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# Crimes Against the Foetus: The Rights and Wrongs of Protecting the Unborn

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## Introduction

The legal position of the foetus raises difficult questions about the status which we accord the developing human being within society. Most conceptions of criminal liability are predicated on the person; usually, there is a victim and an aggressor, both of whom must be legally relevant persons before doctrines of criminal law can be applied.<sup>1</sup> Conceptions of personhood in this context are most often taken in relatively straightforward terms. Surely we know who is, and is not, a “legally relevant person”? And yet, the question is not easily answered in respect of the foetus. Within the UK and American traditions, a “legally relevant person” has not included the unborn child, but increasing developments in the field of foetal rights, particularly in some American jurisdictions, casts doubt on this. In analysing the status of the foetus under national criminal laws, there are two questions to be posed. First, is the foetus capable of being described as a victim<sup>2</sup> and secondly, should recognition of the foetus as a victim bring into play the associated criminal defences which would be available if the accused had attacked or killed an independent individual? Of these, the first presents perhaps the greatest hurdle while the second falls into place if the first is accepted. *If* we accept that the foetus can be classified as the victim, then a prosecutable crime has been perpetrated and, in principle at least, it would seem reasonable to make available such defences as would be open to the accused in any other such case.<sup>3</sup> Thus, and of particular note to the American developments discussed later, if we accept the foetus as a victim of a homicidal assault at the hands of a third party, should we then accept a defence for a person who intervenes, and perhaps even kills that third party, in defence of the unborn victim?

The focus of this paper will lie in the interpretations which have been placed on the concept of a “person” in the course of the foetal rights debate in the United Kingdom and United States. It will seek to address the legal classification of the foetus with regard to some specific developments, and in the light of recent statements from the European Court of Human Rights on the interpretation of Art.2 of the European Convention on Human Rights. In acknowledging the centrality of the concept of personhood in any discussion of the rights of the foetus, and the importance placed on live birth as a necessary criterion for the exercise of rights, the focus of this paper will lie in considering whether ordinary criminal defences can apply where one of the parties involved is not yet an independent human being and if so, what implications this has for the relative status of the foetus.

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<sup>1</sup> The obvious exceptions being corporate offenders and “victimless” crimes.

<sup>2</sup> That is, does the foetus fit the description of those entities we accept as capable of being victims, of suffering wrongs? In other words, can the foetus be not only a physical victim, but also legally recognised as a victim?

<sup>3</sup> However, if one were to proceed to view the foetus as a recognised victim, and therefore a person, for criminal law purposes, it would run contrary to the classic line taken in civil law that foetal rights are not exercisable until birth, and that the foetus is not recognised as a person until that point. See, for example, *Paton v British Pregnancy Advisory Service Trustees* [1979] Q.B. 276, and *Winnipeg Child and Family Services v G (DF)* [1997] 152 D.L.R. (4<sup>th</sup>) 193.

## Legal status

In recent times, the accepted view of foetal status has been expressed clearly by the English courts in *Attorney General's Reference (No. 3 of 1994)* which enshrines the “born alive” rule, stating that:

“(v)iolence towards a foetus which results in harm suffered after the baby has been born alive can give rise to criminal responsibility.”<sup>4</sup>

In America, *Roe v Wade*<sup>5</sup> sets out a framework in which the foetus develops in status as the pregnancy progresses but specifically denies it the status of person until it has achieved live birth. However, the ability of a third party to assert and exercise foetal rights pre-natally has received some support in a decision from Michigan<sup>6</sup> on the applicability of the doctrine of self-defence and foetal protection. This judicial development, combined with legislative moves on the part of the Bush administration,<sup>7</sup> show an increasing tendency in the United States to push forward the cause of foetal rights. In establishing the foetus as a person in an increasing number of arenas, the law sets itself on a particularly dangerous course, as it moves towards an inevitable stand-off between the irreconcilable positions of reproductive autonomy and a foetus’ right to life. Of more specific concern here, the judicial developments in Michigan set the value of the foetus and the value of an existent person against each other and conclude that a mother can be justified in killing an attacker who would otherwise have killed her foetus.<sup>8</sup> If the foetus has sufficient status to justify taking the life of another for its protection, then its status must raise questions as to its position relative to its mother and how far she can be curtailed in its name. Such developments inevitably raise the related issue of the maternal-foetal conflict where the autonomous choices of the competent woman are compromised for the sake of the foetus. In the U.K., a line of cases, starting with the much-criticised case of *Re S (Adult) (Refusal of medical treatment)*<sup>9</sup> saw a rise in court-ordered Caesarean sections against the wishes of the woman. This culminated in *St George's Healthcare NHS Trust v S*,<sup>10</sup> where it was held that, in the case of a competent patient, such an operation could not be carried out without her express consent, even where her decision to refuse treatment “(might) appear morally repugnant”.<sup>11</sup> There is, however, another aspect to the notion of the maternal-foetal conflict, where the mother’s ability to make her own choices in relation to lifestyle, rather than pure medical treatment, are compromised. This has generated cases which are considered below where her choice to engage in risk-taking conduct, whether in the form of illegal drug use, or the

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<sup>4</sup> [1998] A.C. 245 at 254.

<sup>5</sup> 410 U.S. 113 (1973), where it was stated that “... the unborn have never been recognized in the law as persons in the whole sense” ( at 162).

<sup>6</sup> *People v Kurr* 654 N.W.2d 654 (2002).

<sup>7</sup> The Unborn Victims of Violence Act 2004, which amends Title 18, United States Code by inserting a new Chapter 90A.

<sup>8</sup> The case is discussed in depth later, but, in brief, ~~it~~the case centres on the plea of self-defence raised by a woman who had killed her abusive partner because she feared that his attack, although not fatal to her, would prove fatal to her unborn foetuses. The Michigan Court of Appeals allowed her to use the “defence of others” argument to justify killing her attacker in order to protect her foetuses and thus set the value of the potential human beings (her foetuses) above that of the existent human being (her attacker).

<sup>9</sup> [1993] Fam. 123.

<sup>10</sup> [1998] 3 W.L.R. 936. In the Court of Appeal, the initial decision was ultimately overturned and the operation was found to have been unlawful.

<sup>11</sup> *ibid.*, at 957.

consumption of excess alcohol, threatens the safety of her foetus. While autonomy can lay claim to a fundamental role in modern medical practice, the maternal-foetal debate threatens the availability of autonomous choice to some women simply on the grounds of their state of pregnancy, and the limits of this potential erosion of their autonomy are capable of being construed widely. While the issue of unlawful drug use during pregnancy is a threat to the development of the foetus, it is also of itself criminal conduct which no-one is free to enjoy without sanction. However, excessive consumption of alcohol is not *per se* illegal, and other aspects of lifestyle which are not recommended during pregnancy remain open to others. Were the stance taken in the US in relation to pregnant drug addicts adopted more widely, there is tremendous scope for limiting the autonomy of the pregnant woman for the sake of a foetus which has traditionally been thought of as lacking any legal identity.

#### *The classification of the foetus under criminal law*

What view, then, is taken of the foetus' status under the criminal law? In the United Kingdom, the English Court of Appeal<sup>12</sup> has held that a foetus is not a person for the purposes of s.16 of the Offences Against the Person Act 1861. The section imposes criminal liability for threatening to kill another person but the court specifically excluded the unborn foetus on the grounds that it was not a separate entity from the mother and therefore could not, without straining the language of the section, be the "third person" contemplated by the statute. In *Attorney-General's Reference (No.3 of 1994)*<sup>13</sup> the accused had stabbed a pregnant woman in the abdomen, causing her to go into premature labour some two weeks later and give birth to a live child who survived for 121 days. In this particular case, the foetus did achieve live birth and thus the rights attached to all human beings crystallised at that point. However, the House of Lords considered the status of the foetus, holding that it was neither an independent being, nor part of the mother, but rather a unique organism<sup>14</sup> which was not covered by existing legal provisions designed to protect autonomous beings, unless it was first born alive.

In the United States, some courts have adopted positions under which the foetus can be classified as a person for specific and limited purposes. Some states will prosecute the mother for child abuse or child neglect and in doing so, classify the foetus as a child solely in order to qualify under the relevant statutory definition.<sup>15</sup> Some states have specifically enacted foeticide provisions which apply at varying stages of gestation.<sup>16</sup> This development has followed from moves in civil cases to allow parents to claim damages for the wrongful death of their foetus. Courts were required to view the foetus as a person to bring it under the ambit of the civil statute, and it is clear that some courts viewed it as a natural and logical step to extend that classification into the arena of criminal law. For example, in South Carolina, the Supreme Court had

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<sup>12</sup> In *R. v Tait* [1990] 1 Q.B. 290.

<sup>13</sup> [1998] A.C. 245.

<sup>14</sup> The relationship between mother and foetus is classified here as "... one of bond, not of identity", *ibid.*, at 255.

<sup>15</sup> See, for example, *Whitner v State of Carolina* 328 S.C. 1, 492 S.E. 2d 777 (1997), and *State of Wisconsin ex. Rel. Angela M.W. v Kruzicki* 209 Wis. 2d 112 (1997) where, although overturned by the Supreme Court of Wisconsin, the court of appeals had determined that the term "child" in the Children's Code (in relation to a child alleged to be in need of protection or services) included the foetus.

<sup>16</sup> See, for example, Louisiana (La. Rev. Stat. Ann. §14:32.5), California (Cal. Penal Code §187), Florida (Fla. Stat. Ann. §782.09) and Georgia (Ga. Code Ann. §16-5-80).

established some time ago that a viable foetus was a person while still unborn for the purposes of civil liability for wrongful death.<sup>17</sup> Some 20 years later, in *State v Horne*<sup>18</sup> the same court held that it would be “...grossly inconsistent ... to construe a viable foetus as a ‘person’ for the purposes of imposing civil liability while refusing to give it a similar classification in the criminal context”.<sup>19</sup> In *Horne*, the accused was charged, *inter alia*, with the voluntary manslaughter of his full-term foetus in respect of a serious assault on his wife. Conviction required that the foetus was found to be a “person” under the Code.<sup>20</sup> In a judgment which extends to a mere two pages and which does not provide any further elucidation, the court robustly asserted its right and duty to develop the common law to respond to social change<sup>21</sup> and held that the killing of a viable foetus would amount henceforth to homicide.<sup>22</sup>

Similar questions of interpretation were faced in *Whitner v State of Carolina*<sup>23</sup> relating to the prosecution of a mother for endangering her foetus through drug abuse.<sup>24</sup> The Children’s Code<sup>25</sup> classifies a child as a person under the age of 18. This was interpreted, in accordance with the law as a whole and underlying policy, to include a viable foetus. The court referred to its previous statements in *Horne* about the illogicality of civil but not criminal liability in respect of the foetus, and noted that a similar illogicality would arise were the viable foetus accepted as a person under tort and homicide, but not child abuse.<sup>26</sup> This position was affirmed in *State v McKnight*<sup>27</sup> which also relates to the use of drugs by a pregnant woman leading to the death of her viable foetus. The court noted that there is a presumption that the legislature know of all prior legislation and judicial decisions when enacting new provisions.<sup>28</sup> The Children’s Code had been amended in 2000, after the decision in *Whitner*, but yet did nothing to specifically exclude the viable foetus from the definition of a child. Since the legislature were assumed to have known of *Whitner* and still omitted to draft the revisions in such a way as to exclude the foetus, the court were content to apply the reasoning from their own previous decisions, hold the viable foetus to be a person and affirm her conviction for homicide by child abuse. This case can be contrasted with *Arkansas Department of Human Services v Collier*<sup>29</sup> where a foetus was not classified as a dependent-neglected child because the statutory provision clearly stated that a juvenile was someone between birth and 18 years of age, and indeed many states have shown their reluctance to classify the foetus as a child for the purposes of child

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<sup>17</sup> *Fowler v Woodward* 244 S.C. 608, 138 S.E.2d 42 (1964).

<sup>18</sup> 282 S.C. 444, 319 S.E.2d 703 (1984).

<sup>19</sup> *ibid.*, at 447.

<sup>20</sup> South Carolina Code Annotated (1976), §16-3-10.

<sup>21</sup> Although the judges in *Horne* were clearly convinced of this, they did not see fit to set out the basis for their power to create common law crimes *de novo*. Whether or not such power exists, it is not helpful if decisions involving such fundamental issues are set out in such brusque terms.

<sup>22</sup> The principle of non-retroactivity clearly required that the court reversed *Horne*’s conviction as such a killing was not an offence at the time of its commission.

<sup>23</sup> 328 S.C. 1, 492 S.E.2d 777 (1997).

<sup>24</sup> South Carolina Code Annotated, s20-7-50 (1985), on child neglect and endangerment.

<sup>25</sup> *ibid.*, s.20-7-30(1) (1985).

<sup>26</sup> 328 S.C.1 at 9.

<sup>27</sup> 576 S.E.2d 168 (2003).

<sup>28</sup> *ibid.*, at 175.

<sup>29</sup> 95 S.W.3d 772 (2003).

neglect and related provisions.<sup>30</sup> Attempts to secure foetal protection by using child neglect and abuse statutes have been criticised for taking legislation aimed at very different circumstances and *ex post facto* applying it to situations which it was never intended to cover.<sup>31</sup> While differences in approach across different jurisdictions will always remain, the majority of states avoid this legislative twisting and refuse to classify the foetus as a child in these cases. South Carolina seems to stand as an outpost where a run of such cases has created its own momentum.

#### *Foetal status under constitutional provisions*

Given the variety of responses to foetal status so far as inclusion in specific provisions is concerned, is it more helpful to look at higher level provisions? Consideration can also be given to constitutional measures and treaties which could provide some clarification, particularly in determining the foetus's classification as a person. The United Nations Convention on the Rights of the Child applies to all human beings under the age of 18<sup>32</sup> without any further specification and thus might appear as if it does not apply to the foetus. However, the Preamble notes the need to bear in mind that, according to the Declaration of the Rights of the Child, "...the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, *before* as well as after birth".<sup>33</sup> The Fourteenth Amendment to the US Constitution grants due process and equal protection to all persons, but speaks of "...persons born or naturalized in the United States", which clearly limits its scope in ways which exclude the potential human being at any stage prior to birth.

Article 2(1) of the European Convention on Human Rights states that "(e)veryone's right to life shall be protected by law", without further definition of what is meant by "everyone". However, the Commission considered its interpretation with regard to the rights, if any, of the foetus, in *Paton v United Kingdom*.<sup>34</sup> They were concerned to interpret the term in the light of its use elsewhere in the Convention, and concluded that its meaning in these other contexts could not be interpreted so as to include the unborn child. Further, although Art.2 goes on to provide a "defence of others" exception, it is phrased so that liability is excluded only where another *person* is defended. The Commission in *Paton* rather baldly states that this "...by (its) nature, concern(s) persons already born and cannot be applied to the foetus".<sup>35</sup> They also exclude the foetus from the scope of Art.2 because, unless some specific exclusion were introduced into the article, it would prohibit abortion in all cases, even where the mother's life was in danger. This would place the life of the unborn under greater protection than the life of its mother and would clearly be contrary to policy<sup>36</sup>. More

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<sup>30</sup> On this, see Tolliver, "Child Abuse Statute Expanded to Protect the Viable Fetus: The Abusive Effects of South Carolina's Interpretation of the Word 'Child'", 2000 *South Illinois Law Journal* 383 at pp.387-389.

<sup>31</sup> It has been argued in the US that this potentially violates the woman's right to due process. See Schroedel, Fiber and Snyder, "Women's Rights and Fetal Personhood in Criminal Law", 7 (2000) *Duke Journal of Gender Law and Policy*, 89 at pp.107-8.

<sup>32</sup> Art.1, United Nations Convention on the Rights of the Child, 1989.

<sup>33</sup> Declaration of the Rights of the Child, 1959 (my emphasis). This explicitly states that it builds on the principles set out in the Universal Declaration of Human Rights (1948) which granted protection to the states of motherhood and childhood, but clearly, from its wording, does not envisage the unborn child.

<sup>34</sup> (1981) 3 E.H.R.R. 408.

<sup>35</sup> *ibid.*, at 413.

<sup>36</sup> *Ibid.*, at 415.

detailed consideration of Art.2 in this respect is to be found in *Vo v France (Application No.53924/00)*<sup>37</sup>. The case involved a confusion between two women, one of whom (the applicant) had attended hospital for a routine check-up on her pregnancy while the other had attended for the removal of an inter-uterine coil. The doctor had proceeded to try to remove the non-existent coil from the pregnant patient, and, in doing so, punctured the amniotic sac, resulting in a termination on health grounds a week later. In denying the foetus protection under Art.2, the European Court of Human Rights noted that most cases regarding the foetus and Art.2 arise in the context of abortion, and that these cases deny the foetus an absolute right to life as this would value its life over that of its mother, even where the pregnancy threatened her life or health<sup>38</sup>. However, the issue in *Vo* was different; the applicant sought to argue that causing harm to the foetus outwith the context of abortion (*i.e.* through some form of third party negligence) was a breach of Art.2. The issue here is a difficult one—when should legal protection of human life begin? Given the variety of views, differences in legal cultures and variance in domestic legislation, Art.2 is deliberately non-specific so as to give States considerable discretion in complying with the provision<sup>39</sup>. Given this, the court stated that “... it is neither desirable, nor even possible as matters stand, to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 ...”<sup>40</sup>. It is worth noting that the law of negligence still afforded protection for the mother against the acts which had caused the loss of her foetus, and thus in this case, domestic law implicitly protected the foetus through the protection given to the mother. This approach—to deny protection to the foetus *per se* but to provide a remedy for the mother for the actions which have harmed her foetus—allows the law to take a stance which mirrors biology in a way which seems to make sense. Since the foetus is incapable of independent existence but rather is biologically dependent on, and inextricably linked to the mother, there is a symmetry in a legal approach which denies the foetus independent rights but rather protects it through rights afforded to the mother. A clear difficulty in applying Art.2 protection to the foetus lies in its nature; protection applies to all persons, thereby including the pregnant woman and, more particularly the pregnant woman whose life is ~~under~~ greater threat if the pregnancy is continued rather than terminated. If Art.2 were to apply an absolute right to life to the foetus as well as its mother, it would risk falling on the sword of its own tautology since it would be impossible for the same level of protection to be afforded simultaneously to the developing foetus and its mother. Application of Convention rights to the foetus also faces difficulties where Art.2 comes face to face with Art.8 and the right to privacy granted to the pregnant woman.<sup>41</sup> Were the foetus granted protection under Art.2, the absolute nature of that protection would potentially trump any argument based on the qualified right to privacy, and would throw us back into the irreconcilable conflict between abortion and privacy which has plagued courts for decades.

Thus, it can be seen that these constitutional and treaty provisions do not provide any clear and definitive guidance on the status of the foetus, unless the assumption can be drawn that by their silence, they are to be interpreted as covering only the child once

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<sup>37</sup> (2005) 40 E.H.R.R. 12.

<sup>38</sup> See, for example, *X. v UK* (No. 8416/79), Comm. Dec. 13.05.1980.

<sup>39</sup> (2005) 40 E.H.R.R. 12 at para.82.

<sup>40</sup> *ibid.*, at para.85.

<sup>41</sup> On this see R. Scott, “Prenatal Screening, Autonomy and Reasons: the Relation between the law of Abortion and Wrongful Birth”, 2003 Med. L.R. 265 at p.277.

born. However, there has been some, albeit limited, judicial activism in this area which requires us to consider whether traditional criminal law doctrines can (and should) be expanded to include the foetus.

### **The “defence of others” argument**

#### *Definition*

The doctrine of self-defence has, as is well known, developed into three distinct branches; defence of oneself, defence of others and defence of property. However, it is the “defence of others”<sup>42</sup> which has led to attempts to extend the protection offered to the foetus. The basis of the defence is that, although A has assaulted B, perhaps fatally, (s)he did so to prevent B from carrying out an unjustified assault on C. In cases attempting to use this defence to protect the foetus, A would be the pregnant woman who attacked B (the assailant who had attacked her), in order to save the life of C (the foetus). This defence has the usual requirements found in self-defence cases, and thus necessity, proportionality and immediacy are vital, and a fatal assault can only be justified if there was reason to believe that C was in imminent danger of serious injury or death. Traditional attitudes would lead to a restrictive approach towards inclusion of the foetus in this area, as a successful defence would require the court to accept that the foetus could be an “other” for the purposes of this defence. Cases in this area can also be differentiated by reference to the position of the person who acts in defence of the foetus, and it seems clear that, **whereas although** there is one instance of a parent successfully claiming to have acted in defence of their foetus, strangers have been unsuccessful.

#### *Parents acting in defence of their foetus*

Two recent cases are particularly interesting here. In *State of Hawaii v Jardine*<sup>43</sup> the accused was charged with abusing a family or household member following an incident where he had allegedly grabbed the mother of his unborn child by the hair and hit her in order to prevent her from throwing herself out of a moving car. Although he was charged under a domestic violence provision, there is nothing in the case report to suggest that he was repeatedly violent towards her. He attempted to argue that his assault on the victim was justified because he was trying to prevent harm to his unborn child and was thus acting in defence of another under the “choice of evils defense”.<sup>44</sup> However, since the relevant legislation (HRS § 701-118(7)) defined “person” as including natural and juristic persons only, and therefore excluding the foetus, the defence was not available to him. “While there may be sound public policy reasons to allow a choice of evils justification defense for the protection of unborn children, the adoption of such a public policy is best left to the state legislature”.<sup>45</sup> This fits entirely with the general approach of denying the unborn the status of “person”.

More controversially, the Court of Appeals in Michigan has granted the foetus a status which, if applied more broadly, has potentially far-reaching consequences, both for criminal liability and for current conceptions of the extent of foetal rights. As in

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<sup>42</sup> For the sake of consistency and ease, the Anglicised spelling, “defence”, will be used throughout, except in the case of quotations from the cited American cases.

<sup>43</sup> 61 P.3d 514 (2002).

<sup>44</sup> Hawaii Statutes Revised, § 703-302. Here, the accused’s conduct may be justified if his use of force was necessary to avoid imminent harm to himself or another.

<sup>45</sup> 61 P.3d 514 (2002) at 521.



*Jardine*, the context was that of a plea of self-defence (specifically in the form of defence of others), but here the court categorised the foetus as an “other”, thereby allowing its mother to plead justifiable homicide in killing to protect her foetus from imminent danger of death. In *People of the State of Michigan v Kurr*,<sup>46</sup> the defendant had argued with her boyfriend over his drug use and he had punched her in the stomach. She had subsequently told him that she was pregnant with quadruplets and that he should not hit her in the stomach again. When he approached her again, she stabbed him fatally, in defence, she argued, of her unborn children. Although the trial court had granted her permission to raise a “defence of others” argument some time before the trial commenced, they disallowed such a jury instruction at trial on the grounds that the foetuses were not viable at the time of the assault and that therefore the defendant could not show the existence of an independent living human being in whose defence she had acted.<sup>47</sup> She appealed on the grounds that she had been denied her constitutional right to present her defence. The appeal court began by determining the issue of the status of the foetuses in this case. They noted that Michigan allows justifiable homicide in the context of the defence of others and that, although it had been restricted to those with whom the defendant had a close relationship, no such restriction continued to apply.<sup>48</sup> The court concluded that the “defence of others” should also apply to foetuses, whether viable or not, to the extent that their mother should be able to defend them from an attack made upon herself, and to use deadly force to protect those foetuses if she honestly and reasonably believed them to be in danger of imminent death or serious bodily harm.<sup>49</sup> The extension of the defence to cover the foetus was based on the court’s interpretation of the Michigan legislature’s intent when drafting the relevant section of the Michigan Penal Code. They referred to Michigan Compiled Laws sections 750.90a-c which criminalises harming<sup>50</sup> a foetus or embryo through an intentional assault on a pregnant woman, or through a grossly negligent act. If the aggressor has carried out an intentional assault, it must be shown that he intended to cause a miscarriage or stillbirth, or death or great bodily harm to the foetus, or that he acted with “wanton disregard” for the natural and probable consequences of his assault. The court concluded that the plain language of these sections shows the legislature’s intent to protect the life of the foetus,<sup>51</sup> without drawing distinctions between the very early embryo, the developing but as yet non-viable foetus, and the more developed and viable foetus. Given that the legislature showed a clear intention to extend protection from assault and injury to the foetus, regardless of viability, the court concluded that a “defence of others” plea must also be available in relation to such protected individuals. However, the court also made it clear that the defence is only available in cases of assault where the woman acts in response to an unlawful act directed against her which also imminently threatens the

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<sup>46</sup> 654 N.W.2d 651 (2002).

<sup>47</sup> The trial court took medical evidence that viability existed from 22 weeks, and then surmised that, since the foetuses were below this threshold, that she had failed to prove the existence of “others” in whose defence she had acted. This view shows the lack of clarity in the court’s approach to this case. Given the assertion that “... under 22 weeks, there are no others” (*ibid.*, at 653), the clear implication is that over 22 weeks, the decision might have been different. The trial court manage to leave this without further clarification, in their attempt to, at all costs, avoid saying anything specific about when a foetus could become “another”.

<sup>48</sup> *ibid.*, at 653–4.

<sup>49</sup> *ibid.*, at 655.

<sup>50</sup> In the sense of causing death, great bodily harm, serious physical injury or physical injury.

<sup>51</sup> *idem.*

life of her unborn child.<sup>52</sup> Leave to appeal to the Supreme Court of Michigan was denied,<sup>53</sup> but Justice Kelly, in a short opinion, dissented. Her concern, not unreasonably, centred on the lack of supporting precedent for a decision which is of such significance at both state and national level.

In analysing the fairly brief decision in *Kurr*, consideration has to be given to the issue of gender. There is a clear difference between *Jardine* and *Kurr* in that the individual arguing that they acted in defence of the “other” is in the former case, male, and in the latter, female. It is worth questioning whether courts are differentiating their approach on these grounds. Since the foetus is developing inside the woman, any attack on the foetus which prompts her to act in its defence will necessarily involve some form of assault or violation against herself. It is then perhaps the case that her response—whether that is to assault or kill her and her foetus’ attacker—is recognised by the courts in part as a defence of herself against attack, and partly as a defence of her foetus. Clearly, if she has killed the attacker, the court would be required to recognise her actions as a defence of her foetus, for whose life she reasonably feared, since an attack on the woman such as occurred in *Kurr* would not be sufficient on its own to justify a level of *self*-defence which kills the attacker. This form of approach, which looks at the issue of self-defence combined with that of the defence of others, can be compared with the concept of the aggravated assault. In traditional categories of aggravated assault, some factor<sup>54</sup> raises the crime committed from an ordinary assault into the realms of something more serious. Here, the necessary assault on the mother would form the basis of the charge, albeit that it would often be a decidedly ordinary assault, but this could then be aggravated by the presence of “another”—the foetus who suffers a greater degree of injury. Sentencing for aggravated assault is increased to take account of the particular heinous nature of the assault. This could prove a neater solution to this issue than attempts to force the foetus as victim into a framework specified for a child born alive. It would also specify the special status of the woman who acts in defence of her foetus—since she is necessarily physically affected by the same acts which threaten her foetus’ life, the court would be given the golden opportunity to approach this from the point of view of a crime which has been perpetrated against her, a full human being, which also has an effect on another, the potential human being she carries. By viewing the latter as an aggravation rather than the substance of the crime, the approach would avoid some of the difficulties faced in allowing the operation of a defence in the name of protecting a non-person, even to the extent of killing the attacker. It would, however, tie the notion of defence of others very closely to that of self-defence in these cases, and would do nothing to help the third party who acted in defence of another woman’s foetus. It would not provide a solution in cases such as *Jardine* where a man acts in defence of the foetus. It would also not avoid the difficulty apparent in any attempt to classify the foetus as “another”, since it retains that concept. However, whilst requiring the acceptance of the foetus as “another” for these purposes, it does at least avoid the difficulty apparent

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<sup>52</sup> They specifically limited this to the foetus by excluding use of the defence of others in relation to a frozen embryo stored outside the mother’s body (*ibid.*, at 655).

<sup>53</sup> *People v Kurr* 655 N.W.2d 552 (2003) at 552–3.

<sup>54</sup> While aggravated assault appears in both English and Scots criminal law, the situations to which it applies differ. In England, it applies in, for example, cases of resisting arrest and obstructing police officers. In Scotland, it applies, *inter alia*, in cases where a weapon is present, where the victim is of a particular type (elderly, young, the Sovereign, etc.) or where the consequences for the victim are particularly severe.

in some decisions of employing legislation which was drafted to cover children outwith that frame of reference.

In coming to its conclusions, the Court of Appeals in *Kurr* considered similar cases in Texas and Illinois. However, the position in Texas is substantively different to that in Michigan, not least because the relevant provision<sup>55</sup> in Texas applies to “persons”, which are elsewhere defined to include individuals,<sup>56</sup> in the sense of human beings who have been born and are alive.<sup>57</sup> The approach of the courts to this section is shown in *Ogas v The State of Texas*.<sup>58</sup> The accused believed that her boyfriend was about to abandon her when five months pregnant and started an argument with him which culminated in him slapping her in the face. In response, she ran to the car, picked up a gun and shot him fatally several times at point blank range. Her appeal against conviction was unsuccessful on two grounds; firstly because a slap did not constitute deadly force (either in relation to herself or her foetus) for the purpose of self-defence, and secondly because a foetus is not classified as a person for the purposes of raising a defence of others under the Code. Such legislative constraints did not encumber the court in *Kurr* as the defence of others theory has not been codified in Michigan. They were also able to distinguish *Illinois v Gaines*<sup>59</sup> where a similar defence of others argument had been rejected on the grounds that the defendant had not cited any criminal law in support of her case to establish a legislative will to offer protection to the unborn child against this type of attack. Indeed, the lack of evidence put forward in her defence allowed the court to elide the issue of foetal rights in this context completely.<sup>60</sup> By contrast, in *Kurr* there was clear evidence of legislative measures designed to give protection to the foetus which could be used to support her plea of self-defence. The court in *Gaines* had also rejected the defence of others argument by stating that, to succeed, the defendant would have to, and had failed to show that the situation would have justified her killing her husband in *her own* defence. In *Kurr*, little is said that refers specifically to the issue of foetal status, beyond a statement that the language of the statutory provisions makes it clear that the Legislature took the view that “fetuses (*sic*) are worthy of protection as living entities as a matter of public policy.”<sup>61</sup> However, an assertion that the codification of a particular measure means that the subject matter of that measure deserved protection does nothing to explain why the foetus was viewed as being worthy of protection.

The court held that a defence of others plea would succeed, even though *Kurr* had only feared for the life of her foetus, and not for her own life. The court did acknowledge the contentious nature of decisions based on notions of personhood and foetal rights but were prepared to conclude the narrow issue of the applicability of the defence of others theory in respect of a non-viable foetus in its favour,<sup>62</sup> while deliberately leaving open the question of attributing foetal personhood. While the court protest that they are deciding this case on a narrow point which does not require them to delve into the debate on foetal personhood, my view is that they have already

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<sup>55</sup> Texas Penal Code Ann. §9.33.

<sup>56</sup> *ibid.*, §1.07(a)(38).

<sup>57</sup> *ibid.*, §1.07(a)(26).

<sup>58</sup> 655 S.W.2d 322 (1983).

<sup>59</sup> 9 Ill.App.3d 589 (1973).

<sup>60</sup> *ibid.*, at 593. The closest the court comes to discussing the foetus is to note that the only cases she cites in her defence are ones establishing liability in tort for injury to a viable foetus.

<sup>61</sup> 654 N.W.2d 651 (2002) at 654.

<sup>62</sup> *ibid.*, at 657.

dipped their toes into that water and cannot extract themselves from it so easily. Opening the defence of others to mothers in this context does set out an implicit statement about the status of the foetus. In saying that “an individual may indeed defend a fetus from ... an assault and may even use deadly force if she honestly and reasonably believes the fetus to be in danger of imminent death or great bodily harm”<sup>63</sup> raises that foetus to the equivalent status of the attacker for these purposes. In an ordinary case of assault where the victim and attacker are both adult, and a third party intervenes to protect the victim whom he believes to be in life-threatening danger, the third party is justified in acting in defence of the victim in order to save his life, even to the extent of sacrificing the life of the attacker. However, the attacker and the victim are of equivalent standing—they are both independent human beings of equal legal status. In cases where the attacker has been killed, the defence only applies where the victim acted in self-defence in order to save his life, or a third party acted similarly in defence of the victim. By asserting that the mother in *Kurr* can use the defence of others, the court imply that the foetus has equivalent standing with its attacker. They grant the foetus equivalent legal status with the attacker in order to justify the mother’s act (killing the attacker to protect her foetus). Fatal acts in these situations are only justified where the actor is faced with a “choice of evils”—either to allow the attacker to kill the victim, or to intervene and kill the attacker to prevent the victim’s death. The only way to establish a choice of evils in such a case is to view the foetus as the legal equivalent of the attacker. Otherwise, the mother would not have been faced with the requisite unenviable choice. The foetus has to be classed as equivalent to the attacker, leaving the mother with the choice between the death of her foetus and the death of the attacker. If the foetus is not viewed as equivalent to the attacker, the mother is instead faced with a choice between the death of someone of full legal status and humanity, and the death of an entity holding a lesser status. This would not present her with a choice of evils. Thus, the court in *Kurr* have indeed contributed to the debate which they maintain they have avoided.

#### *The Unborn Victims of Violence Act*

*Kurr* was heard at a time when Federal legislation in this field was still progressing through the Senate and had not as yet been passed. However, although limited in its scope to certain federal crimes (and therefore of no direct relevance in *Kurr*), the Unborn Victims of Violence Act (UVVA) was signed into law in the United States on April 1, 2004<sup>64</sup>. It represents a significant development in the area of the recognition of foetal rights, although it does not at any point seek to establish foetal personhood. The legislation itself has had a difficult gestation, having been previously introduced unsuccessfully in both 1999 and 2001 in response to a growing number of high-profile cases involving attacks on pregnant women leading to the deaths of their unborn children. The case which attracted perhaps the most media attention was that of Laci and Conner Petersen, for whom the Act is named. This, and other cases like it, had served to highlight a perceived gap in the law, such that assailants who attacked or murdered pregnant women would, in some States, be prosecuted on two separate counts, while in other States and in areas of Federal jurisdiction, they would be prosecuted solely for the attack on, or the death of the woman. The Act avowedly sought to address this gap at least in relation to matters of Federal jurisdiction. However, it has not been without criticism. An alternate bill, the Motherhood

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<sup>63</sup> *idem*.

<sup>64</sup> The Unborn Victims of Violence Act 2004 (Laci and Conner’s Law) amends Title 18, United States Code by inserting a new Chapter 90A.

Protection Act, was proposed alongside each attempt to introduce the UVVA, but this alternative failed each time. It sought to focus on the unlawful termination of the victim's pregnancy and as such, protect the mother and her state of pregnancy (and therefore the unborn child) without going so far as to give the foetus an independent status and without specifying that protection begins at conception<sup>65</sup>. Many on the pro-choice side<sup>66</sup> have argued that the UVVA is an erosion of the fundamental abortion rights set out in *Roe* and that the creation of legal status from conception will limit women's freedom to choose.<sup>67</sup> However, it is worth noting here that the UVVA prevents any lawful act of abortion from attracting liability for the resultant foetal death, and that *Roe* itself never set out to determine when a foetus becomes a person, but rather when the State acquires an interest in the protection of that foetus.<sup>68</sup>

The UVVA seeks to punish those who cause death or bodily injury to the unborn child, in certain circumstances. The legislation extends protection to the foetus in some 60 or so federal crimes<sup>69</sup> and thus, for example, will apply where a spouse has travelled inter-state in order to commit an act of domestic violence on his estranged wife, where someone attacks a pregnant Supreme Court judge or forcibly prevents a pregnant woman from entering an abortion clinic, and, as a result, injures or kills her unborn child. It applies whether or not they knew of the existence of, and whether or not the accused intended to cause such harm to the foetus.<sup>70</sup> This is simply an illustration of the well-known principle of causation, that one takes one's victim as one finds him. The mere fact that the woman who is assaulted is pregnant is another of the hidden "peculiarities"<sup>71</sup> (although one hesitates to classify pregnancy as a peculiar condition) which the accused must factor into his criminal equation when embarking on his assault. Clearly, there will be cases where the woman's pregnancy will be more than obvious to even the casual observer, and in these cases, the accused would be taken to have known of the existence of the foetus. However, the kind of case envisaged in this part of the Act would arise where her pregnancy was not immediately obvious, in other words, where she was still at a relatively early stage of pregnancy. In these cases, the Act simply requires the accused to take his victim as he

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<sup>65</sup> Motherhood Protection Act 2003, available at: <http://www.govtrack.us/congress/billtext.xpd?bill=s108-2219>.

<sup>66</sup> See, for example, the National Women's Law Center report of April 2004, "Slip-sliding away: the erosion of hard-won gains for women under the Bush administration and an agenda for moving forward", available at <http://www.nwlc.org/pdf/AdminRecordOnWomen2004.pdf>.

<sup>67</sup> Mans, "Liability for the Death of a Fetus: Fetal Rights or Women's Rights?", 15 (2004) *Florida J. Law and Pub. Policy* 295 at pp.304–5.

<sup>68</sup> *ibid.*, pp.310–11.

<sup>69</sup> Although too numerous to itemise, the federal crimes covered include murder, manslaughter and assault committed in the special maritime and territorial jurisdiction of the United States, killings in the course of drug-related activities, death caused as a result of sexual abuse, injuries or killings in the course of inter-state domestic violence, assaults on official persons carrying out their duties, injuries caused by obstructing access to clinics providing reproductive services, killings carried out by escaped Federal prisoners or during the course of inter-state kidnapping, killings (or threats thereof) in the course of hostage taking, killing witnesses, victims or informants, assaults or killings in the course of inter-state racketeering, deaths occurring in the course of wilfully wrecking a train, assaults or killings in the course of a bank robbery, and so on. The legislation also extends the same protection to the foetus under certain provisions of the Uniform Code of Military Justice.

<sup>70</sup> Title 18 U.S.C., Chapter 90A, ss.1841(a)(2)(B)(i) and (ii).

<sup>71</sup> In this respect, her pregnancy operates in the same way as, for example, brittle bone disease or haemophilia. It is a condition which is not necessarily apparent from the outside, but which will render the consequences of an otherwise "normal" assault so much the worse. Under the thin skull rule, the accused cannot avoid liability simply by asserting that he was unaware of the condition.

finds them, and is deemed to have accepted the risk that she might be pregnant. Indeed, this point was set out in *State of Minnesota v Merrill*<sup>72</sup> where the court said that “(t)he possibility that a female homicide victim of childbearing age may be pregnant is a possibility that an assaulter may not safely exclude.”<sup>73</sup>

The classification and description of the foetus employed in the proposed legislation makes reference throughout to the “child”, “child *in utero*” or “unborn child”, where “child *in utero*” is defined as meaning a member of the species *homo sapiens* at any stage of intra-uterine development. Linguistically, this treats the foetus as a child and therefore equates it with a person. There has been considerable debate about the use of language and imagery in relation to the foetus, particularly by the pro-life lobby.<sup>74</sup> Visual images presented of the foetus often depict it in isolation, floating in amniotic fluid, magnified to a point which removes all visual reference to the mother.<sup>75</sup> Beyond this distortion of visual reality, Petchesky points to the linguistic distortion present in anti-abortion literature which refers to “child” or “baby” instead of “foetus”, and “mother” in place of “pregnant woman”.<sup>76</sup> This use of language is powerful, in that the interpretation of foetus as child gives it a political status and the projection of citizenship and identity. It simultaneously places the pregnant woman in the position of a mother before she assumes that status in reality, and in doing so, imposes on her the duties and responsibilities of that role. It also shifts the focus of the debate. Instead of concentrating on the woman’s right to control her own body versus the State’s right to regulate access to abortion, the focus shifts to the woman’s right to choose versus the foetus/child’s right to life.

However, the terminology used reveals another interesting issue; given the definition of child *in utero*, the legislation envisages that protection be given to the foetus at any point in its development, and does not seek to differentiate between the full-term, viable but not yet full-term, or non-viable foetus. Secondly, it also requires that the foetus be developing in the womb. This strikes at two issues, one real, one admittedly more hypothetical. So far as the real issue is concerned, protection is excluded at those very early stages of development where the blastocyte or embryo is either still in transit on its way to the uterus, or has arrived but has not yet implanted into the uterine wall.<sup>77</sup> So far as the more hypothetical issue is concerned, in the current state of technology, this qualification is unnecessary as the foetus could not develop anywhere else. Thus, the qualification must be drafted with an eye to the future, perhaps contemplating the possibility that the foetus could be gestated to term in an artificial environment. The choice of wording then appears to exclude from protection

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<sup>72</sup> 450 N.W.2d 318 (1990).

<sup>73</sup> *ibid.*, at 323.

<sup>74</sup> See for example, R. Pine and S. Law, “Envisioning a future for reproductive liberty: strategies for making the rights real” 27 (1992) *Harvard Civil Rights – Civil Liberties Law Review* 407, discussing anti-abortion literature and noting that “(f)etal imagery, even when accurate, distorts human pregnancy by wrenching it out of its biological, historical and social context”, p.424).

<sup>75</sup> “... the fetus in utero has become a metaphor for ‘man’ in space, floating free, attached only by the umbilical cord to the spaceship” where the woman “... has become empty space”. B. Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the future of Motherhood*, New York, Viking, 1986, p.114, cited in R. Petchesky, *Abortion and Woman’s Choice*, Verso, 1986, p.xi.

<sup>76</sup> Petchesky, *op. cit.*, p.534.

<sup>77</sup> Pragmatically, these very early stages of development are perhaps best left out of the picture, not least because pregnancy is barely established. Philosophically, it is harder to discount this period, unless a clear view is taken that personhood accrues at some specific point in gestation.

the foetus developing elsewhere. If this is indeed the purpose, it would be unwarranted. If the foetus is deemed sufficiently valued for society to offer it this protection whilst developing in the womb, why should that protection be denied if it becomes possible for it to develop in some other environment? The foetus would be the same, whatever (and wherever) its developmental environment. The approach taken to punishment is also informative. As set out in the statute, the punishment to be imposed is that which would have applied if the attacker had caused the same injury or death of the mother. As such, the UVVA sets out a framework which recognises the existence of the foetus as a victim, but does not grant it the right to have its injuries or death calculated *per se* in the sentencing equation. Instead, the parallel is drawn with the sentencing outcome if we imagined the mother in the position of victim, and as such the UVVA is not as full or complete a statement of foetal rights as it might first appear.

### **“Defence of others” v Abortion**

The person most likely to intervene to save the foetus from an attack is the parent-to-be, but the same arguments have been advanced to exonerate strangers who have carried out fatal attacks, allegedly in the name of unconnected foetuses. These cases involve anti-abortion activists who have assaulted or even killed doctors in order to defend the foetuses they would otherwise have aborted. In *U.S. v Hill*<sup>78</sup> the accused was convicted of killing an abortion doctor. During the trial, he had entered a memorandum arguing that he should be allowed to put forward a “defence of others”. He outlined his reasonable belief that such force as he used was necessary (based on his knowledge of the victim’s aggressive and violent behaviour),<sup>79</sup> that the force he used was reasonable given the grave harm the victim was about to perpetrate on the foetuses in question,<sup>80</sup> and that the harm he sought to prevent was imminent (in this context meaning near at hand).<sup>81</sup> So far as the nature of the “other” was concerned, he pointed to the variety of different meanings of the term “person”<sup>82</sup>, and contended that, in the face of such apparent ambiguity, Florida law required the statute to be construed in his favour so as to include the foetus.<sup>83</sup> He further contended that, although the statute in question<sup>84</sup> allows for the use of deadly force if the actor believes it is necessary to prevent imminent death or grave bodily harm to himself *or another*, the use of the word “another” does not require that the foetus has legal personality, but rather connotes someone who shares humanity with the accused. This therefore does include the foetus.<sup>85</sup> His arguments, however, reveal an inconsistency

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<sup>78</sup> 893 F. Supp. 1044 (1994).

<sup>79</sup> Hill, “In Defense of Another: The Paul Hill Brief” 5 (1995) *Regent University Law Review* 31 at pp38–9.

<sup>80</sup> *ibid.*, pp.39–40.

<sup>81</sup> As stated in *Scholl v State* 115 So. 43 (Fla. 1928).

<sup>82</sup> He noted that the terminology differed depending on jurisdiction and on the offence charged.

<sup>83</sup> Hill, *op. cit.*, p.47.

<sup>84</sup> Fla. Stat. Ann. § 776.012.

<sup>85</sup> Hill, *op. cit.*, pp.52–53. He stated that at least part of the difficulty in this area arose from distinctions drawn between the foetus as a human and the foetus as a person. He quoted two definitions from Webster’s Dictionary; “humanity” is the nature of man which distinguishes him from other beings, and “person” is a man, woman or child as distinct from other things. On this basis, he stated that there was no definitional distinction to be found between personhood and humanity. However, the above definitions do not appear to justify his assertion: there is a clear distinction between a “human” and “other beings”, and between a “person” and “other things”, but that does not mean that “other beings” and “other things” are synonymous. An animal is clearly another being, but it is certainly not a thing, just as a table is a thing but it is certainly not another being.

with the constitutional rights set out in *Roe v Wade*<sup>86</sup> which classify abortions carried out within certain parameters as lawful, regardless of the status or shared humanity of the foetus. The victim was, as a duly registered practitioner complying with the current law, carrying out lawful abortions<sup>87</sup> and therefore, any attempt to claim that his killing was justified would, as Hill's did, fail.<sup>88</sup> "Since abortions are a constitutionally protected activity within certain parameters, there is no legally recognizable or cognizable harm for abortions within those parameters."<sup>89</sup> Defence of others, along with self-defence and defence of property, requires that the accused acted as he did through compulsion in the face of an *unlawful* act which would, if allowed to continue, lead to one of the relevant outcomes.<sup>90</sup> Since abortion in a proper context is not an unlawful act, the defence does not apply where the attack is made on a registered practitioner in order to defend the foetus he intends to abort. The alleged inconsistency between assertions of a "defence of others" and abortion law was also recognised in *Kurr*, although the court were keen to state that it was not, in fact, an inconsistency.

In *Kurr*, the court asserted that there is a "straightforward" distinction between its decision and decisions on abortion.<sup>91</sup> They highlighted the lawfulness of a decision to abort within the parameters set by the Supreme Court, given the constitutional protection afforded to that decision. In contrast, the "defence of others" plea is only available to prevent an unlawful assault on another person. It would not be possible for someone to use the theory to intervene and prevent a lawful abortion, precisely because it would be a lawful act, albeit one designed to kill the foetus. This is further shown in *State of Louisiana v Aguillard*<sup>92</sup> where a demonstration outside an abortion clinic led to charges against a number of individuals for criminal trespass, obstruction of public passages and resisting a police officer. It was agreed that the outcome of Aguillard's case would serve as a template for the other cases. Following conviction, she sought a review, alleging that the trial court was wrong to reject the defence of others argument. She noted that the Louisiana Constitution protects the life of a person from the moment of fertilisation and implantation,<sup>93</sup> and therefore asserted that she and her co-demonstrators were simply trying to protect those rights. She also argued that, under Louisiana Revised Statutes §14:22, it was justifiable for her to use force, violence or even kill in defence of another in certain circumstances. These circumstances require, *inter alia*, that the person attacked would have been able to use that same force or violence in their own defence. Since Louisiana allows for abortion

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<sup>86</sup> 410 U.S. 113 (1973).

<sup>87</sup> Clearly, if the victim had been carrying out an illegal abortion, outwith the parameters set by *Roe*, the outcome could have been very different. This point is noted by the judge in *U.S. v Hill* 893 F.Supp. 1044 (1994) at 1046.

<sup>88</sup> Essentially, Hill's argument was this: the statute allows defence of another, and a foetus, because it shares humanity with the accused, is another for these purposes. The discrepancy between this view and the decision in *Roe v Wade* can be put aside on the grounds that *Roe* is positive (man-made) law which violates the Rule of Law. Hill's arguments were not heard at trial because, due to his failure to put forward any evidence in support of the defence, the court granted the State's motion *in limine* to prevent him from raising this issue. Hill was given a further opportunity to present sufficient such evidence but, having again failed to do so, reconsideration of the order granting the motion *in limine* was denied (*U.S. v Hill* 893 F. Supp. 1048 (1994)).

<sup>89</sup> *per* Vinson J. in *U.S. v Hill* 893 F.Supp 1048 (1994) at 1049.

<sup>90</sup> Great bodily harm or death, or destruction of property.

<sup>91</sup> *People v Kurr* 654 N.W.2d 651 (2002) at 656.

<sup>92</sup> 567 So.2d 674 (1990).

<sup>93</sup> Louisiana Constitution, art.1, s.2.



in the terms laid down by the Supreme Court in *Roe v Wade*,<sup>94</sup> the unborn child would not have the right to defend itself against a lawfully performed abortion, and therefore Aguillard and her colleagues could not assert that they were justified in acting in defence of that unborn child.<sup>95</sup>

However, there is an inevitable conflict between the status of the foetus as expressed in *Kurr* and *Roe*. In *Kurr*, the life of the non-viable foetus is deemed sufficiently important to justify its mother in killing her assailant if she fears for the life of her unborn child. This places the value set on the life of the foetus very high. The *dicta* in *Roe v Wade*<sup>96</sup> entrenches a woman's right to reproductive autonomy and privacy, and grants the non-viable foetus so little standing that the State does not have a compelling interest to intervene in the mother's decision to abort prior to the end of the first trimester,<sup>97</sup> and specifically denies it the label of "person" under the Fourteenth Amendment.<sup>98</sup> Even beyond the point of viability, *Roe* classifies the State's interest as one in the *potentiality* of life. Thus, it would appear that, while *Roe* allows for the killing of a non-viable foetus as an aspect of the mother's right to privacy, *Kurr* justifies the killing of another human in the name of protection of that same foetus. This conflict of views about the status of the non-viable foetus suggests that the distinction is less than "straightforward". The court's attempt to deny any inconsistency between their decision and *Roe* rings false. They state that Michigan legislation classifies the foetus as worthy of protection as a living entity on the grounds of public policy.<sup>99</sup> The court then equates "worthy of protection" with "worthy of protection as afforded by the defence of others". This defence requires an attack on another. Therefore, the court assert that, in Michigan, the foetus is worthy of protection under the defence of others because it is "another" in need of protection from an unlawful assault. This directly contradicts what is said in *Roe*. However, the decision in *Kurr* also has more far-reaching implications. It moves the debate over foetal personhood a stage further forward towards the granting of that personhood. Should this line of reasoning become the norm, it is set on a collision course with *Roe*, where it was stated, in respect of the foetus, that "(i)f ... personhood is established, ... the fetus' right to life would then be guaranteed specifically by the [Fourteenth] Amendment."<sup>100</sup>

## Conclusion

What, then, can be said from this about the legal status of the human individual prior to birth? To what extent can the foetus be categorised as a legal person? What protection does the foetus have under the criminal law? The position in the UK is clear: under civil law, the foetus is not a person until it has achieved live birth.<sup>101</sup> Nor is it viewed as a person for the purposes of obtaining protection under the criminal

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<sup>94</sup> 410 U.S. 113 (1973).

<sup>95</sup> 567 So.2d 674 (1990) at 676–677.

<sup>96</sup> 410 U.S. 113 (1973).

<sup>97</sup> *ibid.*, at 731–2

<sup>98</sup> *ibid.*, at 728–9.

<sup>99</sup> 654 N.W.2d 651 at 654.

<sup>100</sup> 410 U.S. 113 at 156–7.

<sup>101</sup> See, for example, *Paton v British Pregnancy Advisory Service Trustees* [1979] Q.B. 276.

law<sup>102</sup>. However, it has been seen that state legislatures in some American jurisdictions have been prepared to classify the foetus as a victim for the purposes of certain specific statutory offences, such as vehicular homicide, foeticide or “child” abuse. Therefore, there can be occasions where liability under statute may be imposed on an accused<sup>103</sup> for their actions in respect of a foetus. However, such statutory provisions are limited in their scope to very specific circumstances. Liability for crimes against the foetus is, in practice, very rare. The significance of *Kurr* lies in the fact that there was a novel and ultimately successful attempt to classify the foetus as a person. The case is significant in itself and may also be cited as authority for the idea that foetal rights can be extended through judicial activism into new and uncharted waters. However, since leave to appeal to the Supreme Court of Michigan was denied, the case carries less weight than it might.<sup>104</sup>

As it stands, *Kurr* is a somewhat fragile and limited authority. It is perhaps best viewed as an interesting development in the field, but with nothing like the monolithic stature or long-term significance of, say, *Roe v Wade*. It is unfortunate that the broader issues raised by *Kurr* were not canvassed at a more senior level. In her dissenting judgment, Justice Kelly rightly viewed the issue as “... significant in ... state and national jurisprudence”, and deserving of further judicial consideration.<sup>105</sup> One of the major issues that would have to be addressed concerns the status of the foetus relative to others, and more specifically, its mother. Although the court in *Kurr* dismissed the argument that their ruling impacted on the law on abortion, it is impossible to keep questions about abortion out of the debate on foetal status. Ultimately, it seems inevitable that attempts to enhance the status of the foetus will have to face a challenge from the feminist perspective; that such a development in the legal status of the foetus has to be measured against the prospect that it will weaken the rights of the pregnant woman. Heavily entrenched positions on access to abortion and fears about the weakening of maternal autonomy are both likely to present formidable obstacles to the further extension of foetal rights. It could be argued that a better approach would be to explicitly exclude the foetus from the full protection of an absolute right to life, but grant it a clear qualified right to life after a certain point (point X). The right would be limited to the extent to which it did not impinge on the mother’s own rights. This would allow for abortions prior to that point, as is currently the case in most jurisdictions, since the foetus would have no rights that would be infringed. It would also protect decisions to abort beyond this point because of a threat to the mother’s life and health, as her rights would trump the qualified right of the foetus. Further, it would take account of the rights of the foetus in situations where harm was

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<sup>102</sup> The foetus is afforded some protection through the criminal law in the form of the Abortion Act 1967, although only after 24 weeks.

<sup>103</sup> The accused can be a third party who kills the foetus, or a mother who substance-abuses so as to harm her foetus.

<sup>104</sup> However, it does clearly set precedent in Michigan, as was noted by Kelly J. in *People v Kurr* 655 N.W. 2d 552 (2003) at 553. The decision is that of the Supreme Court of Michigan, denying leave to appeal, and her judgment is the sole dissenting opinion in which she criticises the Court of Appeal’s decision as a “... precedent-setting opinion for which there appears to be no supporting precedent”.

<sup>105</sup> As was noted by Kelly J. in *People v Kurr* 655 N.W.2d (2003) at 553, “(i)t is manifest that the issue is significant in our state and national jurisprudence. Hence, it is incumbent on us, Michigan’s court of last resort, to examine the lower court rulings and provide guidance for the bench and bar on this important question.”

caused by a third party if the foetus had developed beyond point X, by attributing liability to that third party because the limitations placed on the foetus' right to life would only apply where it conflicts with the mother's rights. In these cases, the foetus' right to life would be asserted against a third party, which would not trigger the limitation. This proposition would, of course, do nothing to alter the outcome of *Kurr* as the pregnancy was still in its early stages, and it would have to be assumed that most jurisdictions would choose to fix point X at a more advanced stage of pregnancy. However, there remains one difficulty with this type of approach—it requires the law to state a definitive point at which the foetus would gain this qualified right to life. This would involve jurisdictions wading into the difficult waters surrounding philosophical assumptions about the nature of life which are notoriously complex. However, it would not be the first time such issues have been considered within a legal context. The law already makes assumptions about the relative status of the foetus. The Abortion Act 1967 distinguishes between the foetus up to 24 weeks, and the foetus beyond that point. *Roe* differentiates by reference to trimesters and accords the foetus increasing status as the trimesters progress. It is therefore not inconceivable that individual jurisdictions could set a demarcating point in the timeline of pregnancy, and grant the foetus an express but qualified right to life after that point. It would, however, require very careful re-wording of current provisions; for example, at present, Art.2 of the ECHR only allows for the taking of life in four specified circumstances (by order of a court by way of a death penalty, where necessary to defend another existent person from unlawful violence, where necessary to effect lawful arrest or prevent an escape, or where necessary to lawfully quell a riot or insurrection). To abort a foetus notwithstanding any qualified right to life would not come under any of these.

Cases such as *Kurr* do not refer to any concept of qualified right for the foetus. It assumes simply that the foetus has a certain status, and from that, imposes liability. Developing from this, the kind of foetal protection offered in *Kurr*, if taken in a broader context, profoundly changes the relative status of the unborn vis-à-vis an existing third party who is not the mother. *Kurr* effectively says that an existing human being may justifiably be killed in the name of protecting the unborn. This sets the value of a potential life at a level equal to the value of an existing non-maternal life and may represent a dangerous and unwarranted extension of basic concepts of permitted justifications for criminal acts.