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THE RIGHTS GAP: HOW THE LAW OF ABORTION IN ENGLAND AND WALES HAS DEPRIVED WOMEN AND FOETUSES OF THEIR INALIENABLE HUMAN RIGHTS.

*Elisabeth Attwood**

The issue of abortion has long been hotly contested. Despite this, the law in England and Wales has failed either to provide a foetus with a right to life or to provide a woman with the autonomous right to abortion on demand. This paper argues that the effect of this legal position is that human rights are denied to both foetus and pregnant woman in what it terms 'the rights gap'. This paper considers the domestic and international law treatment of abortion in the context of human rights. It then moves into a consideration of the possession of dignity as a pre-requisite to the possession of human rights. The effect of this foundation principle of human rights on the rights citizenship of women is explored, concluding that they are ultimately excluded from the human family of rights. The Freudian theory of "the uncanny" is examined in seeking an explanation for this exclusion. Finally, the way in which we could close the "rights gap" by adopting a sentimental understanding of rights is developed. It is argued that the adoption of a compassionate approach to rights, in which we focus on what we have in common with our fellow human beings, rather than allowing differences to create an excluded "Other", is vital in creating a truly universal community of human rights citizens.

INTRODUCTION

In the context of debates surrounding abortion – ‘*the most hotly-contested of all the new civil rights in the post-war era*¹’ – a huge amount has been written about the ethical conflict between the ‘mother’² and the ‘unborn child’³, principally focusing on which should hold primacy. Both ‘pro-life’ and ‘pro-choice’ activists invoke the rhetoric of ‘rights’ in support of their arguments, and the conflict over whether the rights of the mother or the rights of the foetus should be privileged is often fierce.

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¹ David Robertson, *A Dictionary of Human Rights* (London, 1997) 5

² The word ‘mother’ is used with reservation - F.M. Kamm argues that the use of the term in the context of the abortion debate is dangerous: ‘*Pregnant women... are encouraged to think of themselves as already being mothers...although technically only someone who has given birth is a mother*’. F.M. Kamm, *Creation and Abortion: A Study in Moral and Legal Philosophy* (Oxford University Press, 1992) 5

³ The phrase ‘unborn child’ is also problematic as it imputes the status of the child to the foetus. ‘*The phrase has been part of the public discourse about the morality of abortion since at least Roe v Wade in 1973*’ McCulloch, Lawrence B and Chervenak, Frank A. *A Critical Analysis of the Concept and Discourse of the 'Unborn Child'*, (The American Journal of Bioethics 8(7): 34-39, 2008) 34

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Given the depth and breadth of the debate, one would have expected that the competing interests of the woman and the foetus would have been weighed by the legislature, informed by public opinion, and the resulting legislation would have entrenched the rights of one or the other.

However, in England and Wales, the human foetus has no legal right to life. Neither does a woman have an autonomous legal right to terminate a pregnancy.

Focusing on the relationship between rights, humanity and dignity, this paper will argue that the ultimate result of this legal position is that, in this country, while a pregnant woman and a foetus share a physical space, they also share a position in a human rights no-man's land in which their entitlement to human rights is suspended. This means that, while women do hold certain human rights, those rights are not inherent and inalienable; they are always conditional and malleable because of her capacity to become pregnant.

The following will be an exploration of how this lacuna in human rights law⁴ (which will be termed 'the rights gap') has come into being. This paper will present ideas that may explain why there is apparently no popular appetite to change the *status quo*.

The paper will take the following structure: it will first consider the legal status of a woman and her foetus in the law of England and Wales (which will be referred to henceforth in this article as 'English law') and in international law; in the second section it will describe and explore the nature of the rights gap. The third section will explore how this gap has come into existence, with particular focus on the Freudian concept of the 'uncanny', and the fourth will consider how it may be closed.

THE LEGAL POSITION

Domestic Law

In England and Wales there is no right to abortion at any stage in a woman's pregnancy. The Abortion Act 1967 c. 87 provides limited exceptions to the criminal offence of abortion as enshrined in sections 58-59 of the Offences against the Person Act 1861⁵. The exceptions in section 1 of the 1967 Act allow a doctor to terminate a woman's pregnancy in an approved hospital if two registered medical practitioners certify that the pregnancy should not continue on grounds of risk to the woman's (or her existing children's) mental or physical health or of risk to the '*child if it were born*'⁶ of serious mental or physical handicap.

⁴ Although the important issues of bodily integrity and the right to privacy are central to the abortion debate, they will not be explored in this paper as they are outside of its scope.

⁵ Offences Against the Person Act 1861 c.100 24 and 25 Vict.

⁶ S. 1(1)(d) Abortion Act 1967 c. 87

A woman may not seek to procure a miscarriage in herself (the penalty is '*penal servitude for life*⁷') or terminate a pregnancy simply because she believes it would be detrimental for the pregnancy to continue.

In England and Wales, the pregnant woman has no autonomous right to make choices as regards to her future. Either the State, in the person of an accredited doctor acting within the limits of the law, will decide when the combined body will become two, or biology will. No free choice may be made to separate the foetus from the woman (or indeed as to how the separation will occur, or how the woman may conduct herself during pregnancy⁸).

The foetus is not mentioned at all. Under the 'born alive rule' in English law, the 'object' of the pregnancy is the child-in-waiting and only its welfare after birth is taken into account:

*'On a charge of murder or manslaughter it must be shown that the person killed was one who was in being. It is neither murder nor manslaughter to kill an unborn child while still in its mother's womb although it may be the statutory offences of child destruction or abortion. If however the child is **born alive** and afterwards dies by reason of an unlawful act done to it in the mother's womb or in the process of birth, the person who committed that act is guilty of murder or manslaughter according to the intent with which the act is done'* [Emphasis added]⁹.

Accordingly, the foetus itself is not a legal person. It may have claims for damage caused to it *in utero* if it is born alive but such claims do not attach until it becomes a baby which is capable of life independently of its mother¹⁰.

International Law

With the exception of Article 14[2][c] to the Protocol on the Rights of Women in Africa supplementing the African Charter on Human and People's Rights¹¹, which purports to impose on African states the obligation to '*protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest and where the continued pregnancy endangers the mental and physical health of the mother or the foetus*', international law is generally

⁷ S. 58 (n 5)

⁸ See p. 11 of this paper below for a brief account of the state monitoring of pregnant women

⁹ In addition to the Acts mentioned in this paragraph, the Infant Life (Preservation) Act 1929 is also in force. This created the offence of child destruction in the event that a person intentionally causes the death of a **viable** foetus. This is not relevant for the purposes of this article as it adds nothing to the debate as to the legal status of the foetus and it is not specifically concerned with the rights of the pregnant woman.

¹⁰ Halsbury's *LAW OF ENGLAND* (4th ed. reissue, Vol. 11 (1), Butterworths, London, 1990)

¹¹ Protocol to the African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 2 ILM 58 (African Charter)

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circumspect¹² when it comes to abortion and foetal rights. The Universal Declaration on Human Rights¹³ (UDHR), the Convention to Eliminate All Forms of Discrimination Against Women¹⁴ (CEDAW) and the European Convention on Human Rights¹⁵ (ECHR) are silent on the issue (although CEDAW contains provisions regarding healthcare and reproductive rights and both the United Nations conventions referred to afford ‘special’ rights to mothers and children) .

This silence does not arise from oversight: there appears to be a deliberate policy to maintain ‘neutrality’ when it comes to the issue of abortion. Early, rejected drafts of Article 3 of the UDHR (‘Everybody has the right to life...¹⁶’) read, variously:

‘...Every person has the right to life from the moment of conception...’;
‘Every man has the right to life and to bodily integrity from the moment of conception regardless of his physical or mental condition...’; and
‘Unborn children, incurables, imbeciles and the insane have the right to life¹⁷’.

So, as Philip Alston describes:

‘...While there is no basis for asserting that the notion of human rights inhere in the unborn child has been authoritatively rejected by international rights law, there has been a consistent pattern of avoiding explicit recognition of such rights, thereby leaving the matter to be dealt with outside the international legal framework¹⁸’.

The reluctance to make any definitive statement of the rights status of fetuses is aptly illustrated in the judgment in *Vo versus France* (Application No. 53924/00) July 8 2004¹⁹ (a case regarding the extent of criminal culpability of a doctor who negligently caused the death of Ms Vo’s child *in utero*) where the European Court of Human Rights took the position that:

‘the potentiality of [the foetus] and its capacity to become a person...require protection in the name of human dignity, without making it a ‘person’ with the ‘right to life’ for the purposes of Article 2 ... [However] it is neither desirable nor even possible, as matters stand,

¹² Rhonda Copelon, Christina Zampas, Elizabeth Brusie, Jacqueline Devore ‘Human Rights Begin at Birth: International Law and the Claim of Fetal Rights’ (Reproductive Health Matters Vol 13, No 26 The Abortion Pill, November 2005) 120-129

¹³ Universal Declaration on Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)

¹⁴ The Convention to Eliminate All Forms of Discrimination Against Women (adopted 18 December 1979) UNGA 1249 UNTS 13 (CEDAW)

¹⁵ Convention for the Protection of Human Rights and Fundamental Freedoms (The European Convention on Human Rights as amended) (ECHR)

¹⁶ UDHR Art 3

¹⁷ Philip Alston ‘The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child’ (Human Rights Quarterly, Vol 12, No. 1, February 1990) 159

¹⁸ Ibid 161

¹⁹ *Vo v France* (Application No. 53924/00) Grand Chamber, July 8 2004

to answer in the abstract the question whether the unborn child is a person for the purposes of Article 2 [of the ECHR] ²⁰.

Whilst a lack of legally recognized rights does not necessarily point to a lack of human rights²¹, a human right without a corresponding legal right is arguably '*writ on water*'²². In describing this relationship between rights and law, Alan Gewirth wrote:

*'[t]here is...a sense in which the existence of human rights may be construed as consisting in certain positive institutional conditions. In this sense, human rights exist, or persons have human rights, when and insofar as there is social recognition and legal enforcement of all persons' equal entitlement [to rights]*²³.

Thus, while the lack of explicit legal recognition of either a foetal right to life or an unconditional maternal right to choose to terminate a pregnancy could be viewed as '*liberal neutrality... an expression of the core liberal values of equality and autonomy in a world without moral and political foundations*'²⁴, it can equally be argued that the failure of international and domestic law to legislate in favour of either the woman or the foetus in the context of abortion is not a manifestation of the cherished ideal of neutrality, but is an equal deprivation of human rights for both. It is this legal position which, it will be argued below, creates the rights gap.

THE RIGHTS GAP

Although there are, of course, differences between the legal treatment of pregnant women and foetuses, both fall into the rights gap for essentially the same reason. They share a lack of autonomy and are both treated by the law as a means to an end. This, for reasons which will be elaborated on below, is fatal to any claim they may have to human rights.

(I) *The Foetus*

Addressing first the position of the foetus, it has no legal personhood and lacks the fundamental right of all humans under Article 3 of the UDHR – the right to

²⁰ Ibid [84], [86]

²¹ '*... 'having' a right is of most value precisely when one does not 'have' (the object of) the right...An appeal to human rights usually testifies to the absence of enforceable positive legal rights*'. Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003)9-12

²² From John Keats' gravestone 'Here lies one whose name was writ on water' Ed. John Barnard, *John Keats: Selected Poems* (London,1988) XV

²³ Alan Gewirth 'The Epistemology of Human Rights' (Social Philosophy and Policy, Vol. 1, Issue 2, March 1984) 3

²⁴ Jack Donnelly *Universal Human Rights in Theory and Practice* (Cornell University Press, 2003) 49

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life. Celia Wells argues, that despite this, it is over-simplistic to posit that it not does not have rights or interests at all, simply because it is not a legal person:

*'It is sometimes assumed that, because fetuses do not have legal personality, they do not have rights or interests which are recognised by law. This is a serious misstatement of their position in English law. Foetal interests are protected in many ways whether from injury by the woman carrying them or from third parties. Neither the foetus nor the putative father has any status to challenge a woman's decision to have a lawful abortion, and a foetus cannot be the subject of a wardship order, but that does not mean that fetuses are in some kind of legal void.'*²⁵

However, while this may be an accurate account of the legal duties that may be owed to a foetus, this paper takes the position that the foetus does not have human rights simply by virtue of the fact that it may be the beneficiary of certain duties owed by the State and its mother. As Joel Feinberg correctly states, there are:

*'numerous classes of duties, both of a legal and non-legal kind, that are not logically correlated to the rights of other persons... [there are circumstances where persons] 'owe' obedience to the Law but they owe nothing to one another...no-one is accountable to anyone else, and no-one has any sound grievance or 'right to complain'.*²⁶

Therefore, although the foetus may be protected from certain behaviours of the mother that may cause it physical harm, or prevent its development into a baby, it does not have a right to be protected. The duties a woman owes when she is pregnant are to the State, she must abide by the rules it sets governing pregnancy and any penalty that must be paid for breaching those duties is owed to the State. Human rights do not apply to a foetus while it is in the womb – they only attach later after it has been decided that the woman will carry the child to term and it has been 'born alive'.

(II) *The Woman*

For the woman, the position is more complex and it is, of course, arguable that there is no rights gap: the pregnant woman retains her fundamental rights as a woman²⁷, notwithstanding her pregnancy, and only the discrete right to choose whether she continues her pregnancy is denied to her. However, under English

²⁵Celia Wells, *On the Outside Looking In: Perspectives on Enforced Caesareans*, in *Feminist Perspectives on Health Care Law* Ed. Sheridan, Sally and Thompson, Michael 1998

²⁶ Joel Feinberg 'The Nature and Value of Rights' in Ed. Patrick Hayden *The Philosophy of Human Rights* (St. Paul, 2001) 51-52

²⁷ There is, of course, considerable debate as to whether women are full-rights citizens, whether they are pregnant or not. For example, Rebecca J. Cook argues that '*International human rights law has not yet been applied effectively to redress the disadvantages and injustices experienced by women by reason only of their being women. In this sense, respect for human rights fails to be universal*'. Rebecca J. Cook *Human Rights of Women: National and International Perspectives* (Philadelphia, 1994) 3

law as it stands, on becoming pregnant, a woman's right to choose her future identity (mother or not mother) is denied to her. The extent to which this deprives her of full-rights citizenship centres on the interrelation between rights and dignity. The importance of this interrelationship to the rights status of a pregnant woman will be explored below.

Dignity

Beginning with the writings of Cicero and continuing through the Middle Ages dignity was used to describe the kernel of man – the essence that provided a critical distinction between 'us' and 'the animals'²⁸. The principal source of this essence, according to Pico de Mirandola, was autonomy. He asserted that '*at the root of a man's dignity is the ability to choose to be what he wants to be and that is a gift from God*'²⁹.

This equivalence of autonomy and dignity was given perhaps its lasting and most widely resonating meaning by Immanuel Kant who '*... bas[ed] his attribution of dignity (würde) to the rational being on his autonomy or freedom, his capacity for self-legislation, for acting according to laws he gives to himself.*'³⁰ Most famously, he argued that '*[h]umanity itself is a dignity: for a man cannot be used merely as a means by any man...but must always be used at the same time as an end*'³¹.

In a development of this argument specifically in the context of rights, Joel Feinberg more recently equated the possession of rights with the possession of dignity, suggesting that:

'To think of oneself as the holder of rights is not to be unduly but properly proud, to have the minimal self-respect that is necessary to be worthy of the love and esteem of others. Indeed, respect for persons...may simply be respect for their rights, so that there cannot be one without the other; and what is called 'human dignity' may simply be the recognizable capacity to assert claims. To respect a person, then, or to think of him as possessed of human dignity, simply is to think of him as a potential maker of claims'³².

The use of the concept of dignity is, however, not universally accepted as a good. It has been argued that it has become an empty concept and that '*[p]hilosophers frequently introduce ideas of dignity, respect and worth at the*

²⁸ Michael Rosen, *Dignity: Its History and Meaning* (United States of America, 2012) 12-15

²⁹ Christopher McCrudden, 'Human Dignity and Judicial Interpretation' (2008) EJIL 19 659

³⁰ Alan Gewirth, 'The Epistemology of Human Rights', *Social Philosophy and Policy*, Vol 2 Issue 2 March 1984 9

³¹ *Ibid* Gewirth

³² P. 29 Joel Feinberg 'The Nature of Rights' from Ed. David Boersema *The Philosophy of Human Rights* (United States of America) 2011

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*point at which reasons seem to be lacking*³³. Michael Rosen writes that contemporary philosophers often view the concept as *'redundant at best'*³⁴.

However, despite the philosophical debate surrounding the meaning and significance of the concept of dignity, it has been described (in its Kantian definition) as the *'ur-principle'*³⁵, which provides the foundation for the vernacular understanding of human rights and it remains broadly accepted as a prerequisite to the possession and protection of rights. In particular, it is given a foundational position in the cornerstone of international and domestic human rights law through its prominence in the UDHR. The Preamble to the UDHR states that *'...recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...'*, with Article 1 confirming that *'[a]ll human beings are free and equal in dignity and rights'*. Because of this, *'dignity is central to modern human rights discourse, the closest we have to an internationally accepted framework for the normative regulation of political life.'*³⁶

It has been argued above that dignity is an essential component of humanity and a prerequisite to claiming human rights. The effect of a person being deprived of dignity must, therefore, be to rob them of their humanity and of their capacity to claim human rights.

Dignity deprived

With no legal right to choose her future identity for herself, it is axiomatic that a pregnant woman lacks autonomy. Not only is a pregnant woman deprived of free choice, both she and her foetus are also treated by the law as a means to an end (the woman as a vessel for potential human life³⁷ and the foetus as potential human being, as we saw in *Vo*³⁸).

These repudiations of dignity place both outside the human rights framework as, without dignity, one lacks the essence of humanity and, therefore, is not properly human. The pregnant woman's position therefore becomes referable to that of *'homo sacer'*³⁹, (or *'femina sacra'* to adopt Ronit Lentin's phrase if not her definition⁴⁰): she is subject to *'a sovereign decision, which suspends law in the*

³³ Peter Singer quoted by Mirko Bagaric, and James Allan 'The Vacuous Concept of Dignity' *Journal of Human Rights* (2006) 5:257-270

³⁴ Rosen (n 28) 5

³⁵ Louis Henkin quoted in Mary Ann Glendon 'Foundations of Human Rights: The Unfinished Business' (1999) 44 *Am J Juris* 14

³⁶ Rosen (n 28) 1

³⁷ The idea of woman being treated as *'foetal container'* is darkly illustrated in the account of posthumous pregnancy in Katherine de Gama 'Posthumous Pregnancies: Some Thoughts on 'Life' and Death' in n 24

³⁸ (n 20)

³⁹ Giorgio Agamben *Homo Sacer: Sovereign Power and Bare Life* (Trans. Daniel Heller-Roazen) (Sanford, California 1995)

⁴⁰ Ronit Lentin 'Femina Sacra: Gendered Memory and Political Violence' *Women's Studies International Forum* Vol 29 Issue 5, (September-October 2006) 463-473

*state of exception*⁴¹ and she is '*the one with respect to whom all men act as sovereigns*⁴²'.

Like '*homo sacer*', the pregnant woman is at once within the law and outside it. The law is applied to her but it is excessive and exceptional. She is extensively monitored and regulated and her conduct is subjected to moral and legal scrutiny. By way of example from the United States, the court in *Roe versus Wade* 410 U.S. 113 (1973) '*believed that the State has a compelling interest in protecting potential human life at viability... In turn, compelling interest signifies that a woman's interest in having an abortion can sometimes be overridden*⁴³ [emphasis added]'. Furthermore, a woman may be subject to criminal charges if she takes illegal drugs during pregnancy, or if she refuses a caesarean section, with the result of damage to the foetus. A woman may be imprisoned for the duration of her pregnancy if this is deemed to be a means of preventing her from putting her foetus at risk⁴⁴. She, therefore, does not have the same legal rights as a full-rights citizen: her body is no longer her own property over which she has autonomy. Jeffrey A. Gauthier likens the effect of this to the effect of slavery, arguing that '*a variety of accepted social practices...have effectively deprived [women]...of their bodies, thereby rendering them particularly deprived of agency*⁴⁵'.

(III) *Unequal Rights*

Following the analysis undertaken above, the exclusion of the foetus and the woman from the 'human family' of unconditional rights appears clear. This exclusion can apparently not be reversed. There are only two possible outcomes post-pregnancy, and on each outcome human rights remain conditional.

The first is that the potentiality is fulfilled; the woman becomes a mother, the foetus becomes a child and their rights status is nominally enhanced, at least according to the UDHR under which '*Motherhood and childhood are entitled to special care and assistance*⁴⁶'. Adopting Mary Wollstonecraft's argument, this exceptional treatment of a woman on becoming a mother in itself is a deprivation of dignity, an infantilisation as '*while [women] have been stripped of the virtues that should clothe humanity, they have been decked with artificial graces...*⁴⁷'.

The second is that the pregnancy is terminated and a pregnant woman will be a woman again. However, if one follows a Hegelian argument, because she has

⁴¹ Agamben (n 39) 931

⁴² Agamben (n 39) 950

⁴³ Kamm (n 2) 16

⁴⁴ See the very full account of legal and medical treatment of pregnant women set in Bonnie Steinbeck 'Life Before Birth: The Moral and Legal Status of Embryos and Fetuses' Oxford Scholarship Online 2011.

⁴⁵ Jeffrey A. Gauthier *Hegel and Feminist Social Criticism: Justice, Recognition and the Feminine* (New York, 1997) 13

⁴⁶ Article 25(2) UDHR

⁴⁷ Mary Wollstonecraft *Vindication of the Rights of Women* (1792) 46

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had an abortion which society implicitly (by the fact that abortion is *prima facie* illegal) condemns, she is '[left] with the options either of trying to repress her capacity for autonomy altogether, or of rebelling against the society that would define her action in such a way that she cannot take it up as her own'⁴⁸.

The foetus becomes entitled to the most sacred of all rights on its disposal - the right Antigone fought to secure for her brother - '*il a droit au repos*⁴⁹'. It must be treated with dignity and is entitled to the ancient rights of the dead: '*...a [dead] foetus is entitled to respect, according to its status broadly comparable to that of a living person. Thus the relevant categories of ethical significance are 'alive' and 'dead' and the category of 'pre-viable'... is not of ethical significance*'⁵⁰.

It would seem evident that the rights of women and fetuses are conditional on what they may become, rather than being inherent and inalienable as they are for adult males. The question therefore arises as to what it is about pregnancy that allows society to support the expulsion of women and fetuses from full-rights citizenship?

HOW CAN WE EXPLAIN THE RIGHTS GAP?

A recent poll shows that the majority of British people are in support of the current law regarding the termination of pregnancy in England and Wales⁵¹, giving democratic authority to the legal deprivation of the rights of the pregnant woman (despite the radical effect referred to above of depriving women of unconditional rights-holder status and of confirming that inalienable human rights are only granted to adult males).

This popular support seems anomalous to the position that '*[w]hen given a chance, people in the contemporary world usually choose human rights*⁵²'. It also seems anomalous to the position that, when there are two sets of competing rights, we are normally able to legislate in favour of one or the other. The principle of balancing rights is enshrined in UDHR Art. 29(2)⁵³ which essentially adopts the Thomistic idea that:

'since man is a part of a community each man, in that which he is and in what he has, is the community's. Just as every part in that which it is, is the whole's.

⁴⁸ 12 (n 45) Gauthier drew this conclusion from the analogy with the effect of slavery on rational agency as referred to above. 12

⁴⁹ Jean Anouilh *Antigone* (London) 1954 68

⁵⁰ See, for example, the Royal College of Nurses guidance '*The Sensitive Disposal of all Fetal Remains*' at http://www.rcn.org.uk/data/assets/pdf_file/0020/78500/001248.pdf

⁵¹ www.theguardian.com/world/2013/feb/12/anti-abortion-feelings-declining/

⁵² Donnelly (n 24) 39

⁵³ '*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society*'. UDHR Art. 29(2)

*Hence, nature inflicts some injury on a part in order to save the whole. And on account of this, laws of this kind, imposing proportionate burdens, are just, and they bind the court of conscience and are legal laws*⁵⁴‘.

Following this balancing principle, if a law were to be enacted by majority consent in which the rights of woman, ‘trumped’ the rights of the foetus or vice versa, the granting of enforceable rights claims to one at the expense of the other would not be unjust⁵⁵, whether or not each member of the community agreed with the particular hierarchy of rights that had been created. Indeed, the very acknowledgement of the possession of competing rights within the body of the pregnant woman would arguably inscribe both woman and foetus with rights citizenship – after all *‘[r]ights only exist in relation to other rights [and] rights claims involve the acknowledgements of others and their right and of trans-social networks of mutual recognition and arrangement.*’⁵⁶ Neither woman nor foetus would be a conditional rights holder – their claims would merely be limited because of the competing claims of another, as are the rights claims of all human beings under the UDHR.

This brings us to the question of how the ‘rights gap’ can be accounted for. Where does the moral consensus that neither a pregnant woman nor a foetus is worthy of dignity and, in turn, unconditional rights protection come from?

Our disregard for the rights of a pregnant woman could be explained in a number of ways. One explanation is relatively prosaic: owing to the fact that society believes that the right to have an abortion is enshrined in law, we believe that the pregnant woman has been recognised as a human with rights. As Marius Pieterse argues, *‘rights are capable of being used to entrench a socially unjust status quo...This is accomplished through creating the illusion that the more just social order has already been achieved by virtue of mere acknowledgement of its possibility*⁵⁷‘.

However, given that the position in English law appears to be well known (as evidenced by the poll referred to above showing widespread support for the continuation of the *status quo*) another explanation is perhaps needed for the anomalous refusal to attribute rights to the woman.

With regard to the foetus, our failure to ascribe ‘legal person’ status and the attendant rights to a foetus can equally be explained in a number of ways. For example, the idea that *‘[t]he dominant tradition has typically grounded rights in the possession of rationality and language thus implying that non-human*

⁵⁴ P. 160 Paul Groarke and J.L.A West ‘Reconciling Individual Rights and the Common Good: Aquinas and Contemporary Law’ in Ed. William Sweet *Philosophical Theory and the Universal Declaration of Human Rights* (Ottawa) 2003

⁵⁵ ‘...A legal civil right becomes a way of acting or being treated that is correctly understood to be in everybody’s interest, or would so be understood, on reflection and given time and experience’ P. 72 Rex Martin ‘T.H. Green on Rights and the Common Good’ in n 57

⁵⁶ Costas Douzinas *The End of Human Rights* (Oxford; Portland, Oregon,2000) 343

⁵⁷ Marius Pieterse ‘Eating Socioeconomic Rights: The Usefulness of Rights Talk In Alleviating Social Hardship Revisited’ *Human Rights Quarterly*, Vol 29, Number 3, 796-822 (August 2007) 814

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*animals and mentally impaired humans may not have them*⁵⁸, may be extended to the foetus which is possessed of neither rationality nor language and is not capable of making claims.

This argument is also flawed, given that we grant rights to a new born baby, who is equally incapable of rationality, language or of making claims on its own behalf. As in the case of the woman, an alternative explanation needs to be found.

It will be argued below that this alternative explanation (which applies equally to both woman and foetus) may be found in the writings of Sigmund Freud.

A Freudian basis for the rights gap⁵⁹

In *'Totem and Taboo'*⁶⁰, Freud explores (*inter alia*) why certain prohibitions in primitive society are acknowledged and respected, despite their seeming irrationality. He argues that:

*'behind all these prohibitions there seems to be something in the nature of a theory that they are necessary because certain persons and things are charged with a dangerous power, which can be transferred through contact with them, almost like an infection... This power is attached to all special individuals, such as kings, priests or new born babies, to all exceptional states such as the physical states of menstruation, puberty or birth and to all uncanny things such as sickness and death and what is associated with them...'*⁶¹

It is, therefore, possible that we do not challenge the prohibition on abortion because it has become a taboo arising from the fact that we see the pregnant woman and foetus as 'uncanny'⁶².

Freud provides a variety of definitions for the uncanny with the multiple meanings of *'heimlich'* illuminating the multiple, combined characteristics that uniquely create the state of the 'uncanny':

⁵⁸ Nussbaum, Martha *Capabilities and Human Rights* from *The Philosophy of Human Rights* Ed. Boersema, David, 37

⁵⁹ Freud himself was opposed to both contraception and abortion, Freud (like Lenin) seeing abortion (in part and from opposing perspectives) as a class issue. Pps 513-529 Angus McLaren 'Contraception and Its Discontents: Sigmund Freud and Birth Control' *Journal of Social History* 12(4) 1979; and V.I. Lenin 'The Working Class and Neo-Malthusianism' *The Communist* May 1936 accessed at <http://www.revolutionarydemocracy.org/archive/Lenneomalth.pdf>

⁶⁰ Sigmund Freud 'Totem and Taboo' in Ed. Ivan Smith *Freud – Complete Works* (2011) 2646-2799

⁶¹ Ibid 2669

⁶² The argument that follows falls down if one accepts Heidegger's assertion (which has not been explored within this paper) that **all** human beings are uncanny: *'The uncanniest of the uncanny is the human being'* P. 68 Martin Heidegger *Hölderlin's Hymn 'The Ister'* Translated by William McNeill and Julia Davis (Bloomington)1996

*'the word 'heimlich' is not ambiguous, but belongs to two sets of ideas, which, without being contradictory, are yet very different: on the one hand, it means what is familiar and agreeable, and on the other, what is concealed and kept from sight*⁶³.

It is this dual meaning that gives the uncanny its special quality.

This quality is exceptionally present in the pregnant woman: when we look at her we see at once that which is familiar, the face of the woman, and that which is concealed from sight, the foetus – a dividing and multiplying bundle of cells - about which we know little and whose face we cannot envisage, except as the yet-imaginary resulting child. As Freud puts it: *'..an uncanny effect is often easily produced when the distinction between imagination and reality is effaced...*⁶⁴.

Furthermore, because of the precariousness of pregnancy (it is estimated that fifty per cent of all pregnancies end in miscarriage⁶⁵), we cannot be sure when we look at a pregnant woman whether the foetus is, in fact, alive or capable of life, and *'a particularly favourable condition for awaking uncanny feelings is created when there is intellectual uncertainty whether an object is alive or not*⁶⁶.

Finally, the uncanny is strongly associated with death. Unicef reports that there is a one in one hundred and eighty risk of a woman dying in pregnancy or childbirth⁶⁷. Therefore, when we see a pregnant woman, not only are we faced with the risk of foetal death, we are also confronted with a complicated double image of a woman who is at once bearing life and at vastly increased risk of death. We are looking into the eyes of the heimlich and unheimlich – the sacred and the damned.

It may be that in sensing the uncanny in the pregnant woman, we are forced to *'turn away in horror*⁶⁸ from her. Owing to the uncertainty she provokes, we cannot interact with her as a human being and we thus entrust her to a doctor who is accustomed to dealing with the uncanny (in the form of sickness, insanity and death). In doing so, we perpetually reinforce the taboo.

The effect of this perpetual dehumanisation of pregnant women and fetuses is to permit violations of their rights and, specifically, to permit the deprivation of their dignity. Richard Rorty argues when we think of others as lacking the qualities that ground rights claims, we (as violators of those claims) do *'not think of [our]selves as violating human rights [f]or [we] are not doing these things to fellow human beings...*⁶⁹.

⁶³ Freud (n 60) 3679

⁶⁴ Ibid 3

⁶⁵ 50% of pregnancies are estimated to end in miscarriage. <http://www.tommys.org/page.aspx?pid=383>

⁶⁶ Freud (n 63) 3685

⁶⁷ Statistics as at June 2012 accessed at http://www.childinfo.org/maternal_mortality.html

⁶⁸ Freud (n 63) 3690

⁶⁹ Richard Rorty 'Human Rights, Rationality and Sentimentality' from Ed. Obrad Savić for the Belgrade Circle *The Politics of Human Rights* (New York; London, 1999) 67

HOW DO WE CLOSE THE RIGHTS GAP?

It appears that women's and foetus's human rights are conditional for two reasons. Firstly, because of the foundational position of dignity in the understanding and attribution of rights. This means that when dignity is denied, rights are suspended. Secondly, because of the exceptional 'uncanny' quality of pregnancy, we are unable to face this issue and address the deprivation of human rights.

It, therefore, seems that a means by which to close the rights gap is to 'move on' from 'foundational claims' of rights. Richard Rorty further posits that if we do not try to define humanity by certain characteristics that being human 'must' entail, then the idea that there is a class of people who are excluded from this definition is eradicated. He argues for a 'sentimental' understanding of rights which will '*expand the reference of terms 'our kind of people' and 'people like us.*'⁷⁰ If we were to adopt this approach, rather than treating the pregnant woman and foetus as inhuman, they would have the same unconditional rights as adult men. The possession of dignity, and the way in which we view the pregnant woman and foetus as not-quite-human would be irrelevant to their inherent human rights.

As '*[p]eople who reason about this issue [abortion] sincerely and in good faith, have reached and continue to reach different conclusions*'⁷¹, this would not guarantee the legal rights of either foetus or woman, and the democratic political consensus on the rights and wrongs of the issue would be bound to vary over time⁷². However, neither woman nor foetus would be '*excluded from playing the game or winning...*'⁷³. Any claim that they may make to legal rights would be supported by authentic human rights. Therefore, although the woman and the foetus would no doubt be subject to different legal rights (and duties in the case of women) at different times, they would retain their place as human rights holders. A competing claim may prevent them from exercising those rights, in the same way as competing claims potentially limit the rights of all rights holders but the rights gap would no longer exist. There would be continuous rights citizenship pre- and post-pregnancy and arguably from conception.

CONCLUSION

As this paper has argued, a pressing, unaddressed issue surrounding the abortion debate is not whether the rights of the woman or the foetus hold moral sway, but the fact that we deny both women and fetuses inherent and inalienable human rights. The function of the law regarding abortion, and its denial of autonomy to the pregnant woman, has been to render conditional the human rights of all women from birth owing to their having the potential to become pregnant. They

⁷⁰ Rorty (n 69) 88

⁷¹ Jean Hampton *The Intrinsic Worth of Persons: Contractarianism in Moral and Political Philosophy* (Oxford; New York, 2007) 177

⁷² Ibid 176-179

⁷³ Ibid 179

are treated as a means to an end with a fatal consequence for their claim to dignity – the prerequisite quality for any entitlement to human rights.

This paper has posited that if either the woman or the foetus were afforded legal rights in the context of abortion, then both would have full inalienable human rights citizenship, equal to that of men as they would be brought back into the traditional realm of human rights. However, as Richard Rorty regretfully notes, '*everything turns on who counts as a human being*⁷⁴'. Thus, the deprivation arises, and is perpetuated because the uncanny quality that is exceptionally present in a pregnant woman negates her humanity and we, therefore, we see no injustice in denying her the rights that are deemed to belong to the rest of the human family.

As a result, we are complicit in a prohibition of rights which makes every woman's rights citizenship precarious, unequal and conditional, and ensures that the argument that rights are gender-equal or may be inherent from the conception of human life is unsustainable: only males from birth (the time we can categorically confirm they are male) have inalienable human rights.

The solution to this problem would be to adopt the non-foundational, compassionate and inclusive conception of human rights advocated by Richard Rorty: if we focused on what makes a pregnant woman like us, rather than on what makes her different to us – her Otherness – we would be capable of including her in our human rights family and justice would replace injustice.

⁷⁴ Rorty (n 69) 74-75