a pregnancy as 'consensual' with any real confidence once the pregnancy is over. Moreover, no mutuality is possible. Since the foetus is characterised as an aggressor, we are not dealing with any kind of metaphorical 'agreement' or 'arrangement' between parties; we are being asked to understand pregnancy as a relationship between two parties wherein one party has the right to consent or refuse consent, but for the other party the issue of consent never arises.

In other areas of law, 'consent' means something more than merely submitting to a pre-existing situation; for example, in medical law the ideal of 'informed consent' recognises the right of patients to agree to or refuse medical treatment, having been given all the relevant information and been allowed the chance to weigh it up and arrive at a decision *before* treatment commences. The patient's right to consent entails a duty on the part of healthcare professionals to seek consent before attempting to provide

⁴⁷² [1982] QB 320

⁴⁷³ *Ibid.* at 332

treatment. In contract law, similarly, parties to an agreement consent to the contractual terms *in order* for the contract to be constituted; they do not merely submit to the terms and thus acknowledge the agreement retrospectively. In these examples, to say that someone has consented, either to medical treatment or to the terms of a contract, implies that they had the option *not* to consent.

By contrast, in the context of pregnancy as McDonagh construes it, the pregnant woman has never had the option to give *prior* consent – she cannot prevent the foetal ‘attack’ and the resulting pregnancy by refusing to consent to it. In addition, ‘consent’ in the contexts of medical law and the law of contract refers to a relationship which, while not necessarily equal, has some possibility of mutuality. There is more than one active ‘party’ with rights and / or responsibilities. In pregnancy, on the other hand, McDonagh asks us to regard as ‘consent’ a situation wherein one ‘person’ involuntarily imposes a condition upon another, who may, after the fact, choose either to submit to the condition or repel it by destroying the accidental ‘aggressor’. The woman’s ‘right to consent’ is not reflected in any duty on the part of the foetus to seek her consent before implanting itself in her uterus – the very idea is, of course, absurd. It is difficult, therefore, to see how this situation can be likened to ‘consent’ as that concept normally operates in other areas of the law.

A related problem is the distinction between coercion and control which emerges from the slavery analogy McDonagh employs. The problem is that the legal definition of slavery offered by McDonagh herself refers not to ‘coercion’, but to ‘control’ – there is no mention of the ‘will’ the slave, or of lack of consent⁴⁷⁴. Under this definition, then, slavery is still slavery even if the slave ‘consents’ to it. This is so because, although coercion always entails an element of control, the reverse is not the case; control need not necessarily be coercive. This distinction between coercion and control is essential to the relevance of consent, a concept which is, of course, fundamental to McDonagh’s model. McDonagh describes pregnancy as an attack; it always begins as coercion, but this element of coercion may subsequently be removed by the addition of the woman’s consent. Control, on the other hand, is

⁴⁷⁴ McDonagh, *Breaking the Abortion Deadlock* at 74

unaltered by consent, even taking into account the Rousseauian notion of ‘agreeing to be bound’; one who agrees to be bound is bound – is *controlled* – nonetheless.

So how apt is the slavery analogy? Could the willingness of a slave to be a slave render the ‘slavery relationship’ legally-benign on account of its consensuality? If not, and if the analogy between pregnancy and slavery is a fair one, then why is it that the consent of a woman to be pregnant can render the pregnancy relationship benign? In fact, the analogy with slavery threatens to undermine the power of ‘consent’ in McDonagh’s model by casting doubt on the notion of ‘benign, consensual pregnancy’ altogether. In Western legal systems, it is safe to say, slavery would never be recognised as a legitimate relationship between consenting parties. We are not permitted to ‘contract out’ of our fundamental human rights. If pregnancy were to involve a similar alienation of personhood – even a temporary one – the law would struggle to recognise the possibility of *benign* pregnancy.

These factors, taken in combination, mean that speaking about ‘consent to pregnancy’ or about a particular pregnancy as ‘consensual’ or ‘nonconsensual’ seems inappropriate. Rather, when the foetal ‘attack’ meets no resistance from the woman, it seems more appropriate to describe her lack of resistance as ‘submission’, not consent. This is problematic mainly because it undermines the possibility of consensual pregnancy. But it is also problematic in another way. If pregnancy cannot be described as ‘consensual’ until after it is complete, then all pregnancies are ‘voidable’ relationships which may be terminated at any point, should the woman’s feelings change. This may have serious social consequences for our understanding of the nature of pregnancy. Pregnant women themselves, and society at large may become wary of treating even a well-established and apparently consensual pregnancy as anything other than a ‘conditional’ good, with family, friends and the woman herself all reluctant to invest any emotional energy or expectation in something that may at any time be recharacterised as something coercive and therefore undesirable.

4.4.3.3. *The problem of legitimation*

A related criticism is that McDonagh's model equates 'consensual' with 'good', or 'valuable'. I have already argued that her notion of 'consent to pregnancy' is closer to *submission* than to our ordinary understanding of consent. Some commentators have responded by asking: isn't the *authenticity* of consent what really matters?

Robin West notes that 'liberalism rests heavily, and in some versions exclusively, on the moral significance of consent.'⁴⁷⁵ While she acknowledges that it is proper to condemn coercive and non-consensual transactions, West also notes the danger that 'the consensuality of a transaction, transfer, event, distribution, or social system, in liberal societies, inexorably comes to be viewed as not only a necessary condition of its justice or value, but a sufficient condition as well.'⁴⁷⁶ The emphasis on consent above all else, she writes, means that 'that which is consensual comes to be seen as both legal and good – consent comes to be our moral marker of what we value and should value, as well as our legal marker of what we criminalize.'⁴⁷⁷ West is keen to show that consensual relationships can be damaging too:

Women consent to events and transactions and arrangements all the time – day in and day out – that do us considerable harm: from marriages, to love affairs, to one-night stands, to unequal pay for comparable work, to sexually-harassing work and school environments, to second shifts in the home, and to mommy tracks at work.⁴⁷⁸

We must therefore look beneath the consensual surface of relationships to discover whether the voluntariness they embody is authentic or not. West argues that caregiving such as that undertaken in pregnancy must be *authentically*-consensual in order to be 'good' and not harmful; McDonagh's model, she claims, is guilty of over-emphasis on the *superficialities* of

⁴⁷⁵ West, *op. cit.*, at 2137

⁴⁷⁶ *Ibid.* at 2138

⁴⁷⁷ *Ibid.* at 2139

⁴⁷⁸ *Ibid.*

consensuality at the expense of this need for real voluntariness in the giving of care.⁴⁷⁹

These are powerful arguments. It is easy to imagine a number of reasons why women might submit to a pregnancy other than because they are undertaking the responsibility of caregiving with authentic voluntariness. The physical and emotional pressure exerted by the pregnancy itself can be tremendous. Hormonal fluctuations, feelings of responsibility or even guilt for causing the pregnancy (however misplaced McDonagh would regard these as being), social pressures and the influence of traditional norms of pregnancy, motherhood and femininity could combine quite powerfully to inhibit the ability of a woman to say 'no' to the pregnancy relationship. As Monica Pa comments, 'liberal formulations of consent ignore how patriarchal institutions create inequalities of power that make voluntary consent impossible...the question is not whether consent existed, but rather, the hows and whys of consent.'⁴⁸⁰

4.4.4. Miscellaneous criticisms

4.4.4.1. Late abortions

'[Another] problem with McDonagh's theory', according to Judith Scully, 'is that it would permit abortions even in the final weeks of pregnancy – a result that the majority of the American public probably would not support.'⁴⁸¹ Scully elaborates the point as follows:

McDonagh appears to argue that a woman's right to withdraw her consent to pregnancy can be exercised at any time, even in the ninth month of pregnancy. This conclusion seems extreme, and it fails to adequately address the fact that, at some point in time, a fetus becomes viable and no longer needs to rely on a woman's body for survival. If a fetus is a person and it has a right to life, then, at the point at which it

⁴⁷⁹ *Ibid.*, *passim*

⁴⁸⁰ Pa, *op. cit.* at 88-89

⁴⁸¹ Scully, *op. cit.* at 147

becomes viable, it would seem appropriate to weigh its right to life against the continuing intrusion upon the woman's bodily integrity...Thus, at the point of viability, it seems reasonable to limit a pregnant woman's ability to decide to terminate a pregnancy because she no longer consents to being pregnant.⁴⁸²

There are a couple of problems with this argument. First, although McDonagh treats the foetus as a 'legal person', she does so only in a negative sense, and does not ascribe to it all of the incidents of legal personality usually applied to human beings, such as a right to life. The problems inherent in her 'cipherous' notion of foetal personality are discussed under heading 4.4.1.4. Given that she does not recognise the foetus as a person in the strong sense of having a right to life, then, it is fair to assume that McDonagh would not accept any need to weigh the competing rights of foetus and mother at the point of viability.

Another problem is that, even if we *were* to accept that the foetus has a right to live, and that this right is not limited by its dependence upon the body of the pregnant woman after the point of viability, in order to grant it independent existence it must first be delivered, either vaginally or by caesarean section. If, on McDonagh's model, a woman cannot be forced to undergo the intrusion of *pregnancy* against her will, then surely by the same logic she cannot be forced to undergo the intrusions of serious surgery or childbirth unwillingly? If a woman chooses abortion post-viability it will be problematic to try to force her to undergo birth or caesarean delivery instead; the procedures are different and her right to consent to medical treatment surely means that she can not be compelled to undergo one procedure instead of another.

A potential counterargument is that, in the United States, the foetus is emerging as a 'second patient' in medical law, raising the issue of balancing the woman's refusal to consent to a caesarean against the foetus's right to life as a serious possibility. This is something that my own proposed model of pregnancy (which I call the 'property model' and which will be developed in

⁴⁸² *Ibid.* at 147-148

the following chapter) resolves. In the UK, the problem does not arise because several important cases have clarified the area, putting beyond any doubt the right of the competent pregnant woman to consent or refuse consent to medical treatment, meaning that a competent patient cannot be compelled to undergo a caesarean section against her will.⁴⁸³

4.4.4.2. *Women's well-being*

Judith Scully argues that:

By framing abortion as an act of war, McDonagh suggests that a woman's primary health concern should be elimination of the fetal attack, not her overall well-being. Within the self-defense framework, what right does a woman have to demand competent health care? In our attempts to advance the abortion debate, we must not lose sight of the fact that abortion is a medical procedure that is supposed to further the health interests of the woman.⁴⁸⁴

In other words, McDonagh's focus on repelling the foetal 'attack' rather than on the welfare of women generally, McDonagh's analysis ignores the need to secure state provision of *safe* abortions and good-quality backup services such as pre-abortion counselling and aftercare. Scully points out that the 'consent model' is incapable of discouraging certain things which are dangerous for women, such as unfettered access to abortion and repeated abortions, and criticises it on the basis that it overlooks 'the risk that women might use abortion as a regular form of contraception when indeed it should be used only as a last resort.'⁴⁸⁵

This particular criticism of the consent model is probably unwarranted. It is not the job of jurisprudence to educate women about their reproductive health, and Scully herself admits that the law should not be used to limit the

⁴⁸³ The leading case is *St George's Healthcare NHS Trust v S* (see *supra* note 62)

⁴⁸⁴ Scully, *op. cit.* at 149

⁴⁸⁵ *Ibid.* at 148

number of abortions a woman may have.⁴⁸⁶ Health education programmes aimed at encouraging women to practise contraception or abstinence rather than relying on abortion as a means of dealing with unwanted pregnancies are of course vital; however, there is no reason to suppose that the adoption by the courts of a consent model rather than the orthodox conflict model would be inimical to the success of such programmes. McDonagh's model certainly provides *legal* justification for abortion whether it be the first or fifth abortion a woman seeks; however, it is a fallacy to suggest that because the law permits greater access to abortion that women who are receptive to health education will not choose to avoid unwanted pregnancies in other ways. Just because women have a legal right to abortion does not mean that they will simply throw caution to the wind, become pregnant numerous times and seek repeated abortions; there are overwhelming health reasons (and for many women, strong moral reasons) not to do so, and these reasons are likely to be at *least* as influential to women planning their reproductive lives as the legal rights they possess. As Scully notes, legal theory will inevitably (and very rightly) be complemented by measures designed to shape cultural attitudes and patterns of behaviour, since '[c]ommunity advocacy and public education are the keys to all successful social movements.'⁴⁸⁷

The health factors involved in pregnancy, and the medical advice which is given accordingly, will be the same *whatever* model the courts adopt; as such, public bodies' and healthcare professionals' duties to provide information and advice on reproductive health are not threatened by the prominence of one academic theory of pregnancy or another. The purpose of legal models of pregnancy is primarily to provide better ways for lawyers and lawmakers to understand and adjudicate maternal/foetal issues; such models are addressed in the first place to legal academics, judges and practitioners who are concerned with issues of legal coherence, clarity, and justification. They seek to provide frameworks for *judicial* decision-making, not for decision-making by women faced with unwanted pregnancies.

When deciding whether or not to seek an abortion, a pregnant woman is likely to be concerned with her own health, perhaps the health of the foetus,

⁴⁸⁶ *Ibid.*

⁴⁸⁷ *Ibid.* at 149

her future prospects of motherhood, possibly her relationship with her partner and her extended family, her existing children, her financial situation, her career, and many other factors. When legislatures decide what abortion laws to have, or when judges decide how to dispose of a particular case involving maternal/foetal issues, it would be paternalistic of them to concern themselves with these factors in the same way. Public policy considerations are likely to play a part in their deliberations, but it would be inappropriate for a judge to decide a case on the basis that he thought a woman was simply wrong to choose an abortion in her circumstances. The issues and responsibilities of judges and the issues and responsibilities which pregnant women must contend with are quite different. Because of this, it is perfectly possible to endorse a legal model which permits late abortions and repeated abortions so long as those educating and counselling women warn them of the dangers of taking full advantage of these legal rights.

4.4.4.3. Masculinisation of the foetus

Despite McDonagh's assurances that her model avoids 'dehumanising' the foetus, the very way her model operates, and her use of language, combine to *masculinise* the foetus, regardless of its actual biological gender. As noted above, McDonagh has analogised wrongful pregnancy to the crime of rape, thus analogising the foetus to the rapist – the paradigmatic perpetrator of masculine violence on women.⁴⁸⁸ Elsewhere, she compares the foetus to a 'slavemaster'.⁴⁸⁹

While she masculinises the foetus, however, she simultaneously feminises pregnancy. One aim of McDonagh's thesis is to redefine pregnancy as a relationship between a woman and a foetus – a relationship in which the male progenitor exists, at best, as a shadowy figure, either purely historical (the 'genetic parent') or in a kind of suspended animation until the birth of the child, when 'social parenthood' can attach to him. This banishment of the masculine is evident in her discussion of how pregnancy begins, where McDonagh refers to the precursor of the foetus (prior to implantation) as the

⁴⁸⁸ See *supra*, notes 346, 358

⁴⁸⁹ See *supra*, notes 365, 366

‘fertilised ovum’, choosing this term over ‘product of conception’, ‘conceptus’, ‘cytoblast’, ‘zygote’ or any of the other *ungendered* terms available to her. Of all the alternatives, ‘fertilised ovum’ is the most effective in de-masculating the event of conception and the beginnings of life. Pregnancy begins, on McDonagh’s model, quite literally *on feminine terms*.

There is a palpable tension in the juxtaposition of the feminine terminology of ‘fertilised ovum’ with the masculine terminology of penetration, invasion and injury used to describe the *behaviour* of this entity. In its behaviour, the foetus is decidedly masculine, performing the stereotypically patriarchal role of colonising, terrorising and depleting a woman. The language McDonagh employs in these parts of her analysis echo the idea of the foetus-as-monster, which appears elsewhere in the feminist canon.

In a fascinating essay, Ernest Larsen discusses Mary Shelley’s *Frankenstein* as a metaphor for pregnancy.⁴⁹⁰ At the centre of the narrative, he tells us, is a ‘man-created monster’,⁴⁹¹ the ‘incarnation of phallic violence’.⁴⁹² Larsen writes:

the tale exteriorizes pregnancy, making it into a momentous, exacting and, as described, incredibly disgusting feat that occurs in the laboratory of the young manly natural philosopher Frankenstein rather than in the natural laboratory of the womb.

Larsen claims that Shelley is making a conscious link between ‘fetality’ and ‘fatality’:

Mary Shelley...can be credited with creating (giving birth to) the image of the fetus as monster, the fetus as revived corpse, the fetus as a pile of used body parts.⁴⁹³

⁴⁹⁰ Ernest Larsen, ‘The Fetal Monster’, in Lynn M. Morgan and Meredith W. Michaels (eds.) *Fetal Subjects, Feminist Positions* (Philadelphia: University of Pennsylvania Press, 1999)

⁴⁹¹ *Ibid.* at 237

⁴⁹² *Ibid.* at 238

⁴⁹³ *Ibid.* at 238-239

He goes on to describe the 1931 film of the novel as ‘fetal horror’, and quotes Garrett Hardin’s reference, in his 1974 book *Mandatory Motherhood*, to uses of foetal imagery by the pro-life movement:

‘Suppose the six-foot-tall projected picture of a twenty-four-week-old embryo came to life, stepped down off the screen, and walked toward you would probably run screaming from the room. At that size the creature would look less like a human being than it would like the Man from Mars constructed for a horror movie.’ Hardin connects the monstrosity of pro-life fetal representation to horror movies.⁴⁹⁴

Having discussed *Frankenstein* and other Hollywood films in which women give birth to monsters, Larsen remarks:

The popularity of such images of the fetus as monster seems a repeated confirmation of what fatality might often feel like – an invasive experience of the monstrous – to the pregnant subject. Pregnancy, in such representations, subjugates the thematics of horror, contains the fantasy, nurtures it. That which is unknown or unknowable, unnamed or unnameable, unstable, but ever more insistent, hidden from sight yet imperiously present to the body, is that thrilling territory of fear that marks out the site of horror. And all these qualities mark the fetus, *every fetus*, as a potential monster...Fatality contains horror, the expressive extremity of feeling that horror films sanction.⁴⁹⁵

Larsen concludes by reassuring the reader, lightheartedly, that ‘the fetus – in the overwhelming number of cases – is not a monster. In the overwhelming number of cases it first has to be delivered into the world and then grow up to become one.’⁴⁹⁶ Although Larsen seeks here to distance himself from the claim that ‘fatality’ equals monstrosity by stating that this is not so ‘in the

⁴⁹⁴ *Ibid.* at 239, citing Garrett Hardin, *Mandatory Motherhood: The True Meaning of “Right to Life”* (Houghton Mifflin Co, 1974)

⁴⁹⁵ *Ibid.* at 240-241

⁴⁹⁶ *Ibid.* at 249

overwhelming number of cases', he implicitly acknowledges that in some cases, the foetus *is* monstrous. This is hardly the kind of sentiment that requires no further justification, and while the rest of Larsen's essay contains plenty of evidence that many representations of the foetus contain elements of the monstrous, nowhere does he provide any adequate explanation of *why* the foetus is so represented. He comes close a couple of times: first, when he traces the origins of Mary Shelley's horrific 'metaphor for pregnancy' to events in her own family history such as death in childbirth and infant mortality and to the general dangers inherent in pregnancy at the time when she lived and wrote; the other point at which an explanation seems to be close is when Larsen suggests that Hollywood representations of pregnancy (and its aftermath) as horrific might reflect 'what fatality might often feel like...to the pregnant subject'.

At any rate, Larsen's concluding minimisation of foetal monstrosity is unconvincing given that elsewhere he has claimed that 'the fetus, *every fetus*, [is] a potential monster' and speculates that pregnancy 'might *often* feel like [Hollywood horror narratives]...to the pregnant subject' (my emphasis).

McDonagh's model, and Larsen's discussion, reveal that 'personification' of the foetus as a 'separate entity' with personhood or person-like characteristics does not always work to the foetus's advantage. Ascribing person-like attributes to foetuses and embryos does not necessarily entail that they will be treated like born persons and afforded greater legal protection than is currently the case. On the contrary, they may be regarded as malign agents of injury – as 'monsters', even – to be repelled using deadly force. Claiming that the foetus ought to be regarded as a legal person may, in the end, turn out to be a bad strategic choice for opponents of abortion.

4.5. Conclusions

McDonagh's 'consent model' provides an 'innovative and provocative...new way of thinking about women, pregnancy, and abortion rights'⁴⁹⁷, and several elements in her approach represent valuable contributions to the literature on

⁴⁹⁷ Scully, *op. cit.* at 143

legal interventions in pregnancy. In particular, her emphasis on relationships rather than intrinsic moral status is to be welcomed, as it represents a significant shift in thinking which seems to offer legal theory an escape-route from the familiar intractable debates about the metaphysics of personhood and moral status.

Unfortunately, as promising as this approach seems at first, it fails on account of major flaws in the way McDonagh employs such concepts as self-defence, causation and consent. Judith Scully has remarked that ‘McDonagh’s analysis...leaves many questions unanswered’.⁴⁹⁸ In this chapter I have addressed these holes in her thesis, and demonstrated that upon further scrutiny the inadequacies of the consent model become even more apparent. Significantly, the failure of McDonagh’s attempt to discover a ‘purely legal’ way of understanding foetal personhood demonstrates that legal notions of personhood are too ‘thin’ and cipherous to provide solutions to maternal / foetal issues. This means that, if we insist on framing such issues as conflicts of rights and interests, courts will be forced to fall back on the metaphysics of personhood. As was demonstrated in chapter two, even this ‘full-blooded’ version of personhood is incapable of serving as a criterion for moral status in borderline cases, and accordingly, it is incapable of answering the most fundamental questions about the nature and status of the foetus.

In the next chapter, I build on two positive features of the consent model – the focus away from the *nature* of the foetus, and the emphasis on the relationships involved in pregnancy – to construct another alternative to the orthodox ‘conflict model’. I will show that my preferred model, which is based on property, retains the advantages of the consent model and possesses other advantages besides, while solving the problems inherent in the conflict model much more effectively than the consent model can. Unlike the consent model, the ‘property model’ is not a refinement of the conflict model; it is an altogether more radical way of thinking about pregnancy and maternal/foetal issues. Most importantly, the property model does not suffer from the problems which, ultimately, defeat the consent-based approach.

⁴⁹⁸ *Ibid.* at 131

5. The Property Model of Pregnancy

‘If, legally speaking, the foetus is not a person, is it property?’⁴⁹⁹

5.1. Introduction

In this chapter, I elaborate what I consider to be a promising alternative to the problematic ‘conflict model’ of pregnancy: a model of adjudication based on an understanding of pregnancy as a *property* relationship. As I demonstrated in chapter one, the conflict model is unsatisfactory. As I explained in chapters two and three, the problems associated with it are largely due to its dependence on contested ethical concepts: in particular, the concept of personhood, which underpins the conflict model, is incapable of functioning as a determinant of moral status in hard or borderline cases (of which the foetus is perhaps the paradigmatic example); moreover, ‘personhood’ inevitably involves questions of sentience, and the questions of when, if ever, the foetus becomes sentient, and to what extent, are far from settled.

In chapter four I examined the most comprehensive attempt to reinvigorate debate about maternal / foetal issues: Eileen McDonagh’s ‘consent model’ of pregnancy and abortion rights, which claims to ‘break the abortion deadlock’, essentially by refining the conflict model and reframing the relevant conflict as one that takes place between legal persons. Having concluded that the ‘consent model’ fails, ultimately, to resolve the problems inherent in the traditional version of the ‘conflict model’ – and in fact creates many totally new problems – I argue, in this chapter, for the complete abandonment of the conflict model in all its guises, and the adoption of a new ‘property model’ of pregnancy. The property model, I shall argue, has several distinct advantages over traditional or orthodox ways of debating and adjudicating pregnancy: it explains and justifies features which currently appear as inconsistencies or contradictions in the current law, and provides

⁴⁹⁹ Wells and Morgan, *op. cit.* at 438

possible solutions to contested issues such as surrogacy, the ‘rights’ of fathers in decision-making about pregnancy, and the role of the state in setting limits on abortion.

The first stage of my argument here has to be to ask whether it even makes any sense to speak of pregnancy as a property relationship, and of embryos and fetuses as objects of property relationships. Intuitively, it may seem like an absurd or even an offensive idea. However, courts in the United Kingdom have maintained consistently that personhood attaches at birth, and accordingly, they have refused to ascribe legal personality to fetuses or embryos. In a variety of disparate cases, courts have affirmed that under UK law, the foetus has no separate legal existence.⁵⁰⁰ In addition, the Report of the Warnock Committee, published in 1984, states that ‘[the] human embryo *per se* has no legal status. It is not, under law in the United Kingdom, accorded the same status as a child or an adult, and the law does not treat the human embryo as having a right to life.’⁵⁰¹ This being the case, we are entitled to ask, with Wells and Morgan: if embryos and fetuses are not persons in law, what are they? Are they ‘things’? And if they are things, can they be owned?

5.2. What is property?

For those who subscribe to the person / property binary, as I do for the purposes of this discussion, it is possible to define property negatively, as the absence of personhood. On this view, if it has been settled that an entity is not a person, as is the case with the embryo and foetus under United Kingdom law, then according to the binary, it can be an object of property relations. This is so because the person / property binary recognises only two categories of entity: those which are persons, and can form property relations with other persons in respect of ‘mere things’; and those entities which are not persons and can therefore be objects of property relations between persons.

⁵⁰⁰ Such cases include: *St George’s Healthcare NHS Trust v S* (see *supra* note 62) ; *Paton v Trustees of the BPAS* [1979] 1 QB 276; *C v S* [1988] 1 QB 135; *Re F (in utero)* [1988] Fam 122; *Burton v Islington Health Authority* [1992] 3 All ER 833; *De Martell v Merton and Sutton HA* [1992] 3 All ER 820 and *De Martell v Merton and Sutton HA* 3 All ER 833 CA.

⁵⁰¹ Mary Warnock, *A Question of Life: The Warnock Report on Human Fertilisation and Embryology* (Oxford: Basil Blackwell, 1985) *para.* 11.16

Many attempts have also been made to construct *positive* definitions of property, however, and it is important to pay attention to them here, for two reasons. First, because, as will be shown, the person / property binary is not universally accepted; second, because other jurisdictions – notably in the United States - *have* been willing to ascribe personhood, albeit in a limited form, to the foetus. Accordingly, it is insufficient to define the foetus as property simply because it lacks legal personhood; what is needed here is a demonstration that the foetus possesses the *positive* features of property, where these can be discerned, so that two things may be accomplished: first, any attempt to ascribe personhood or quasi-personhood to the foetus can be shown to be erroneous; and second, the foetus-as-property can be asserted in a manner convincing to those who reject the person / property binary.

5.2.1. Definitions of property

Property is a notoriously mercurial concept; in the words of J. W. Harris, ‘any general notion of property is notoriously elusive’⁵⁰². There is no exhaustive list of criteria and no scientific formula for determining whether or not something counts as property. As Laura Underkuffler remarks: ‘Property reflects the ways in which we resolve conflicting claims, visions, values, and histories. Yet, despite this important role, there is remarkably little exploration of what property – as a socially and legally constructed idea – really is.’⁵⁰³ Nevertheless, Harris says, ‘all of us (philosophers, lawyers and ordinary folk) seem to share an intuitive sense of what property is.’⁵⁰⁴ Indeed, legal scholars generally agree that the term ‘property’ refers not to objects themselves, but to the network of legal and social relationships which surround them:

The idea that property is ‘things’ is...easily discredited by lawyers and philosophers for its awkwardness and incompleteness...although the idea of property as ‘things’ commands great cultural and rhetorical

⁵⁰² J. W. Harris, ‘Who Owns My Body?’ *Oxford Journal of Legal Studies* Vol. 16 (1) (1996) 55 at 57

⁵⁰³ Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford: OUP, 2003) at 11

⁵⁰⁴ J. W. Harris, *op. cit.* at 58

power, it fails to reflect the rich meanings of property in social discourse and law.⁵⁰⁵

Citing a famous theorist of property, Underkuffler continues:

In his famous essay, 'The Meaning of Property', C.B. Macpherson states that 'in law and in the writers, property is...*rights*, rights in or to things.' The American Law Institute has adopted this approach, stating in its Restatement that property denotes 'legal relations between persons with respect to...thing[s]'.⁵⁰⁶

We have 'an intuitive notion that property is somehow "thing-based"'⁵⁰⁷. By understanding property as relations between persons in respect of things, we satisfy this intuition without committing ourselves to the 'awkward' definition of property *as* things. Rather, property consists in relationships *about* things.⁵⁰⁸ Yet more support for the view of property as relationships, rather than things, comes from other contemporary legal scholars. Kathleen Guzman writes that: 'Legally, property is not a tangible thing but rather a series of enforceable rights to use, possess, enjoy, exclude, dispose, and destroy that thing. While ownership is usually thought to embody all of these rights, any one of them, standing alone, is property.'⁵⁰⁹ Ngaire Naffine agrees, defining property as follows:

Briefly, property describes a legal relationship *between* persons *in respect of* an object, rather than the relation between a subject and the objects possessed as properties of the person. The invocation of a property right entails the proprietor's exercising control over a thing, the object of property, against the rest of the world which is thereby excluded from use. Property thus defines the limits of my sphere of

⁵⁰⁵ *Ibid.* at 11-12

⁵⁰⁶ *Ibid.* at 12

⁵⁰⁷ *Ibid.*

⁵⁰⁸ *Ibid.*

⁵⁰⁹ Kathleen R. Guzman, 'Property, Progeny, Body Part: Assisted Reproduction and the Transfer of Wealth' 31 *U. C. Davis L. Rev.* (1997) 193 at 212-213

influence over the world; it defines the borders of my control over things and so marks the degree of my social and legal power.⁵¹⁰

Naffine's definition introduces another point of convergence in legal writing about property: perhaps because of the lack of a scientific formula for deciding whether or not a particular situation counts as an example of property, most writers tend to define property not in terms of what it *is*, but in terms of what it *does*, the social and political functions it performs. Jennifer Nedelsky has described the role of property as being to delineate a bounded sphere, 'autonomy', into which the state cannot enter.⁵¹¹ Similarly, Charles Reich describes property as drawing 'a circle around the activities of each private individual...by creating zones within which the majority has to yield to the owner.'⁵¹² Alice Tay writes that 'property is that which a man has a right to use and enjoy without interference; it is what makes him a person and guarantees his independence and security.'⁵¹³ When I come to discuss the advantages of the property model of pregnancy in greater detail, this political function of property will be relevant, since adopting the property model will mean *giving* property to women during pregnancy – a context in which women often suffer from a *lack* of political and social power.

The view of property as relationships has perhaps its most familiar expression in the claim that property is a 'bundle of rights'. Brian Ocepek writes that 'property is usually thought to consist of a "bundle of rights" that a person or persons have in a certain object.'⁵¹⁴ The decision in the United States case of *Moore v Regents of the University of California*⁵¹⁵ supports the view of property as a 'bundle of rights'. The *Moore* court adopted the definition of property contained in the *Encyclopedia of American Jurisprudence*:

⁵¹⁰ Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or The Self-Possessed Man and the Woman Possessed' *Journal of Law and Society* 25(2) (1998) 193 at 197

⁵¹¹ Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' in A. Hutchinson and L. Green (eds.) *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989) at 230

⁵¹² Charles Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733 at 771

⁵¹³ Alice Tay, 'Law, the Citizen and the State' in E. Kamenka, R. Brown and A. Tay (eds.) *Law and Society: The Crisis in Legal Ideals* (London: Edward Arnold, 1978) at 10

⁵¹⁴ Brian M. Ocepek, 'Heating Up the Debate Over Frozen Embryos' 4 *Journal of Pharmacy and Law* (1995) 199 at 217

⁵¹⁵ 202 Cal. App. 3d at 1409, 249 Cal. Rptr. at 498 (1988)

In its strict legal sense ‘property’ signifies that dominion or indefinite right of use, control and disposition which one may lawfully exercise over particular things or objects; thus ‘property’ is nothing more than a collection of rights.⁵¹⁶

For the purposes of the present discussion it is important to note, at this stage, that a property-based analysis concentrates on *relationships* instead of asking, ‘what is this entity’? The implications of this for theorising and adjudicating maternal / foetal issues are far-reaching: if it is, indeed, possible to apply a property model to pregnancy, this would allow us to focus away from questions of intrinsic status and look instead at the relationships surrounding the embryo or foetus *in utero*. This would represent a significant breakthrough, since it would allow the law to avoid interminable debates about the intrinsic nature of the foetus and its moral status and to focus instead on relationships. Regulation of relationships between persons is, after all, the ‘stuff of law’, unlike questions of moral status, which are the stuff of metaphysics.

Of course, ethical and philosophical discussion about the nature of the foetus and the moral status which ought to ascribe to it will continue in parallel with legal debate and adjudication of the relationships surrounding pregnancy; the property model of pregnancy is not intended as an *alternative* to, or an end to, moral debate. The advantage of the property model is simply that it would allow courts to do the work of adjudication in the absence of moral consensus. Since discussions of maternal / foetal issues are characterised by lack of moral consensus, and promise to remain so for the foreseeable future, the necessity of being able to resolve individual cases without such consensus must surely be clear. Robert Lee and Derek Morgan point out that to believe such fundamental moral issues can be solved ‘betrays a misunderstanding of what moral disagreement is about, as much as it does about the political process of legislating life or regulating reproduction.’⁵¹⁷ As Lee and Morgan have observed, ‘there comes a time when fundamental moral

⁵¹⁶ 202 Cal. App 3d at 1415, 249 Cal. Rptr. at 504; citing 63A Am. Jur. 2nd, Property, § 1

⁵¹⁷ *Ibid.* at 23

disagreement collides with public and professional demands for certainty or consistency'.⁵¹⁸ The need to adjudicate *despite* moral controversy is thus a very real and immediate need, and, it is submitted, one that can be met by adopting the property model of pregnancy.

We are now in a position to ask whether embryos and fetuses are the kinds of 'things' which can be the objects of property relationships. Clearly, they are not legal persons, so at least the *possibility* of property arises. However, as acknowledged above, the mere lack of personhood is too meagre a basis for claiming that an entity can be an object of property, both because many writers dispute the idea that persons and property are the only two categories into which entities can be organised, and because a much stronger case can be made by having regard to legal sources and finding *positive* evidence in support of the notion of property-in-the-foetus.

Of course, my thesis is primarily concerned with pregnancy, and its primary claim is that fetuses *in utero* can be objects of property relations. Perhaps unsurprisingly, given its lack of intuitive appeal, this notion has had no airing in the legal literature to date: I have found no reference to property in the foetus *in utero*, either in case law or in academic commentary. This being the case, my examination begins with a look at legal decisions involving *ex utero* (frozen) embryos, noticing an emerging jurisprudence of property in that area and asking whether it can be translated or extrapolated into the pregnancy context.

5.3. Property in the frozen embryo

Before going on to ask whether embryos and fetuses are 'things' capable of ownership, however, it is necessary to note that not all scholars accept the person / property binary. Immanuel Kant distinguished, famously, between two sorts of entity – persons, and those entities which have 'only a relative value as means, and are consequently called things' (which could be objects

⁵¹⁸ Robert G. Lee and Derek Morgan, *Human Fertilisation and Embryology: Regulating the Reproductive Revolution*, (London: Blackstone Press, 2001) at 24

of property)⁵¹⁹ - and many contemporary writers uphold the notion that all entities can be filed under one or other of these two categories. Particularly in literature relating to pregnancy, writers often refer to the 'mixed status' of the foetus as *neither* a person *nor* a 'mere thing'. One of the most widespread justifications for 'mixed status' is the claim that embryos and fetuses are 'potential persons', and thus are entitled to greater moral consideration than other entities which have no possibility of attaining personhood. Marie Fox, one commentator who challenges the dualistic distinction between persons and property, regards the 'mixed status' approach to frozen embryos as 'an emerging international consensus on the legal status of the embryo.'⁵²⁰

In Fox's view, 'mixed status' approaches are misleading and will inevitably be unhelpful since they attempt to define the embryo by reference to two 'ill-fitting' categories, personhood and property. Her solution is to abandon attempts to liken embryos either to persons or to property, focusing instead on what they are 'really' like. According to Fox, the closest metaphor for embryos created outside the body of a woman would be a 'cyborg metaphor' since, like the cyborg, the *ex utero*, cryo-preserved embryo is an organic entity which is dependent, for its survival/ development, either upon technology or upon the body of a woman. Another commentator who rejects the property / person binary is Hugh McLachlan. He writes: 'People and things cannot be classified *exhaustively* as either "persons" or "property"...Many things are neither persons nor property.'⁵²¹ Like Fox, McLachlan favours abandoning the language of personhood and property altogether in attempting to determine how we ought to respond, legally, to such entities:

⁵¹⁹ Immanuel Kant, *The Moral Law: Kant's Groundwork of the Metaphysics of Morals*, trans. H. J. Paton (London: Hutchinson, 1948) at 91

⁵²⁰ Marie Fox, 'Pre-Persons, Commodities or Cyborgs: The Legal Construction and representation of the Embryo' 8 *Health Care Analysis* (2000) 171 at 181. Fox observes that the 'mixed status' approach reflects the approach taken by the Warnock Committee, and is itself reflected in the Convention for the Protection of Human Rights and the Dignity of the Human Being With regard to the application of Biology and Biomedicine ('the Bioethics Convention'), adopted by the Council of Europe in 1996.

⁵²¹ Hugh McLachlan, 'Persons and Their Bodies: How We Should Think About Human Embryos' 10 *Health Care Analysis* (2002) 155 at 157

I am not sure what sense, if any, it makes to talk of a status *between* property and personhood...‘person’ and ‘property’ are not, so to speak, conceptually contiguous. They do not merge: they are different types of categories from each other; they are not, as it were, at either ends of the same spectrum.⁵²²

Instead of straining to accommodate embryos somewhere within the ‘spectrum’ of personhood and property, McLachlan insists that we should acknowledge and respond to what an embryo ‘actually is’: a ‘partially developed human body’.⁵²³ Thus, for McLachlan, the salient question is not ‘are embryos and fetuses persons or property?’, but rather, ‘what rights and duties have we in respect of partially-formed human bodies?’

Much about McLachlan’s approach is puzzling. For example, why does he choose to define an embryo as a ‘partially developed human *body*’, rather than as a ‘partially developed human *being*?’ Surely by such logic an adult would be defined as a ‘fully developed human body’? Can we not assume that all aspects of the being are partially developed at the embryonic stage, and if not, why not?

Another puzzling feature of McLachlan’s analysis comes toward the end, where he states that ‘an embryo is neither a person nor (unequivocally) property. It could become (unequivocally) property if our legal conventions and interpretations of them changed. It could not become a person.’⁵²⁴ This implies that, unlike Fox (who rejects the idea of the embryo-as-property on the basis that the category ‘property’ is intrinsically incapable of accommodating the embryo satisfactorily), McLachlan’s only reason for rejecting the proposition that embryos can be property is the fact that the law does not currently recognise them as such. If ‘our legal conventions and interpretations of them’ were to change so that the law did speak of embryos in terms of property, McLachlan indicates here that this would be sufficient for embryos to ‘become’ property. His rejection of embryos-as-persons is clearly much more principled, however, since an embryo ‘could not become a

⁵²² *Ibid.*

⁵²³ *Ibid.* at 159

⁵²⁴ *Ibid.* at 163

person', and (on the basis of his silence on the matter) this is presumably true irrespective of any legal turnaround on the issue of embryonic or foetal personhood.

Obviously, since a change to 'our legal conventions and interpretations of them' is precisely what I am proposing in this thesis, and since, if my proposed change were to be well-received by the courts, McLachlan's 'binary scepticism' would dissolve, I should probably prefer his approach to that of Marie Fox. Self-interest aside, however, Fox's analysis is much stronger; it is prescriptive, where McLachlan's appears to be mainly descriptive, and her proposed alternative to property / personhood (the 'cyborg metaphor') is more coherent than McLachlan's suggestion that we treat embryos as 'partially developed human bodies'.

All things considered, then, Marie Fox provides a much stronger rejection of the person / property binary. As exciting as Fox's cyborg metaphor is, however, her analysis is confined to frozen embryos and it is unclear what (if anything) it would mean for the adjudication of maternal / foetal issues. Moreover, for the purposes of my argument here, it is unnecessary to seek out a 'third way' of classifying and dealing with embryos and fetuses. Writers like Fox, who reject the person / property binary, do so because they take the view that neither arm of the binary can accommodate the foetus satisfactorily. My own view, which I shall develop throughout the course of this chapter, is that a classification of the foetus as an object of property need not be legally problematic. As such, one of my claims in this chapter is that, whether we view entities as separable into two categories, or into more, the foetus fits readily under the heading 'object of property', at least for legal purposes.

Support for the view that frozen embryos can be regarded as property comes from a variety of authoritative sources: advisory bodies, judicial decisions, and academic commentary.

5.3.1. Advisory bodies

In the United Kingdom, the Warnock Committee, whose report formed the basis for legal regulation of assisted reproduction, recommended that the

couple who store an embryo should have use and disposal rights in respect of it,⁵²⁵ and was also prepared to countenance licenses permitting the *sale* of gametes and embryos.⁵²⁶ In the United States, an American Fertility Society ethical statement specifically provides that ‘concepti are the property of the donors’.⁵²⁷

As such, it can be said that the concept of property rights in frozen embryos is accepted by ethicists both in Britain and in America. The American Fertility Society acknowledges this explicitly. The Warnock Committee went out of its way to try to deny that its recommendations supported property-in-the-embryo, recommending ‘that legislation be enacted to ensure there is no right of ownership in a human embryo’⁵²⁸ but as Kennedy and Grubb have commented: ‘What is ownership if it is not the right to control, including to dispose of by sale, or otherwise?’⁵²⁹. This sentiment is echoed by Brian Ocepek when he says that ‘[property] principles can be applied to frozen embryos, since certain persons – namely the donors – can assert rights to use and enjoy the embryos.’⁵³⁰

5.3.2. Case law

So far, all of the case law which considers the application of property principles to frozen embryos has come from the United States. Even in the US, however, only one case, *York v Jones*,⁵³¹ has held, explicitly, that frozen embryos are a type of property.

The judge [in *York v Jones*] looked upon the relationship between the couple and the [IVF clinic] as a bailor/ bailee relationship, and further referred to the contract between the couple and the institute which consistently referred to the pre-zygote as the property of the

⁵²⁵ Warnock, *op. cit.* at paras 10:11-12

⁵²⁶ *Ibid.*, para. 13:13

⁵²⁷ Ethics Committee of the American Fertility Society, *Ethical Considerations of the New Reproductive Technologies* (1990)

⁵²⁸ Warnock, *op. cit.*, at para. 10.11

⁵²⁹ Ian Kennedy and Andrew Grubb, *Medical Law: Texts and Materials* (London: Butterworths, 1989) at 682

⁵³⁰ Ocepek, *op. cit.*, at 217

⁵³¹ 717 F. Supp. 421 (1989)

couple...Although the judge in this case did not face the question of whether one spouse has a greater property interest in the pre-zygote than another, this case is judicial precedent for the view that frozen embryos are to be treated as property for the resolution of disputes.⁵³²

Although *York v Jones* is a landmark case, the decision was made fairly straightforward by the existence of a contract between the parties which referred to property rights. As such, the judgment in this case was neither constructed out of jurisprudential principles nor inspired by any policy reasons for construing frozen embryos as property:

The court looked to the contract between the parties, which recognized the couples “proprietary” rights in the embryos created with their gametes. Because the clinic defined its rights in the contract that it drafted, the couple owned the embryos and were entitled to possession of them for any purpose.⁵³³

So on what basis was the contract held to create property rights in the frozen embryo? Brian Ocepek tells us that the court found the following provisions to infer that the clinic recognized the Yorks’ property rights in the embryo: ‘first, the Yorks had primary responsibility to decide the disposition of the embryo; second, the embryo would not be released from storage without the Yorks’ written consent; and third, in the event of a divorce, the legal ownership of the embryo would be determined in a property settlement.’⁵³⁴ The court in the case of *Kass v Kass*⁵³⁵ declared that ‘it had no cause to consider the precise legal status of the embryos, because it found that the agreement between the parties as to the disposition of the embryos in the

⁵³² Michelle F. Sublett ‘Frozen Embryos: What Are They and How Should the Law Treat Them?’ 38 *Cleveland State Law Review* (1990) 585 at 598

⁵³³ Marla Clark, ‘Potential Parenthood: The Ownership of Frozen Embryos’ 43 *Res Gestae* (1999) 24 at 28

⁵³⁴ Ocepek, *op. cit.*, at 209

⁵³⁵ 673 N. Y. S. 2d 350 (1998)

event of divorce controlled.’⁵³⁶ Here, as in *York v Jones*, a written agreement precluded the need for jurisprudential analysis of the soundness, not to mention the desirability, of treating frozen embryos as property.

Another case, *Del Zio v Presbyterian Hospital Medical Center*⁵³⁷ may also be seen to support the notion that frozen embryos are property. In this case, a treatment facility destroyed a frozen embryo before it could be implanted. The couple sued for conversion and for intentional infliction of emotional distress. The court in this case did not rule on the issue of whether the frozen embryo was property, but Ocepek has argued that the judge’s willingness to instruct the jury on the issue of conversion, which could not arise except in the context of property, can be taken to imply that the court assumed that the frozen embryo could be regarded as property in the legal sense:

The significance of the [Del Zio] case lies in the fact that the court allowed the Del Zios to bring the [conversion] claim in the first place. It may be inferred, from the fact that it allowed a property-based tort claim to be brought in a case dealing with a frozen embryo, that the federal district court in Del Zio considered the embryo to be personal property...thus, in Del Zio we have some inkling of how a court might approach the subject of frozen embryos, even though the Del Zio court did not expressly state that embryos are property.⁵³⁸

In yet another US case, that of *Davis v Davis*⁵³⁹, the embryos under dispute were treated as objects of property by the Tennessee Court of Appeals, although this was overturned by the state’s Supreme Court in the final appeal. Almost all possibilities – persons, property, or something in between - were considered during the various stages of the legal process:

⁵³⁶ Clark, *op. cit.*, at 26

⁵³⁷ No. 74-3588, slip op. (S. D. N. Y. Nov. 14, 1978) (as summarised in Lori. B. Andrews, ‘The Legal Status of the Embryo’ 32 *Loyola Law Review* (1986) 357 at 367-8

⁵³⁸ Ocepek, *op. cit.*, at 207

⁵³⁹ 1989 WL 140495 (Tenn. Cir.)

In settling the parties' dispute, the courts were faced with the fundamental question of what status should be accorded the frozen embryos. ..[Mrs Davis] argued that...the embryos were 'children', the custody of whom should be decided by reference to the 'best interest of the child' standard. The trial court agreed and determined that the best interest lied (sic) in [Mrs. Davis's] attempts to bear them, rather than in [Mr Davis's] wishes that they be destroyed. The Tennessee Court of Appeals reversed...analyzing the dispute as one over competing property interests. The Tennessee Supreme Court...rejected the analysis of both of the lower courts and instead held that the embryos occupied an intermediate category between property and personhood that 'entitled them to special respect because of their potential for human life.'⁵⁴⁰

The Supreme Court in this case adopted a 'mixed status' approach to frozen embryos:

According to the court, frozen embryos are not persons or property, rather they 'occupy an interim category that entitles them to special respect because of their potential for human life.' Therefore the Davis' did not have a true property interest in the embryos, but more of an interest 'in the nature of ownership, to the extent that they have decision-making authority concerning disposition' of the embryos.⁵⁴¹

Brian Ocepek has accused this decision to classify the embryos neither as persons nor as property, but as something in between, of 'clouding the picture'.⁵⁴² He complains: '[The courts] in effectively stating what a frozen embryo is not, have failed to state what a frozen embryo is. In a very real sense then, the debate is still unresolved, and if nothing else, is more

⁵⁴⁰ Clark, *op. cit.* at 25

⁵⁴¹ Ocepek, *op. cit.* at 211-212

⁵⁴² *Ibid.* at 202

convoluted than ever.’⁵⁴³ Marla Clark agrees that ‘no clear approach to determining interests in frozen embryos has emerged from the handful of cases that have been decided thus far.’⁵⁴⁴

So how would courts in the United Kingdom be likely to respond to the idea of frozen embryos as property? Andrew Grubb has claimed that:

When a court is seized of a case...[it] would have no choice but to treat an extra-corporeal embryo as either a person or a chattel. The likely outcome is that it would be held to be a chattel. Such law as exists points in this direction and the pragmatism of the common law would see that to treat an extra-corporeal embryo as a chattel is more consistent with common sense than for it to be given the rights of a person.⁵⁴⁵

Note that here Grubb seems to be accepting that the person / property binary holds good for legal purposes, even if it fails to reflect and capture the complexities inherent in attempts to determine the *moral* status of the foetus.

Other British commentators have echoed Grubb’s view that courts in this country would be likely to treat frozen embryos as ‘chattels’. Commenting on the recent British ‘frozen embryos’ cases of *Evans & Hadley*,⁵⁴⁶ Professor J.K. Mason has advocated the adoption of a property framework for the disposal of frozen embryos.⁵⁴⁷ He writes:

There are, in fact, good pragmatic reasons why it is positively right to vest the woman with a form of property rights in her embryo. In the first place, she has done much more to produce the embryo than has the man – IVF treatment provides no easy road for the would-be

⁵⁴³ *Ibid.* at 213

⁵⁴⁴ Clark, *op. cit.*, at 29

⁵⁴⁵ Andrew Grubb, ‘The Legal Status of the Frozen Human Embryo’ in A. Grubb (ed.), *Challenges in Medical Care* (Chichester: John Wiley & Sons, 1991) at 72

⁵⁴⁶ *Evans v Amicus Healthcare Ltd; Hadley v Midland Fertility Services Ltd*; [2003] EWHC 2161 (Fam)

⁵⁴⁷ J.K. Mason, ‘Analysis: Discord and Disposal of Embryos’ *Edinburgh Law Review* Vol. 8 (2004) pp 84-93

mother. Secondly, the woman is solely responsible for the hoped-for metamorphosis from embryo to fetus to neonate.⁵⁴⁸

This remark will be analysed more fully under subsequent headings within this chapter, since (i) it seems also to support property rights in embryos and foetuses *in utero*, and (ii) it appears to take *labour* as the source of property rights in embryos and foetuses whether they be inside or outside the body. At this stage of the argument, however, it suffices to note that Professor Mason supports the view that frozen embryos ought to be regarded as objects of property rights.

5.3.3. Academic argument

Many academic commentators have also recommended a property-based approach to frozen embryos. Brian Ocepek tells us that ‘supporters of the embryo-as-property theory believe that the mere potential for life is not enough to justify “personalizing” a frozen embryo.’⁵⁴⁹ But more than this, many believe that case law and legal theory provide positive reasons for treating frozen embryos as property.

In *Moore*, the court noted that ‘the rights of dominion over one’s own body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interests that it would be a subterfuge to call them something else.’⁵⁵⁰ Of course, *Moore* concerned bodily tissue which had been taken and exploited for commercial purposes. However, Michelle Sublett argues that:

The same type [of] reasoning may be applied to frozen embryos. The genetic material which creates an embryo is no less the property of the

⁵⁴⁸ *Ibid.* at 91

⁵⁴⁹ Ocepek, *op. cit.*, at 203

⁵⁵⁰ See *supra*, note 515 at 505

owners than the cells in Moore which made possible the creation of a 'Cell-line', a product from Moore's tissue.⁵⁵¹

Support for this view comes from Kermit Roosevelt when he writes that:

The transferability of reproductive material is particularly well established. The sale of sperm and eggs is commonplace, and it appears never to have been suggested that such transactions have no legal effect.⁵⁵²

Michelle Sublett argues that this property right in 'reproductive material' can be extrapolated so that frozen embryos ought to be regarded as the *marital property* of the couple whose gametes created it:

A male's sperm is unquestionably his own personal property. Likewise, a female's egg is her own personal property...none would question an individual's right to dispose of his or her own gamete. Because the sperm and egg have united to become one, the resulting concepti cannot be said to be the personal property of either the male or the female, but rather the marital property of both.⁵⁵³

On this analysis, frozen embryos qualify as marital property because 'an embryo is not acquired by gift, inheritance or purchase, but rather created by the effort of both spouses during marriage. The Uniform Marital Property Act provides that all property acquired during marriage other than by gift, inheritance, or other exceptions is marital property.'⁵⁵⁴ The legal basis for treating embryos as marital property, Sublett argues, is the common law doctrine of *commingling*:

⁵⁵¹ Sublett *op. cit.* at 600

⁵⁵² Roosevelt, 'The Newest property: reproductive Technologies and the Concept of Parenthood' 39 *Santa Clara Law Review* (1998) 79 at 84

⁵⁵³ Sublett, *op. cit.*, at 596

⁵⁵⁴ *Ibid.*

The doctrine of commingling, borrowed from community property and used in marital property cases, can be applied here. The doctrine states that ‘separate property becomes marital property if inextricably mingled with marital property or with the separate property of another spouse.’ Therefore it can be argued that when the egg and sperm unite, they are no less the property of the gamete owners, but rather since they are inseparable without resorting to destruction, they become marital property instead of personal property. The problem with treating frozen embryos as marital property comes into existence when the marital property is to be distributed.⁵⁵⁵

The ‘marital property’ approach is not entirely straightforward, however, as Sublett acknowledges when she writes that ‘if frozen embryos are to be treated as property, the court or legislature must develop some sort of guidelines for distributing this type of property.’⁵⁵⁶ Another potential problem with frozen embryos as ‘marital property’ is implied by the *Moore* decision, as Ocepek notes:

The court’s decision [in *Moore*] seems to imply that a person loses his property interest in a thing once it is transformed into something else. It is this type of reasoning that presents a potential flaw in the embryo-as-property theory. It may reasonably be inferred from the court’s decision in *Moore* that a woman who donates her ova, material over which she clearly has a property right, loses that right once her ova joins with the man’s sperm and creates a totally new organism – the embryo.⁵⁵⁷

This leads Ocepek to conclude that ‘the embryo-as-property theory is not without its own share of weaknesses...this side of the debate assumes that the donors of the gametes necessarily have ownership rights in the embryo they

⁵⁵⁵ *Ibid.* at 596-597

⁵⁵⁶ *Ibid.* at 597

⁵⁵⁷ Ocepek, *op. cit.*, at 211

helped to create. However this is not always a given, as such ownership rights are sometimes difficult to prove and even if proven, may be subject to competing third party ownership interests.⁵⁵⁸

For example, frozen embryos may not have been created using the gametes of the couple who are parties to treatment. The embryo may include the gametes of one member of the couple, and gametes donated by an anonymous source. Otherwise, the embryo itself may have been donated, and neither 'party to treatment' may have made any genetic contribution to it. So there is plenty of scope for challenging the view that property rights in a frozen embryo flow logically from property rights in the gametes used in its creation. In instances where embryos are created using the gametes of the parties to treatment, it may be argued that the property rights of the parties have *two* sources: the contract for provision of services, and the property they have in their gametes transferred to the embryo by the common law doctrine of commingling.

The problem with this is that if we recognise genetic contribution as any factor in property rights in frozen embryos, donors could also, potentially, claim property in frozen embryos created using their donated gametes. However, this fear is unfounded; donation is *gifting*, and when a person makes a gift they relinquish any property claims they may otherwise have had. Accordingly, it may be a mistake to regard property in the frozen embryo as 'marital property', or as being grounded, in some way, in the relationship between the frozen embryo and the gametes which created it; rather, property rights in the frozen embryo ought to be regarded as flowing from the contracts which govern provision of assisted reproduction services. If this were the case:

[t]he embryo's genetic contributors, the institution in which it was stored, or the intended recipients could assert control over the property and could own either or both legal and equitable title to the embryo depending on the theory of ownership proffered. The owner could then

⁵⁵⁸ *Ibid.*

convey the property through donative transfer or sale regulated by basic gift, contract and code principles.⁵⁵⁹

It is important to note here that the California Supreme Court's judgment in *Moore* did not hold that *no-one* could own the intellectual property products derived from Moore's bodily tissue because it was not property; the court held merely that *he* did not own them. As such, the *Moore* judgment may threaten the notion that the embryo is *necessarily* the property of the gamete donors, or that property-in-the-embryo is derived from genetic contribution, but it does not threaten the idea that the embryo can be property per se, and owned by *someone*.

There are strong *practical* reasons to seek an alternative to treating frozen embryos as persons; as Ocepek warns, 'adopting the embryo-as-person theory means that the court will have to dispose of the embryo through a child custody proceeding.'⁵⁶⁰

If frozen embryos were the subject of a custody battle, the court would be faced with the same type of analysis as if an infant child was involved. But with frozen embryos the court would be dealing with the unborn, and it would have no choice but to weigh the wishes of the donors most heavily in making its best interest determination. The embryo's biological status as a child-to-be and incapable of any expression reveals the pitfall inherent in attempting a custody proceeding over an embryo. Therefore, adopting an embryo-as-person theory when a divorce is involved in frozen embryo litigation is not an advisable approach for any court.⁵⁶¹

Where an infant is involved – and by extension, an embryo too – the 'child' is too young to speak as to his or her own 'best interest', so the court must

⁵⁵⁹ Guzman *op. cit.* at 206

⁵⁶⁰ Ocepek, *op. cit.*, at 215

⁵⁶¹ *Ibid.* at 216

decide best interest by having regard to the parents' character, lifestyle, fitness, and so on. Obviously, where a frozen embryo is concerned, the 'parent' who wishes to destroy the embryo will not gain custody on the basis of these criteria. The issue at stake in disputes regarding the disposal of frozen embryos is usually the issue of *whether* to become a parent; this means that it would be erroneous to *assume* parenthood as a framework for deciding such cases. But would a property-based approach be any less problematic? Ocepek acknowledges that:

Clearly there will be some difficulty for the court in applying the principles of a property settlement to frozen embryo litigation...Obviously the embryo cannot be 'split' equally between the parties. So how is the court to distribute it? If the parties both want control of the embryos, one solution would be to do what the Tennessee Supreme Court did in *Davis* – weigh the relative interests that each party has in the embryos and give them to whichever party offers the more legitimate or beneficial interests.⁵⁶²

However, he argues, 'the potential problems associated with applying the embryo-as-property theory and a marital property settlement to frozen embryo litigation pale in comparison to the alternative. If a court attempted to apply the embryo-as-person theory and a custody determination to frozen embryos, it would be faced with an even more difficult problem: constitutional rights.'⁵⁶³ Ocepek concludes that 'resolving the debate over the legal status of the embryo in favor of a property theory would, at least in the context of a divorce, make the court's task somewhat easier. It would allow the court to dispose of the embryos in a marital property settlement – a more practical device for handling embryos than a child custody determination.'⁵⁶⁴ It is

⁵⁶² *Ibid.* at 220

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.* at 221

perhaps for this reason that Roosevelt describes property rights as ‘ the hidden variable of family law’.⁵⁶⁵

Another advantage of the property-based approach is that property is *relational* in nature – it focuses on relationships surrounding an object rather than the intrinsic nature and status of the entity itself. As Guzman observes: ‘if the embryo is property...[issues] would focus not on the embryo but on others’ status thereto – who has paramount rights relative to whom.’⁵⁶⁶ This is a major advantage where fetuses and embryos are concerned, because it is their contested moral and legal status which makes adjudication so difficult.

For all of the above reasons, many commentators conclude, with Ocepek, that ‘the debate over the status of frozen embryos should be resolved in favor of the embryo-as-property theory. The legal analysis commonly used to determine whether something constitutes property is broad enough and flexible enough to include a frozen embryo.’⁵⁶⁷ Roosevelt, for example, claims that ‘with respect to very early embryos...the need for recognition of property rights seems just as great as with respect to sperm and eggs.’⁵⁶⁸

Ocepek is convinced that ‘property has the elasticity to incorporate the reproductive products of progenitors who use IVF.’⁵⁶⁹ Frozen embryos are property, according to Ocepek, ‘because they are not human life, only the potential for human life...Furthermore, frozen embryos are things in which certain individuals – the donors of the gametes – have rights of ownership and use. The only way these rights can be properly upheld is to treat the embryos according to the principles of property law.’⁵⁷⁰

John A. Robertson cautions that ‘applying terms such as “ownership” or “property” to early embryos risks misunderstanding. Such terms do not signify that embryos may be treated in all respects like other property. Rather, the terms merely designate who has authority to decide whether legally available options with early embryos will occur, such as creation, storage,

⁵⁶⁵ Roosevelt, *op. cit.*, at 87

⁵⁶⁶ Guzman, *op. cit.*, at 206

⁵⁶⁷ Ocepek, *op. cit.*, at 216

⁵⁶⁸ Roosevelt, *op. cit.*, at 85

⁵⁶⁹ Ocepek, *op. cit.*, at 217

⁵⁷⁰ *Ibid.* at 218

discard, donation, use in research, and placement in a uterus.⁵⁷¹ Nevertheless, he makes the crucial observation that, '*although the bundle of property rights attached to one's ownership of an embryo may be more circumscribed than for other things, it is an ownership or property interest nonetheless.*'⁵⁷²

5.4. Should being in the body make a difference?

Having noticed an emerging 'jurisprudence of property' in the law's treatment of embryos outside the body, the next stage is to ask whether embryos *inside* the body can also be objects of property. The key question here is: should being in the body make a difference? This question was raised, indirectly, in the comparatively recent cases of *Evans & Hadley*,⁵⁷³ which, although it deals with the disposal of frozen embryos, has implications for the pregnancy context. The background of the case is as follows: two women, Natallie Evans and Lorraine Hadley, had undergone fertility treatment with their then-partners. In the course of the treatment, embryos had been frozen and kept in storage. The relationships between the women and their partners had subsequently broken down, but Evans and Hadley wished to have the embryos implanted anyway. For Natallie Evans, who had become infertile following treatment for cancer, the frozen embryos represented her only chance of becoming a genetic parent.

According to the statute regulating the field of assisted conception, the Human Fertilisation and Embryology Act 1990 (HFE Act), embryos cannot be used (implanted or donated) or even stored without the consent of both 'parties to treatment'.⁵⁷⁴ Both of the male parties in this case refused to give their consent to implantation; they no longer wished to become parents with women who were now their ex-partners. The women challenged the statutory requirement for consent in the courts. With the law in the area so clear and unambiguous, then, what was the basis of the women's case? Why did they believe that their challenge had a chance of success?

⁵⁷¹ John A. Robertson, 'In the beginning: the legal status of early embryos' 76 VA. L. REV. 437 (1990), at 454-455

⁵⁷² *Ibid.*, emphasis added.

⁵⁷³ See *supra*, note 546

⁵⁷⁴ Human Fertilisation and Embryology Act 1990, schedule 3.

There were several arguments brought in support of the women's claim, but the most relevant and interesting from the point of view of the current analysis is the argument from *discrimination*. If Evans and Hadley had been fertile women who had conceived the embryos naturally, within their bodies, they argued, their male partners would have no control over the destiny of the embryos, and certainly no veto akin to the veto granted them by the HFE Act. Because they were infertile, and had had to 'conceive' the embryos *ex utero*, their ex-partners had a determining say in whether or not the embryos would be implanted. The women argued, therefore, that their reproductive choice was being circumscribed, by statute, in a way that the reproductive choice of fertile women was not. The law was depriving them of the ordinary control women have over embryos on the basis of their 'disability', infertility. The crux of the argument was that the women claimed that for legal purposes, they ought to be regarded as being similarly situated to fertile women who had conceived naturally. When the law treats similarly situated parties differently - for example, on the basis of a disability - this amounts to discrimination.

While expressing sympathy with the women's desire to become parents, the High Court rejected their claim. It held that women with frozen embryos in storage were *not* situated similarly to women whose embryos were conceived and located within their bodies. In so holding, the court affirmed that being in the body *does* make a difference. While not expressly adopting the language of property, the court dealt with the issue of the use and control of frozen embryos, which is closely related to, if not synonymous with, the issue of ownership. It held that, outside the body, this 'ownership' could be joint, with use of the embryos requiring authorisation from both parties to treatment (both 'owners'). The decision was later upheld in the Court of Appeal.⁵⁷⁵ By implication, the court seemed to be recognising that the law vested control of embryos *inside* the body solely in the pregnant woman herself. Although it did not say explicitly that frozen embryos were joint property and embryos *in utero* the sole property of the pregnant women, the court's reasoning supports this conclusion nonetheless. It upholds both the 'male veto' over the use and disposal of frozen embryos, and the fact that in

⁵⁷⁵ *Evans v Amicus Healthcare Ltd. and others* [2004] 3 All ER 1025 (CA)

pregnancy, only the pregnant woman herself enjoys any of the rights of control and possession normally associated with ownership. As such, the judgment in *Evans & Hadley* answers the key question – ‘should being in the body make a difference?’ – in the affirmative, and hints at precisely what *kind* of difference it ought to make.

5.5. Property in the embryo / foetus *in utero*

As the judgment in *Evans & Hadley* suggests, the difference that being in the body makes is that embryos inside the body can be controlled, ‘owned’, only by the pregnant woman herself, whereas ownership of embryos outside the body is open to other parties. The HFE Act, which regulates assisted conception, essentially makes each of the parties to fertility treatment ‘joint owners’ of the frozen embryo, although of course it does not use that terminology. Theoretically, frozen embryos may also be owned by clinics, or bequeathed in wills; both of these scenarios can be found in case-law in the United States. Once inside the body, however, any interests that third parties may have in the destiny or welfare of embryos or foetuses cannot translate into property rights. This is so because of the serious implications the existence of such property rights would have for the personhood of pregnant women.

Of course, many parties may have strong *interests* in respect of embryos *in utero*: potential fathers may have strong interests either positively (if they are keen for the pregnancy to result in the birth of a healthy child) or negatively (if they are keen to avoid fatherhood); members of extended families may have similar interests; doctors who treat pregnant women may regard the embryo or foetus, to a greater or lesser extent, as a ‘second patient’; and it might also be said that the state has an interest in the welfare or fate of its ‘future citizens’. However, none of these interests can be accorded the status of property *rights* without undermining the personhood of the woman within whose body the embryo or foetus is located. If someone other than the pregnant woman were to be recognised as the owner (or joint owner) of a foetus or embryo *in utero*, this could only be meaningful if such a person were able to exercise their property rights. Since the unborn entity can only be

accessed through her body, exercise of property rights by others would necessitate a right of trespass on the body of the pregnant woman, and would be likely to involve restrictions on her right to consent, and to refuse to consent, to medical treatment. This would represent a dramatic limitation on women's autonomy and bodily integrity sufficiently severe to constitute a loss of full legal personhood.

In response to this, we may ask: what if a pregnant woman was to seek, *voluntarily*, to confer property rights in 'her' foetus on others? Can she alienate her property-in-the-foetus despite its location within her body? Surrogacy is perhaps the context in which such a question is most likely to arise, since in surrogacy a woman carries a foetus which is destined to become the child of a party or parties other than herself. Liezl van Zyl and Anton van Niekerk write, disapprovingly, that 'to deny that the surrogate is the mother of the child amounts to viewing the relationship as one of ownership.'⁵⁷⁶ By way of clarification, they continue:

The prenatal separation of biological and moral relationships places the surrogate in a highly ambiguous relationship with the fetus. As a woman who has a right to bodily integrity, she has a right to an abortion, but as a *surrogate*, she would have no right to determine the destiny of the fetus.⁵⁷⁷

An understanding of pregnancy as a property relationship in which only the pregnant woman herself may 'own' the foetus helps to explain this apparent tension. When a woman agrees to act as a surrogate for a commissioning party or couple, she agrees to recognise that party or couple as the rightful parents of the child and to hand the child over to them once it has been born. In law, however, surrogacy arrangements are unenforceable, and if the courts are asked to decide whether a child born subsequently to a surrogate pregnancy ought to remain with its gestational mother or be placed in the care of the commissioning party or parties, the decision will be made *not* on the basis of

⁵⁷⁶ Liezl van Zyl and Anton van Niekerk, 'Interpretations, Perspectives and Intentions in Surrogate Motherhood', *Journal of Medical Ethics* 2000 (26) 404-409, at 406

⁵⁷⁷ *Ibid.* at 407

the terms of the surrogacy contract, but according to the best interests of the child. So what about *during* pregnancy? Does the fact that a pregnancy is a surrogate one give the commissioning parent(s) any right to control the behaviour of the pregnant woman, to prevent her from terminating the pregnancy, or indeed to *compel* her to terminate it?

The *Surrogacy Review*, the culmination of the last major review into the law regarding surrogate motherhood, was published in 1998.⁵⁷⁸ The review, while recommending a new 'Surrogacy Act' under which surrogacy arrangements would remain legally unenforceable, is ambivalent with regard to issues of antenatal conduct. It leaves unclear the issue of commissioning parents' rights regarding the behaviour of surrogate mothers during pregnancy, such as smoking or attendance at antenatal clinics or classes. Ought they to be able to insist that surrogates take certain positive steps during pregnancy, or make prohibitions, in order to promote foetal well-being? Ought they be able to insist on a caesarean delivery against the will of the surrogate, or override her refusal to consent to treatments ranging from medication to reduce blood pressure to foetal surgery? Most of us would wish, instinctively, to deny that anyone should be able to overrule the right of a woman to make such decisions for herself, even where she is carrying a child that is destined for someone else. A property model of pregnancy allows us to deny it, and to do so on a stronger basis than mere instinct alone. On the property model, the reason why such external control over pregnancy is impermissible is because the foetus *in utero* is the property of the pregnant woman alone.

On birth, of course, legal personhood attaches and the child, *qua* person, is the property of no-one. Before birth, the foetus is a legal non-person and can be an object of property relations; however, the only possible owner can be the pregnant woman herself. To endow any other party or parties with ownership (for example, the commissioning couple in a surrogacy arrangement) would be to permit a woman to contract out of some of her most fundamental human rights, including the right to refuse medical treatment, the right to make choices about her own health and lifestyle within the legal limits

⁵⁷⁸ M. Brazier, A. Campbell and S. Golombok, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (CM 4068), HMSO, 1998.

that apply to other competent adults, and the right to terminate her pregnancy. We do not allow competent adults to contract out of their ‘personhood rights’: people are not permitted, by law, to sell themselves into slavery or prostitution, or to sell their vital organs (although they may donate them if doing so would not cause their own death). When framed in this way, it becomes obvious why only the pregnant woman herself can be regarded as the owner of the foetus she carries: to recognise any other owner would entail a denial of the personhood of the woman, and while the law allows competent adult citizens many freedoms, the freedom to render oneself less than a full person by contracting out of one’s fundamental rights is not among them.

Thus, the property model of pregnancy explains why surrogacy contracts are unenforceable and why commissioning parents in surrogacy may not insist that surrogates terminate pregnancies, remain pregnant against their will, follow particular diets, quit smoking or drinking, attend clinics or classes, undergo medical tests, or submit to medical interventions. The model also illuminates a new area of concern in the surrogacy debate. So far, concern has centred on the potential for exploitation of poor women and the undesirability of commodifying children, women’s bodies (as ‘wombs for rent’) and their reproductive labour. The property model highlights another danger associated with surrogacy: the danger that surrogacy encourages the alienation of personhood through the incremental handover of personhood-constituting rights and freedoms. An explicit recognition that the pregnant woman is the sole owner of the foetus she carries would reduce this danger by removing the possibility of property-in-the-foetus as a means by which external parties might control women during pregnancy.

5.6. The source of the property right

Here, I wish not only to argue that embryos and foetuses *in utero* are objects of property relations, but also to make the further claim that, inside the body, embryos and foetuses can be owned *only by the pregnant woman herself*. It will be necessary, therefore, to support this claim by demonstrating *why* pregnant women are the sole owners of embryonic and foetal property inside the body. In other words, I will need to discover the *source* of the right and

justify vesting it in pregnant women and no-one else. Below, I explore a variety of possible justifications, their advantages and disadvantages.

5.6.1. Genetic contribution

For some theorists, the property rights that ‘parents’ have in frozen embryos derive from the genetic contribution they have made in creating the embryos. One version of this view is espoused by Michelle Sublett, who argues that frozen embryos ought to be regarded as ‘marital property’, since ‘[a]n embryo is not acquired by gift, inheritance or purchase, but is created by the effort of both spouses during marriage.’⁵⁷⁹ The rationale behind this view is given as follows:

A male’s sperm is unquestionably his own personal property. Likewise, a female’s egg is her own personal property...none would question an individual’s right to dispose of his or her own gamete. Because the sperm and egg have united to become one, the resulting concepti cannot be said to be the personal property of either the male or the female, but rather the marital property of both.⁵⁸⁰

This is so, according to Sublett, because of the applicability of the common law doctrine of *commingling*:

The doctrine states that separate property becomes marital property if inextricable mingled with marital property or with the separate property of another spouse. Therefore it can be argued that when the egg and sperm unite, they are no less the property of the gamete owners, but rather since they are inseparable without resorting to destruction, they become marital property instead of personal property.⁵⁸¹

⁵⁷⁹ Sublett, *op. cit.* at 595

⁵⁸⁰ *Ibid.* at 596

⁵⁸¹ *Ibid.* at 596-597

There are a couple of immediate difficulties with this way of justifying property rights in frozen embryos. Most obviously, not all embryos are created by spouses within marriage, so the common law doctrine of commingling, which applies only to marital property, would have effect only in a limited number of cases. What I require here is a justification that applies to *all* embryos equally, not only to those created by married couples. However, this observation calls into doubt only the extent of the applicability of the doctrine of commingling; it does not strike at the validity of linking ownership to genetic contribution, which is Sublett's more important claim. Nevertheless, this link may be attacked on other grounds. First, contrary to what Sublett states, embryos *can* be acquired by gift (donation), or can be created using donated gametes. In some pregnancies resulting from IVF treatment, women carry embryos and foetuses which have been created using donated eggs, and in some the embryos themselves have been donated, so that there is no genetic contribution from the pregnant woman herself.

Thus, to link ownership to genetic contribution would be to give ownership rights in embryos to the donors of the eggs and / or sperm used to create them. Accordingly, doubt would exist over whether, when a couple donate a surplus embryo, property rights vest in the donor couple or in the ultimate recipients who intend to use (implant) the embryo. This may lead to legal and moral confusion where, for example, a couple have created an embryo using donated sperm, and the embryo is in storage. Suppose that the circumstances of *Evans & Hadley* were to be replicated – the woman wishes to proceed with implantation, but the man refuses his consent. As we have seen, under the current law, the consent of each party is required before the embryo can be 'used', and this would be so even if one of the 'parties to treatment' under the HFE Act had not contributed gametes to the embryo, since it is parties to treatment, and not genetic contributors, who currently have rights in respect of assisted reproduction. Were a model of ownership based on genetic contribution to be adopted, joint ownership would vest in the woman and the sperm donor (not the man who is a party to treatment); providing, therefore, that the sperm donor consented, the woman could proceed to implantation without the consent of her former partner, even

though the embryo was originally created for use by the partners who sought ‘treatment together’.

A second, related point is that on this model of justification it is clearly *both* of the genetic contributors who acquire property rights in the embryo or embryos created using their gametes. I have already argued that one of the effects of the judgment in *Evans & Hadley* is to establish joint ownership of the frozen embryo outside the body, so it may seem as if, on this point at least, a model of justification based on genetic contribution would not alter the status quo. This may be true with regard to embryos outside the body; however, my main claim in this chapter is that embryos *inside* the body are also objects of property. If property-in-the-embryo is taken to stem from genetic contribution, then both genetic ‘parents’ would have property rights in respect of embryos inside as well as outside the body. Obviously, this result would be extremely dangerous from the point of view of women’s rights to privacy and self-determination. A male genetic contributor may, on the basis of his joint property rights, attempt to prevent her from seeking to terminate the pregnancy in which he has a property interest; he may also seek to have medical treatment imposed on a pregnant woman against her will (to safeguard his property), or even to impose positive duties on her to promote the health of the foetus-as-property. This is why I have observed, under heading 5.6. above, that any justification for property-in-the-foetus *in utero* will only be acceptable if it vests the property rights in the pregnant woman alone. On this criterion, the justification from genetic contribution fails.

Yet another difficulty with the argument from genetic contribution is that it depends on controversial notions of property-in-the-body and property-in-the-self (‘self-ownership’). These are discussed in detail under heading 5.6.2. below⁵⁸², where it will become apparent that there are important philosophical and ideological reasons to resist the notion that persons own their bodies. Although it is unnecessary for me to endorse either the pro- or anti- self-ownership position for the purposes of my thesis, the very controversy of such notions means that it will be preferable for my

⁵⁸² Although there are complex and subtle differences between the proposition that I own my self and the proposition that I own my body, I have, for convenience and clarity, dealt with all such notions under the heading of ‘property in the self’.

property model of pregnancy to avoid dependence on the idea of self-ownership; the model will be stronger if it can appeal both to those who accept the notion and those who reject it.

5.6.2. Property-in-the-self

The ‘genetic contribution’ view of property in the embryo claims that people have property in the embryos that their gametes are used to create because they have property in the gametes themselves. As Sublett has already been quoted as saying, ‘[a] male’s sperm is unquestionably his own personal property. Likewise, a female’s egg is her own personal property...none would question an individual’s right to dispose of his or her own gamete’.⁵⁸³ But indeed people *do* question it. The idea that we own our gametes depends, in turn, on the belief that we own our own bodies, and this is a far from uncontroversial position. I will begin by outlining the concept of self-ownership, and go on to explain the two main objections to the concept: one philosophical, one ideological.

5.6.2.1. The background to the concept

Ngaire Naffine writes that:

The concept of the person as self-proprietor has a secure place within our modern liberal political theory and liberal jurisprudence. It has become a convenient way of highlighting the freedoms enjoyed by the modern individual, a sort of legal shorthand, a rhetorical device, which serves to accentuate the fullness of the rights enjoyed by persons in relation to themselves and to others.⁵⁸⁴

But mere convenience is not the only, or even the main reason, that the concept has such a ‘secure place’, as Naffine puts it, in our legal theory. Its centrality can also be attributed to the perception that the notion of property-

⁵⁸³ See *supra*, note 553

⁵⁸⁴ Naffine, *op. cit.*, at 193-194

in-the-self is in some way fundamental to other ideas that we consider to be important.

An example is the concept of autonomy, which enjoys undeniable prominence in Western thought, largely thanks to the writings of Kant in the eighteenth century. In the legal context, autonomy is key to many central concepts such as liberty, privacy and individual rights. Naffine describes property-in-the-self as ‘a potent symbol of human autonomy as it emerges within the contractual society.’⁵⁸⁵ She goes on to explain that this is because:

The claim of property in oneself is an assertion of self-possession and self-control, of a fundamental right to exclude others from one’s very being. It is a means of individuating my person, of establishing a limit between the one and the other; between mine and thine; between me and you.⁵⁸⁶

In other words, as individuals within civil society, we relate to one another as autonomous agents, or as Naffine expresses it, ‘bounded selves’⁵⁸⁷. Our freedom, paradoxically, involves the recognition of boundaries marking where I and my interests end and you and your interests begin. These boundaries, according to Naffine, are *property* boundaries.⁵⁸⁸ In this way, self-ownership can be understood as the basis on which individuals interact with one another autonomously.

Another example is the concept of personhood, discussed in great detail in chapter three of this thesis. Naffine tells us that ‘Blackstone believed that a person’s integrity depended on a legally enforceable right to police the boundaries of the body. Full personhood was equated with the effective exercise of a property right in one’s body.’⁵⁸⁹ On this view, property-in-the-self (or at least, in the body – the difference will be discussed more fully under the following heading) is essential to full personhood, since many of what may be termed ‘personhood-relevant qualities’, such as autonomy, the

⁵⁸⁵ *Ibid.* at 200

⁵⁸⁶ *Ibid.* at 197-198

⁵⁸⁷ *Ibid.* at 205

⁵⁸⁸ *Ibid.*

⁵⁸⁹ *Ibid.*

capacity to self-determine, and so on, depend upon the ability to ensure one's physical integrity by excluding others from our bodies. This position chimes quite clearly with the arguments offered by Eileen McDonagh in support of her 'consent model' of pregnancy⁵⁹⁰, in which she claims that the power to exclude a foetus who intrudes upon the body of a woman without her consent is essential to women's possession of full legal personhood.

A final example is the concept of property itself. John Frow has claimed that our Western view of property 'is based on self-possession, a primordial property right in the self which grounds all other property rights'.⁵⁹¹ If all property rights have their roots in the right of self-ownership, if property-in-the-self is indeed the 'mother of all property rights', then it is easy to see why it holds such sway in legal and political theory, despite the objections to which I will now turn.

5.6.2.2. *The philosophical objection: dualism*

According to this objection, the idea of property-in-the-self is founded on the 'fiction...that mind can be separated from flesh.'⁵⁹² As Naffine observes:

self-ownership is usually not intended to denote the entire person reflexively owning the entire person...[r]ather there is presumed to be an internal division of the person, two different and distinct parts which represent the owner and the owned. Richard Arneson, for example, expounds the Lockean concept of self-ownership thus: 'Owning himself, each person is free to do with his body whatever he chooses so long as he does not cause or threaten any harm to non-consenting others.'⁵⁹³

As such, self-ownership 'relies on a dichotomization of our selves into subject and object [or]...into mind and body. In short, it relies on a form of Cartesian

⁵⁹⁰ Discussed in detail in chapter four of this thesis.

⁵⁹¹ Naffine, *op. cit.* at 199

⁵⁹² *Ibid.* at 202

⁵⁹³ *Ibid.* at 201

dualism.’⁵⁹⁴ This is evident in the writing of some of the main theorists on property-in-the-self.

John Christman observes that ‘insofar as my body moves or acts, *I* should be the one who has the ultimate say over what it does and where it goes.’...In Christman’s account, the body is reduced to an ‘it’ – a thing (the very move that worried Kant)...J.W. Harris seems also to equate the idea of self-ownership with body ownership...His concluding remark that ‘nobody owns my body, not even me’ ...instates an incorporeal ‘me’ as the potential ethereal owner, and the mundane body as the object of ownership.⁵⁹⁵

This dualism worries critics for two main reasons. First, the insistence on the separability of mind and body means that ‘[t]he body is not the subject person – because that is the mind – but rather it is an object which belongs to that subject. The body is therefore alienated and fetishized...It is baser, it is mundane, it is inferior, and it is natural. And yet it is a necessary condition of the person.’⁵⁹⁶ The second cause for concern can be summarized by saying that if mind and body can be separated, and body ‘owned’ by the mind, then potentially, it can be owned by others, with seriously illiberal consequences. I turn now to consider this ‘ideological objection’.

5.6.2.3. *The ideological objection: illiberalism*

To its critics, the idea of property-in-the-self is dangerous because it entails, as a matter of definitional necessity, that the ‘self’ is *capable* of ownership. Naffine writes:

Some liberal theorists have also been alert to the negative connotations of property-in-self. Kant found the idea particularly troubling (and so

⁵⁹⁴ *Ibid.* at 202

⁵⁹⁵ *Ibid.* at 201

⁵⁹⁶ *Ibid.* at 202

rejected it) because it suggested to him a commodification of the person, the reduction of the human being to thing'.⁵⁹⁷

While advocates of self-ownership see this possibility as an opportunity to enshrine the self as master of his (or less commonly, her) own destiny, critics fear that if we accept in principle the concept of the self as an object of ownership, this may have the undesirable additional effect of justifying slavery, possessive marriage (coverture), and other scenarios of ownership where the self, or the body, is owned by someone other than the subject him or herself. Naffine observes this when she comments that:

The idea of property-in-self is, to many, still suggestive of an unsavoury and illiberal past when persons could be slaves. As Margaret Davies has remarked, if persons can objectify their selves they become susceptible to objectification by others.⁵⁹⁸

Because of this association, she claims, 'to suggest that property-in-self is a means of expressing human autonomy is, paradoxically, also to threaten liberty.'⁵⁹⁹ She continues: 'Property-in-self in private life may be poorly theorized in the legal and political literature for the very reason that its implications are distinctly illiberal...the story of contract, with its self-contained, autonomous central character, is still a story of men premised on the denial of women's property in themselves.'⁶⁰⁰

5.6.2.4. Reasons to reject the justification from 'property-in-the-self'

Above, I have identified, briefly, two *general* grounds on which the concept of property-in-the-self has been criticised. From the point of view of my present argument, and my advocacy of the property model of pregnancy, however, there is a more specific reason why I wish to avoid sourcing the property right of a pregnant woman in her foetus in any notion that she owns

⁵⁹⁷ *Ibid.* at 199

⁵⁹⁸ *Ibid.* at 200

⁵⁹⁹ *Ibid.* at 200

⁶⁰⁰ *Ibid.* at 212

her own body, or her self. Without needing necessarily to denounce the notion of property-in-the-self on either of the grounds described above, nonetheless it is better that my proposed property model does not *entail*, or depend upon, this notion.

The conflict model has its foundations in the view that the pregnant woman and the foetus she carries are separate entities, each having moral status and rights. This produces the familiar ‘maternal / foetal conflict’, the ‘clash of absolutes’. Other theorists prefer what John Seymour has called the ‘body-part model’, which holds that the foetus is not a separate entity, but rather a part of the body of the pregnant woman. In this context self-ownership can be used to explain why the pregnant woman, as the owner of her own body, also owns the foetus, as a part of that body. It could be claimed, therefore, that my present thesis is redundant or unnecessary since property-in-the-foetus can be established via the notions of the foetus-as-body part, and property-in-the-self.

Such a justification is problematic, however. As demonstrated above, the notion of property-in-the-self is controversial, with distinctly illiberal overtones. Historically, it has not served women well, as Naffine observes. Moreover, any attempt to justify property-in-the-foetus on the basis of property-in-the-self will presuppose the validity of the ‘body-part model’. The appeal of the body-part model is that it offers a way of avoiding the conflict picture generated by separate entities models. It has been heavily criticised, however, as being contrary to common sense.⁶⁰¹ Moreover, unless we accept that persons, including pregnant women, own their own bodies (and we have seen that many commentators deny that this is so), the body-part model does not necessarily confer abortion rights on women.

My property model of pregnancy is certainly a ‘separate entities model’, yet it does not give rise to issues of maternal / foetal conflict. This is because, unlike other separate entities models, mine does not claim that woman and foetus are separate *persons* or that they each possess interests and / or rights. My property model regards the foetus as a separate entity, but a legal ‘thing’, not a legal person; as an object of property relations. As such,

⁶⁰¹ Seymour, *op. cit.* at 191-194

my model avoids the absurdity of the body-part model and the controversy associated with the concept of property-in-the-self; it also avoids the illusive ‘conflict’ engendered by separate-entities models which frame pregnancy as a clash between two morally-considerable entities with potentially opposing rights and interests. The respective merits and drawbacks of the separate entities, body-part and intermediate ‘not-one-but-not-two’ models will be scrutinised under heading 5.7.

5.6.3. Labour

An alternative to the view that we own our bodies themselves is the view that, although we do not necessarily own our bodies, we own the *labour* of our bodies, the work they do. A proponent of one such theory, John Christman, has stated that ‘[a] powerful way of expressing the principle of individual liberty is to claim that every individual has full “property rights” over her body, skills and labour.’⁶⁰² Applying the labour theory of property to reproduction, Donna Dickenson writes that:

Stem-cell technologies highlight the ‘use-value’ which women produce in the reproductive labours of superovulation, egg extraction, and the work of early pregnancy and abortion. It is abundantly clear that these pregnancy-derived tissues have value, and enormous value. What is shown by the commodification of bodily products such as stem cells is that there is no firm divide, as Marx thought there was, between the use-values produced through social means of production and the absence of use-values in reproduction.⁶⁰³

Dickenson argues that, because ‘[we] do not generally own that which we have not laboured to create’⁶⁰⁴, we do not possess property in our bodies (as we have not created them). However, she notes:

⁶⁰² John Christman, ‘Self-Ownership, Equality and the Structure of Property Rights’ (1991) 19 *Political Theory* 28 at 28

⁶⁰³ Donna Dickenson, Dickenson, D., ‘Property and Women’s Alienation From Their Own Reproductive Labour’ *Bioethics* 15(3) (2001) 205 at 215

⁶⁰⁴ *Ibid.*

Women *do* labour to create the bodies of their fetuses in pregnancy and childbirth. The labour which women put into superovulation, egg extraction and early pregnancy qualifies as labour which confers a property right in a Lockean model...a feminist Marxist analysis...likewise supports women's property rights in the forms of embryonic tissue which they have laboured to create.⁶⁰⁵

This despite the fact that 'early capitalism segregated women from market values, establishing an "unpolluted realm" of domestic labour by "creating the necessary fiction that women's labour produced no use-values."'”⁶⁰⁶ J.K. Mason appears to support this 'labour' justification of property in the frozen embryo in his comment on the *Evans & Hadley* case.

There are, in fact, good pragmatic reasons why it is positively right to vest the woman with a form of property rights in her embryo. In the first place, she has done much more to produce the embryo than has the man – IVF treatment provides no easy road for the would-be mother. Secondly, the woman is solely responsible for the hoped-for metamorphosis from embryo to fetus to neonate.⁶⁰⁷

If we are prepared to accept that women own foetal and embryonic tissue because of the reproductive labour they have invested in creating it, then the foetus or embryo *in utero* must also be the property of the pregnant woman; on this analysis, she has not created it any less because it is *in utero* or 'alive' – she can plausibly be regarded as having a property interest in the foetus or embryo until it achieves legal personhood (on birth), since only the presence of personhood (the legal status which precludes its being the property of another) can extinguish the property interest of the woman.

However, although Mason argues that the 'labour' view justifies vesting property rights in embryos in women alone, I would suggest,

⁶⁰⁵ *Ibid.* at 215-216

⁶⁰⁶ *Ibid.* at 217

⁶⁰⁷ Mason, *op. cit.* at 91

respectfully, that this is insufficient to justify the kind of strong, exclusive property right that I wish to establish here. This is because although the labour input from the woman has been substantially greater than that of the male progenitor, he has, nonetheless, contributed *some* of his labour to the production of the embryo / foetus. As such, he may, on the labour view, be able to assert some property claim on the basis of his contribution, and this claim, although it would be significantly less than (and would in all probability be defeated by) the far more substantial property claim of the woman, would confuse the issue unnecessarily. To acknowledge any property right whatsoever on the part of the man would represent a weakening of the immunity which pregnant women currently enjoy from legally-endorsed interference in pregnancy by potential fathers. This being so, my property model requires to justify the sole ownership of the foetus by the pregnant woman without reference either to genetic contribution or to labour.

5.6.4. Property-for-personhood

Another possible justification for endowing pregnant women with sole ownership of their embryos and fetuses is found in Margaret Radin's theory of 'property-for-personhood'. Property-for-personhood sources property rights not in self-ownership, but in the fact that the recognition of property rights in certain things is necessary for full personhood. 'The essence of [Radin's] theory', according to Jeanne Schroeder, 'is that we identify so closely with certain objects of personal property that we cannot distinguish our property from our selfhood. Consequently, human flourishing requires the recognition of certain legal rights that protect these objects of personal property'.⁶⁰⁸ Radin explains:

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing

⁶⁰⁸ Jeanne Lorraine Schroeder, 'Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body' 79 *Minnesota Law Review* 55 (November 1994) at 56

personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house...an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement. If so, that particular object is bound up with the holder.⁶⁰⁹

Naffine echoes this when she writes that property is so important for personhood that 'certain categories of property can bridge the gap, or blur the boundary, between the self and the world, between what is inside and outside, between what is subject and object.'⁶¹⁰ Radin contrasts 'property-for-personhood' with the sort of property we have when we hold goods that are 'perfectly replaceable with other goods of equal market value'.⁶¹¹ The archetypal example of an object held for 'purely instrumental reasons' is money, which we almost always hold only because of its exchange value.⁶¹² Radin continues:

Once we admit that a person can be bound up with an external 'thing' in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that 'thing'. But here liberty follows from property for personhood; personhood is the basic concept, not liberty.⁶¹³

So according to Radin, recognising property-for-personhood enables us to understand why certain forms of property are treated by theorists as being 'stronger' or more important than others, and as giving rise to stronger moral claims and more stringent legal protections.

Radin concludes that at least some conventional property interests in society ought to be recognized and preserved as personal, and that where we

⁶⁰⁹ Margaret Jane Radin, 'Property and Personhood', 34 *Stanford Law Review* (1982) 957 at 959

⁶¹⁰ Naffine, *op. cit.*, at 199

⁶¹¹ Radin, *op. cit.*, at 959

⁶¹² *Ibid.* at 960

⁶¹³ *Ibid.* at 960

can ascertain that a given property right is personal, there is a prima facie case that that right should be protected to some extent against invasion by government and against cancellation by conflicting fungible property claims of other people.⁶¹⁴ This is precisely the kind of property right in the foetus that my property model of pregnancy wishes to vest in pregnant women. So can the foetus feasibly be regarded as property-for-personhood? I have argued earlier, under headings 5.3., 5.4. and 5.5., that there are good reasons to accept that embryos and fetuses, whether inside or outside the body, can be regarded as property. If we accept this as a starting point, we can proceed to ask whether they are the kind of property which is so bound up with the identity of the owner that they ‘cannot be distinguished from (her) selfhood’, meriting the kind of strong protection from interference by government and others that Radin envisages.

There is a subtle, but fundamental, problem with all of this. While property-for-personhood provides a strong justification for the *strength* of the property right in the foetus, it does not clarify *why* the right ought to vest exclusively with the pregnant woman who carries it. So, bearing in mind that, if we can establish that property rights in the foetus ought to vest exclusively in the pregnant woman, we can, by reference to Radin’s concept of property-for-personhood, regard them as an extremely robust instance of property, I turn now to consider J.W. Harris’s theory of property and personhood and to ask whether this is capable of justifying why only pregnant women should be regarded as the owners of the fetuses.

5.6.5. J.W. Harris on property and personhood

Harris offers several different justifications for what he calls ‘natural property rights’. Two of these are relevant to property-in-the-foetus: the ‘*personhood constituting*’ justification, and the justification from *privacy*.

⁶¹⁴ *Ibid.* at 1014-1015

5.6.5.1. 'Personhood constituting' property

Harris tells us that '[w]here someone constitutes his personhood, in part, by incorporating a thing into himself, he ought to be regarded as the owner of that thing.'⁶¹⁵ The similarity with Radin's property-for-personhood is clear, and indeed Harris quotes Radin's statement that 'once we admit that a person can be bound up with an external "thing" in some constitutive sense, we can argue that by virtue of this connection the person should be accorded broad liberty with respect to control over that "thing".'⁶¹⁶ Despite the similarity, however, note that Harris is engaged in justifying the *locus* of the property right whereas Radin's theory (in my view) is capable of justifying only the *strength* of the right.

Harris continues, '[a] successful invocation of the personhood-constituting argument would not yield full-blooded ownership. In particular, it appears incompatible with freedom to transmit.'⁶¹⁷ Again, the relevance to property-in-the-foetus is clear. The fact that the personhood-constituting justification would yield a property right in the foetus which is 'incomplete' in the sense that it does not include the right to transmit should not be regarded as a disadvantage, since: (i) in discussing the nature of property, I have already pointed out that there is no formula for determining what is and is not an instance of property, so that to qualify as 'property', a particular relationship need not necessarily exhibit *all* of the incidents we commonly associate with property⁶¹⁸, and (ii) I will argue later that in the context of pregnancy, to regard the foetus as an object of non-transmissible property is perfectly in keeping with principles of individual liberty generally, and in particular with the way in which courts in the United Kingdom have recently been adjudicating cases of 'maternal / foetal conflict'.

Harris tells us that 'the phenomenon of personhood-constituting through incorporation of external resources does exist. If an artificial organ is

⁶¹⁵ J.W. Harris, *Property and Justice* (Oxford: Clarendon, 1996) at 220

⁶¹⁶ See *supra*, note 613

⁶¹⁷ Harris, *op. cit.*, at 221

⁶¹⁸ See *infra*, under heading 5.2.1.

implanted into someone's body, it becomes part of him.'⁶¹⁹ Once again, the relevance to the pregnancy context is clear. However, although I have claimed (and will go on to elaborate on the claim) that the 'incompleteness' of property under the personhood-constituting justification need not make this a less attractive route to justifying property-in-the-foetus, nevertheless this consideration leads Harris, ultimately, to prefer other ways of justifying property rights:

[T]he personhood-constituting argument for a natural property right, when it can be plausibly invoked, does support a just claim to a limited, non-transferable ownership interest. Its authentic scope is, however, extremely limited. Furthermore, when it applies the privacy argument...will invariably apply as well. Personhood-constituting is hence in practice a redundant as well as a rare phenomenon.⁶²⁰

It is to Harris's explanation of the justification based on privacy that I turn now.

5.6.5.2. *Property for privacy*

Harris states that '[w]here a person's privacy can be effectively guaranteed only if he is granted an open-ended set of use-privileges and control-powers over some resource to which he is intimately connected, he ought to be regarded as owner of that resource.'⁶²¹ In the context of pregnancy, it is easy to see that the privacy of the pregnant woman 'can only be effectively guaranteed' if she is granted such privileges and powers in respect of the foetus within her body. The landmark case of *Roe v Wade* established privacy as the basis of abortion rights in the United States, and ever since, privacy has been regarded as the animating value in adjudicating maternal / foetal issues. Given the centrality accorded to privacy in the maternal / foetal context, and the close connection between privacy and property noted by Harris above, it is

⁶¹⁹ Harris, *op. cit.*, at 222

⁶²⁰ *Ibid.* at 223

⁶²¹ *Ibid.* at 224

perhaps surprising that such matters have not hitherto been framed in terms of property – although there have undoubtedly been strong political and rhetorical reasons for avoiding references to pregnancy as a property relationship, particularly given the heat of the abortion debate in America. Nevertheless, it is the central claim of this thesis that it is both possible and useful to understand pregnancy in property terms, and the strength of the link between property and privacy – perhaps *the* most familiar theoretical justification for abortion rights – would seem to support this claim.

Harris clearly prefers the privacy-based justification to the personhood-constituting one when he writes that '[p]rivacy is an important property-specific justice reason to be taken into account in property-institutional design. Its importance drowns any significance which might be attached to metaphysical notions of personhood-constituting.'⁶²² Because of the familiarity and success that arguments based on privacy have had in the maternal/foetal context, justifications which invoke privacy will perhaps be more accessible and of more obvious practical value than 'personhood-constituting' justifications of property-in-the-foetus. This notwithstanding, however, I see no reason why the two modes of justification should not be taken together, since they both provide persuasive reasons for establishing the pregnant woman as the exclusive locus of property-in-the-foetus. Having thus justified the pregnant woman's exclusive property right, it is possible to use Radin's theory of property-for-personhood to explain the strength of that right.

5.7. Advantages of the property model

The property model of pregnancy proposed here avoids the inconsistency of the conflict model. The conflict model cannot explain satisfactorily why a woman is permitted to terminate a pregnancy until the twenty-fourth week whereas a third party may be liable under criminal and / or civil law for causing the death of (or injuring) a foetus of the same gestational age.

⁶²² *Ibid.* at 228

According to the property model, this can be explained by the fact that the foetus is the property of the pregnant woman, so that while she is permitted to dispose of it, no-one else is entitled to damage or destroy it. If they do so, they are liable to pay her compensation. Under the property model, the most pressing inconsistency is the restriction on the right to terminate pregnancy. If a foetus is understood as the property of the pregnant woman, there is no justification for restricting her freedom to dispose of it.

A related advantage is the ability of the property model to recognise the foetus as something of value. As such, cases where compensation is awarded for foetal death or injury can be understood as attempts by the law to compensate women for the loss of their valued foetal property. As many commentators note, the courts currently struggle with the intuition that the foetus is 'not nothing', is something that matters, within the framework of a model which focuses on the potential 'conflict' between woman and foetus. The conflict model struggles to recognise the value of the foetus because of the implications such value may have for women's rights and freedom within a system where the interests of one are being balanced against those of the other. The property model acknowledges that the foetus has value, but since it is valued as *property* and not for its potential as human life, the valuing of the foetus within the property model poses no threat to the legal (or social) position of pregnant women.

A focus on relationships rather than intrinsic nature, on law rather than metaphysics, is yet another advantage of the property model. Because property is concerned with relationships, this allows us to focus away from interminable wrangling about the 'true nature' of the embryo or foetus and toward the relationships surrounding it. Instead of asking, 'what is this entity?', the property model asks, rather, 'what relationships exist in respect of this entity?'.

The property model also provides answers to another problematic question arising from pregnancy: the question of whether the foetus is a body-part, a separate entity or something in between. The conflict model treats the pregnant woman and the foetus as separate entities with competing interests. The shortcomings of the conflict model have led some commentators to reject the idea of woman and foetus as 'separate entities', hoping thereby to discover

a better, less ‘conflicted’ way of thinking about and adjudicating pregnancy. But what are the alternatives? One is to claim that the foetus is nothing more than a part of the pregnant woman’s body. An example of the body-part model can be found in the work of Barbara Katz Rothman, when she writes of ‘the baby not planted within the mother, but flesh of her flesh, part of her’.⁶²³ Liam Clarke also adopts the body-part model. He claims that, while a woman is pregnant, ‘her personhood...necessarily involves the fetus such that it is part of who she then is.’⁶²⁴ This forms the basis for his notion of the ‘fetus/mother’⁶²⁵ and his insistence that, prior to birth, ‘issues and problems pertaining to the fetus/mother may...be discussed only in the context of their unity.’⁶²⁶ Obviously, the foetus is located within, connected to and dependent upon the body of the pregnant woman, but does this *really* make it a body-part?

In my view, the body-part model can be rejected because, as John Seymour observes, ‘[it] cannot be reconciled with the physiological facts.’⁶²⁷ First, the DNA profile of the foetus is different from that of the mother – if it were indeed a body-part, it would be the only body-part to have anomalous DNA. Moreover, as Catharine MacKinnon has noted, ‘[f]etal dependence upon the pregnant woman does not make the fetus a part of her any more than fully dependent adults are parts of those on whom they are dependent. The fetus is a unique kind of whole that, after a certain point, can live or die without the mother.’⁶²⁸ A related point is that, if the foetus is taken to be a body-part, this entails that the woman who gives birth or undergoes a termination is ‘less than whole’, ‘diminished’ somehow by the absence of the foetus. Indeed, perhaps *all* women who are not pregnant could be said to be ‘incomplete’, or ‘lacking a foetus’ in the same way that someone lacking another body part would be incomplete. This is surely absurd: as MacKinnon points out, ‘[t]he woman’s physical relation to her fetus is expected to end and

⁶²³ Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in a Patriarchal Society* (New York, 1989) at 61

⁶²⁴ Clarke, *op. cit.* note 213 at 40

⁶²⁵ *Ibid.* at 39

⁶²⁶ *Ibid.*

⁶²⁷ Seymour, *op. cit.* at 191

⁶²⁸ Catharine A. MacKinnon, ‘Reflections on Sex Equality under Law’ (1991) *Yale Law Journal* 1281 at 1315

does; when it does, her body still has all of its parts. She is whole with or without it...'.⁶²⁹ Courts in the United Kingdom have rejected the body-part model explicitly.⁶³⁰

The other alternative would be to claim that the foetus is *neither* a body-part *nor* a separate entity, but something else – ‘not-one-but-not-two’, in the words of John Seymour. The key feature of such approach, according to Seymour, is ‘its emphasis on the shared needs and interdependence of the woman and her fetus’.⁶³¹ Seymour acknowledges that ‘[t]here is no simple way of explaining the resulting model’, but points out that it ‘stresses the uniqueness of pregnancy’.⁶³² Is this what we need from a new legal paradigm of pregnancy? One of the main liberal criticisms of academic comment on pregnancy is the tendency of writers to emphasise how ‘unique’ the pregnancy condition is, and how difficult it is to find appropriate analogies from which to begin reasoning about how the law ought to deal with it. As Robin West has commented:

Equal regard – the heart of liberalism – requires that pregnant women be treated similarly to those with whom they are similarly situated. The imperative of equal treatment at the heart of liberal legalism animates the need to locate those to whom she is similarly situated and therefore, the search for analogous conditions.⁶³³

Whatever we think of liberalism as a political philosophy, surely we would wish the law to ‘treat like cases alike’? Models which emphasise the ‘uniqueness’ of pregnancy threaten to ‘strand’ pregnant women out of reach of the protection of the law by depriving them and their advocates of analogies. Although it is difficult, given the vagueness of the ‘not-one-but-not-two’ approach, to imagine precisely what following such an approach would entail, it is fair to imagine, given the approach’s stress on the

⁶²⁹ *Ibid.* at 1314

⁶³⁰ See the cases of *Attorney General’s Reference (No. 3 of 1994)* [1998] AC 245 and *St. George’s Healthcare NHS Trust v S* (see *supra* note 62)

⁶³¹ Seymour, *op. cit.* at 190

⁶³² *Ibid.*

⁶³³ West, *op. cit.* at 2125

uniqueness of pregnancy, that to follow it would be detrimental to the legal status of pregnant women.

The property model avoids the illiberalism of the ‘not-one-but-not-two’ approach, its indeterminacy, and the impracticality which would inevitably hamper any attempt to translate the latter into a coherent adjudicative framework. It also avoids the absurdity of the body-part model, since it recognises the foetus and the pregnant woman as two distinct entities. Unlike the conflict model, which ascribes competing interests to each of them, however, the property model avoids the problems of conflict inherent in other ‘separate entity’ models by defining the foetus as a separate entity *without* interests. It is separate from the mother in the same way that any piece of property is separate from (but related to) its owner.

A final advantage is that the property model avoids justifying the property right of a pregnant woman in her foetus on the basis of the controversial notion of ‘property in the self’, with all its dualistic and illiberal implications (discussed above). Because I have sourced the pregnant woman’s right of property-in-the-foetus in J. W. Harris’s notions of ‘personhood-constituting property’ and ‘property for privacy’, there is no need to make the contentious claims that: (a) a woman owns her own body; and (b) that the foetus is a part of the body which she owns.

Although the property model has these advantages over the conflict and consent based models, it will undoubtedly have its critics, and I now consider what some of the main criticisms may be.

5.8. Some criticisms anticipated

5.8.1. Moral repugnance

Perhaps the most obvious objection to my property model would be to ask why the courts should adopt an analysis which so many people would consider to be morally-repugnant. My response to this would be to argue that a view is morally-repugnant only if it offends some collective moral understanding. As the controversies surrounding such topics as abortion, embryo experimentation, surrogacy and maternal/foetal conflict in the medical

context reveal, we do not *have* any shared moral sense which could be offended by the notion of the foetus as property - although, of course, there may be many *individuals* who will feel offended by it. Moreover, as the discussion in chapters two and three shows, it is highly unlikely that any moral consensus over the issue of foetal moral status will emerge.

But an even stronger response than this may be made. Even if it were to be assumed that we *do* have some sort of shared moral sense that the foetus is morally-considerable, it would be a great mistake to suppose that an approach based on personhood would lead to conclusions which were any more favourable to that view than the conclusions of the property-based approach proposed here. Personhood theories like Kant's - interpreted strictly - would categorise all infants, young children and adults with severe mental disability as non-persons. A personhood theorist like Peter Singer would also exclude infants and the severely mentally-disabled from the category of 'person', while including some non human animals. Is this any more 'in line' with our moral intuitions?

As I have shown in my discussion of McDonagh's model and my references to writers such as Hartouni, Larsen and others, models which focus on questions about the moral status of embryos and fetuses can also arrive at constructions wherein the foetus is a monster, an aggressor, even a 'rapist'. Is demonising the foetus necessarily better than reifying it, simply because the demonised foetus is regarded as an 'individual'? In my view, the heat of the personhood / rights debate, and the accompanying sense that it is an 'us or them' contest between women and fetuses, can lead to conclusions which are potentially even more repugnant than the conclusion that the foetus is a 'thing', an object of property.

To the extent that the law does not currently recognise the foetus as a 'person', it is *already* 'a thing' in law, despite the lengths to which judges and academics go to tell us what a special and unique 'thing' it is. The law *already* permits the destruction of embryos in the course of scientific research, and the destruction of embryos and fetuses in legal terminations of pregnancy. Would a property-based model really have such a detrimental effect on their moral and legal status? Is it really more repugnant to experiment on embryos and abort fetuses because they are 'things' than because they are 'special

(but not special enough) non-persons'? For all these reasons, I would wish to resist the conclusion that moral intuition necessarily leads us to prefer the current paradigm of personhood and rights over the property paradigm I propose here.

5.8.2. Incompatibility with the experience of real women?

There will be those who argue that my property model of pregnancy is as much at odds with women's 'ordinary' experience of pregnancy as McDonagh's foetus-as-aggressor model. Against this criticism I would argue that we cannot talk meaningfully about 'women's ordinary experience of pregnancy', since it makes sense to suppose that each woman has her own *individual* experience. In the case of a *wanted* pregnancy, it is accepted that the majority of women experience a 'bonding' with the foetus. But a property model does not preclude this, any more than the current conflict model does. Very few women conceive of their wanted pregnancies as clashes of interest between themselves and their future children, so the fact that they do not generally envisage pregnancy as conferring a property right in respect of the foetus should not be regarded as a reason to reject the property model. Rather, the model should be resisted only if it makes *no legal sense*, or fails to improve upon the status quo. I have argued that it *does* make legal sense and improve upon the conflict model. The current conflict model, by contrast, is both a legal nonsense – 'where is the *legal* conflict?' – and a source of incoherence. The ability to present an accurate picture of wanted pregnancy is not a priority for adjudicative models of this kind because, as I have already suggested, there is unlikely to *be* one common experience of wanted pregnancy.

5.8.3. Rights of trespass?

A second concern about property-in-the-foetus might be the fear that someone other than the pregnant woman herself could have property rights in the foetus which allow them to trespass on the body of the woman. As I have already suggested, my view of property-in-the-foetus would not recognise any party

other than the pregnant woman as having property rights in respect of the foetus *in utero*. Although other parties – potential fathers, members of the extended family, doctors, and even the state – may have strong *interests* in the welfare of embryos and fetuses *in utero*, these interests cannot translate into property *rights*. This is because the personhood rights of the pregnant woman herself act as a trump to defeat any interests that others may have.

Why does personhood act as a trump over property? Put simply, in law personhood always *is* a trumping concern. The clearest example of this is the principle that persons themselves cannot be owned; institutions such as slavery and possessive marriage which treated persons as objects of property relations are now recognised as anathema precisely because it is accepted that the categories of ‘person’ and ‘property’ are mutually exclusive. As full legal persons, pregnant women are entitled to rights of privacy and bodily integrity, such as the right to refuse medical treatment. If third parties were to hold property rights in respect of embryos and fetuses *in utero*, these ‘personhood rights’ of pregnant women would be placed in serious jeopardy, to the extent that the personhood of women might even be regarded as being ‘suspended’ for the duration of pregnancy. At any rate, pregnant women would certainly not be able to exercise their personhood as fully as non-pregnant women. In the United Kingdom at least, courts have recognised that this would be unacceptable, and the decision in *Re MB* comes close to saying precisely that.⁶³⁴

Although I have argued that personhood is inadequate as a criterion for determining moral status, I have emphasised that it is nonetheless possible to recognise clear cases of moral and legal personhood which are no less compelling because the concept is of little use at the margins of life. As such, it is not contradictory to invoke the personhood of the woman as a protection against the potential property-claims of others. I have already mentioned surrogacy in passing. A property-based analysis of pregnancy would explain why surrogacy contracts are unenforceable, and why the couple who have commissioned the surrogacy cannot coerce the surrogate during pregnancy.

⁶³⁴ See *supra*, note 60 at 436-438

As such, the property-based analysis protects women's bodily integrity rather than threatening it.

5.8.4. The foetus as a patient in medical law?

The recent trend in medical law in the United States to treat the foetus as a 'second patient' highlights a related danger with the property-based approach. New technology has enabled clinicians to have a greater understanding of foetal development and has given them the ability to intervene more and more for the clinical benefit of the foetus. In America, many commentators are increasingly concerned about the willingness of state authorities to impose treatment upon pregnant women against their will, 'for the benefit' of the foetus.⁶³⁵

This is one area of law in which the property-based approach is a double-edged sword. On the one hand, the foetus-as-property model could be used to refute the notion that the foetus is in any sense a "patient" and thereby prevent clinicians from trespassing upon the woman's body (or to provide an alternative basis for the conclusions in *Re MB*⁶³⁶ and *St George's Healthcare NHS Trust v S*⁶³⁷ that a woman may reasonably refuse treatment to benefit the foetus). But what about the pregnant woman who actively *seeks* medical intervention to benefit her foetus? If the law regards the foetus as property which is valuable only to her, its owner, why should it sanction the use of scarce public resources in order to protect her private property interest when the NHS is unable even to meet all the needs of *born* people? Does the property-based analysis commit us to the conclusion that foetal surgery - or any ante-natal care other than that designed to promote the health of the mother herself - be carried out privately, at the mother's expense? This would obviously penalise poor pregnant women, which seems a highly undesirable outcome.

This difficulty is not as easily rebutted as all of the following ones, and I think it requires further examination. First, it could be claimed that the

⁶³⁵ See *supra*, note 79

⁶³⁶ See *supra*, note 60

⁶³⁷ See *supra*, note 62

‘public good’ interest in preventing people from being born with disabilities can justify the use of scarce resources on foetal surgery / treatment. Of course there is another way of preventing children from being born with disabilities, namely a system of compulsory screening with compulsory abortion in those cases where foetal abnormality is found. But this also uses up resources (on screening and abortion) and much more importantly, in my view, it would involve coercing woman into having abortions in those cases where the existence of foetal abnormality did not cause the woman herself to wish the pregnancy to be terminated. Such a massive intrusion would of course be abhorrent to the majority of people, and would contravene the clear precedent regarding the right of a pregnant woman to refuse to consent to treatment.⁶³⁸

Of course, a counterargument could be made along the lines that it would be unreasonable for a woman to wish to give birth to a child that she knows will be disabled, and that the law only allows scope for the *reasonable* refusal of consent. But this would be a very dangerous development; it would entail the value-judgment that the life of a disabled person is not worth living by implying that to wish such a person into existence is ‘unreasonable’. It also fails to take account of the refusal of some parents to trust absolutely in the technology and expertise which has produced the diagnosis of disability. For a woman who refuses her consent to an abortion on the basis that she is not entirely convinced of the absolute certainty that her child *will* be born disabled, to treat this as an unreasonable ground for withholding consent is to deny patients the right to disagree with medical opinion and still remain ‘reasonable’.

Furthermore, many women have some degree of *moral* objection to abortion, and *Re MB* clearly recognises the right of patients to withhold their consent for moral reasons, or indeed, for no reasons at all. Such is the scope of patient autonomy as recognised in *Re MB* that the spectre of forced abortion can be dismissed as a horror-scenario which the law, as it stands, would not countenance. But I am suggesting that the law alters its adjudicative framework; so the correct question is not whether a court proceeding on the basis of the analysis in *Re MB* would ever allow forced abortion; rather, the

⁶³⁸ On the present analysis, it would also represent a violation of the pregnant woman’s strong right of *property* in the fetus.

question ought to be how a court applying my property model would regard *Re MB* – would such a court reach the same conclusion? In other words, would the patient-autonomy of pregnant women still be protected such that forced abortion would still be illegal?

My view is that a property-based account of the maternal/foetal relationship would have no detrimental effect upon pregnant women's autonomy as patients. Rather, it would enhance their autonomy by providing a basis for apportioning more weight to women's wishes, and less weight to the views and professional prejudices of the medical establishment.⁶³⁹ This is so, in my opinion, because if abortion involves the disposal of unwanted property rather than a 'clash of [moral] absolutes', there is less scope for medical personnel to argue with the decision of a woman either to dispose of her property, or to retain possession of it.

It may be claimed that, if abortion is nothing more than the disposal of unwanted property, then there is no obligation for the state to provide and fund abortions in NHS hospitals. However, any such suggestion can be rebutted strongly by pointing out that the state already takes responsibility for providing us with means to dispose of our unwanted property safely and hygienically, because, if it were the responsibility of each individual citizen to dispose of his or her own refuse, this would lead to an insanitary environment and eventually disease. On a property model of pregnancy, the obligation of the state to provide state funded abortions in NHS hospitals would be grounded in the need to avoid the consequences of not doing so: backstreet or DIY abortions and widespread injury and infection. The public good considerations weighing in favour of state-funded hospital abortions would thus be overwhelming.

⁶³⁹ I do not mean here to use the term 'prejudices' in a pejorative sense; I note simply that all professions have a 'culture', a 'way of doing things' which may affect the attitudes and modes of reasoning of members of those professions in a way that works to undermine the personal autonomy of those they serve. However, see Sally Sheldon, *Beyond Control* (Pluto Press, 1997) for the view that the systematic medicalisation of abortion has robbed women of reproductive power because the medical profession is inherently 'male'; this could certainly be one way in which professional prejudices threaten the decisional autonomy of pregnant women.

5.8.5. Property-in-the-body?

Another potential problem with the notion of foetal property is the notion that the property interest flows from the property we are said to have in our own bodies. As discussed above, many theorists dispute this idea. For many philosophers, the idea of self-ownership involves an unacceptable dualism between the part of the self that does the owning, and the part that is owned. The implication is that the mind is the person doing the owning, and the body is a mere thing that is owned. This is worrying to some people because it raises the issue of slavery and appears to threaten liberty. Moreover, some feminist writers point out that historically, self-ownership has operated so as to exclude women; their bodies have always been at the disposal of men, serving masculine interests and the goals of patriarchal societies.⁶⁴⁰

This ideological dispute need not be fatal to the notion of foetal property. As has already been demonstrated, property in the foetus need not stem from property in the body. My model founds the pregnant woman's exclusive right of ownership in the foetus she carries in the fact that such ownership is necessary to her privacy (as explained by J.W. Harris) and therefore to the meaningful exercise of her personhood.

5.8.6. The nature of property

Another response to my view of pregnancy might be to point out that philosophically, property is just as contentious and indeterminate a concept as personhood. Why, then, would a paradigm shift from personhood to property be of any assistance to the courts in determining the outcomes of hard cases? I hope I have shown that a property analysis *is* more helpful. The very fact that it allows courts to stop attempting to determine the moral status of the foetus is helpful in itself. Although both concepts - personhood and property - have both legal and moral implications, the courts should find it easier to deal with

⁶⁴⁰ See, for example, Donna Dickenson, *Property, Women and Politics* (Polity Press, 1997) and Ngaire Naffine, *op. cit.* at note 511

property claims. Although the term ‘person’ has a legal meaning, it is ‘wholly formal’⁶⁴¹ in the sense that it has no normative content; it ‘does not provide us with a definition of a person from which to derive solutions to practical problems.’⁶⁴² As such, it is invariably to the *moral* philosophy of personhood that the courts are forced to turn in hard cases.

A recent example can be found in the case of the conjoined twins Jodie and Mary, where the court acknowledged both twins to be ‘persons’ in the eyes of the law, but concluded that this finding did not aid their deliberations. In that case Lord Justice Ward was moved to remark, with a hint of frustration, that ‘this is a court of law, not of morals’.⁶⁴³ Deliberations about personhood force the courts into uncharted and often uncomfortable territory. By contrast, the law of property would allow courts to dispose of cases involving pregnancy without the need for such moral discomfort.⁶⁴⁴ It would be relatively easy to regard pregnancy as an instance of property by looking at its features and deciding, in Waldron’s words, whether it has enough of the ‘stuff of ownership’ about it.⁶⁴⁵

A different, but related question asks ‘why property?’ In other words, a property framework may be workable, may even be helpful, but why should we choose to adjudicate pregnancy in terms of property rather than in terms of any of the other legal categories available? Pondering the issues arising from the capacity of new reproductive technologies (‘NRTs’) to allow various stages of potential human life to exist outside the body of a woman, Jennifer Nedelsky wonders: ‘Should we treat these forms of potential life as property, invoking the law of property to handle the inevitable disputes and policy choices that the NRTs will give rise to?’⁶⁴⁶ Nedelsky says that ‘no one concept, such as property...is intrinsically appropriate or inappropriate’⁶⁴⁷, observing that ‘[t]he choice of legal category is essentially a strategic

⁶⁴¹ Richard Tur, ‘The “Person” in Law’ in Arthur Peacocke and Grant Gillett (eds.) *Persons and Personality: A Contemporary Inquiry* (Oxford: Basil Blackwell, 1987) at 121

⁶⁴² *Ibid.* at 129

⁶⁴³ *Re A (Children) (Conjoined Twins: Surgical Separation)* [2000] 4 All ER 961 at 969

⁶⁴⁴ Although for some judges, academics and lay people the very notion of framing pregnancy in terms of property may be sufficient to engender moral discomfort.

⁶⁴⁵ Jeremy Waldron, ‘What is Private Property?’ 5(3) *Oxford Journal of Legal Studies* (1985) 313 at 314

⁶⁴⁶ Jennifer Nedelsky, ‘Property in Potential Life? A Relational Approach to Choosing Legal Categories’ *Canadian Journal of Law and Jurisprudence* 16(2) (1993) 343 at 344

⁶⁴⁷ *Ibid.*

choice’⁶⁴⁸. In other words, we should choose the legal categories that will best promote ‘the norms and objectives which we think are primary.’⁶⁴⁹

So which norms and objectives should we prioritise when choosing a legal category for adjudicating pregnancy? Nedelsky offers some suggestions when she writes:

[L]egal rights structure basic relationships in our society. In choosing or designing legal concepts for dealing with the problems posed by potential life, I think the relationships we must have in mind are these:

1. Relationships of respect and appreciation for children...
2. Relationships of respect for women and honouring of their reproductive capacities and labour.
3. Relations of equality, between people of all classes and backgrounds as well as between men and women.⁶⁵⁰

I do not wish to disagree with the relationships Nedelsky prioritises here; indeed, I would contend that none of these goals is undermined by the property model of pregnancy which I propose. The property model does not commodify children, and need not erode respect for them or attention to their interests. This is so because the foetus, not the child, is commodified in the property model of pregnancy; the foetus-as-property is possible only because the law insists on the non-personhood of the foetuses, whereas the law is clear that born children *are* persons. Even then, the foetus is ‘commodified’ only theoretically, since, as will shortly be discussed, I conceive of property-in-the-foetus as necessarily non-transferable.

With regard to Nedelsky’s second priority – respect for women, their reproductive capacities and their labour – the ‘symbolic power of property language’⁶⁵¹ is well-known. Nedelsky herself acknowledges the view that ‘women’s autonomy, power, and control vis a vis the medical establishment, might be enhanced...by the position that all stages of potential life issuing

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.* at 355

⁶⁵¹ Noel Whitty, Thérèse Murphy and Stephen Livingstone, *Civil Liberties Law: The Human Rights Act Era* (London: Butterworths, 2001) at 299

from her body are her property – and remain so even when they are no longer in her body.’⁶⁵² This latter phrase indicates clearly that the possibility of property-in-the-foetus *in utero* is envisaged here.

Nedelsky also seems to accept that her third priority – equality, particularly between the sexes – would also be served by the choice of property as a legal category, when she writes that ‘this position might be seen to aid women in struggles over power and oppression with their male sexual partners – both in regard to struggles specifically around reproduction and more generally.’⁶⁵³

I do not disagree with Nedelsky’s priorities then, but I would wish to add to them. Specifically, I would prioritise, along with the relationships Nedelsky identifies, the need for internal coherence within the legal system. This additional consideration weighs strongly in favour of the property model of pregnancy. Whereas the current conflict model is beset by inconsistency, as chapter one has shown, the property model not only irons out many of the apparent ‘inconsistencies’ in the current law; it also provides a solid theoretical basis for future adjudicating, thereby ensuring that the law in the area will develop coherently in accordance with readily-identifiable legal principles. Moreover it is capable of providing a *justification* for existing decisions and intuitions about how maternal / foetal cases ought to be resolved – something the conflict model continues to struggle with.

5.8.7. ‘Incomplete’ property?

Some may object that property-in-the-foetus is, at best, a highly unusual example of property, since many of the incidents commonly associated with ownership cannot apply. For example, a woman cannot hire her foetus out, or dispose of it by sale or gift during pregnancy. An immediate response to this is that there are always limitations on the exercise of our rights. As discussed above at 5.8.3., property rights in the embryo or foetus *in utero* cannot be held by third parties because this would undermine the full legal personhood of the pregnant woman. Similarly, the pregnant woman herself may not exercise her

⁶⁵² Nedelsky, *op. cit.* at 347 – although Nedelsky herself ultimately rejects this view.

⁶⁵³ *Ibid.*

rights of property in her foetus in such a way as to undermine her legal personhood. If she were to attempt to sell the foetus *in utero*, for example, the law would treat the contract of sale as being invalid. Just as we may not lawfully sell our kidneys, or sell ourselves into slavery (or even, in many jurisdictions, hire out our bodies in prostitution), neither may we alienate the fundamental components of our personhood, such as our privacy or the rights to refuse medical treatment or to terminate a pregnancy. We may *purport* to sign these rights or freedoms over to others, but the law will not uphold or endorse such ‘transactions’.

As such, the limitations on the exercise of the pregnant woman’s property rights in the foetus are no more fatal to the notion of the foetus-as-property than the laws on planning permission and waste disposal are fatal to ownership of land. Ownership of the foetus does not require that the pregnant woman, as owner, is able to do whatever she pleases with her foetus, since the law always regulates ownership of property, limiting it by reference to ‘trumping’ concerns, of which the personhood of the pregnant woman is treated here as being one.

Undoubtedly, many of the incidents normally associated with property are not present in the property model of pregnancy. However, recall the definition, contained in the *Encyclopedia of American Jurisprudence* and followed in the case of *Moore v Regents of the University of California*,⁶⁵⁴ of property as ‘nothing more than a collection of rights’. As Jeremy Waldron tells us, ‘[e]ach of the legal relations involved in [property] is not only distinct, but in principle separable, from each of the others...Because they are distinct and separable, the component relations may be taken apart and reconstituted in different combinations’ to give ‘newly constituted bundles’ which may also confer ownership.⁶⁵⁵

There are, however, powerful legal arguments against the idea of a property right which does not include the right of transfer (or ‘alienation’). In the case of *National Provincial Bank Ltd. v Ainsworth*,⁶⁵⁶ Lord Wilberforce stated that, before it can qualify as ‘property’, a right must be ‘definable,

⁶⁵⁴ See *supra*, note 515

⁶⁵⁵ Waldron, *op. cit.* at 315

⁶⁵⁶ [1965] AC 1175

identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.’⁶⁵⁷ The requirement that property rights must be ‘capable of assumption by third parties’ amounts to a denial of the possibility of non-transferable property rights. Following Lord Wilberforce’s dictum in *Ainsworth*, says Kevin Gray, ‘[n]on-transferable rights or rights which failed on transfer were simply not “property”’.⁶⁵⁸ Gray rebuts the idea that a right must be transferable before it can constitute property, arguing that such assumptions are the result of ‘a legal culture dominated by transfer and conveyance’⁶⁵⁹ and that ‘[o]nly brief reflection is required in order to perceive the horrible circularity of such hallmarks of “property”’.⁶⁶⁰

According to Gray, definitions of property should focus less on transferability and more on *excludability*. This is so because “Property” is not about *enjoyment of access* but about *control over access*. “Property” is the power-relation constituted by the state’s endorsement of private claims to regulate the access of strangers to the benefits of particular resources.’⁶⁶¹ As such, ‘the criterion of “excludability” gets us much closer to the core of “property” than does the conventional legal emphasis on the assignability or enforceability of benefits.’⁶⁶² It is possible, therefore, to describe as ‘property’ rights which may not be transferred or alienated, such as the rights of a pregnant woman in respect of her foetus.

There is also disagreement among academics about whether or not it is *desirable* that all property rights be transferable. Jeanne Lorraine Schroeder explains that for one leading property theorist, some property rights *should* be inalienable:

In *Market-Inalienability*, Radin...argues, in effect, that the more an object is ‘personal’, the less legal recognition should be accorded its exchange value. That is, for those objects at the extreme, personal end

⁶⁵⁷ *Ibid.* at 1247G-1248A

⁶⁵⁸ Kevin Gray, ‘Property in Thin Air’ *Cambridge Law Journal* 50(2) (1991) 252 at 293

⁶⁵⁹ *Ibid.*

⁶⁶⁰ *Ibid.*

⁶⁶¹ *Ibid.* at 294

⁶⁶² *Ibid.*

of her personal/fungible property spectrum (i.e., body parts and female sexuality), the right of alienation should not only not be specifically enforced, but the law should affirmatively prohibit market alienation.⁶⁶³

By contrast, Donna Dickenson seems to argue, in her article ‘Property and Women’s Alienation From Their Own Reproductive Labour’⁶⁶⁴, that segregating women’s reproductive labour from market values exploits women by robbing them of property in the products of the labour of their bodies.

From my point of view, both Dickenson’s and Radin’s approaches support the view that the products of women’s reproductive labour are ‘property’; they merely disagree about the desirability of alienation. My interest here is in whether and to what extent women’s ‘reproductive rights’, and in particular the right to seek an abortion, can be regarded as rights of property-in-the-foetus, and neither Dickenson nor Radin seems to exclude that possibility. Whether property-in-the-foetus can be alienated by ‘gift’, on the market, in abortion, or merely kept and enjoyed by the woman herself ‘as a means to her own ends’, as described above, all of these are consistent with the exercise of a property right.

5.9. Conclusions

The property model of pregnancy outlined in this chapter is perhaps surprisingly straightforward. Rather than treating the foetus as a body-part, it treats the woman and foetus as two distinct entities; however, unlike other ‘separate entities’ models it does not treat each of them as morally-considerable entities with interests and (potentially) rights. Following settled United Kingdom medical law cases, the foetus is regarded as a legal non-person, and from this basis it is argued that there is nothing to prevent it being an object of property – particularly when cases involving frozen embryos are

⁶⁶³ Jeanne Lorraine Schroeder, ‘Virgin Territory: Margaret Radin’s Imagery of Personal Property as the Inviolable Feminine Body’ 79 *Minnesota Law Review* (1994) 55 at 89

⁶⁶⁴ *Bioethics* 15(3) (2001) 205

considered. If embryos outside the body can be objects of property, then what is to say that embryos *inside* the body – which are morphologically and functionally indistinguishable from them – cannot also be so treated? And if *embryos* can be objects of property *in utero*, then why not foetuses, since personhood, which precludes property, does not attach until birth?

In treating the foetus as a separate entity, but not a potential rights-bearer, the property model solves the inconsistency and contradiction of the conflict model, providing a basis for according women robust reproductive rights while simultaneously recognising the foetus as something distinctive and potentially-valuable. Moreover, as a relational model, the property-based approach avoids the interminability of the ‘intrinsic nature’ debates and satisfies the growing demand for a greater emphasis on ‘relationality’ in theorising and adjudicating pregnancy.

The property model also has the advantage of fitting with existing case law and employing familiar legal concepts. In the context of the model, pregnancy can be adjudicated on the basis of the familiar framework of property law; this represents an advantage over theories which hold pregnancy to be so unique or ‘without analogy’ that academics and judges must come up with ever more creative ways of talking about women and their foetuses.

Conclusion

In the course of this examination, three models of pregnancy have been discussed. In the opening chapter of this discussion, I argued that the orthodox ‘conflict model’, which dominates current legal thinking and reasoning, fails to provide an adequate framework for adjudicating maternal / foetal issues. In the conflict model, such issues are framed as conflicts of *rights*, and this forces us to examine and contrast the legal and moral status of the entities involved – woman and foetus – and to weigh these against one another. Of course, the conflict model has intuitive appeal, not only because we are accustomed, by decades of its legal and social prevalence, to theorise maternal/ foetal issues in this way, but also because we are inclined to believe that resolutions to such issues *must* depend on finding the right moral answer – on determining, accurately, the moral status of the entities concerned.

The problems with the conflict model are twofold: first, it leads to inconsistent results; second, it simply does not provide adequate *justification* for the rights it ascribes. This is partly because it is attempting to do the impossible – to discover a satisfactory answer to the fundamental and deeply-contested moral question of foetal status. As was demonstrated in the discussion in chapters two and three, two of the most influential approaches to determining moral status – accounts based, respectively, on sentience and personhood – fail to yield any definitive conclusions regarding the moral status of the foetus. Sentience fails because of the state of our knowledge about foetal development, and because experts in the area disagree profoundly about at what stage of pregnancy – if at all – the foetus becomes sentient. Personhood fails because it is too riddled with arbitrariness and contradiction to function as a meaningful account of moral status at all. As such, the characterisation of the foetus as a ‘sentient non-person’ – which is necessary to the conflict model – is fundamentally flawed. The property model, by contrast, justifies existing law by reference to familiar legal principles and concepts, and as such it offers a preferable model for adjudicating pregnancy.

The consent model espoused by Eileen McDonagh is essentially a variation on the conflict model; it purports to avoid the ‘deadlock’ which

characterises the traditional conflict model by accommodating foetal ‘personhood’, but fails, ultimately, because it uses basic legal concepts (including the central concept of consent itself) in a way that is both confused and faulty. Moreover, the kind of ‘personhood’ it accommodates is a thin, ciphersous, *purely legal* personhood which does nothing to avoid the deep ethical controversies involved in maternal / foetal issues.

The property model I set out in the final chapter offers a real alternative to framing and adjudicating pregnancy in terms of conflict between woman and foetus; however, it is important to note the limitations of the model. First, there is the problem of its application in the United States context. As I have demonstrated, in the U.K. the status of the foetus as a legal non-person is clear. Given this starting point, the project of constructing a model wherein the foetus is an object of property relations is relatively straightforward. In the United States, the legal status of the foetus is less settled, particularly in medical law cases which purport to treat the foetus as a ‘second patient’.

The second limitation which must be considered is the limited applicability of my model in the legislative context. *Unwanted* pregnancies are very rarely the subject of adjudication, as most cases— the ‘enforced caesarian’ cases, actions for foetal injury, and so on — concern wanted pregnancies. Unwanted pregnancy is generally dealt with by legislation. Although this thesis has primarily been about what model the *courts* ought to adopt, the property model undoubtedly also has legislative implications. The right of a pregnant woman to property-in-the-foetus, as I have sourced and justified it, is equally strong *throughout* pregnancy. This means that, according to the property model, the present abortion laws in the United Kingdom are woefully inadequate, as they place unjustifiable and onerous restrictions on the right of pregnant women to dispose of (i.e. abort) their foetal property. However, it would be considerably more difficult to apply the property model in the legislative context, since legislation requires broad, usually cross-party support in both Houses of Parliament, and given the extent of fundamental moral disagreement on the abortion issue, this is unlikely to be forthcoming. Furthermore, many Members of Parliament would be reluctant, given the strongly-divided nature of British public opinion on abortion, to

associate themselves with legislation which enshrined such an absolutist position on the issue.

Where legislating on the issue of abortion is concerned, then, compromise is undoubtedly necessary. As such, any piece of legislation dealing with the issue cannot be expected to enshrine a recognition of the *legal* status of the foetus so much as an uneasy trade-off between warring factions. That being the case, a 'foetal property' statute is probably impossible. The courts, however, *are* free to apply the property model to the cases before them, and that is why it is as a model of *adjudication* that the notion of 'the foetus as property' is most valuable.

My thesis here has been both descriptive and prescriptive: my main claim is that a paradigm shift from personhood to property would reflect more accurately what is actually happening in the courts. But although I do not wish to say that this is necessarily a 'good thing' morally-speaking, I will go so far as to say that it not an outrageous or offensive thing, and that it is not a trend which we should resist on ethical grounds. In fact, I propose formalising it in a property model since that would lend coherence and justification to many legal decisions which presently appear inconsistent and contradictory. The moral debate can carry on in parallel, and if the issue of whether or not the foetus is a person is resolved tomorrow, then the courts will of course be free to abandon the property model of pregnancy altogether and implement the new moral consensus. What I claim, essentially, is that we should not allow the stalemate in the moral debate to inhibit or prevent the courts from making coherent decisions which are founded in recognised legal concepts. As such, the notion of the foetus-as-property is not intended to replace thoroughgoing moral argument about the appropriate status of entities and the various rights and responsibilities of the parties involved in beginning-of-life controversies; rather, it is intended to provide a *modus operandi* in the absence of moral consensus, one which enables the court faced with a case involving pregnant women and fetuses to function, in the words of Lord Justice Ward, as 'a court of law, not of morals.'⁶⁶⁵

⁶⁶⁵ See *supra*, note 643

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