

JURISPRUDENTIAL ANALYSIS OF FETAL RIGHTS

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Almost over the past two decades, medical science has equipped us with the heightened knowledge regarding the sources of harm to unborn children. The various sources include but are not limited to ailments of the pregnant woman, reactions of the prescribed medication she is taking, environmental chemicals, the use of alcohols or illegal drugs by the pregnant woman and the defects inherited from the genetic makeup of the biological parents. To a reasonable but a lesser extent, medical science offers an elevated ability to avert or reduce the aforementioned harms to the fetus. These augmentations have led some jurists, physicians and moral philosophers to expound the introduction of new fetal rights into our legal system. The newest example includes the right not to be born with a life which is not worth living induced by reasons of medical malpractice. As a result of the increased ability to diagnose and treat medical problems of the unborn child, many contend that the fetus ought to have a legal right to medical care liberated of, but parallel to the mother's right to care by her physician. More contemporary than these adjuncts of medical malpractice law is the proposition that the fetus ought to be given analogous rights holding against her parents, especially her mother, not to be subjected to parental malpractice and not to be denied any medical care necessary to preserve her life or promote her health. The altercation over these proposed fetal rights continues today and is doubtful to disappear in the foreseeable future. The apostles of the new fetal rights are vehemently opposed by those who believe that any such right which violates the fundamental rights of pregnant women and in the bargain, do more to harm than to prevent the injury to the unborn child.

LEGAL PERSONALITY OF FETUS

Before proposing right to life to fetus, it is important to establish that fetus has a legal personality because to be a legal person is to be a subject of rights and duties. To confer legal rights is therefore to confer legal personality.¹²⁷ The conundrum with regard to the legal status of the unborn child prevails because of the dilemma of whether the unborn child may be

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¹²⁷ SALMOND, JURISPRUDENCE, 277 (London: Sweet and Maxwell, 6th ed., 1920)

considered as another living entity or merely as a property of the mother who has the right to terminate it according to her will and wish. According to Martha Nussbaum, her capability approach should be extended to all forms of life and according to her its basic moral intuition concerns the dignity of a form of life that possesses both capabilities and deep needs.¹²⁸ So applying capability approach, fetus which is a form of life and which has both the capability to form full fledged human being unless aborted and has a deep need of care and love from her mother should be allowed to flourish in a dignified manner and no obstacles should be put to prevent it. The requisite to provide legal personality to fetus is that as it is a form of human life and has potential personality, its right to life should not be curtailed so easily based only upon the mere choice to abort. Therefore, to permit the fetus to flourish with grace, there is a need to confer bounded legal personality upon them so that their basic right to life is not breached.

CONDITIONAL RIGHTS OF THE UNBORN

From time immemorial, the English common law has acknowledged the right of an unborn child to inherit property. The traditional common law precepts state that the present ownership which is a right possessed by the unborn child is conditional on birth. This contingent right of the unborn has been long accepted in the United States law. Recently, the predicament of whether the fetus has a right not to be wrongfully injured before birth has been put to rest in *Bonbrest v. Kotz*¹²⁹, where assent was given to this right again conditional to the birth of the child. These explanations even though admitted as authentic, pose a palpable theoretical anomaly. The basis of these aforementioned rights being conditional on birth is often cited as the “born alive rule”. Subject to the preference of the legislature, the law could confer unconditional rights upon the unborn child i.e rights of the fetus qua fetus. This would indeed call for providing the fetus with a legal power to institute jural proceedings before birth. However, the prospect of conditional rights is often associated with two purposes. Firstly, the respect for the will of a deceased father can be achieved by apportioning some portion of this father’s estate to be reserved for the unborn, whether it is expressly mentioned in the will or otherwise presumed if he dies intestate. Secondly, this enables the father in fulfilling his legal duty of supporting the child by virtue of his legal power to settle a share of his estate upon his unborn child. There is a homologous altercation for holding the born alive rule for the right of

¹²⁸ MARTHA NUSSBAUM, FRONTIERS OF JUSTICE, DISABILITY, NATIONALITY, SPECIES, 346-352 (Oxford University Press New Delhi (2006))

¹²⁹ *Bonbrest v. Kotz*, 65 F.Supp.138 (D.C.D.C. 1946)

the unborn child not to be wrongfully injured. Presumptively, the underlying objective of this legal right is to require the parents for the medical care of their wrongfully injured child or to compensate the child for its medical expenses post birth. This intent corroborates impeccably with the born alive rule. If this rule were to be abandoned, it would also serve the mechanism for compensating the parents for the misery caused to their unborn child.

PLAUSIBLE RIGHT-HOLDERS

It has been time and again argued that the necessary function of legal rights is to revere the choice of the right-holder. If one advocates an interest theory of rights, then only entities adept of having interests would be the probable right-holders. Joel Feinberg argued that what is distinctive and important about rights is that they give the possessor standing to claim performance of some correlative duty.¹³⁰ However, a legal right is best conceived in the Hohfeldian notion of legal positions which confer dominion upon the right-holder in face of some second party in some potential confrontation.¹³¹ The dominion theory of rights suggest that only an agent, a rational being with all the psychological capacities could possess any right the reason of which is that it would be pointless and deluding to impute dominion, liberty and authority to any entity impotent of exercising the legal freedoms and powers that give a right-holder privilege over the defining rationale of a genuine legal right. Since no fetus has gained the capability for even elementary rational action, it is theoretically not possible for unborn children to possess any legal rights.

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¹³⁰ JOEL FEINBERG, RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY, 143-158 (Princeton NJ : Princeton University Press, 1980)

¹³¹ CARL WELLMAN, A THEORY OF RIGHTS, 81-107 (Totowa NJ: Rowman & Allanheld, 1985)