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The Right to Life of Potential Persons

I. *Introduction*

The law accords an individual the right to sue for damages sustained *in utero* when these damages are the result of what would otherwise be described as criminally negligent treatment. Recent court actions involving children subjected to the influence of thalidomide during certain critical stages of their fetal development[1] make this only too clear.[2] At the same time, however, the law also permits abortion:

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This paper develops a suggestion made by the author in his recent book, *The Practice of Death* (New Haven: Yale University Press, 1975) at 20, n.20

1. The damage (injury) is engendered by the action of the drug when ingested by the mother during the first trimester of the gestation period. For a thorough discussion of this, see H. B. Taussig, *The Thalidomide Syndrome* (1962), 207 Scientific American 29. See also Laurence Lader, *Abortion* (Indianapolis: Bobbs-Merrill, 1966) at 10-16

2. *Cf. Henry* v. *Richardson-Merrill Inc.* (1975), 508 F. 2d 28 (U.S.C.A., 3d Circ.). The juridical basis of the claim lay in the New Jersey tolling statute, N.J.S.A., s.2A:14-21, which provides that:

> If any person entitled to any of the actions or proceedings specified in section 2A:14-1 to 2A:14-8 or sections 2A:14-6 to 2A:14-20 of this title or to a right or title of entry under section 2A:14-6 of this title is or shall be, at the time *of any such cause of action or right or title accruing, under the age of 21 years,* or insane, such person may commence such action or make such entry, within such time as limited by said sections, *after his coming to be or being of full age or of sound mind* [emphasis added].

Presumably, in the light of *Roe* v. *Wade* (1973), 410 U.S. 113, the defendant could have argued that the suit should have been dismissed because of the absence of any right or title accruing to the infant who had "suffered [personal injuries] as a result of his mother's ingestion of thalidomide during pregnancy" (*Henry* v. *Richardson-Merrill Inc., id.* at 30), because at "the time of such cause" — *i.e.*, at the time of the action of the drug — the infant was not a person, actually or legally, and therefore did not enjoy the protection of the various amendments of the Constitution. However, the defendant did not do so, and the opinion of Circuit Judge J. Hunter III, expressing the majority opinion, clearly recognized the right of the infant. In fact, during the whole proceedings, the legitimacy of this was never questioned. *Cf. Henry* v. *Richardson-Merrill Inc.* (1973), 366 Fed. Supp. 1192 (U.S. Dist. Ct., N.J.), where the Court took explicit cognizance of Article 1053 of the Quebec Civil Code as interpreted to the effect that a minor has "the right to bring a tort action for prenatal injuries". The Court also noted with favour the Justinian principle, quoted in the precedent case, *Montreal Tramways Co.* v. *Léveillé,* [1933] S.C.R. 456, on which this interpretation was explicitly based. That principle, codified in *Digest of Justinian*, lib. I, tit. 5, ss. 7 and 26, reads at 26:

the deliberate and intentional killing of fetuses at precisely those stages of their development at which thalidomide damage would be sustained were the drug to be administered.[3] In adopting these two stances, the law appears to find itself in a position of conflict. For the right to sue for damages is reserved solely for those individuals which in one sense or another are persons;[4] and in taking a favourable stance in the thalidomide cases,[5] the law seems to be operating on the principle that those individuals who suffer morphological damage as a result of exposure to the drug in fact enjoyed the status of persons at that particular time. On the other hand, in permitting abortions to occur at that particular stage of fetal development, the law seems to be operating on the principle that these individuals are not yet persons;[6] for otherwise, the act of abortion would be one of murder.

Prima facie, therefore, we are here faced with an anomaly, and the question arises, how it may be resolved. Several suggestions immediately come to mind. For instance, one could argue that fetuses are not persons and have no rights whatever; that only actually developed fetuses are persons who then do have rights. In that case the right to sue for damages would be a retroactive right attaching only to those individuals that have acquired personhood by surviving their uterine stay.[7] Alternatively, one could argue that

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Qui in utero sunt in toto paene jure civili intelliguntur in rerum natura esse.
and, particularly importantly, at 7:
Qui in utero est, perinde ac si in rebus humanis esset, custoditur quoties di commodis ipsius partas quaeritur.
In allowing the action to go forward, the Court was plainly in accord with s. 7 above. See also *Heavner* v. *Uniroyal Inc.* (1973), 63 N.J. 130; 305 A 2d 412 (N.J.S.C.)

3. *Cf.* the United States Supreme Court ruling in *Roe* v. *Wade* (1973), 410 U.S. 113

4. See, *supra,* note 1. For other statutes that may be considered guiding in light of *Henry* v. *Richardson Merrill,* see Civil Code of Quebec, articles 337, 338, 345, 608, *etc.* See also I.C. Aubry et C. Rau, *Cours de Droit Civil Français* (5th ed. Paris: Marchal et Billard, 1897) para. 53 at 262 (". . .[P]ar une fiction des lois civiles, il est considéré comme étant déjà né, en tant du moins que son intérêt l'exige.") and Lord Atkinson in *Villar* v. *Gilbey,* [1907] A.C. 139 (H.L.). The Justinian principle seems to be operative here, especially s. 7.

5. Although the decision in New Jersey was negative, the suit was dismissed not because of lack of right or title but because of lack of interest on part of the State of New Jersey. Out-of-court settlements in Great Britain in the various thalidomide cases clearly indicate that the right or title is there. Once more, in all cases the Justinian principle seems to be operative.

6. *Cf.* majority opinion in *Roe* v. *Wade* (1973), 410 U.S. 113

7. This could be taken as underlying the decision in *Roe* v. *Wade* (*id.*). However,

fetuses are potential persons and, therefore, do have rights, but that being merely potential persons they do not have the same rights as actual persons. Therefore, while they may have the right to normal development and non-negligent treatment, they do not have the right to life.

In fact, we can imagine all sorts of other suggestions involving variations on the notion of personhood, rights attaching to persons as opposed to potential persons, the ordering of such rights, the notion of retroactive rights, and so on. However, the law is so encrusted with purely administrative and pragmatic considerations that it is easy to lose sight of the really substantive moral issues that underly the conflict that I have sketched. Consequently, I think that clarity would be best served if I began by considering those issues independently of their purely legal ramifications and instead addressed myself to the moral and philosophical parameters involved. Therefore I propose to consider first the moral status of a fetus *vis-à-vis* the question, Is it a person? Then I shall address myself to the question, Do only persons have rights, or do potential persons have rights as well? Subsequent to this, I shall consider the issue of whether or not the right to life and the right to non-negligent treatment can be had independently of each other. And finally, I shall return to the initial legal anomaly in order to see whether or not it is amenable to solution.

II. *The Fetus: Person or Potential Person?*

Is a fetus a person or is it a potential person only? In a rather obvious sense, the reply to this question depends on the definition of personhood that we are willing to accept. If by "person" we mean a fully developed member of the species *homo sapiens*, then, clearly, a fetus is not a person. It is a potential person at best. It lacks the morphological features generally found in developed individuals of that species and can lay claim to them only with respect to potentiality. The genetic foundation necessary for their realization is present, but that realization has not occurred as yet. To draw an analogy to clarify the issue, while a tadpole is unquestionably a

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as I shall argue below, this would lead to a dilemma: either the right or title is acquired in a retroactive manner at birth which would raise logical difficulties with respect to the nature of the action and of the right connected with it, or it depends on the legal fiction that the injury occurs at time of birth which would contravene facts and in any case fly in the face of the intent as well as letter of the various tolling statutes.

potential frog, as such it is not yet a frog, and to consider it such would be absurd.

On the other hand, this very example of the tadpole may itself be construed in another way; *i.e.*, it may lend impetus to the desire to accord actual personhood to a fetus. For, so the reply could run, surely a tadpole is a frog; that is to say, surely it belongs to the species *rana pipiens* throughout its phylogenetic development and is one and the same individual throughout the whole course of its biological career. Therefore, does it not follow from this that like a tadpole, a fetus ought to be treated in the same way throughout its career?

In other words, the argument could proceed along the following lines: given an organism that goes through various morphological changes in the course of its development prior to reaching a full realization of its genetic potential, it is not possible to single out any one part or stage of that development as the point at which it realizes this potential or as the stage at which it ceases to be merely a potential and becomes a Φ in actuality. Nor should we want to, for in actual fact the organism is a Φ all along. The ascription of potentiality is really not at all with respect to its Φ-hood, for that is never in doubt. Instead, it is with respect to the final external and morphological evidence of (characteristic of) its Φ-hood, which of course will obtain later in its career. In fact, given the very nature of Φ-hood, it would be surprising if this were not the case. To revert to the example of *rana pipiens*, it would be surprising indeed if what was said to be a frog — a Φ — never underwent such morphological changes or a phylogenetic development. It would not be a frog — a Φ — if it did not. Therefore, so long as the reason for inclusion in the species — in the category of Φ — is present, the individual is a member of that species: is a Φ. Likewise with persons. As members of the species *homo sapiens* it is necessary that they undergo certain developmental changes on their way to adulthood.[8] They would not be members of the species — would not be human beings — if they did not. However, as long as the reasons for their inclusion in the species *homo sapiens* are present, they will have to count as members of that species, their undeveloped morphology notwithstanding. Consequently, at all stages they must count as persons.

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8. Of special interest in this context are changes in and additions to the structure of the central nervous system, in particular changes in the connecting structures of the brain.

The essential difference between the two positions that I have just sketched is clearly this: The first involves a purely physiological criterion of personhood whereas the second centres around a wholly genetic conception. That is to say, whereas the first maintains that the notion of personhood is not coextensive with that of membership in the species *homo sapiens,* the second contends that personhood is just such a species-specific characteristic and that the two are in fact the same. Whereas the first perceives personhood to involve the actual attainment of a certain stage of development of the genetic potential inherent in the entity — in short, whereas the first equates personhood with the actual possession of genetically programmed physiological characteristics, the second equates possession of the mere potential with membership in the species *homo sapiens* and views any such genetically predetermined entity as a person, no matter what its particular stage of genetic realization.

Neither of these positions is acceptable. The first would exclude too much; the second, too little. The first would exclude children from the rubric of persons since they do not attain the full realization of their genetic potential until they are roughly 17 years of age; the second would entail that each cell of an embryo at the blastular stage of development must count as a person since each of these carries a completely active genetic code and when cloned can develop into an individual human being.

However, the failure of these two positions is instructive; for their individual differences notwithstanding, ultimately their failure has a common basis. Both identify personhood with the possession of a biological property. In fact, they do more than this: both ignore the fact that the notion of a person is not an inherently biological notion; that being a person essentially involves moral, legal and conventional parameters which a biological concept, no matter what its nature, cannot and does not possess.

Therefore, in order to decide whether or not a given entity is a person, we shall first have to see whether or not there are any characteristics of individuals we recognize as persons that do not reduce to mere biological properties without moral parameters. Once in possession of such characteristics we can then go on to inquire about criteria for the determination of personhood, so as to be able to decide whether or not an entity is a person, a potential person or not a person at all in any given case.

Are there such — is there such a characteristic? In brief, the answer is *yes.* It consists in what might be called the constitutive

potential for rational self-awareness. That is to say, an individual may be counted as a person if and only if he is now thus self-aware or can acquire such an awareness without it being necessary that he undergo a fundamental constitutive change in his physiological make-up in order to have such an awareness.[9] Of course, in order to be useful, this definition of personhood requires a pragmatically applicable criterion, since the characteristic itself can scarcely function in that role. A notion that has lately begun to acquire some currency in another area of biomedical ethics is that of brain-death: an individual is said to be no longer a person when his nervous system and in particular his brain has suffered such irreversible damage that a return to consciousness (rational self-awareness) is deemed impossible. This position is clearly predicated on the thesis that personhood, self-awareness and awareness in general go hand in hand with the presence of a certain type of functioning nervous system. Suitably modified, this concept can find applicability in our case: the presence of a nervous system complete in its basic cellular structure *vis-à-vis* the nuclei of the non-limbic cortex can count as a determining criterion; for once the latter are present, the constitutive basis for all later processes is given.

The next question that faces us is, whether or not this definition of personhood is acceptable, and furthermore, whether or not the criterion attached to it will work. In both instances, the answer is *yes*. As to the first, the notion of personhood as thus defined is not a biological or physiological notion, its criterion of applicability notwithstanding. Instead, it focuses on that essential aspect of a moral entity which already Aristotle saw as decisive. As to the criterion, it too is effective. It permits us to rule out those cases which we do not want while at the same time including those that we want to capture. Children will count as persons because, although their nervous systems are not quite as developed as those of the adult members of the species *homo sapiens*, they are sufficiently developed to permit such self-awareness.

It goes without saying that adults, by and large, fall into the same category — "human vegetables" possibly being excepted. As to fetuses, here there is no hard and fast answer. It all depends on their stage of development. At two months, even three, they will not meet the criterion. Therefore, while unquestionably members of the

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9. *Cf.* E. W. Kluge, *The Practice of Death* (New Haven: Yale University Press, 1975) at 93*ff*.

species *homo sapiens*, for all that they will not be persons. They will be *potential* persons. They will contain the genetic basis for the characteristic that I suggested was defining. At four months, the question will be more difficult to decide, for the neural network will be at that stage of development which constitutes a grey area for the application of the criterion, and where no precise answer can be given.[10] At seven months, there will be no question but that the definition for personhood will be met, the undeveloped morphological nature of the fetus notwithstanding. Consequently, at this point, we will be confronted not only with a member of the species *homo sapiens* but an actual and not merely potential person.

Is a fetus a person or a potential person? The answer once more is, that it depends. Not, however, on whether or not it is a fully developed human being, nor even on whether or not it is a card-carrying member of the right zoological species. Instead, it depends on whether or not the constitutive potential for self-awareness is present. And that may vary from time to time and case to case. An immediate corollary of this is that whereas it is always correct to call a fetus a human being — perhaps an undeveloped one, but a human being nevertheless — it is not always correct to call it a person: at some earlier stages of its development it is a potential person only, awaiting the realization of its potentiality upon the attainment of certain morphological and functional characteristics.

III. *Rights of Potential Persons?*

A fetus, then, at least in the early stages of its development, is merely a potential person. Certainly, it is a potential person at that stage of development when, typically, thalidomide damage occurs. I therefore pass on to the second question indicated at the beginning: do only persons *in actu* — actual persons — have rights, or do potential persons have rights as well?

By and large, traditional arguments against abortion and similar acts visited upon fetuses have been to the effect that insofar as they are potential persons, they do have rights. And not merely rights in general, but those very same rights that fully actualized persons

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10. Lest this be thought a fault of the criterion, I hasten to point out that this is the case with all empirically applicable concepts. There is a grey transition area where decisions must be made. Ludwig Wittgenstein, in his *Philosophical Investigations*, has some rather good things to say about this topic.

possess. After all, the only point on which they differ from actual persons is that of the realization of their potential — and that is already inherent in them. In other words, the continued material identity of the fetus with its later stages, as well as its genetic potential and present potential personhood, are seen as guaranteeing it the same rights as those possessed by a person. Consequently, both with respect to the right to life as well as with respect to the right to non-negligent treatment, the fetus *qua* potential person and the actual person (whatever its particular morphological state) are said to be on a par.[11]

However, its traditional nature notwithstanding, this sort of reasoning is mistaken. Moral prerogatives and rights, at least in that aspect of their nature which concerns me here, are like relations in one fundamental respect: they require as it were a *fundamentum adscriptionis*; a basis or ground which anchors their ascription to any given individual. Therefore, whatever the moral prerogatives, rights or privileges in question may be, they will attach to (belong to) a given individual if and only if that individual evinces the requisite *fundamentum* here and now. In other words, the ascription of moral prerogatives, rights and privileges to a fetus must find their *fundamentum adscriptionis* in its present biological constitution. Consequently, if the same rights and privileges attach to a fetus as to an individual whom we normally consider a person, then both the fetus and that individual must share the same *fundamentum* here and now — or, failing that, both the fetus and the individual must have constitutive characteristics which, although indeed distinct in nature, nevertheless can ground the ascription of one and the same series of rights.

Clearly, the first is not the case. This can be shown by elimination. The prerogatives and privileges in question must redound to the fetus either because (a) there is some characteristic *fundamentum* that it possesses in common with developed individuals here and now; or because (b) the ascription of the right is based not on the actual presence of that *fundamentum*, but on its potential possession by the fetus: *i.e.*, on the fact that it is a potential person. As to (a), even a brief glance at the present constitution of a

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11. *Cf.* J. J. Thomason, *A Defense of Abortion* (1971), 1 Philosophy and Public Affairs 47, has a similar presentation of the traditional position. See also, R. Wertheimer, *Understanding the Abortion Argument* (1971), 1 Philosophy and Public Affairs 67, who calls this or something like it the "extreme conservative position". See also, Kluge, *supra*, note 9 at 6 *ff*.

fetus rules this out. The constitution of a fetus at, say, three months of age is not at all like that of the developed individual or person. In fact, in many ways it does not differ essentially from that of a whole host of other organisms which, if we knew no more about them, we certainly would not credit with such rights simply because we would not credit them with the constitutive potential of self-awareness in the sense that I just explained. In other words, considered *vis-à-vis* its constitution here and now, such a fetus lacks that *fundamentum* which, in the case of a developed individual, serves as the basis for ascribing moral rights and privileges, and the presence of which would permit us to say, independently of whatever else we might know about the fetus, that it had these rights.

As to (b), it runs head-on into the fact that a potential is not a constitutent of the present make-up of an entity. Instead, it is described more correctly as the law-like expectation of certain results based on present conditions if and when certain environmental, *etc.* conditions are met. In other words, the potential of a fetus for rational awareness — *i.e.*, to be a developed individual in the requisite sense — is no more constitutive of it here and now than the potential of being a diamond is constitutive of a lump of carbon here and now. Therefore, the ascription of moral rights and privileges in general cannot be based on the potential of a fetus.

This leaves the second general alternative: namely, that the ascription of such rights proceeds on the basis of characteristics which, although distinct in nature from those encountered in developed individuals — although distinct from what I have called the constitutive potential for rational awareness — nevertheless can serve as such a *fundamentum*. However, as in the case of (a) above, this alternative is a conceptual dead-end. It entails that here and now, independently of any consideration of its potentials as a member of the species and its constitutive potential of rational awareness, we should be able to determine that it has these rights. And that we cannot do. If we could, then the whole question of whether or not a fetus has the same rights as a developed member of the species would not have arisen in the first place; or, if it had, it could have been answered just as easily and in the same way as in the case of the latter. The only way to avoid this outcome is to adduce this consideration of the fetus' membership in the species *homo sapiens* as a relevant parameter; *i.e.*, to appeal to its status as a potential person. And that lands the argument back with the first alternative.

In other words, the claim that a fetus has the same rights and privileges as someone who is unequivocally a person goes through if and only if the potential personhood of the fetus is considered a relevant parameter. However, as we saw, the notion of potential personhood that is here involved ultimately reduces to no more than the claim of membership in the human species. And with this, it becomes clear that the ascription of such rights and privileges to a fetus as potential person is based on a gross confusion over what it is that grounds their ascription: it is not humanity — *i.e.*, membership in the species *homo sapiens* — but personhood — the present constitutive potential of rational awareness. And while humanity (membership in the species) is undeniably present in the case of fetuses, personhood in the sense I have indicated definitely is not. It also becomes clear that what previously I had called the continued material identity of the fetus with the later person is an irrelevant consideration. All in all, therefore, it is not the case that with respect to the relevant moral parameters (rights and privileges) a fetus *qua* potential person and an actual person are on a par.

Of course, what I have just argued does not show, nor is it intended to show, that fetuses, *i.e.*, potential persons, have no rights. It merely shows that if they do have rights, these must attach to them by virtue of their nature as individual entities here and now, and are not derivable from their present merely potential personhood or present merely potential constitution. In other words, whatever rights they are said to have must be argued for on the independent grounds of what is presently the case.

IV. *Right to Life and Right to Non-negligent Treatment: Independent Rights?*

There is one more question to be considered before I address myself to the final problem: the question, namely, of whether or not the right to life and the right to non-negligent treatment can be had independently of each other.

Fortunately, the answer to this is easily given: it is a fundamental moral principle that if Φ and Ψ are rights related in such a way that the exercise of Φ is a pre-condition for the exercise of Ψ, then to have the right to Ψ is *eo ipso* to have the right to Φ. The right to life and the right to non-negligent treatment are just such rights. The latter presupposes the former, since the right to a certain sort of treatment cannot attach to an individual unless that individual has a

right to live.[12] Therefore, if a fetus has the right to non-negligent treatment, it will also have the right to life.

V. *Non-Actionable Abortion: A Legal Contradiction?*

At this point, I should like to return to the problem which I posed at the beginning: do the right to sue for thalidomide-engendered damages and the susceptibility to abortion on part of a fetus constitute a contradiction in the law? It is now easily demonstrated that this is in fact the case. For consider: on the one hand (by general consent and custom) the right to non-negligent treatment while *in utero* attaches in the relevant sense only to persons. Consequently, it does not attach to non-persons. Otherwise, *in utero* modification of non-persons, such as occurs in the case of genetic manipulation of great apes would be immoral as well as illegal. Therefore, if an entity has the right to sue for damages sustained *in utero* due to such causes, then that individual must be a person at the time the damage occurred. Consequently, from the fact that individuals *do* have the right to sue for such damages, it follows that they must be considered to have been persons at that particular time of their development.[13] Therefore, to abort such an individual at that particular stage would be to kill, with full knowledge, purpose and intent, not a potential person but a person. In a word, it would be to commit murder.

On the other hand, however, the law is also quite explicit in permitting the abortion of such fetuses and does not consider it murder. In and by itself, of course, this need not constitute a contradiction if it could be argued that the possession of personhood and the right to non-negligent treatment while *in utero* do not entail the right to life. However, as my previous argument has shown, this possibility is ruled out. The right to non-negligent treatment presupposes the right to life. Therefore, it follows that by virtue of being accorded the right to sue for damages the fetus is granted the right to life and is admitted to have the status of a person after all.

VI. *Conclusion*

The contradiction in the law that I indicated in the beginning is

12. The converse of this need not be — and in fact is not — true.

13. Unless, of course, it is argued that the right can be acquired too retroactively, as it were *ex post facto*. But that, clearly, is unacceptable because it would contradict the theory.

patent. To be sure, it could be resolved without altering any aspect of current legal practice. It would merely require that we reject all that I have argued and assert either that the right to life is not presupposed by the right to non-negligent treatment; or that rights can be acquired retroactively — as it were, *ex post facto*; or that fetuses, one and all, are potential persons and that with respect to these, none of the standard moral considerations hold. Still other alternatives suggest themselves. However, I should like to suggest that these alternatives, together or singly, are too high a price to pay for consistency in a legal situation which may be adjusted without such desperate expedients — and where in any case moral as well as juridical expediency would be best served by consistency in the notion of a person.