

‘Owning’ Unborn Children: Their Moral Status and Rights – A Critique of the Bodily Autonomy Argument

Dr. Johnny Michael Sakr

Ph.D., M.Phil (Law), M.BEth, LL.M., Grad. Dip. Leg. Prac, LL.B.
University of Notre Dame, Australia
Dr.JMSakr@gmail.com

ABSTRACT: The bodily autonomy argument is central in the debate on abortion and is used within the areas of law, medicine, and philosophy. The purpose of this paper is to highlight that even upon conceding that women have the right to bodily autonomy, this right is not absolute. Though this caveat is not unorthodox in and of itself, even if, for the sake of argument, unborn children are viewed as ‘property’ and are ‘owned’ by the mother (‘Premise’), both concepts being defined within the framework of Foetal Bundle Theory, it does not follow that pregnant women can treat the foetus however they desire. Therefore, the bodily autonomy argument cannot be used to justify a termination. This paper further argues that even if the truth of this Premise is granted, it does not nullify an unborn child’s moral status or rights. Therefore, their moral status and rights should be taken into consideration when evaluating the justification of a termination. This paper is both topical and timely given the recent overturning of *Roe v Wade* (1973).

KEYWORDS: Ownership, unborn children, bodily autonomy, women’s rights, abortion, foetal bundle theory

Introduction

Given the recent overturning of *Roe v Wade*, 410 U.S. 113 (1973) (‘*Roe*’) by *Dobbs v Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. ____ (2022) (‘*Dobbs*’), the topic of abortion is at the forefront, with the argument

of bodily autonomy as one of the main justifications in arguing for a woman's right to an abortion. It is important to note that Dobbs did not eradicate a woman's ability to procure an abortion *in totum*. Instead, laws governing abortion are now provided to the states to decide. Abortion is now no longer a constitutional right, but a state right (where applicable).

We end this opinion where we began. Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. Roe and Casey arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives.

The judgment of the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion. It is so ordered (*Dobbs* 2022, 78-79). Given these recent events, this paper is both topical and timely. The purpose of this paper is to demonstrate that even if women do have the right to bodily autonomy, this right is not absolute. Although this position is not unorthodox, even if conceive unborn children as 'property' and are 'owned' by the mother ('Premise'), both of these concepts being understood within the framework of Foetal Bundle Theory, it does not follow that pregnant women can treat the foetus however they will. Therefore, the bodily autonomy argument cannot be used to justify a termination.

This paper further argues that even if the truth of this Premise is granted, it does not nullify an unborn child's moral status or rights. Therefore, their moral status and rights should be taken into consideration when evaluating the justification of a termination. This paper is both topical and timely given the recent overturning of *Roe v Wade* (1973).

Section I will provide a brief overview of Foetal Bundle Theory and explain how the concepts of 'ownership' and 'property' are understood within this framework. Section II will argue that, even if unborn children are 'owned', they still receive rights and moral status, and Section III will apply the concept of ownership to the bodily autonomy argument.

Section I – Foetal Bundle Theory

Foetal Bundle Theory has three characteristics:

1. First, legal personhood of prenatal life is a cluster property and contains active and passive incidents which are separate but interrelated.

2. Second, these incidents include granting prenatal life with specific types of claim-rights.
3. Thirdly, this Theory contains natural law principles.

This offered view mirrors, in part, the bundle-of-rights analysis of ownership as purported by Anthony Honoré. Legal personhood is thus a 'complex disjunctive property, consisting of distinct incidents, just as ownership is often analyzed as a bundle of rights.' (Kurki 2019, 5)

The purpose of this paper is not to provide a comprehensive explanation of Foetal Bundle Theory (see Sakr 2022) but to explain the concept of ownership within this framework. Naffine states that a bundle theory view of legal personhood is like ownership, which can be recognized as separated but associated with incidents such as ownership, the liberty to use and so on. (Naffine 2009, 46 - 47; Kurki 2019, 93).

A. The Concept of Ownership Defined

Within the framework of Foetal Bundle Theory, the notion of ownership means having physical control of that thing (Honoré 1961, 107, 113; Cochrane 2009, 435). Therefore, in a sense, women 'own' their unborn child given they are located within their bodies and thus, have control over it. I agree with Robertson, applying terms such as 'ownership' or 'property' to pre-natal life risks misinterpretation. (Robertson 1990, 454)

The terms 'possession' and 'ownership' are, for some, charged, loaded, or even derogatory terms. However, though there are several similarities, having possessive interest in, or the ownership of, a foetus is not the same as having a property interest in cars or boats. The major question is who has a dispositional right and what are the limitations of this right (Robertson 1990, 456). An interpretation of property as the use of dispositional authority was discussed in *Moore v Regents of the University of California*, 793 P 2d 479 (1990) when the court, in determining whether one's spleen cells removed during surgical procedure were property, held:

In our evaluation of the law of property, we consider the definition of the word 'property' and cases and statutes involving such issues as the right of dominion over one's own body ... We find nothing which negates, and much which supports, the conclusion that plaintiff had a property interest in his genetic material. As a matter of legal definition, 'property' refers not

to a particular material object but to the right and interest or domination rightfully obtained over such object, with the unrestricted right to its use, enjoyment and disposition. In other words, [in] its strict legal sense 'property' signifies that dominion or indefinite right of user [sic], control, and disposition which one may lawfully exercise over particular things or objects; thus 'property' is nothing more than a collection of rights. (Moore 1988, 504 quoting 63A Am. Jur. 2d, Property § 1).

Similarly, the concept of ownership should be read, for example, with the concept of ownership of non-transferred embryos (Sills and Murphy 2009, 6). The only differentiating factor is the location of the embryos. This notion is not unfamiliar, as Andrew Grubb notes:

When a court is seized of a case... [it] would have no choice but to treat an extracorporeal embryo as either a person or a chattel. The likely outcome is that it would be held to be a chattel. Such law as exists points in this direction and the pragmatism of the common law would see that to treat an extra-corporeal embryo as a chattel is more consistent with common sense than for it to be given the rights of a person (Grubb 1991, 69).

While some argue that embryos should not be characterized as chattel, this same embryo could be perceived as 'someone else's property'. This notion was communicated by Lord Hailsham when he wrote, 'an embryo is not a chattel, and to destroy it if it were would be (sic) a trespass to someone else's property. A human entity which is living is not a chattel and neither is it a person in the ordinary sense'. (House of Common 1990, 750 – 751; Morgan 2001, 119)

The purpose for the discussion around ownership, property and prenatal life as chattel is because Bundle Theory holds that, in some sense, unborn children could be 'owned' much like how the law has viewed embryonic life as 'someone else's property'. Furthermore, the *priori* understanding of ownership, when referring to human beings, offers a convoluted concept that Bundle Theory does not promote and, for this reason, this misunderstanding must be explained. As Sills and Murphy wrote, citing Robertson:

Ownership does not signify that embryos may be treated in all respects like other property. Rather the terms merely designates who decides which legally available options will occur, such as creation, freezing, discard, donation, use in research and placement in a uterus. Although the bundle of property rights attached to one's ownership of an embryo

may be more circumscribed than for other things, it is an ownership or property interest nonetheless. (Sills and Murphy 2009, 8; Robertson 1994, 1027-1065)

Applying the concepts of ownership and property to embryos and thus, pre-natal life, is not unorthodox. For instance, in the case of *York v Jones*, 717 F. Supp. 421 (1989), the judges (at 425) applied the concept of property to frozen embryos (Howell 2013, 413) while a similar approach was taken in *S.H. v D.H.*, (2018) ONSC 4506, [13] (Hammond 2019, 330).

B. The Extent of Ownership

It is often assumed that ownership of property implies absolute and exclusive control over the object owned. This view was endorsed by William Blackstone, 'there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right to property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe' (Blackstone 1979 reprint, 2; Cochrane 2009, 426). This perception of ownership bestows the right to exclusive and absolute control over the thing owned. However, this simple view of ownership has its constraints.

There are numerous non-controversial examples of ownership that do not present absolute and exclusive control. For instance, if I own a case of beer, I cannot simply sell bottles of beer to the public; if I own a house, I cannot forbid entry in all circumstances; and if I own a piece of land, I cannot build whatever I please. Ownership is rarely thought of as an 'absolutist' notion. Instead, ownership is usually recognized as a distinct set of 'incidents' or 'relations,' which do not consist of necessary and sufficient conditions required to own property, but rather the collective and qualified elements of ownership (Cochrane 2009, 426 – 427).

The most famous supporter of this relational view of ownership is A.M. Honoré (Quigley 2007, 631). In his paper 'Ownership,' Honoré lists eleven ordinary incidents, or relations, that an owner can have with respect to his property 'X': the right to the income produced by X; the right to use X; a duty to refrain from using X that may harm others; the right to own X; the right to defend against the removal of X; the right to have the failed interests others have over X reverted to the owner; the right to oversee X;

the power to reallocate X to another person; the legal accountability that judgments against the owner may be implemented on X; the right to the monetary value of X; and the absence of any term on the ownership of X (Honoré 1961, 107; Cochrane 2009, 427).

Honoré holds that it is not necessary for each of these incidents to be present for a thing to be owned. A thing can be owned even in the absence, or limitation, of some of these incidents. Honoré further notes these incidents form the common elements of ownership (Waldron 1988, 49-50).

This relational perception of ownership is much more accustomed to the complexities of how things are owned. This view synchronises the variety of property relations in any example of ownership, such as those presented earlier and even, arguably, an unborn child.

Although this paper has only provided an outline of the notion of ownership, it hopes to have recognized two critical facets of ownership. First, ownership is not synonymous with absolute and exclusive control. Instead, it is a collection of incidents that differ situationally. Second, the owner has a certain relation with the thing owned, carrying precedence with respect to those incidents (Cochrane 2009, 428). This understanding provides greater explanatory power as to how women don't have an absolute right to do whatsoever they desire to their unborn child, including its termination, even if it is conceded that women 'own' their unborn child.

Section II – Unborn Children: Their Moral Status and Rights

A. Unborn Children And Their Moral Status

Bodily autonomy advocates may argue that the ownership of unborn children prevents acknowledging their moral status. The concept of moral status is 'a means of specifying those entities towards which we believe ourselves to have moral obligations' (Warren 1997, 9). Thus, moral status delivers an entity with a specific standing, indicating that we have duties with respect to that thing. For instance, I have a duty to care for my pet and not to harm him. There may be two explanations for this duty. First, this duty comes from the exclusive fact that I own my pet and have no desire to harm him. In this example, the dog is without moral status; I have moral status, and this duty extends to the owner. Otherwise, I have the duty to not harm my pet even

if I were persuaded to do so. A variety of factors could justify this notion, such as the discomfort my pet may encounter, and producing unwarranted pain to animals is usually wrong.

In this situation, the responsibility is provided to my pet, and thus he is given moral status. For advocates of justice for unborn children, their moral status must be recognized and, because of who they are, they warrant moral consideration, and such consideration should not be contingent upon the interests in them.

The proposition that 'owning' unborn children voids acknowledging their moral status is established upon the belief that the value of that thing owned has its value determined by the usefulness it has to its owner, not for itself. (Cochrane 2009, 428-429). Just as Ariel Simon penned, 'property implies that we see an object's value through the context of its owner's welfare, a denial of [its] intrinsic value' (Simon 2006, 6).

If the ownership of unborn children necessitated treating them as pure commodities, then this would inhibit the recognition of their moral status. If this view of prenatal life is granted, then prenatal life is treated in accordance with their monetary value: like animals, unborn children with no supposed 'market value' would be abused or terminated. This brings into question whether procuring an abortion reveals their perceived 'value,' or lack thereof. Just as a pet can be provided with moral status albeit being owned, so too can unborn children.

B. Unborn Children And Their Rights

Even though owning an unborn child does not undercut their moral status, perhaps it inhibits endowing them with rights. Though, why would this be? One contention holds that it is impossible for property to hold legal rights – for it cannot be concurrently owned by someone or something and hold rights (Hambrick 2006, 55; Dryden 2001, 178). This position is established upon a 'dualistic' nature of law. This notion states that the law considers entities as either persons or things: the former obtain the full protection of the law and therefore are given rights, while the latter are not provided with rights, nor are they fully protected by the law.

Since unborn children are property, they are 'things', and therefore have no rights (Wise 2000, 4). However, this idea is a desultory view of the law. The law does not establish a clear position that states that all entities that are owned are necessarily things that have no rights. For instance, companies are bestowed with personhood, although an artificial form (Rossini 1998, 1211 Beisinghoff 2009, 174; Jitta 2012, 94), and have responsibilities and rights (French 1991, 133; Manning 1984, 77; Colombo 2014, 85 – 101). Companies are owned by human-persons who have the right to possess, sell, use, buy, receive income, and manage. An additional example is that of animals. Animals can be owned, but they can also have the right not to be unreasonably, recklessly, or deliberately caused gratuitous harm (see Animal Welfare Act 1985 (SA) s 13).

These examples establish that a dualistic understanding of the law is fallacious, principally because this understanding does not correspond with how laws regulate in the real world. Therefore, it is critical, not only to hold to a position that is theoretically possible, but is practically efficacious. A stringent dualistic view of the law cannot be applied. Therefore, Bundle Theory has greater explanatory power because it can justify how animals and companies, although owned, can hold rights. This is done by providing both animals and companies with passive incidents, such as legal standing, the ability to own property, and the capability to endure legal harms. Crucially, the standing of companies underlines the possibility for an entity to hold legal rights while simultaneously being owned. Thus, this justification can apply to prenatal life.

The treatment of unborn children is decided by the state, which attempts to balance the interests of pre- and post-natal human beings. Since 'states have discretion in determining which entities will be considered juridical persons' (Berg 2007, 400) and thus, obtain rights, this balancing act establishes the degree of protection unborn children are provided with in certain state of affairs. Within the context of abortion, society has asserted that prenatal life should not receive victimhood because the mother has used her right to bodily autonomy to consent to this termination.

Bundle Theory allows entities, such as corporations, to possess both personhood and the capacity to be owned. These qualities do not endow them the claim-right to victimhood because any received rights are not

grounded upon these qualities, but upon the interest they receive. Similarly on Foetal Bundle Theory, an unborn child can be a person (or non-person) and be owned for there is an interest in them, whether be from the state, the mother herself, or on a metaphysical substrate, God.

Within a Foetal Bundle Theory framework, if a foetus is prejudicially terminated, this foetus may be regarded as a legal person, or non-person, holding the passive incidents of victim status in criminal law and legal standing. Therefore, prenatal life is able to be viewed as a victim in an abortion and thus, possessing the claim-right to victimhood.

Additionally, even though the foetus is given these passive incidents, its position of being owned is not removed. The unborn child can hold these passive incidents while simultaneously being owned. Thus, the unborn child's personhood and ownership status does establish its victimhood status, it is contingent upon whether it is presented with these passive incidents. In an abortion, the mother's consent removes these passive incidents while the unborn child still possesses the status of being owned and has the ability to hold other incidents. However, as this paper will outline below, through the lens of Foetal Bundle Theory, owning an unborn child does not bestow the mother with absolute and exclusive control over her unborn child. Thus, state of affairs exist whereby it is in the best interests of the unborn child to prevent and forbid 'unnecessary' suffering. Nonetheless, in situations where the mother's life is at risk, the unborn child's interests are subordinate if there is no reasonable manner of saving both lives. For this reason, many laws regulating abortion exempt criminal accountability and allow abortions under circumstances where it is essential to terminate the unborn child to save the mother: the harm imposed upon the unborn child under these circumstances is understood to be critical by the 'balancing of interests' (As it relates to animals, see Cochrane 2009, 433; Francione 1995, 4-5; Francione 1996, 4; Francione 2000, 55).

The notion of ownership does not necessarily allocate property with a default subordinate position regarding the balancing of interests, and therefore never holding rights. For instance, the interpretation of s 4 of the United Kingdom's *Animal Welfare Act 2006* precludes foie gras being produced (see also; *Welfare of Farmed Animals (England) Regulations 2007* (UK) s 23 – 23). This restriction affords geese with the right not to be force-fed, protecting the

geese's interest, even if this protection has harsher consequences for humans. That is, foie gras production may reduce its price, create more jobs and so on. Regardless of these consequences, the geese's interest predominates, and the law bestows on them a right not to be force-fed. Geese, like unborn children, may be 'owned'. However, this does not classify them as 'things', deficient of rights. Laws, like the *Unborn Victims of Violence Act* (2004), can provide rights to unborn children (such as victimhood status in an abortion) even if this bestowment opposes the interests of the mother. Therefore, the notion of ownership does not inevitably mean that if something is owned, it cannot bear rights (Cochrane 2009, 434). Thus, unborn children may be owned and be the bearer of rights.

Another reason why unborn children have rights is because of the passive incidents provided to them. Unborn children receive (a) substantive passive incidents which consist of the fundamental protections of liberty, bodily integrity, and life; and (b) remedy incidents which compromise of victimhood status under law, ability to endure legal harms and legal standing ('Passive Incidents').

As highlighted earlier, Foetal Bundle Theory incorporates natural law principles. Two of the basic goods of natural law are: (i) good is to be done and evil avoided (Aquinas, Part II, I, Q. 94; Charvet and Kaczynska-Nay 2008, 32; Belliotti 1994, 22) and (ii) the preservation of human life (Aquinas, Part II, I, Q. 94; Donnelly 2016, 77) ('Goods') Aquinas, Part II, I, Q. 94 A. 2). These Goods provide the reasons why Foetal Bundle Theory bestows unborn children with these Passive Incidents. Therefore, natural law directs how victimhood of unborn children should be provided, namely - established in the unborn child's nature, and thus indicates that the mother cannot do whatsoever she desires to the unborn child.

Stemming from these Goods is the perception to protect these Goods, a similar way intuition has directed human beings to use the rule of law to protect human rights (Universal Declaration of Human Rights 1948, Preamble; Osiatyński 2009, 28). On this Theory, providing unborn children with these Passive Incidents mirrors the same intuition that protects human rights. That is, if an individual inexcusably harms or terminates an unborn child, the foetus has legal standing as a victim of homicide or assault in the same way had that injury or death occurred to an *ex utero* human being. This

is because prenatal life has the same passive incidents as an *ex utero* human being. Therefore, since a foetus is a human being and Foetal Bundle Theory entails natural law principles, the same Goods directing the treatment of *ex utero* human beings are also given to prenatal life. Thus, these Passive Incidents are bestowed up the unborn child as an example of applying these Goods. Since Foetal Bundle Theory grounds foetal victimhood upon the nature of the unborn child, this entails that victimhood should not be founded on mother's will. Therefore, even if the mother owns her unborn child, this child still has rights for which must be protected.

The following section will discuss the concept of ownership from a Bundle Theory approach, and how that relates to unborn children.

Section III – 'Owning' Unborn Children

And The Bodily Autonomy Argument

Supporters of abortion may agree with this paper's position thus far. That is, they recognize that ownership does not void the recognition of the unborn child's moral status or rights. However, they may highlight that insofar as unborn children are owned, prenatal life will always be in a subservient position to their owners. That is to say, if unborn children are owned, they cannot be equal to the pregnant woman thus, cannot be seen as a legal victim of homicide in an abortion context or, at the very least, used as a reason for disallowing the mother to achieve an abortion.

The mantra 'my body, my choice' is reverberated in the abortion debate, having its grounding upon the claim of bodily autonomy, or integrity (Staples 2007, 2; Stetson 1998, 40; Garavaso 2018, 397). Lawton states that bodily integrity is a principal criterion of personhood. However, not necessarily sufficient. The idea of integrity requires not only being able to support one's bodily desires and objectives, but to also maintain control of one's body. Therefore, a deficiency in this autonomy has two differing connotations; firstly, the depletion of bodily mobility and secondly, 'the loss of control of the physical boundaries of the body' (Lawton 2002, 87; Purtilo 2010, 124). This position is also communicated by Catriona Mackenzie where she explains this position as the 'maximal choice view', which states that bodily integrity reduces to choice, which is subservient to our personal inclinations, irrespective of the choice (Mackenzie 2010, 71-90).

Within relation to abortion, the bodily autonomy argument contends that women have the right to an abortion and impeding upon this right breaches bodily autonomy (Veltman and Piper 2014, 303). Mel Feit underscored the synergy between abortion and the bodily autonomy argument, 'there's such a spectrum of choice that women have—it is her body, her pregnancy' (Crary 2006; Veltman and Piper 2014, 302).

An advocate of this proposition is Judith Thompson, who petitions this position in four ways. First, Thompson argues that bodily autonomy is a basic right, sharing the same grounding as our right to self-defence. Thompson notes, 'my own view is that if a human being has any just, prior claim to anything at all, he has a just, prior claim to his own body...the woman has a right to decide what happens in and to her body' (Thompson 1971, 54).

Second, Thompson claims that this right assumes that pregnant women own their bodies, 'making claims about it before other claims' (Veltman and Piper 2014, 303; Thompson 1971, 53). As a fundamental right, Thompson develops this notion of ownership to suggest that the owner can protect her body against things that occur to and in it (Thompson 1971, 53).

Third, bodily autonomy is associated with one's status of personhood. With respect to what a mother may do with her body, as opposed to a third party, Thompson (1971, 52) states:

So, the question asked is what a third party may do and what the mother may do, if it is mentioned at all, is deduced, almost as an afterthought, from what it is concluded that third parties may do. But it seems to me that to treat the matter in this way is to refuse to grant to the mother that very status of person which is so firmly insisted on for the f[o]etus. For we cannot simply read off what a person may do from what a third party may do.

In other words, a person's right to bodily integrity is connected with their personhood status (Veltman and Piper 2014, 307).

Thompson's final point states that, without consent, no person has a right to use another person's body; Thompson (1971, 53) suggesting that a right to bodily integrity is so intensely entrenched in our personhood, that only the right holder can justifiably renounce it (Veltman and Piper 2014, 307). However, is this position plausible? From the perspective of Bundle Theory, even if we suppose that pregnant women 'owns' their unborn child,

it is a *non-sequitor* to claim that they have absolute and exclusive control over that child. As emphasized above, ownership does not inevitably require this form of control. The purpose of this paper is not to justify the principle of equality between prenatal and post-natal human beings. However, it is crucial to comprehend the meaning of this principle. Pro-choice advocates could contend that equality means taking into consideration equal interests, but not equal treatment. Peter Singer's philosophy of animal liberation employs this concept:

The extension of the basic principle of equality from one group to another does not imply that we must treat both groups in exactly the same way, or grant exactly the same rights to both groups. Whether we should do so will depend on the nature of the members of the two groups. The basic principle of equality... is equality of consideration; and equal consideration for different things may lead to different treatment and different rights (Singer 1986, 217).

Therefore, equality between prenatal and post-natal human beings does not suggest that we ought to provide prenatal life with the right to suffrage. Prenatal life does not have interest in voting. Equality involves that we should not favor the pregnant woman's interests over prenatal life or vice versa. This principle holds that all individuals with interests are permitted to have their interests taken into consideration equally.

It is important to consider whether owning other post-natal human beings, like adult human beings, and owning unborn children is an model of unequal consideration. To resolve this, we need to establish whether prenatal life, like adult human beings, have an interest in not being owned. To assess this, this paper will assess one relation, or incident, of ownership: the right to possess. This specific incident was selected for two reasons. First, this incident is the most fundamental aspect with relation to the concept of ownership. Second, adult human beings have no interest in being owned. This interest forms the strongest resistance to the ownership of adult human beings. Thus, it is sensible to assess whether prenatal life shares that same interest.

Possessing Unborn Children and Equal Consideration of Interests

As stated previously, to have physical control of that thing it to possess that thing (Honoré 1961, 107, 113; Cochrane 2009, 435). When one is

physically controlled, it inhibits their freedom (see Berlin 1967, 141 – 152; Taylor 1991, 211-229; Pettit 1997). Freedom is thought to be a human being's most fundamental interest, with possession being juxtaposed to the interest of most humans.

What then of prenatal life? Does owning a *child in utero* also inhibit their freedom? Absolutely. However, it is uncertain whether freedom is in the interest of the unborn child. In fact, not all human beings have an interest in freedom. For instance, the freedom of young children is frequently limited: their freedom is limited with the use of paraphernalia such as safety fences; parents enforce rules upon their children, an example of dominion by possessing the sovereignty to restrict their actions, and their interest in self-mastery is deprived of by forcing them attend school against their will. Although these paternalistic restrictions are not detrimental, they would be if enforced upon adults. This is because, dissimilar to adults, children – like prenatal life – are not entirely autonomous agents.

Namely, young children do not have the capacity to conceive, adjust and practice their perception of the good (see Fabre 2000, 77 – 98). Given the inabilities of young children, limiting their freedom in the manner highlighted above is not incongruous with their interests. This also demonstrates why 'owning' unborn children and young children does not establish a conflict of interest. Although it is not ordinarily said that parents 'own' their unborn child, or children, it should be acknowledged that they stand, at a minimum, one property relation to them: parents have the right to possess them (Cochrane 2009, 435). However, it is essential to emphasize that the right to physical control is circumscribed. For instance, parents have a responsibility to meet their child's best interest and it is this responsibility that reveals the degree of freedom restraint. Nevertheless, this right is one of the incidents of ownership.

We can see, then, why ownership of unborn children may not always be in conflict with their interests. Even though unborn children do not have a conception of the good, this does not deny that the unborn have desires, or that they act to fulfill them. The point to be made is that prenatal life cannot reflect on those desires and develop their own life plans in the same manner that most adult humans can. This absence of autonomy represents that freedom is not an unborn child's fundamental interest, as it is for the majority

of adult human beings. Considering this, the ownership of unborn children as women carry them to term will not be in conflict with their interests. For instance, the ownership of an animal is analogous to a parent's ownership of a pre- and post-natal child with regard to physical control. This control is subject to certain conditions – such as a duty of care – nevertheless, physical control is not disapproved of because it restricts the freedom of the animal.

In conclusion, it is feasible to own prenatal life while simultaneously equally considering their interests. This is because unborn children do not have interest in not being owned. Additionally, even if we concede that mother's own their unborn child, it does not follow that she can do whatsoever she desires with, or to, them. This idea is not foreign. For instance, in the United Kingdom, the mother may be responsible for harming her unborn child in the instance of negligent driving (see *Congenital Disabilities (Civil Liability) Act 1976* (UK) s 2).

In *In re Ruiz*, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (1986) and *In re Baby X*, 97 Mich. App. 111, 293 N.W.2d 736 (1980), Ohio and the Michigan courts, respectively, removed the mother's custody of her newborn children who were addicted to heroin, declaring that these newborns were abused (*In re Ruiz* 1986, 35, 939). Neither states child abuse statutes refer to unborn children, yet both courts abandoned the mother's argument that a mother's acts toward an unborn child were not forbidden by the statute (*In re Baby X* 1980, 114-15, 739; *In re Ruiz* 1986, 34-35, 938). The courts' rulings were established upon the state's interest in protecting potential life (*In re Ruiz* 1986, 34, 938) and the child's right 'to begin life with a sound mind and body' (*In re Ruiz* 1986 35, 939 quoting *Womack v Buckhorn*, 384 Mich. 718, 725, 187 N.W.2d 218, 222 (1971)). Additionally, a New York court ruled that establishing the existence of child abuse may be exclusively founded on the mother's conduct during pregnancy (see *In re Smith*, 128 Misc. 2d 976, 492 N.Y.S.2d 331 (1985)).

In *In re Smith*, the court ruled that a mother's abuse of alcohol during pregnancy, in combination with her omission to obtain appropriate prenatal medical care, placed the unborn child in 'imminent danger of impairment of physical condition' (*In re Smith* 1985, 979, 334). Taking into account the interest of the state in protecting potential life, the court in *In re Smith* held that prenatal human beings was captured within the meaning of a 'child' within the

neglect and child abuse statutes (*In re Smith* 1985, 980, 334) and that those statutes signified a 'reasonable mechanism to implement the state's interest in the unborn' (*In re Smith* 1985 980, 335 quoting Myers 1984, 29-30).

State v McKnight, 576 S.E.2d 168 (2003) is another case that highlights a duty of care to prenatal human beings. In 1999, due to cocaine use, McKnight's daughter was found to have traces of cocaine in her body, which led to her stillborn birth. This fact was confirmed by Pathologists. The court found McKnight guilty of murder by child abuse, deciding (Marzilli 2006, 101):

McKnight admitted she knew she was pregnant and that she had been using cocaine when she could get it, primarily on weekends. Given the fact that it is public knowledge that usage of cocaine is potentially fatal, we find the fact that McKnight took cocaine knowing she was pregnant was sufficient evidence to [find that] she acted with extreme indifference to her child's life (*State v McKnight* 2003, 168, cert. denied, *McKnight v South Carolina*, 124 S. Ct. 101 (2003)).

The United States Supreme Court rejected McKnight's appeal (Marzilli 2006, 101). Addressing this issue, Louise Chan wrote, 'it does not follow that because a woman has a legal right to abort her pre-viable f[o]etus, she, therefore, has a right to engage in illegal conduct that would harm, but not terminate, the f[o]etus' (Chan 1993, 199).

The above cases highlight that even if the mothers own their unborn child, they are still liable for their actions. This furthers the position that bodily autonomy does not mean that the mother has absolute control over their body or even the body of their unborn child.

Furthermore, the victimhood status of the unborn child is not determined by its status of being 'owned' by the mother. If it were, then, due to this ownership, (i) the unborn child is either always a victim when aborted or harmed or (ii) never a victim when aborted or harmed. However, the cases highlighted above reveal that an unborn child can be a victim of harm, while also not viewed as a victim in an abortion. This shows that ownership is not the defining element of foetal victimhood, and that ownership is not identical with absolute and exclusive control because mothers are still accountable for harm done to their unborn child.

Conclusion

This paper has contended that even if it is conceded that women 'own' their unborn child, it does not void their moral status or rights. This position can be maintained if the conception of ownership is within the framework of Bundle Theory. Owning an unborn child, or ownership generally, does not provide the owner with exclusive and absolute control. Rather, ownership is a fragmented concept, allocating various incidents and rights in certain circumstances. Foetal Bundle Theory provides mothers with particular rights over their unborn child, while simultaneously appointing that child with rights, victimhood and moral status. If the position of this paper is valid, the treatment of unborn children should be amended or much of their treatment eradicated. This paper has argued that justice for unborn children can be obtained without the need to eradicate their ownership. Furthermore, even if it is conceded that unborn children are viewed as 'property' and are 'owned' by the mother, it does not follow that pregnant women can treat the foetus however they desire. Therefore, the bodily autonomy argument cannot be used to justify a termination.

References

- Aquinas, Thomas. *Summa Theologicae*.
- Beisinghoff, Niels. 2009. *Corporations and Human Rights: An Analysis of ATCA Litigation against Corporations*. Peter Lang.
- Belliotti, Raymond. 1994. *Justifying Law: The Debate Over Foundations, Goals, and Methods*. Temple University Press.
- Berg, Jessica. 2007. 'Of Elephants and Embryos: A Proposed Framework for Legal Personhood.' *Hastings Law Journal* 59, no. 2: 369 – 406.
- Berlin, Isaiah. 1967. 'Two Concepts of Liberty' in *Political Philosophy*, edited by Anthony Quinton, 141 – 152. Oxford University Press.
- Blackstone, William. 1979 reprint. *Commentaries on the Laws of England: Of the Rights of Things*. University of Chicago Press.
- Chan, Louise M. 1993. 'S.O.S. From the Womb: A Call for New York Legislation Criminalizing Drug Use During Pregnancy.' *Fordham Urban Law Journal* 21: 199-237.
- Charvet, John and Elisa Kaczynska-Nay. 2008. *The Liberal Project and Human Rights: The Theory and Practice of a New World Order*. Cambridge University Press.

- Cochrane, Alasdair. 2009. 'Ownership and Justice for Animals.' *Utilitas* 21, no. 4: 424 – 442.
- Colombo, Ronald. 2014. *The First Amendment and the Business Corporation*. Oxford University Press.
- Congenital Disabilities (Civil Liability) Act 1976 (UK)*
- Crary, David. 2006. *Roe v Wade for Men Would Let Dads Opt Out the Lawsuit Argues Men Should have the Choice of Declining the Financial Responsibilities of Fatherhood*. Associated Press.
- Donnelly, Bebhinn. 2016. *A Natural Law Approach to Normativity*. Taylor & Francis, 2016.
- Dryden, Amie. 2001. 'Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals.' *Idaho Law Review* 38: 177 - 212.
- Fabre, Cecile. 2000. 'A Philosophical Argument for a Bill of Rights.' *British Journal of Political Science* 30, no. 1 77–98.
- Francione, G L. 199. *Rain Without Thunder: The Ideology of the Animal Rights Movement*. Temple University Press.
- Francione, G L. 1995. *Animals, Property, and the Law*. Temple University Press.
- Francione, G L. *Introduction to Animal Rights: Your Child or the Dog?*. Temple University Press.
- French, Peter A. 1991. 'The Corporation as a Moral Person' in *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, edited by Larry May and Stacey, 133 – 149. Hoffman. Rowman & Littlefield.
- Garavaso, Pieranna. 2018. *The Bloomsbury Companion to Analytic Feminism*. Bloomsbury Publishing.
- Grubb, Andrew. 1991. *Challenges in Medical Care*. Wiley.
- Hambrick, David. 2006. 'A Legal Argument against Animals as Property' in *People, Property or Pets?*, edited by Marc D Hauser et al, 55 – 58. Purdue University Press.
- Hammond, Kathleen. 2019. 'Relationally Speaking: The Implications of Treating Embryos as Property in a Canadian Context.' *Canadian Journal of Family Law* 31: 323 - 385.
- Honoré, Anthony. 1961. 'Ownership.' in *Oxford Essays in Jurisprudence*, edited by Anthony Guest, 107-147. Oxford University Press.
- House of Commons. 1990. *Human Fertilisation and Embryology Bill 1990*.
- Howell, Shirley. 2013. 'The Frozen Embryo: Scholarly Theories, Case Law, and Proposed State Regulation.' *DePaul Journal of Health Care Law* 14, no. 3: 407 – 440.

- In re Baby X*, 97 Mich. App. 111, 293 N.W.2d 736 (1980).
- In re Ruiz*, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (1986).
- In re Smith*, 128 Misc. 2d 976, 492 N.Y.S.2d 331 (1985).
- Jitta, Daniel Josephus. 2012. *The Renovation of International Law: On the Basis of a Juridical Community of Mankind*. Springer Netherlands.
- Kurki, Visa. 2019. *A Theory of Legal Personhood*. Oxford University Press.
- Lawton, Julia. 2002. *The Dying Process: Patients' Experiences of Palliative Care*. Routledge.
- Mackenzie, Catriona. 2010. 'Conceptions of Autonomy and Conceptions of the Body in Bioethics' in *Feminist Bioethics: At the Center, On the Margins*, edited by Jackie Leach Scully, Laurel E. Baldwin-Ragaven, and Petya Fitzpatrick, 71–90. Johns Hopkins University Press.
- Manning, Rita. 1984. 'Corporate Responsibility and Corporate Personhood.' *Journal of Business Ethics* 3, no. 1: 77 – 84.
- Marzilli, Alan. 2006. *Fetal Rights: Point/Counterpoint*. Chelsea House Publishers.
- Moore v Regents of the University of California*, 202 Cal. App. 3d 1230, 249 Cal. Rptr. 494, 504 (1988).
- Morgan, Derek. 2001. *Issues in Medical Law and Ethics*. Cavendish Publishing.
- Myers, John. 1984. 'Abuse and Neglect of the Unborn: Can the State Intervene?' *Duquesne Law Review* 1: 1-76.
- Naffine, Ngaire. 2009. *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*. Hart Publishing.
- Osiatyński, Wiktor. 2009. *Human Rights and Their Limits*. Cambridge University Press.
- Pettit, Philip. 1997. *Republicanism*. Oxford University Press.
- Purtilo, Ruth B. 2010. *Ethical Foundations of Palliative Care for Alzheimer Disease*. Johns Hopkins University Press.
- Quigley, Muirean. 2007. 'Property and the Body: Applying Honoré.' *Journal of Medical Ethics* 33, no. 11: 631 – 634.
- Robertson, John. 1990. 'In the Beginning: The Legal Status of Early Embryos.' *Virginia Law Review* 76, no. 3: 437- 517.
- Robertson, John. 1994. 'Posthumous Reproduction.' *Indiana Law Journal* 69, no. 1: 1027-1065.
- Rossini, Christine. 1998. *English as a Legal Language*. Springer Netherlands.
- Sakr, Johnny Michael. 2022. 'Prenatal Legal(non) Persons and Their Rights.' *Special Issue - ICTIMESH – 2022* 1: 107-114.
- Sills, Eric Scott and Sarah Ellen Murphy. 2009. 'Determining the Status of Non-Transferred Embryos in Ireland: A Conspectus of Case Law and

- Implications for Clinical IVF Practice.' *Philosophy, Ethics, and Humanities in Medicine* 4, no. 8: 1 – 15.
- Simon, Ariel. 2006. 'Cows as Chairs' in *People, Property or Pets?*, edited by Marc D Hauser et al, 3 – 8. Purdue University Press.
- Singer, Peter. 1986. *Applied Ethics*. Oxford University Press.
- Staples, William. 2007. *Encyclopedia of Privacy: A-M*. Greenwood Press.
- State v McKnight*, 576 S.E.2d 168 (2003).
- Stetson, Brad. 1998. *Human Dignity and Contemporary Liberalism*. Praeger, 1998.
- Taylor, Charles. 1991. 'What's Wrong with Negative Liberty?' in *Liberty*, edited by David Miller, 211 – 229. Oxford University Press.
- Thompson, Judith Jarvis. 1971. 'A Defense of Abortion.' *Philosophy and Public Affairs* 1, no. 1: 47 - 66.
- Universal Declaration of Human Rights* (1948).
- Veltman, Andrea and Mark Piper. 2014. *Autonomy, Oppression, and Gender*. Oxford University Press
- Waldron, Jeremy. 1988. *The Right to Private Property*. Oxford University Press.
- Warren, Mary Anne. 1997. *Moral Status: Obligations to Persons and Other Living Things*. Clarendon Press.
- Wise, Steven. 2000. *Rattling the Cage: Toward Legal Rights for Animals*. Perseus Publishing.