

Is the 'Born Alive' Rule Outdated and Indefensible?

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Abstract

This article attempts to theorise legal personhood in a manner that will enable courts to express what it is about newborn infants that relevantly distinguishes them from foetuses for legal purposes. This is a difficult task if one focuses solely on the intrinsic properties of the foetus, as many philosophical and biological accounts of personhood tend to do. Further, it is a task complicated by the integration of medical technologies into the embodied experience of pregnancy and popular discourses about foetal personhood. I argue that a conception of personhood that pays due regard to the intrinsic *and* relational aspects of foetal being has greater potential both to explain the existing criminal law, and to guide future developments, than does a theory based solely on the intrinsic properties of the foetus. The theory developed here is consistent with retaining the 'born alive' rule. However, in the event that the courts decide to abandon the rule for the purposes of homicide, the theory also provides a basis for confining the recognition of foetal personality to the context of foeticide caused by third party assaults on pregnant women.

1. Introduction

In the recent decision of *R v Iby*,¹ the NSW Court of Appeal examined the development, scope and purpose of the born alive rule in the context of a manslaughter charge arising from a dangerous driving incident which caused the premature birth and subsequent death of a child. In its consideration of the rule, the Court both affirmed its longstanding historical significance to the common law and questioned its continuing relevance. It observed that the rule is based on 'two anachronistic, indeed antiquated factors.'² The first of these was 'the primitive state of medical knowledge at the time that it was adopted'³ and, the second, 'the fact that birth was a process fraught with risk until comparatively recently and, accordingly, there was a high probability that a stillbirth had natural causes.'⁴ Medical knowledge and technology has moved on considerably since the 17th Century. It is now possible to demonstrate that a foetus is alive before it is born and the natural rate of still birth is somewhere in the vicinity of 0.5 per cent of total

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1 *R v Iby* (2005) 63 NSWLR 278 (hereafter *Iby*).

2 *Id* at 284 (Spigelman CJ, Grove & Bell JJ).

3 *Ibid*.

4 *Ibid*.

births.⁵ In light of these developments, the Court expressed the view that ‘there is a strong case for abandoning the born alive rule completely.’⁶

It is implied in this analysis that the common law has not articulated, in any substantive way, what the term ‘person’ seeks to express. Thus, the ‘born alive’ rule does not provide a principled basis for explaining why it should be that a baby, but not a foetus, can be a victim of homicide. In *Iby*, the Court was considering the death of a foetus at 38 weeks gestation who was ‘fully developed in a perfect condition and within a week or two of actual birth.’⁷ If ever the ‘born alive’ rule was going to face serious challenge, it would likely be in circumstances, such as these, where the foetus possesses most or all of the intrinsic properties of a newborn baby and the mother grieves the loss of what was for her, and her kin, already a person.

The absence of a clear articulation of the meaning and content of the term ‘person’ leaves the ‘born alive’ rule vulnerable to challenge and abolition. As many commentators have pointed out, such a development could have ramifications well beyond the context of third party assaults against pregnant women. It is unclear how the abolition of the rule might affect the criminal and civil liability of pregnant women whose acts or omissions cause foetal death or serious harm or, indeed, the criminal liability of medical professionals involved in terminations of pregnancy.⁸ This article considers whether it is possible to theorise legal personhood in a manner that is both sensitive to differences in context and which helps courts to express what it is about newborn infants that relevantly distinguishes them from foetuses for legal purposes. Admittedly this is a difficult task, especially if one focuses solely on the intrinsic properties of the foetus, as many philosophical and biological accounts of personhood tend to do. The task is

5 Id at 284.

6 Id at 288.

7 Ibid.

8 This article will focus on criminal liability in respect of foeticide resulting from the consensual termination of pregnancy and third party acts of violence against pregnant women. There is a vast literature in particular concerning the legitimacy and implications of imposing criminal and civil liability on pregnant women for conduct causing, or threatening to cause, foetal death or injury. See generally, John Seymour, *Childbirth and the Law* (2000); Rosamund Scott, *Rights, Duties and the Body — Law and Ethics of Maternal-Fetal Conflict* (2002). Much of this commentary concerns the United States context where some courts and legislatures have recognised maternal liability for prenatal death and harm, for example, Jacqueline Berrien, ‘Pregnancy and Drug Use: The Dangerous and Unequal Use of Punitive Measures’ (1990) 2 *Yale J of Law and Feminism* 239; Cynthia Daniels, *At Women’s Expense—State Power and the Politics of Fetal Rights* (1993); Janet Gallagher, ‘Prenatal Invasions & Interventions: What’s Wrong with Fetal Rights?’ (1987) 10 *Harv Women’s LJ* 9; Lisa Ikemoto, ‘Furthering the Inquiry: Race, Class and Culture in the Forced Medical Treatment of Pregnant Women’ (1992) 59 *Tennessee LR* 487; Dawn Johnsen, ‘The Creation of Fetal Rights: Conflicts with Women’s Constitutional Rights to Liberty, Privacy and Equal Protection’ (1986) 95 *Yale LJ* 599; Isabel Karpin ‘Re-imagining Maternal Selfhood: Transgressing Body Boundaries and the Law’ (1994) 2 *Australian Feminist LJ* 36; Jeffrey Parness, ‘Crimes Against the Unborn: Protecting and respecting the Potentiality of Human Life’ (1985) 22 *Harvard Journal on Legislation* 97; Dorothy Roberts, ‘Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy’ (1991) 11 *Harv LR* 1419.

also complicated by the integration of medical technologies into the embodied experience of pregnancy and popular discourses about foetal personhood. The task, however, is a necessary one, not least because abolishing the rule would still leave a host of questions about at what stage of development, and for what legal purposes, a foetus is to be regarded as a person. I argue that a conception of personhood that pays due regard to the intrinsic *and* relational aspects of foetal being has greater potential both to explain the existing criminal law, and to guide future developments, than does a theory based solely on the intrinsic properties of the foetus. The theory developed here is consistent with retaining the 'born alive' rule. However, in the event that the courts decide to abandon the rule, the theory also provides a basis for confining the recognition of foetal personality to the context of foeticide caused by third party assaults on pregnant women.

2. *The Born Alive Rule*

A. *How Does the Rule Function in the Criminal Law?*

Barry observes that the unborn child was not considered a human being in Roman Law but was, rather 'part of the viscera of the mother.'⁹ However, Blackstone took a contrary view, observing that 'life is the immediate gift from God, a right inherent in every individual; and it begins in contemplation of the law as soon as the infant stirs in the mother's womb.'¹⁰ Historically, the event of 'quickening' was regarded as having legal relevance and was 'adopted by the law because it was the only test that could be relied upon with any degree of certainty'.¹¹ Blackstone stated that 'if a woman is quicke with child and by a potion or otherwise killeth it in her womb or if anyone beat her whereby the child dieth in her body and she is delivered of a dead child this though not murder, was by the ancient law manslaughter.'¹² But, as Blackstone himself conceded, Coke did not regard the killing of a foetus after quickening in 'so atrocious a light'.¹³ As Barry points out, Coke's view prevailed. Thus, for the purposes of the criminal law, the born alive rule has been traced to Coke who defined the common law offence of murder by reference to the killing of a 'reasonable creature in *rerum natura*'.¹⁴ According to *Stephen's Digest of the Criminal Law*:

A living child in its mother's womb is not a human being within the meaning of the definition that a homicide is the killing of a human being, and the killing of such a child is not homicide, although it may be a misprison.¹⁵

9 J Barry, 'The Child *en Ventre sa Mere*' (1941) 14 *ALJ* 351 at 353.

10 *Id* at 351 quoting Blackstone, 1 *Comm* (3rd ed, 1768) 129.

11 *Ibid*. The historical development of the common law is also discussed in Stanley Atkinson, 'Life, Birth and Live-Birth' (1904) 20 *LQR* 134; D Seabourne Davies, 'The Law of Abortion and Necessity' (1938) 2 *Mod LR* 126; John Keown, *Abortion, Doctors and the Law* (1988).

12 Blackstone quoted in Barry above n9 at 351.

13 *Id* at 353.

14 Coke, *Institutes*, Part III, Ch 7, 50 cited in Barry above n9 at 353; Hawkins P C Bk 1 C 20.

15 *Id* quoting Stephen, *Digest of the Criminal Law* (7th ed, 1926) Art 310.

In his consideration of the rule in *AG's Reference (No 3 of 1994)*,¹⁶ Lord Mustill thought it 'unnecessary to look behind [Coke's] statement to the earlier authorities, for its correctness as a general principle ... has never been controverted.'¹⁷ However, the principle, as stated, does not give adequate guidance on how to determine liability for injuries inflicted prior to birth in circumstances where a child is born in a living state before succumbing to the pre-birth injury. To meet this challenge, Coke proposed a modest extension of the reach of the law of homicide to the pre-birth space:

If the child be born alive, and dieth of the potion, battery or other cause, this is murder: for in law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.¹⁸

On Coke's view, the law could permit the conduct and mental state of an accused prior to the 'existence' of the victim to constitute the elements of the offence of homicide, provided that the child was subsequently born alive.

Lord Mustill notes that the extension of the law of homicide to include situations where the conduct causing death occurred prior to birth, 'did not at first command universal acceptance, largely on the practical ground that medical science did not then permit a clear proof of causal connection'.¹⁹ However, it was adopted in the 1830s and 40s 'and never substantially doubted since'.²⁰ The rule was further extended to situations where the act of violence caused the premature birth of a child that later died as a result of being born prematurely and to the offence of manslaughter.²¹ Its continuing application to the English law of murder and manslaughter was confirmed by the House of Lords in *AG's Reference (No 3 of 1994)*. As foreshadowed in the introduction, the rule also survives as part of the law of manslaughter in NSW²² and has been placed on a statutory footing with respect to the offence of murder.²³

Precisely what 'born alive' means for the purposes of homicide has been the subject of a long line of authorities, which explicate, in various and sometimes conflicting ways, the legal demands of separateness (born) and independent existence (alive).²⁴ The rule was articulated in *Hutty*²⁵ (approved in *Iby*) in the following terms:

A baby is fully and completely born when it is completely delivered from the body of its mother and it has a separate and independent existence in the sense

16 [1988] AC 245 (hereafter *AG's Reference (No 3 of 1994)*).

17 *Id* at 254.

18 Coke quoted in Barry above n9.

19 *Ibid*.

20 *Ibid*.

21 *Id* at 254–55, citing *R v West* (1848) 2 Car & K 784 and *R v Senior* (1832) 1 Mood 346.

22 *Iby*, above n1 at 288.

23 *Crimes Act* 1900 (NSW) s20 provides: 'On the trial of a person for the murder of a child, such child shall be held to have been born alive if it has breathed, and has been wholly born into the world whether it has had an independent circulation or not.'

that it does not derive its power of living from its mother. It is not material that the child may still be attached to its mother by the umbilical cord ... But it is required that the child should have an existence separate from and independent of its mother, and that occurs when the child is fully extruded from the mother's body and is living by virtue of the functioning of its own organs.²⁶

In *Iby*, a case concerning criminal liability for causing the death of a child from injuries inflicted whilst *in utero*, the latter component of the rule was examined in some detail. The trial judge accepted the Crown case that the child 'did breathe, albeit with the assistance of a respirator', that 'his lungs functioned in that they oxygenated his blood' and that he 'had a heartbeat for almost two hours after delivery'.²⁷ These signs of life were sufficient for the judge to conclude that the child lived independently of its mother for a period of around two hours and, accordingly, the accused was convicted of manslaughter. As Spigelman CJ noted, the appeal raised the question of 'what is meant by the words 'born alive'?'²⁸ A review of the authorities established that there was no 'common law definition of what constitutes "life" for the purposes of the born alive rule'²⁹ though a number of different criteria had been accepted as indicating life: crying, breathing, the presence of a heartbeat and an independent circulation.³⁰ Whilst it was accepted that the authorities were 'not necessarily reconcilable',³¹ it was suggested that this was because the rule has functioned as an evidentiary rather than a substantive rule. Consequently, 'the observations made by judges, including directions to the jury, in each case must be understood in the context of the particular evidence in the case.'³² Although the Court of Appeal was unable to discern any clear definition of 'alive', it was nonetheless persuaded that the authorities favoured a minimalist interpretation. In keeping with this approach, the Court found that any indicia of independent life would satisfy the rule:

Authority is clearly in favour of a conclusion that the common law 'born alive' rule is satisfied by any indicia of independent life. There is no single test of what constitutes 'life'. The position is well-stated by one author: A child is live-born in the legal sense, when, after entire birth, it exhibits a clear sign of independent vitality; in practice, at least the evanescently persistent activity of the heart.³³

24 The authorities are examined in some detail by the Court of Appeal in *Iby*, above n2 at 285–87. See also *Rance v Mid Downs Health Authority* [1991] 1 QB 587 at 619–20; and *C v S* [1988] 1 QB 135 at 146–47. For a critical analysis of these authorities see Kristin Savell, 'The Mother of the Legal Person' in Susan James & Stephanie Palmer, *Visible Women — Essays on Feminist Legal Theory and Political Philosophy* (2002) 29 at 38–46.

25 [1953] VLR 338.

26 *Id* at 339.

27 *Iby*, above n1 at 280 (Spigelman CJ).

28 *Id* at 279.

29 *Id* at 284.

30 *Id* at 285.

31 *Ibid*.

32 *Ibid*.

33 *Id* at 287 (footnoting omitted).

Although the court confirmed that the born alive rule does not encompass ‘a requirement of viability in the sense of physiological viability of a newly born child to survive as a functioning being’,³⁴ it was clearly a matter of significance to the court that the foetus was at 38 weeks gestation and viable when injured by the accused. As Spigelman CJ noted ‘the context in which the rule arises for present consideration is a context in which the appellant wishes to avoid criminal responsibility for manslaughter of a baby which was injured as a late-term foetus, indeed was fully developed in a perfect condition and within a week or two of actual birth.’³⁵ Since still-births are now very rare, and since medical technology is able to both ‘establish’ and ‘ensure’³⁶ viability in ways not contemplated when the born alive rule was adopted, the Court held that the born-alive rule ‘should now be applied consistently with contemporary conditions by affirming that any sign of life after delivery is sufficient.’³⁷

B. The ‘Born Alive’ Rule as an Evidentiary Rule

Although the rule remains part of the common law of NSW, the Court also endorsed the view, favoured by some scholars³⁸ and jurists,³⁹ that the rule is ‘a product of primitive medical technology and the high rate of infant mortality characteristic of a long past era.’⁴⁰ Forsythe provides one of the clearest and most plausible expositions of this thesis, and the Court of Appeal’s analysis of the rule bears the traces of his reasoning. Forsythe contends that the born alive rule ‘is a rule of medical jurisprudence’⁴¹ and merely an accommodation made necessary because in times past rudimentary medical knowledge prevented a court from ascertaining whether a child was alive until after it had been born.⁴² Thus, he argues, the born alive rule originated as an evidentiary rule rather than a ‘substantive definition of a human being.’⁴³ He contends that with modern techniques available to establish that a foetus was killed by a particular act, there is no reason to bar prosecution for its death. In his view, ‘it no longer makes sense in law or medicine for the law to retain an evidentiary principle that does not rationally relate to contemporary facts.’⁴⁴ Indeed, a number of jurisdictions in the US have modified the ‘born alive’ rule in order to permit charges to be laid against

34 Id at 286.

35 Id at 288.

36 Ibid.

37 Id at 288.

38 The most frequently cited scholarly exposition of the argument is Clarke Forsythe, ‘Homicide of the Unborn Child: The Born Alive Rule and Other Legal Anachronisms’ (1987) 21 *Valparaiso U LR* 563.

39 See for example, *Winnipeg Child and Family Services v G* (1997) 152 DLR (4th) 193 (Major & Sopinka JJ) (hereafter *Winnipeg CAFS v G*); *In the Matter of P (An Unborn Child)* [1995] NZFLR 577; *State v Burrell* 699 P 2d 499 (1985); *Commonwealth v Cass* 467 NE 2d 1324 (1984); *State v Horne* 319 SE 2d 703 (1984); *Hughes v State* 868 P 2d 730 (1994).

40 *Iby*, above n1 at 288.

41 Forsythe, above n38 at 567.

42 Id at 575.

43 Id at 613.

44 Id at 626.

persons responsible for the death of a foetus and these are noted with interest by the Court of Appeal in *Iby*.⁴⁵ Spigelman CJ observed that '[t]here is a strong case for abandoning the born alive rule completely, as has occurred by statute in many states of the United States and by judicial decision in Massachusetts, South Carolina and Oklahoma.'⁴⁶

Because these remarks were strictly *obiter*, the Court did not provide a careful analysis of the implications of its suggestion. It is important to note that, however compelling the argument that birth was never intended by the common law to be a substantive criterion for personhood, any modification of the rule *would* entail some judgement about what constitutes a legal person (or, at the very least, the conditions necessary for the imposition of criminal liability for homicide). If live birth was abandoned as the threshold for personhood, there are at least two possibilities. The first possibility is that wherever medical science can establish that a foetus is alive, it would be classified a legal person and thus, could be the victim of manslaughter. Another possibility would be to create a new threshold for personhood somewhere between conception and birth. In this scenario, wherever medical science can establish that a foetus possessed the relevant property to meet the definition, it would be regarded as a legal person and thus, could be the victim of manslaughter. In both of these scenarios, it is implicit the law would be relying on some substantive concept of personhood, — either 'being a member of the human species' or 'being a viable member of the human species' or some other criterion.

Thus, the assertion that the rule is an evidentiary one requires not only a plausible defence of the thesis, but also a consideration of how a substantive definition of personhood is to be formulated, assuming one is required.⁴⁷ Forsythe attempts to achieve both purposes through a re-reading of Blackstone. He observes that in contrast to his articulation of the born alive rule for the purposes of homicide, Blackstone did not limit the 'right to life' by reference to whether a child was born. This right, according to Blackstone, begins 'in contemplation of the law as soon as the infant is able to stir in the mother's womb' (ie, at the time of quickening). Forsythe argues that this apparent contradiction supports his thesis:

An unborn child could not be considered a "person" with a right to life and personal security at quickening, and yet not be considered a "human being" when that right to life and personal security was denied by the killing of the child in the womb. The implicit contradiction in Blackstone only arises from the assumption that the born alive rule was substantive ... Blackstone held that the unborn child was a "person" with a right to life at quickening but recognised that proof of the denial of that right at common law could not be obtained without live birth.⁴⁸

45 *Iby*, above n1 at 288. Of the United States position, see generally Mervyn Finlay, *Review of the Law of Manslaughter in NSW* (2003) (hereafter *Finlay Report*). Finlay notes that twenty-four US States have now enacted laws that recognise foetuses as victims of violent crime: *Id* at 95. A more detailed account of the nature and scope of this legal protection is provided in Schedule 15 to the Report.

46 *Iby*, above n1 at 288.

47 The various conceptions of legal personhood and their relationship to legal norms and human beings is discussed below in Part D of this section.

48 Forsythe, above n38 at 586.

Forsythe also relies on the practical application of the rule to demonstrate his thesis, arguing firstly, that ‘if the rule were truly a substantive definition of a human being, and a foetus only became a human being at birth, then injuring an unborn child *in utero* would not be injuring a human being’⁴⁹ and secondly, that if the rule was substantive, one would not expect that the *ex utero* death of a non-viable infant would attract liability.

It is undoubtedly true that recognising liability for conduct occurring prior to birth introduces some conceptual difficulty with respect to the relationship between personhood and the elements of the offence of homicide. This is especially so in relation to the mental element, as illustrated by *A-G’s Reference (No 3 of 1994)*. This case concerned the criminal liability of a person who deliberately stabbed a pregnant woman, without any intention to harm the foetus or the child it would become, in circumstances where the child was live born but later died due to complications arising from the premature birth. The UK Court of Appeal took the view that the stabbing of the mother could constitute the crime of murder or manslaughter depending on the mental state of the accused at the relevant time.⁵⁰ Because the foetus was, in law, *an integral part of the mother*, the requisite intent for murder would be satisfied if the Crown could prove that the accused intended to kill or cause grievous bodily harm to the mother.⁵¹ This analysis was not accepted by the House of Lords. Lord Mustill was highly critical of the argument that since the foetus ‘does not attain sufficient human personality to be the subject of a crime of violence, and in particular of a crime of murder, until it enjoys an existence separate from its mother’ it must therefore ‘share a human personality with its mother’.⁵²

This seems to be to be an entire non sequitur, for it omits the possibility that the foetus does not ... have any relevant type of personality but is an organism *sui generis* lacking at this stage the entire range of characteristics both of the mother to which it is physically linked and of the complete human being which it will later become.⁵³

On Lord Mustill’s view, the foetus neither shares the legal personality of the mother, nor does it possess a legal personality of its own. Thus, where the assailant has no intention with respect to the foetus, or the child it will become, there can be no murder. However, this reasoning would not preclude liability for manslaughter, because there are public policy grounds for regarding the child born alive as a ‘person’ within the scope of the mens rea for unlawful and dangerous act manslaughter.⁵⁴

As already mentioned, Forsythe also relies on the fact that ‘the punishment for the killing of the child born alive as homicide did not depend on the gestational age

49 Id at 589.

50 [1996] QB 581 at 593 (CA).

51 Ibid.

52 *AG’s Reference (No 3 of 1994)*, above n16 at 255.

53 Ibid.

54 Id at 271 (Lord Hope).

of the unborn child.⁵⁵ Thus, a child born alive at any gestational age (even before quickening) could still be the victim of homicide if it was born alive, even if it was too immature to survive. This, Forsythe suggests, is further evidence that birth was never intended as a substantive definition of a human being since it is barely intelligible to regard death *ex utero* of a pre-viable child to be homicide, whilst regarding the *in utero* death of a full term viable foetus as giving rise only to liability for abortion. Simester and Sullivan advert to this apparent contradiction when they observe that 'the legal conferment of personhood reflects societal perceptions which are not underpinned by biological data' and result 'in some uncomfortable anomalies.'⁵⁶ However, this point of view assumes that a 'substantive' definition of human being is to be determined by reference only to the intrinsic biological (and possibly moral) properties of the foetus, a point to be taken up in more detail later in section 3.

Finally, in addition to his reliance on Blackstone and certain anomalies arising from the practical application of the rule, Forsythe also notes that 'despite the common law's technological inability to prove pregnancy before quickening, or to prove homicide before birth, other prophylactic penal measures were in place which prevented the killing of the child *in utero* without requiring proof of ... homicide',⁵⁷ viz the offence of abortion. His argument is that the proscription of abortion is consistent with the thesis that the unborn child has a right to life and was thus, at least in this sense, regarded as a person. Although the proscription of abortion is consistent with Forsythe's thesis, the recognition of liability in this context does not entail that the foetus had the status of person. For one thing, there are reasons other than (or in addition to) the foetus' right to life that could explain the proscription of abortion, for example, protecting maternal health. Moreover, as Forsythe's argument implies, it is possible to conceptually distinguish questions of liability and status. It is thus plausible to claim that the foetus is deserving of legal protection without contending that it is a person.

C. How Does the 'Born-Alive' Rule relate to the Attainment of Legal Status?

Forsythe's argument distinguishes questions of liability from questions relating to the attainment of legal status. He contends that human beings at every stage of development (at least after quickening) were persons in the eyes of the common law, but that criminal liability could only lie in respect of human beings born alive because of the practical difficulties of proving the elements of homicide. As Forsythe himself concedes, this stands in stark contradiction to a substantial body of modern authority in favour of the view that the foetus does not attain legal personality until it is born alive. Simester and Sullivan state that 'a foetus, even to the point of delivery and birth, is not accorded full human status.'⁵⁸ In order 'for a live foetus to attain full personhood, the whole body of the child must emerge into the world and must sustain an existence independent of the mother for however

55 Forsythe, above n41 at 591.

56 Andrew Simester & Robert Sullivan, *Criminal Law Theory and Doctrine* (2000) at 321.

57 Forsythe, above n41 at 591.

58 Simester & Sullivan, above n56 at 320.

brief a period of time.⁵⁹ In *AG's Reference (No 3 of 1994)*, Lord Mustill stated that:

it is established beyond doubt for the criminal law, as for the civil law (*Burton v Islington Health Authority* [1993] QB 204) that the child *en ventre sa mere* does not have a distinct human personality, whose extinguishment gives rise to any penalties or liabilities at common law.⁶⁰

In *Paton v British Pregnancy Advisory Service*,⁶¹ a case in which a husband's application for an injunction to prevent his wife from obtaining an abortion was refused, Sir George Baker stated 'there can be no doubt in my view that in England and Wales, the foetus has no right of action, no right at all until birth.'⁶² The point was elaborated by Heilbron J in *C v S*:⁶³

The authorities, it seems to me, show that a child, after it has been born, and only then in certain circumstances, based on he or she having a right, may be a party to an action brought with regard to such matters as the right to take, on a will or intestacy, or for damages for injuries suffered before birth. In other words, the claim crystallises upon the birth, at which date, but not before, the child attains the status of a legal persona, and thereupon can exercise that legal right.⁶⁴

A plausible interpretation of these authorities is that there is no legal liability without live birth because there is no legal person who can be the subject of rights or duties prior to this time.⁶⁵ If this interpretation is correct, the attainment of legal status, though connected to the question of liability is, indeed, independent of it, with the result that the basis for recognising legal personhood must be located elsewhere. As we have already seen, Forsythe locates the basis for legal personhood in the biological fact of being a member of the human species. Ultimately, the Court of Appeal in *Iby* did not need to address this question because it found that the baby was born alive. But, as mentioned already, the abolition of the born alive rule would give rise to this and other questions, specifically, whether the effect of abolition would be limited to the criminal law and whether it would be limited to the non-consensual acts of third parties.

D. Alternative Conceptions of the Legal Person

The precise nature of the relationship between the attainment of legal status and the determination of civil or criminal liability is complicated by the fact that there appears to be some conceptual confusion about the nature of the 'legal person' itself. Naffine contends that 'there are deep divisions in legal thinking about the

⁵⁹ *Id* at 321.

⁶⁰ *AG's Reference (No 3 of 1994)*, above n16 at 261.

⁶¹ [1979] QB 276 (hereafter *Paton*).

⁶² *Id* at 279.

⁶³ [1988] 1 QB 135.

⁶⁴ *Id* at 140.

⁶⁵ An alternative interpretation is that there is no legal person prior to birth *because* the law recognises no legal liability until this time. In this interpretation, legal status *rests* on the question of whether or not the law recognises liability in relation to the foetus, with the result that the recognition of legal liability in relation to a foetus is suggestive of its status as a person.

nature of law's person and its appropriate application.'⁶⁶ She identifies a number of distinct uses of the term legal personhood 'each of which can be characterised and distinguished by its own particular take on the relationship between legal and metaphysical persons.'⁶⁷ Thus, there are a number of theorists who regard personhood in purely abstract terms, 'they insist that the person is pure legal artifice, and have little time for philosophical speculation. The legal concept of person, they affirm, does not and should not depend on metaphysical pre-suppositions about persons.'⁶⁸ Other theorists regard personhood as 'necessarily linked with biological and metaphysical definitions of humanity.'⁶⁹ Within this broad category, there are theorists who assume that 'humanity, rather than the narrower conception of personhood, is the basis for both moral and legal claims on others and the basis for legal personality.'⁷⁰ For these theorists, legal personality is defined by reference to Coke's maxim of 'a reasonable creature in being' which is in turn given its content by their understanding of the meaning of 'human being'. Thus, 'legal rights map onto a natural moral subject' or put differently 'legal rights are natural to human beings; they are a legal expression of a subject with its own inherent nature.'⁷¹ Whereas theorists who regard personhood in purely abstract terms resist the claim that legal personhood has any necessary connection to matters of ontological concern, these theorists invite 'legal reflection about when human life begins and ends'.⁷² They also invite 'judicial speculation about what is a human being' which 'prompts judges to turn their minds to metaphysics and to science.'⁷³

There is evidence of both approaches in the authorities that touch upon the legal status of the foetus. In *Tremblay v Daigle*⁷⁴ a case concerning the status of the foetus for the purposes of the *Quebec Charter of Rights and Freedoms*, the Supreme Court of Canada observed that:

Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties — a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.⁷⁵

66 Ngairé Naffine, 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) *Mod LR* 346 at 349.

67 *Ibid.*

68 *Ibid.*

69 *Id* at 357.

70 *Id* at 350.

71 *Id* at 358.

72 *Ibid.*

73 *Ibid.*

74 *Daigle v Tremblay* [1989] 2 SCR 530.

75 *Id* at [39].

This is consistent with a purely abstract conception of legal personhood. There is a clear attempt to distinguish legal and non-legal considerations, and to focus exclusively on the legal. As such, it does not entail that foetal personhood is impossible, it simply claims that the question is a matter for the law to decide, having regard to legal norms.⁷⁶ This approach also finds support among the Model Criminal Code Officers Committee which observe that the legal definition of birth ‘is not so much a question of trying to define what really is a ‘human being’ but [rather] developing a practical formula for the purposes of the unlawful killing offences.’⁷⁷ A further example can be found in *Winnipeg CAFS v G*, a case concerning whether a drug-addicted pregnant woman could be confined until the birth of her child for the purpose of preventing her from sniffing solvents. There the majority of the Supreme Court of Canada observed that ‘the common law has always distinguished between an unborn child and a child after birth. The proposition that biologically there may be little difference between the two is not relevant to the inquiry. For legal purposes there are great differences, differences which raise a host of complexities.’⁷⁸

But, as Naffine points out, it is not clear that the law can attain this ideal of autonomy since ‘it is not easy to separate the legal from the non-legal’.⁷⁹ Not only does the concept of person tend to ‘linguistically invoke’⁸⁰ the idea of a particular being, it is unclear whether it is actually intelligible to think in these purely abstract terms.⁸¹ Naffine suggests that ‘with each application, [the abstract conception of personhood] seems to become a real, non-abstract, person participating in particular legal relations’ which ‘means that the concept may not be able to transcend its actual empirical use.’⁸² This may help to explain why the authorities that specifically address the born-alive rule seem to waiver between resisting, and invoking, biological considerations as regards the question of legal personhood.

Another explanation for this phenomenon is that courts are not consistent in the manner in which the legal person is conceived. As already mentioned, an alternative conception of legal personhood defines this concept by reference to a human being who is born and has not yet died. This conception invites ‘the contribution of non-lawyers to the legal definition of person, especially medical scientists but also theologians and philosophers, indeed any disciplinary grouping interested in the question of what it is to be human’.⁸³ In *Re A (Children)(Conjoined Twins: Surgical Separation)*,⁸⁴ the English Court of Appeal

76 As Naffine observes ‘the critical legal question is whether rights and duties should be ascribed within a given set of legal relations. This does not result in a resort to philosophy or science to discover whether the entity in question has a particular character.’ Naffine, above n66 at 354.

77 MCCOC, *Draft Model Criminal Code: Chapter 5 Fatal Offences Against the Person* (1998) at 13.

78 *Winnipeg CAFS v G*, above n39 at 206–07.

79 Naffine, above n66 at 354.

80 *Id* at 355.

81 *Ibid*.

82 *Ibid*.

83 *Id* at 357.

84 [2001] 2 WLR 480 (CA).

was asked to determine whether the surgical separation of conjoined twins was lawful in circumstances where the surgery was necessary to save the life of one twin (Jodie) but which would result in the certain death of the other twin (Mary). A threshold question for the Court was whether the conjoined twins were distinct legal persons. Ward LJ rehearsed, in some detail, the medical opinion as to the twins' individuality before concluding that 'the fact that Mary is dependent on Jodie ... should not lead the law to fly in the face of the clinical judgment that each child is alive and that each child is separate both for the purposes of the civil law and the criminal law'.⁸⁵ This method of reasoning is not very surprising, since the application of the born alive rule by tribunals of fact will often depend on the state of medical evidence about whether separate existence was achieved and whether the child was in a living state. These matters in themselves are not directed to the legal definition of person, being concerned rather with the application of the definition to a particular case. Brooke LJ, however, addressed the different question of whether the definition 'any *reasonable* creature in being' might have excluded conjoined twins on the basis that they were 'monstrous births'.⁸⁶ Brooke LJ endorsed the following view in answer to this novel question:

Advances in medical treatment of deformed neonates suggest that the criminal law's protection should be as wide as possible and a conclusion that a creature in being was not reasonable would be confined only to the most extreme cases, of which this is not an example. Whatever might have been thought of as monstrous by Bracton, Coke, Blackstone, Locke and Hobbes, different considerations would clearly apply to today.⁸⁷

Thus, Brooke LJ adverted to both legal and non-legal 'considerations' in deciding that the term *reasonable* did not preclude conjoined twins from being regarded as distinct legal persons.

A conception of legal personhood that uses the biological human being as its referent is a potentially unstable one, as the arguments for abolishing the born-alive rule attest. The dissenting judges in *Winnipeg CAFS v G* would have permitted wardship of the foetus under the *parens patriae* jurisdiction of the court on the basis of Forsythe's argument about the evidential basis of the 'born alive' rule. Specifically, the judges considered that knowledge of foetal development should in effect 'push back the moment of personality'.⁸⁸

Present medical technology renders the "born alive" rule outdated and indefensible. We no longer need to cling to an evidentiary presumption to the contrary when technologies like real-time ultrasound, foetal heart monitors and foetoscopy can clearly show us that the foetus is alive ... there is a temptation to assume that the courts of the past that treated the "born alive" rule as one of substantive law knew as much as is known today about foetal development.⁸⁹

85 *Id* at 514.

86 *Id* at 545.

87 *Id* at 546.

88 Naffine, above n66 at 359.

89 *Winnipeg CAFS v G* above n39 at 234 (Major J).

This supports Naffine's argument that the legal definition of personhood based on Coke's maxim is 'exposed to controversies between biologists, which are in turn influenced by the new medical technologies.'⁹⁰ Further examples of this phenomenon can be found in judicial interpretation of the phrase 'capable of being born alive' for the purposes of the *Infant Life Preservation Act 1929* (UK).⁹¹ In *C v S*,⁹² a case that concerned the attempt by a putative father of a foetus to restrain the pregnant woman from obtaining an abortion, Heilbron J was required to determine whether the abortion at 18–21 weeks gestation would have constituted the offence of child destruction and thus been unlawful. The applicant lead medical evidence that an 18–21 week old foetus was capable of being born alive in the minimalist sense approved in *Iby* for the purposes of the born alive rule — for instance, showing recognisable signs of life, such as, a pulsating chord or heartbeat.⁹³ The respondent lead medical evidence that such a foetus was not capable of being born alive because it could not breathe and would not be able to survive for more than a short period of time.⁹⁴ Heilbron J noted that the evidence indicated 'very clearly the wide difference in thinking and interpretation of medical men, all of high reputation and great experience, in regard to the language used in the Act of 1929.'⁹⁵ In the result, Heilbron J did not find that there was sufficient basis for bringing the foetus in question within the scope of the offence of child destruction.⁹⁶ The Court of Appeal affirmed this judgment, finding that if a foetus at a particular stage of development 'is incapable ever of breathing, it is not in our judgment "a child capable of being born alive" within the meaning of the Act.'⁹⁷ Although Heilbron J seemed to prefer an interpretation that was closer to the meaning of 'viability' than 'live birth', in *Rance v Mid Downs Health Authority*,⁹⁸ Brooke J held that 'capable of being born alive' means capable of existing as a live child ie 'living and breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother.'⁹⁹ On this basis he held that a foetus at 27–28 weeks gestation possesses these attributes and thus, the hypothetical abortion being considered in that case would have been unlawful.

The broader point here is that where 'human being' and 'legal person' are regarded as roughly synonymous, advances in technology and knowledge about human nature and development may be deployed to impel the law to respond with a re-evaluation of its concept of personhood.¹⁰⁰ This interplay is at work in the

90 Naffine, above n66 at 359.

91 Section 1 of this Act enacts the offence of 'child destruction' which prohibits the intentional destruction of the life of a 'child capable of being born alive' before it has an existence separate from its mother, except where the act is done in good faith to preserve the life of the mother.

92 [1988] 1 QB 135.

93 *Id* at 142.

94 *Id* at 142–44.

95 *Id* at 141.

96 *Id* at 148.

97 [1988] 1 QB 149 (CA) at 151 (Donaldson MR).

98 [1991] 1 QB 587.

99 *Id* at 621.

decision of *A-G's Reference (No 3 of 1994)*. As already mentioned,¹⁰¹ their Lordships did not depart from the traditional position that the foetus is not a person until born alive, nor did they accept that there is no basis for recognising the foetus prior to birth. Importantly, they did attempt to configure the maternal body by reference to substantive notions of what makes foetal life significant. Their Lordships rejected the view, implied by the Court of Appeal, that the foetus is without distinction until its birth. There are strong resonances in this judgement with the decision in *Iby* on the question of how technology informs (or ought to inform) legal understandings of the foetus. Lord Hope adverted to the practices of reproductive technologies, which serve 'to remind us that an embryo is in reality a separate organism from the mother from the moment of conception.'¹⁰² Lord Mustill also emphasised the importance of genetic identity:

There was, of course, an intimate bond between the foetus and the mother, created by the total dependence of the foetus on the protective physical environment furnished by the mother, and on the supply of the mother through the physical linkage between them of the nutrients, oxygen and other substances essential to foetal life and development. The emotional bond between the mother and her unborn child was also of a very special kind. But the relationship was one of bond not identity. The mother and the foetus were two distinct organisms living symbiotically, not a single organism with two aspects.¹⁰³

It is consistent with both conceptions of legal personhood examined in this section that the foetus is not a legal person. However, it is also clear that where legal personhood is defined in relation to a human referent, the conception is, at least potentially, unstable. This is especially so where non-legal conceptions of human life and its significance pose challenges to the legal definition, as appears to have been the case in *Iby*.

3. Human Life from the Standpoint of Biology, Moral Philosophy and Culture

In *Harrild v Director of Proceedings*, McGrath J observed, somewhat apologetically, that:

The modern justification for the born alive rule is that legal complexities and difficult moral judgements would arise if Courts were to alter the common law to treat the foetus as a person ... It is important however to bear in mind that the rule according legal rights only at birth is in modern times one founded on convenience. It does not rest on medical or moral principle.¹⁰⁴

The claim that the 'born-alive' rule is a rule of convenience rather than a rule based on medical or moral principle suggests that these non-legal domains do provide principled accounts of personhood or, at any rate, pose serious challenges to the

100 Naffine, above n66 at 359.

101 See above n50–54 and accompanying text.

102 *AG's Reference (No 3 of 1994)*, above n16 at 255.

103 *Ibid.*

104 [2003] 3 NZLR 289 at 313, cited in *R v King* [2003] NSWCCA 399 at 488.

born-alive definition. As the decision in *Iby* attests, technology has been a significant driver in the process of challenging and revising orthodox ideas about the beginnings of human life. The technological challenge to understanding birth as the principal threshold of ethical and legal significance comes in two forms. The first of these concerns direct observation, through ultrasound, of the physical appearance and behaviour of the foetus *in utero*, which has been deployed to invoke a 'baby' well before birth. The second challenge concerns the practices of neonatal intensive care which, whilst being credited with enabling the survival of prematurely born babies, have been used to invoke a sense of incongruity at not regarding viable foetuses as persons. Both of these developments finesse criteria (such as membership of the human species and foetal viability) that have for some time been in contention as intrinsic properties of significance in the definition of personhood. In the *Digests of the Criminal Law*, Stephen in fact turned his mind to biological (and possibly moral) considerations when defining the concept of personhood for the purposes of homicide:

The line must obviously be drawn either at the point where the foetus begins to live, or at a point where it begins to have a life independent of its mother's life, or at a point where it has completely proceeded into the world from its mother's body. It is almost equally obvious that the last of these three periods is the one which it is most convenient to choose ... the line has in fact been drawn at this point by the law of England.¹⁰⁵

A. *The Irrelevance of Birth*

There seems to be little agreement among philosophers about what quality or qualities distinguish persons from other beings. At one end of the philosophical spectrum lies the contention that being a member of the species *homo sapien* is the material quality¹⁰⁶ and, at the other, the contention that a person must possess the qualities of rationality and self-awareness. For the former, human life at every

¹⁰⁵ Barry, above n9 at 352, quoting Stephen, *Digest of the Criminal Law*, Vol 3 at 2.

¹⁰⁶ One proponent of this position in Noonan, who contends that abortion is almost always wrong because an embryo is a human being from conception. As such, it has a right not to be killed (save in cases of self-defence). To support this position, Noonan disputes the validity of a range of other criteria for marking the origination of humanity, including viability, capacity to experience and social visibility. He rejects viability on the basis that it is insufficiently precise, given that viability fluctuates according to a range of incidental factors such as weight, length and technological support. He rejects experience, or the idea that a being possesses the requisite level of humanity when it has lived and suffered, on the basis that embryos (and even zygotes) are capable of experiencing and reacting to their environment. He rejects memory as the relevant criteria on the grounds that neither adults with aphasia (loss of memory) nor very young children are regarded as less than human. And he rejects the idea that the foetus is not, in social terms, perceived to be a person on the basis that if humanity depended on social recognition, individuals or groups may be de-humanised by being denied social status. Noonan's thesis rests on the proposition that the distinctions offered as alternatives to conception fail the test of objectivity. Accordingly, because Noonan finds no objective basis for distinguishing between an embryo and a human being at any other stage of development, he ascribes full moral rights, including a right to life, to the embryo. John Noonan, 'An Almost Absolute Value in History' in Ronald Munson (ed), *Intervention and Reflection: Basic Issues in Medical Ethics* (1992) at 67.

stage of development merits the ascription of full moral rights, including the right not to be killed. For the latter, only human (and possibly non-human) beings who 'possess the concept of a self as a continuing subject of experiences and other mental states'¹⁰⁷ attract full moral rights.¹⁰⁸ This is not to say that forms of human life that are not 'persons' in this sense can never be harmed. Philosophers working within this framework concede that beings who are sentient, ie can experience pain and distress, can be harmed (and there is a corresponding injunction on moral agents not to inflict harm on these beings). But as they are not persons, so defined, they do not possess a right not to be killed.¹⁰⁹ This view would not only exclude embryos and fetuses but also newborn infants from the scope of personhood, since newborns do not yet possess the requisite mental capacities.¹¹⁰ It is a curious synchronicity in an otherwise polarised debate that proponents of both positions agree that birth is immaterial to personhood. Sumner observes that:

Birth is a shallow and arbitrary criterion of moral standing, and there seems to be no way of connecting it to a deeper account. In most respects the infant shortly after birth has the same natural characteristics (is the same kind of creature) as a fetus shortly before birth; the same size, shape, internal constitution, species membership, capacities, level of consciousness and so forth. Biologically, a full term fetus resembles a newborn infant much more than it resembles a zygote or an embryo.¹¹¹

On this account the near-term foetus and the newborn infant are, physiologically and developmentally, all but identical so there seems to be no basis for distinguishing them on the grounds of mere geography (inside or outside the mother's body). In other words, the former qualities are morally relevant whilst the

107 Michael Tooley, 'Abortion and Infanticide' (1972) 2 *Philosophy and Public Affairs* 37 at 44.

108 Singer argues that if we are going to say that it is morally wrong to kill something we must look to the actual characteristics of the being and not simply the species to which it belongs. From this position, abortion is not seriously wrong in the way that Noonan contends because embryo's and fetuses, though human beings, are not persons. Singer contends that the mental quality of self-awareness is what distinguishes human beings from other beings that do not have a right to life. Since it is not a quality possessed by an embryo or foetus, it cannot be used to argue for its inclusion in the category of person. Neither, he argues, will the *potential* to become a being with the requisite mental qualities provide the basis for conferring full moral rights on an embryo, because one does not assume the rights of X by being a potential X. Whilst Singer contends that morally significant changes do occur to the human being prior to birth, at no stage does the foetus possess the determinative characteristic of self-consciousness: Peter Singer, *Practical Ethics* (1999) at 152–56.

109 Ibid. See also John Harris, *The Value of Life: An Introduction to Medical Ethics* (1984).

110 Tooley defends infanticide on the basis that babies do not possess the essential criteria for personhood, but the practical problem of determining precisely when a human being does possess the concept of a continuing self remains. Tooley does not regard this as particularly troubling because 'in the vast majority of cases in which infanticide is desirable, its desirability will be apparent within a short time after birth. Since it is certain that an infant at such a stage of its development does not possess the concept of a continuing self ... there is excellent reason to believe that infanticide is morally permissible in most cases where it is otherwise desirable.' Tooley, above n107 at 64.

111 L W Sumner *Abortion and Moral Theory* (1981) at 53.

latter is not. Singer makes the further point that ‘a prematurely born infant may well be *less* developed in these respects than a fetus nearing the end of its normal term. It seems peculiar to hold that we may not kill the premature infant but we may well kill the more developed fetus.’¹¹² These ideas, taken together, have been referred to as the ‘continuity thesis’. Bermudez explains:

The Continuity Thesis claims that birth cannot be a morally relevant fact in the transition from zygote to person. Obviously, being born does bring about important changes for the foetus ... Neonates, but not foetuses, are responsible for their own respiration, digestion and excretion. No longer do they inhabit another person’s body. But, proponents of the Continuity Thesis claim, none of these changes are morally relevant ... An individual can be no more and no less morally significant when it is a new born baby than when it is a full term foetus.¹¹³

This reasoning could be engaged in an attempt to understand the deeper reasoning for the Court of Appeal’s questioning of the born-alive rule in *Iby*. Indeed, and not surprisingly, it has resonances in the public domain.¹¹⁴

The common ground between the moral frameworks under discussion is that they approach the question of personhood from the perspective of the intrinsic properties of a being. They assume that if a being possesses the property thought to be morally relevant for the ascription of personhood, they cannot be killed, save in cases of self-defence. The disagreement then concerns the relevant distinguishing property. As we have already seen, the contention that self-awareness is a necessary condition of personhood has been criticised, not only for permitting infanticide, but also for failing to provide any way of distinguishing between beings at different stages of human development. Beings are either persons (in which case they cannot be killed) or non-persons (in which case they may be killed but we cannot wantonly inflict pain or distress on them). But this does not seem to square with many people’s intuitions about the moral significance of human life. Again, Bermudez expresses this point well:

Most people (however wholeheartedly they approve of abortion) would, I think, feel that the decision to abort at the end of the second trimester is more morally serious than the decision to abort at the end of the first trimester. By a ‘more morally serious’ decision here I mean one that seems to require more careful thought, more weighing up of the issues involved, a greater scrutiny of one’s motives.¹¹⁵

Thus, there seems to be some intuitive appeal in the observation that ‘any theory that is even going to begin to do justice to the complexity and subtlety of our reflections on the moral significance of different forms of life must view the animal kingdom in such a way that it comes out with more than two layers of moral significance.’¹¹⁶ The criteria of sentience and personhood ‘might well be the lower

112 Singer, above n108 at 108.

113 Jose Bermudez, ‘The Moral Significance of Birth’ (1996) 106 *Ethics* 378 at 386.

114 This is discussed in the following section.

115 Bermudez, above n113 at 381.

and upper limits of the scale respectively, but it is hard to see why the scale should have no points in between.¹¹⁷ Between the extremes of ascribing personhood to all human life, no matter the stage of development, and ascribing personhood only to self-aware beings, lies a range of positions that seek to identify the point at which a human being possesses the intrinsic property that justifies a right not to be killed.¹¹⁸

B. Foetal Viability and the Invocation of a Baby through Ultrasound

In the cultural arena, the properties of foetal viability and the physical similarities between a late foetus and a baby are often deployed, both singly and in tandem, to support the claim that the foetus is a person with a right to life. The term 'viability' is itself a disputed one. As the above discussion of *C v S* and *Rance v Mid Downs Health Authority* demonstrates, medical professionals have divergent views on the scope and content of the term.¹¹⁹ The more liberal interpretation takes viable to be 'synonymous with being "born alive", irrespective of the length of time the baby survives or the extent or nature of any medical problems or disabilities.'¹²⁰ A more restrictive (and perhaps commonly understood) interpretation of viable takes the term to mean 'capable of meaningful life.'¹²¹ The lack of consensus about the meaning of viability is further complicated by the fact that, in its practical application, a range of factors will impact on whether a particular foetus is viable so that conclusions about viability cannot always be drawn from gestational age alone.¹²²

This disagreement as to the content of the term viable suggests that the term is used in two distinct senses — as a biological criterion and as an ethical category.

116 *Id* at 382.

117 *Ibid*.

118 For a review of the criteria that has been suggested by various ethicists including conception, brain life and the capacity for sentience, viability and self-awareness see Raanan Gillon, 'Is There a New Ethics of Abortion?' (2001) 27 *Journal of Medical Ethics* ii5–ii9. See also British Medical Association Medical Ethics Committee, *Abortion Time Limits: A Briefing Paper from the BMA* (2005) (hereafter *Report on Abortion Time Limits*) which provides a good review of the medical and ethical literature with respect to foetal viability and foetal pain as thresholds of ethical (and potentially legal) significance. As the title suggests, this briefing paper was published in response to calls to review the upper time limit for terminations of pregnancy. The introduction to the report states that a significant factor fuelling momentum for the legislative review was 'the publication of 4D ultrasound images of a fetus *in utero* ... and a legal challenge centred around the definition of serious handicap in the *Abortion Act*.' *Id* at 1.

119 Above n91–99 and accompanying text.

120 *Report on Abortion Time Limits*, above n118 at 16.

121 *Ibid*. This is the interpretation implicitly favoured by Heilbron J in *C v S* above n24 and adopted by Blackmun J in *Roe v Wade* 410 US 113 (1973). He states that: 'with respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of foetal life after viability thus has both logical and biological justifications.' *Id* at 163.

122 Other factors that influence viability include birth weight, sex, whether it is a multiple pregnancy, and the quality of medical facilities available: *Report on Abortion Time Limits* above n118 at 15–17.

The former is very close to the meaning of 'live born' in the barest sense of showing some sign of life, whereas the latter expresses the idea that the foetus is of a stage of development that, if brought *ex utero*, it could be placed in 'the social role of child.'¹²³ A foetus that is viable in this sense is no longer completely dependent on the body of its mother for survival. Thus, if born, it could be expected to live and flourish with or without the involvement of its biological parents. In this sense, viability is expressing both a capacity for meaningful life and a real potential for individuation which renders relations with others possible.

Englehardt argues that 'since fetuses are neither persons nor highly developed sentient organisms, it appears unreasonable to hold that a biological criterion of viability can in some simple fashion, be given moral force.'¹²⁴ He seeks to distinguish clearly between these two senses of the term, describing viability in the ethical sense as the 'point at which fetuses, should they be aborted, would survive, given the level of support thought to be obligatory in the case of full term or near full term births.'¹²⁵ He invests ethical significance in this threshold for two reasons. First, by this point, 'one has usually given a woman sufficient time to decide whether she wishes to carry a pregnancy to term'¹²⁶ (he specifically excludes maternal life or health grounds and the decision to terminate a pregnancy for foetal abnormality, which he contends should be without limitation). Second, recognition of the threshold will promote important social values and goods by reducing the deleterious impact 'of late abortions on attitudes toward parenthood, on the emotional well-being of physicians and nurses and on the establishment of a general high regard for the value of human life.'¹²⁷

However, the gap between these conceptions of viability creates a space for the expression of anxiety about the rights of, and obligations owed to, foetuses capable of being born alive in the bare biological sense. Stories concerning the live births of pre-viable infants following lawful abortions provide examples of this phenomenon.¹²⁸ One such story was reported to the UK House of Commons during the passage of the *Human Embryology and Fertilisation Act* 1990, which amended the *Abortion Act* 1967. According to Miss Widdecombe:

That child of 21 weeks gestation was born alive ... the two nurses and the doctor did not know what to do. They had not expected a live birth. Had it been a premature baby from an early birth, they would have known exactly what to do, but they were confused and distressed because they had expected what they

123 Tristram Englehardt, 'Viability and the Use of the Fetus' in William Bondeson, Tristram Englehardt, Stuart Spicker & Daniel Winship (eds), *Abortion and the Status of the Fetus* (1984) 183 at 196.

124 *Id* at 194.

125 *Id* at 196.

126 *Ibid*.

127 *Id* at 192.

128 Andrew Bolt refers to at least two occasions in which State Coroners have investigated the deaths of children born alive following abortions: Andrew Bolt, 'In Cold Blood' *Herald Sun* (27 August 2004) 23.

would have termed a foetus and what they got was a baby which gasped and ran a pulse for three hours. What distresses me about that case is that during the three hours for which that little scrap lived she was not in an incubator or in her mother's arms. She was not even — spare us — wrapped up decently in a warm cot. She was on a kidney dish in a side ward for three hours.¹²⁹

The point is not merely that some foetuses at 21 weeks gestation are sufficiently developed to be born alive in the sense that they can breathe. It is also to stress the confusion produced by the presence of a living human infant outside a clearly defined social role. The abortion places the infant outside the range of potential or anticipated human relationships and, accordingly, its living presence confounds our categories of foetus and child. This point is supported by the comments of the Northern Territory Coroner who remarked, of a child born alive after a termination at 22 weeks:

The deceased was not, and should not be described as a “fetus”, and “aborted fetus”, an “abortus”, a “living fetus” or a “living abortus”, “non-viable fetus”, “live neonate” or anything else that diminishes her status as a human being ... the deceased, having been born alive, deserved all the dignity, respect and value that our society places on human life.¹³⁰

In the cultural domain, the anxieties that surround foeticide close to the point of viability intersect with sophisticated 3D foetal imagery which personifies the late term foetus through the depiction of behavioural similarities and its close physical resemblance to a baby. In the United Kingdom, there has been considerable public discussion about lowering the 24-week threshold for abortion in response to the circulation of 3D images of the foetus.¹³¹ In a recent article appearing in a British nursing journal, a 3D picture of a 12 week foetus is displayed with the caption: ‘this recent image showing how well-formed a fetus is at this stage has raised questions of how late a termination should take place.’ To the side of this image, a respondent observes:

I gave birth to my first daughter Wendy Ann prematurely. She was placed in an incubator and baptised by a midwife. Sadly, she died after 24 hours. She had a

129 House of Commons, *Debate on the Human Embryology and Fertilisation Bill (Hansard)*, (24 April 1990) at column 193–94.

130 Quoted in above n128.

131 See for example: ‘Williams calls for Abortion Review’ *Times Online* (March 20, 2005): <http://timesonline.co.uk/print_friendly/0,,1-1-210-1533343,00.html> (8 February 2006.) The question of reducing time limits has since been raised in the House of Commons, following the recommendations of the *Science and Technology Committee on Human Reproduction and the Law* (2005). The Committee recommended that the Parliament set up a joint committee to consider the scientific, medical and social changes in relation to abortion that have taken place since 1967, with a view to presenting options for new legislation: House of Commons, *Hansard Debates* (3 July 2006). The British Medical Association put the question of abortion time limits to a vote of its members in 2005. Seventy seven per cent of members voted to maintain 24 weeks as the threshold of viability: Carvel, ‘Doctors Vote to Keep 24 Week Abortion Limit’ *The Guardian* (1 July 2005): <http://www.guardian.co.uk/uk_news/story/0,3604,1518712,00.html> (6 October 2006).

birth certificate, a death certificate and a funeral, yet if we had sought a planned legal abortion for some reason, she would have been surgically removed and taken away to die in the sluice. At 24 weeks a baby responds to sounds, stretches, gasps, turns and sucks its thumb There can be sound medical reasons for not continuing with a pregnancy but 24 weeks is far too late for an abortion.¹³²

Where gestational age is taken to be the only or principal measure of personhood, there is no straightforward way to distinguish between late abortion and premature birth. From this standpoint, any attempt to distinguish these contexts seems arbitrary and illegitimate. However, Englehardt argues that if the distinction between biological and ethical viability is kept firmly in mind, there is in fact no parity between the wanted premature baby (who may have been born before viability and whose parents wish to commit resources to attempting to secure its survival) and the unwanted foetus at a comparable stage of development. The former, unlike the latter, is ‘already born and therefore already plays a role under the social rubric of child.’¹³³ Thus, the fact that many parents might try to save the lives of infants born prior to the threshold of viability, he contends ‘would not detract from the legitimacy of maintaining a fairly constant criterion of viability for moral decisions at somewhere between 24 and 28 weeks.’¹³⁴ Englehardt’s analysis points to a largely ignored dimension of personhood. Another way of illuminating the distinction he draws is to focus of the relevance of social relationships to the actualisation of personhood. The attitude of the parents to the preservation of a foetus in the context of abortion and premature birth is markedly different. Thus, for the woman or parents of the very prematurely born child, the child is a person whose life they may wish to preserve at all costs. For the woman or parents who have decided to terminate a pregnancy, a conscious decision has been made to end the maternal-foetal relationship and thus, the foetus’s journey to personhood.

C. Legal Recognition of the Viable Foetus

A philosopher might contend that a viable foetus has a much stronger claim than an embryo not to be killed, without contending that a viable foetus is actually a person in the moral sense.¹³⁵ In fact, concerns about the significance of viability do find expression in law or policy in many Australian jurisdictions, though not through the recognition of personhood. Thus, it is important to distinguish between the identification of a property that establishes personhood and that which (less ambitiously) seeks to introduce ‘more gradations into assessments of the value of

132 ‘Calling Time on Late Abortions — Should Parliament Reconsider the Legal Time Limit of 24 Weeks?’ (2004) 8(48) *Nursing Standard* 22.

133 *Ibid.*

134 *Ibid.*

135 See, for example, Mackenzie who contends that: ‘at least in terms of intrinsic properties, an early stage foetus does not have great value. With respect to a highly developed foetus, although it is not a being with full moral rights, its gradually increasing moral significance warrants our treating it, in most circumstances at least, as if it were such a being.’ Catriona Mackenzie, ‘Abortion and Embodiment’ (1992) 70 *Australian Journal of Philosophy* 136 at 146.

life.'¹³⁶

In the statutory context of abortion, NSW law does not formally distinguish between abortions based on gestational age,¹³⁷ although the NSW Department of Health policy distinguishes procedurally between requests for abortion prior to 13 weeks, between 13 and 20 weeks and after 20 weeks.¹³⁸ In other jurisdictions, gestational age is legally recognised as a basis for regulating and limiting access to abortion.¹³⁹ More significantly, the offence of killing an unborn child has been enacted in all Australian jurisdictions¹⁴⁰ other than NSW and South Australia. This offence is modelled on the offence of 'child destruction' which was introduced in England by the *Infant Life Preservation Act 1929*. The offence of child destruction was originally intended to apply shortly before birth¹⁴¹ to fill a perceived lacuna in the law between the offence of abortion and manslaughter. However, judicial interpretation, aided by improvements to the care of pre-term infants, has resulted in a much broader coverage.¹⁴²

In a recent review of the law of manslaughter in NSW,¹⁴³ Justice Finlay recommended that the NSW parliament legislate to create the offence 'killing an unborn child' where the criminal act causes the death of a child, capable of being born alive, before it has an existence independent of its mother.¹⁴⁴ The Report adverts to Lord Mustill's configuration of the maternal-foetal relationship as 'one of bond not identity' as one basis for the recommendation, observing that 'the status of the foetus capable of being born alive is not merely that of a body part of its mother nor is it that of a "person" at law. But it is a distinctive entity, the existence and value of which the law in some circumstances should recognise.'¹⁴⁵

136 Bermudez, above n113 at 6.

137 In NSW, the *Crimes Act 1900* makes it an offence for a woman to unlawfully procure her own miscarriage (s82) or for anyone else to unlawfully procure her miscarriage (s83) or to unlawfully supply any drug, instrument or noxious thing, knowing that it is intended to be used to procure a miscarriage (s84). Cognate provisions exist in the other jurisdictions (except the ACT): see the *Crimes Act 1958* (Vic) ss65–66; the *Criminal Law Consolidation Act 1935* (SA) ss81–82; the *Criminal Code* (Qld) ss224–226; the *Criminal Code* (Tas) ss134–135; the *Criminal Code* (WA) s199; the *Criminal Code* (NT) ss172–173. In NSW there is a common law defence of necessity which requires that the doctor believe, on reasonable grounds, that the abortion was necessary to preserve the woman from a serious danger to her life or physical or mental health and that, in the circumstances, the abortion was not out of proportion to the danger averted (*R v Wald* [1971] 3 DCR (NSW) 25). This has been interpreted to include social and economic, as well as medical grounds, as a possible basis for an opinion that the pregnancy might present a serious danger to a pregnant woman's physical or mental health. These grounds may exist at the time of the decision, at some stage during the pregnancy or, on Kirby P's interpretation in *CES v Superclinics*, after the birth of the child: *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47 at 60.

138 NSW Department of Health 'Framework for Terminations of Pregnancy in NSW Public Hospitals' Circular 2002/64 (2000) (hereafter *NSW Health Policy on Abortion*) The requirements of the policy differ according to the gestation of the pregnancy. Thus, before thirteen weeks, counselling is offered and the treating doctor conducts an assessment of need; between 13 weeks and 20 weeks, the treating doctor may need to confer with others and will decide in consultation with the patient after counselling; After 20 weeks a multi-disciplinary assessment is necessary. This may involve mental health professionals and neonatologists.

The offence recommended by the *Finlay Report* was limited to the killing *in utero* of a viable foetus, with a statutory presumption that any foetus of twenty six weeks gestation is capable of being born alive.¹⁴⁶ Finlay provided a number of factors in support of adopting viability, rather than an earlier stage of pregnancy, as the threshold applicable to the proposed offence. These included, first, ‘ideological problems in giving a premature zygote, foetus or embryo the same status as a foetus so advanced that it could live outside its mothers body’.¹⁴⁷ Second, the advantage of having an ‘objectively discernible point’¹⁴⁸ in pregnancy which would ‘trigger culpability’¹⁴⁹ and third, avoiding the difficulties which would inevitably arise in proving that miscarriage at an earlier stage of pregnancy was caused by the acts of the accused.¹⁵⁰

The recognition of viability as legally relevant for the purposes of the offence does, however, raise questions about the nature of the relationship between the proposed offence and the practice of abortion after the point of viability. In Victoria, this became the subject of public controversy following the termination of pregnancy at 32 weeks gestation by doctors at Royal Melbourne Hospital. The woman concerned presented at Royal Melbourne Hospital, 31 weeks pregnant and in a highly distressed state. The foetus she was carrying had just been diagnosed with suspected achondroplasia (dwarfism) and she no longer wished to continue with the pregnancy. According to the hospital lawyer, ‘she would kill herself or do anything not to have the baby she was carrying.’¹⁵¹ She was assessed by a team of specialists — a geneticist, genetic counsellor, obstetrician, ultrasonographer and psychiatrist, who all believed that she would commit suicide if they did not accede to her request for a termination. Other possibilities, including adoption, were explored, but the woman rejected all other avenues.¹⁵² After obtaining the

139 In England and Wales, the *Abortion Act* 1967, as amended by the *Human Embryology and Fertilisation Act* 1990, distinguishes between abortions performed before the pregnancy has exceeded its 24th week and those performed after. In the former, an abortion may be carried out if two registered medical practitioners are of the opinion, formed in good faith, that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the mental or physical health of the pregnant woman or any existing children of her family. After twenty-four weeks gestation, an abortion will only be justified if necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman (s1(1)(b)); if its continuance would involve risk to the life of the pregnant woman (s1(1)(c)); or if there is a substantial risk that if the child was born it would suffer from such physical or mental abnormalities as to be seriously handicapped (s1(1)(d)). However, if any of these grounds are satisfied, an abortion may be performed at any time prior to birth. When the *Abortion Act* was amended in 1990, it was de-coupled from the *Infant Life Preservation Act* with the effect that abortions carried out in accordance with the *Abortion Act* now lies outside the scope of the offence of child destruction.

140 The manner in which these offences have been framed varies between jurisdiction and their scope and applicability to medical terminations of pregnancy is uncertain: see *Criminal Code* (NT) s170; *Criminal Code* (Qld) s313; *Criminal Code Act* (Tas) s165; *Criminal Code* (WA) s290 and *Crimes Act* (Vic) s10. For a summary of the prosecutions brought under these sections see *Finlay Report*, above n143 at 75–81.

141 *Finlay Report*, id at 110.

142 See *Rance v Mid Downs & Cvs*, above n24.

approval of the responsible hospital administrator, a termination of pregnancy was performed at 32 weeks gestation.

Victorian law recognises a defence of necessity to the statutory offence of abortion. This means that in order for the abortion to have been lawful, the doctors should have formed an honest belief, based on reasonable grounds, that the termination was necessary to avert a serious risk to the mother's life or health.¹⁵³ That this was done seems plausible in the reported circumstances. However, due to the advanced gestational age of the foetus, it was alleged that the doctors had committed the offence of child destruction under section 10 of the *Crimes Act* 1958 (Vic). Senator McGauran took the view that this provision constituted an absolute prohibition on the destruction of near term foetuses.¹⁵⁴ In a speech to federal parliament, he contended that 'the reason this law is black and white in making a late-term abortion a criminal offence is that the baby can live separately from the mother. That is, there is no contest of life between the rights of the mother and the child; the child is viable without the mother.'¹⁵⁵ He claimed that early and late abortions are not morally equivalent in the public's eyes, nor in the eyes of the law and he called for the law of child destruction to be enforced against the doctors.¹⁵⁶

The area of potential overlap between offences concerning the death of a foetus was raised as a concern in the *Finlay Report*. Specifically, the Australian Medical Association (AMA) was concerned that the proposed offence would 'render the medical practitioner and/or the patient open to a charge of manslaughter'¹⁵⁷ in a variety of circumstances including foetal reduction during a case of multiple pregnancy and termination for foetal handicap. Justice Finlay did not think that either scenario would engage the law of manslaughter, though he may have assumed that the terminations in these cases would occur by procedures that would preclude the delivery of a live foetus.¹⁵⁸ As for the proposed offence of killing an unborn child, neither would this affect doctors acting within the existing law with respect to terminations of pregnancy. Finlay states:

It would be a mistake for anyone to think that these recommendations are in

143 *Finlay Report*, above n45. The terms of reference for the review included an 'examination of whether the *Crimes Act* provisions concerning manslaughter should be amended in such a way as to allow a charge of manslaughter to be brought in circumstances where an unborn child dies.' In addition, the review was to consider '(i) whether it would be necessary to establish that an offender knew that the mother was bearing a child; and (ii) whether NSW should legislate to introduce the offence of "child destruction"'. Id at 8–9.

144 Id at 112.

145 Id at 114.

146 Id at 158.

147 Id at 109.

148 Ibid.

149 Ibid.

150 Ibid.

151 Lachlan de Crespigny & Julian Savulescu, 'Abortion: Time to Clarify Australia's Confusing Laws' (2004) 181 *Medical Journal of Australia* 201 at 201.

152 Ibid.

anyway involved with the abortion debate. They are not. The recommendations, if adopted, contain no relaxation of the anti-abortion laws of this State. What they do is fortify the criminal law by providing for a substantial term of imprisonment for a criminal act killing an unborn child 'capable of being born alive'. Suggested subsection three ensures that the existing law of abortion is left untouched.¹⁵⁹

The sub-section referred to provides that a person who procures a lawful miscarriage cannot be guilty of the offence of killing an unborn child. This concern to exclude abortion from the scope of the proposed offence of child destruction¹⁶⁰ is suggestive that, however significant foetal viability may seem, it is clearly not alone sufficient to provide a coherent or uniform basis for the imposition of criminal responsibility for foeticide.

Thus, from an intrinsic properties standpoint, it is difficult to persuasively distinguish between the deaths of foetuses of the same gestational age who are killed by consensual abortion and the intentional or negligent acts or omissions of third parties. If foetal personhood were to be located in the biological fact of being a member of the human species or being viable, these deaths would be all equivalent in the eyes of the law. The fact that distinctions are made suggests that factors other than intrinsic properties are significant. The question is whether a convincing foundation can be developed to rationalise these distinctions. It is suggested that an account of personhood that encompasses both the intrinsic properties of human beings *and* the contribution of social relations to the actualisation of personhood can provide such a foundation.

153 *Crimes Act* 1958 (Vic) s65 makes it an offence to 'unlawfully administer or cause to be taken any poison or other noxious thing' or 'use any instrument' with the intent to procure a miscarriage. The use of the term 'unlawfully' to qualify the means by which an abortion might be effected, has been widely interpreted to imply that under certain conditions such actions might be lawful. In *R v Davidson* (1969) VR 677 the court accepted that the defence of necessity might apply in response to a charge under s65, with the result that a doctor would not fall foul of the section if s/he held an honest belief, based on reasonable grounds, that his/her actions were proportionate and necessary in the circumstances. The actions would be necessary in the relevant sense if they were required 'to preserve the woman from a serious danger to her life or her physical or mental health (not being merely the normal dangers of pregnancy and childbirth) which the continuance of the pregnancy would entail': *Id* at 672. They would be proportionate in the relevant sense if, in the circumstances, the action taken was not out of proportion to the danger to be averted: *Ibid*.

154 The provision relates to the unlawful killing of a child capable of being born alive. This leaves scope for a defence of necessity, though it must be conceded that the scope of the defence in this context is uncertain. In the instant case, presumably the doctors would have contended that the termination was necessary to save the woman's life, since she was actively suicidal. An exception for the preservation of the mother's life was included in the *Infant Life Preservation Act* 1929 (Vic) upon which the provision was based. It is clear from the Finlay report that the offence, where it exists in Australia, has given rise to very few prosecutions. See above n143 at 75–81.

4. *A Richer Concept of Personhood*

A. *The Limitations of an Intrinsic Properties Approach*

One difficulty with an approach to foetal status based solely from the perspective of 'intrinsic properties' is that it fails to adequately account for the complexities of pregnant embodiment.¹⁶¹ To this extent it leaves little room for an analysis of the contribution of the maternal-foetal and the maternal-child relationship to personhood.¹⁶² As Marie Ashe has observed:

Even to speak of the pre-birth period as one of mother-child "interdependence" does not begin to do justice to the experiential reality of pregnancy as a state of being that is neither unitary nor dual, exactly; a state to which we can apply no number known to us.¹⁶³

In addressing the question of pregnant embodiment from a phenomenological perspective, Mackenzie observes that pregnancy is unique in that 'it defies a sharp opposition between self and other, between the inside and outside of the body.'¹⁶⁴ Thus:

The foetus, to the extent that it is experienced as part of the woman's body, is also experienced as part of her self, but as a part that is also other than herself. On the one hand it is another being, but it is another being growing inside her body, a being whose separateness is not fully realised as such by her. This is the case even with an unwanted pregnancy.¹⁶⁵

155 Julian McGauran, Parliament of Australia, Senate, *Parliamentary Debates (Hansard)*, 29 November 2000, at 20106. The matter was referred to the Coroner who found that there was no jurisdiction because the foetus was born dead. Unsatisfied with this outcome, Senator McGauran lodged a complaint with the Medical Practitioners Board of Victoria. In a further speech to parliament, Senator McGauran challenged the legal basis of the Coroner's decision and indicated that any failure on the Board's part to investigate the matter fully would 'perpetuate the belief that there is a cover-up going on': Senate, *Parliamentary Debates (Hansard)*, 13 March 2002 at 638. The Medical Practitioners Board of Victoria subsequently decided to conduct a preliminary inquiry into the matter. However, the investigation has stalled because neither the patient nor the hospital will consent to the release of medical records to the Board. The Supreme Court of Victoria has dismissed an appeal from a magistrate's order to produce the records (*Royal Women's Hospital v Medical Practitioners Board of Victoria* [2005] VSC 225).

156 *Ibid.*

157 *Finlay Report*, above n143 at 101.

158 Notably, Finlay recommended against extending manslaughter to circumstances in which a foetus dies *in utero*. *Id* at 100.

159 *Id* at 129.

160 Again, it is noteworthy that an exception for medical terminations of pregnancy was incorporated into the amendment of the definition of grievous bodily harm in the *Crimes Act 1900* (NSW) discussed below in section 4D.

161 Sherwin argues that non-feminist accounts of pregnancy 'have ignored the relational dimension of fetal development' and have tended to presume that 'the moral status of fetuses could be resolved solely in terms of abstract, metaphysical criteria of personhood as applied to the fetus alone'. Below n162 at 109.

Mackenzie develops a dynamic account of this complex embodiment, which combines elements of a feminist account of autonomy with an account of the intrinsic properties of fetuses. She observes that in the early stages of pregnancy, the fetus' separateness is not well established, nor is it experienced as separate by the woman.¹⁶⁶ She argues accordingly that, in the early stages of pregnancy, the moral status of the fetus 'is defined in relational terms because it is a being with moral significance for the woman in whose body it develops and who acts as its moral guardian.'¹⁶⁷ But as the pregnancy continues, the fetus develops and becomes more physically differentiated from the woman.¹⁶⁸ And, as this occurs, the intrinsic moral significance of the fetus increases. 'Its moral standing is less and less dependent on its relational properties to the woman in whose body it develops and more and more tied to its own intrinsic value.'¹⁶⁹ This process of physical differentiation is matched with a corresponding process of psychic differentiation through which the woman begins to experience herself as both connected to and differentiated from the fetus.¹⁷⁰ These dual processes of physical and psychic differentiation 'are usually accompanied by an increasing emotional attachment of the woman to the fetus.'¹⁷¹ This attachment is, according to Mackenzie 'based both in her physical connection with the fetus and in an anticipation of her future relationship with a separate being who is also intimately related to her.'¹⁷²

Mackenzie's framework is useful in attempting to capture the complexity of pregnant embodiment *and* the increasing intrinsic worth of the fetus as the pregnancy continues, without losing sight of the fundamental point that the morality of abortion is about women's self-determination. Thus, she contends, 'pregnancy is never simply a biological process, it is always an active process of shaping for oneself a bodily and moral perspective.'¹⁷³ In the early stages of pregnancy the fetus' value is best measured in terms of the worth placed on it by the woman. As the pregnancy advances, the intrinsic worth of the fetus increases. But, as Mackenzie is careful to point out, 'this does not mean that ... the fetus is ever the moral equivalent of the woman. Hence, in cases where the fetus'

162 See for example, Marie Ashe, 'Law-Language of Maternity: Discourse Holding Nature in Contempt' (1988) 22 *New Eng LR* 512; Isabel Karpin, 'Re-imagining Maternal Selfhood: Transgressing Body Boundaries and the Law' (1994) 2 *Australian Feminist LJ* 36; Susan Sherwin, *No Longer Patient: Feminist Ethics and Health Care* (1992) and Mackenzie, above n135.

163 Ashe, above n162 at 551.

164 Mackenzie, above n135 at 148.

165 *Ibid.*

166 *Ibid.*

167 *Id* at 146.

168 *Id* at 148.

169 *Id* at 146

170 *Id* at 148.

171 *Ibid.*

172 *Id* at 149.

173 *Id* at 142.

continued existence severely threatens the woman's physical or mental survival, her interests should always prevail up until the moment of birth. It does, however, suggest that the late term abortion is morally different from early abortion and that cannot be justified on the same grounds.¹⁷⁴

Mackenzie's analysis enlarges the framework for thinking about personhood by providing an account of the bodily, psychic and emotional connections between women and fetuses. But she stops short of providing a specific account of the social aspects of personhood. Sherwin argues that 'personhood is a social category.'¹⁷⁵ She contends that sociality is central to any definition of personhood 'because persons are embodied, conscious beings with particular social histories.'¹⁷⁶ This is a very different conception of personhood from those proposed by the philosophers considered in section 3. On this account, persons 'are members of a social community that shapes and values them and personhood is a relational concept that must be defined in terms of interactions and relationships with others.'¹⁷⁷ Translating these ideas to the unique embodiment of pregnancy, Sherwin argues that a foetus cannot be a person in any morally relevant sense 'because they have not developed sufficiently in their capacity for social relationships ... In this way they differ from newborns, who immediately begin to develop into persons by virtue of their place as subjects in human relationships; newborns are capable of some forms of communication and response.'¹⁷⁸

Although Sherwin configures the foetus in relational terms, she resists any implication that individuals other than the woman can 'relate' to fetuses in ways that seek to displace or override the value accorded them by pregnant women.¹⁷⁹ Thus, 'efforts to speak of the fetus itself, as if it were not inseparable from the woman in whom it develops, are distorting and dishonest.'¹⁸⁰ Sherwin insists that the 'responsibility and privilege of determining a fetus's specific social status and value must rest with the woman carrying it.'¹⁸¹

Working within an anthropological tradition, James too acknowledges the social dimensions of personhood.¹⁸² For her, the essence of personhood is the 'capacity to be drawn into a mutually defining network of anticipatory relations with others over time.'¹⁸³ The emphasis here on potentiality is important because it distinguishes James' conception of personhood from the philosophical accounts within the liberal philosophical tradition, which draw a sharp line between people

174 Id at 146.

175 Sherwin, above n162 at 109.

176 Ibid.

177 Id at 110.

178 Id at 111.

179 Ibid.

180 Id at 110.

181 Ibid.

182 Wendy James, 'Placing the Unborn: On the Social Recognition of New Life' (2000) 7 *Anthropology and Medicine* 169 at 176.

183 Id at 177.

and potential people at least for the ascription of rights.¹⁸⁴ This distinction holds less significance for James because ‘social relations are always set in time, open-ended, anticipatory ... potentiality is the essence of sociality.’¹⁸⁵ For James, ‘recognition’ of a child is a notion that is not confined to a moment in time or event, such as birth, but ‘could often be said to be a process starting before birth’.¹⁸⁶

Foetuses, and even infants, may not be individually registered as jural persons, or holders of legal rights, or even given this or that specific status or legal protection in a particular social context. But they bear a relationship to others who may hold such rights and who are prepared to recognise and care for them, to confer a link on the model of ‘I/Thou’ with them.¹⁸⁷

This ‘more open, relational approach to personhood’¹⁸⁸ could well yield different answers to the question of when personhood begins. James suggests that:

The detection of a being which can respond, can answer back in some way that signals the presence of a potential partner in human reciprocity, is arguably a plausible basis for representing the beginnings of personhood.¹⁸⁹

Sherwin and James both invite us to consider the foetus in its social dimensions, as a relational being. For Sherwin, the moral worth of the foetus is determined solely by the woman within whose body the foetus is developing. In this respect, Sherwin can support the very strong attachments and investments made by some women to their foetuses as well as the unwillingness for other women to proceed with their pregnancies. James contemplates a broader set of connections, situating the foetus in a web of potential relationships prior to birth. But, unlike Sherwin, James’ places considerable emphasis on the fact that foetuses at certain stages of development possess intrinsic properties (such as the ability to experience pain and react to stimuli) which signal their potential to engage in reciprocal human relationships. James does not appear to be arguing that this establishes foetal personhood, merely that it might mark the beginnings of a process which could result in a person. Although these accounts differ in important respects, they do provide a framework for understanding the complex ways in which women and others relate to the foetus in what James calls the ‘pre-birth space’. And just as technology is challenging legal configurations of the foetus, so too it challenges and transforms women’s experiences of pregnancy.

184 The fact that human beings at the early stages of life only hold the potential to engage in reciprocal social relations does not, she argues, present the difficulties claimed by many philosophers. For when we consider personhood in social terms, the distinction between X and potential X is not important. This is because ‘social relations are always set in time, open-ended, anticipatory ... potentiality is the essence of sociality.’ *Ibid.*

185 *Ibid.*

186 *Id* at 178.

187 *Id* at 177.

188 *Ibid.*

189 *Id* at 187.

B. Pregnant Embodiment and the Actualisation of Personhood

The impact of foetal images on cultural and medical discourses about foetal personhood is now well documented.¹⁹⁰ Newman observes that early modern obstetrical visualisations 'figure the female body not merely as inert, an object, but, in its openness, its breached boundaries, and its capacity to "make babies" a violation.'¹⁹¹ Petchesky contends that images of the foetus, dangling in the inner space of the womb, recalls the 'Hobbesian view of born human beings as disconnected, solitary individuals.'¹⁹² Within this frame of reference, the foetus is 'not only "already a baby" but more — a "baby man" an autonomous, mini-space hero.'¹⁹³ She argues that this is a distortion of the realities of maternal embodiment.

But even where feminists have been critical of the appropriation of foetal images to conservative agendas, they have been alive to the multiple (and not necessarily oppressive) ways in which women themselves receive and incorporate these images into their experiences of pregnancy. Petchesky acknowledges that many women subjectively experience the viewing of foetal images as reassuring, even elating, and some women do talk about having bonded with their foetus through the viewing of ultrasound images.¹⁹⁴ Indeed, there is some evidence to suggest that "seeing the baby" and "putting the baby on television" are now what make the pregnancy feel "real."¹⁹⁵

A recent Australian study found that foetal imaging is experienced by women in complex and sometimes contradictory ways. Many women expressed feelings of anxiety about their scans, due in large measure to the possibility that the scan might identify a health problem with the foetus.¹⁹⁶ But they also reported that seeing the foetal images reassured them of the bodily changes they were experiencing, a phenomenon that has been described as sort of 'technological quickening'.¹⁹⁷ Moreover, many reported the primary reason for accepting the scan was their desire to 'see the baby'.¹⁹⁸ Some of the women who had multiple scans found the 18–20 week scan to be the most pleasurable because of the opportunities it presented to distinguish the human form of the foetus¹⁹⁹ to

190 See generally Rosalind Petchesky, 'Fetal Images: The Power of the Visual Culture in the Politics of Reproduction' (1987) 13 *Feminist Studies* 263 (hereafter *Fetal Images*); Valerie Hartouni, *Cultural Conceptions: On Reproductive Technologies and the Re Making of Life* (1997); Barbara Duden, *Disembodying Women: Perspectives on Pregnancy and the Unborn* (1993).

191 Karen Newman, *Fetal Positions: Individualism, Science, Visuality* (1996) at 64.

192 Petchesky, above n190 at 271.

193 *Ibid.*

194 *Id.* at 279.

195 Lisa Mitchell & Eugenie Georges, 'Cross-Cultural Cyborgs: Greek and Canadian Women's Discourses on Fetal Ultrasound' (1997) 23 *Feminist Studies* 373 at 397–98.

196 Gillian Harris, Linda Connor, Andrew Bisits & Nick Higginbotham, "'Seeing the Baby": Pleasures and Dilemmas of Ultrasound Technologies for Primiparous Australian Women' (2004) 18 *Medical Anthropology Quarterly* 23 at 36.

197 Mitchell, above n195 at 373.

198 Harris, above n196 at 39.

199 *Ibid.*

‘construct a persona for the baby’, or to facilitate the socialisation of the male partner into the role of father.²⁰⁰

The emphasis on the physical likeness of a foetus to a baby and the link from this likeness to ‘foetal personification’ is a theme that surfaces time and again in cultural representations of the late-term foetus. 3D and 4D imaging can now provide even more ‘realistic’ images of the foetus’ appearance (more akin to the photograph of a newborn than a grainy black and white image) as well as the ability to view foetal movement in real-time. The pioneer of this technology, Stuart Campbell has commented that the 4D images are ‘invaluable in enhancing the normal bonding process, allowing new parents to see a realistic picture of their child and to make an early bond.’²⁰¹ But it is not simply a physical likeness that is being represented, it is ‘baby-like behaviour.’ This seems to hold even greater potential to impact on women’s experiences of pregnancy, since this connotes a ‘conscious and sentient fetal actor communicating its needs and demands’²⁰² which, in turn, implies a moral imperative. One media report about the 4D technology quoted an expectant mother who was so moved by the video images that she gave up smoking and drinking:

Until I saw the video of Katy at 20 weeks old, I could not relate to this lump growing inside me enough to want to give up my cigarettes. But as soon as I saw the beautiful pictures of my daughter, it felt criminal to do anything which might cause her harm. I stopped smoking straight away, gave up my glasses of wine and concentrated on making myself as healthy as possible to give Katy the best possible start in life.²⁰³

This narrative positions ultrasound as a technology that both separates and then reconnects individuals.²⁰⁴ Seeing a ‘realistic picture’ of her foetus had the effect of transforming a ‘lump’ into *her daughter*, an identification that held considerable significance for her. It encouraged the pregnant woman to think about the foetus not only as a being with a future, but as a child whose future could be defined by her actions in the present. Her identification of a ‘significant presence’ within her body apparently inspired her to start actively and consciously caring for her child and imputing a moral (even legal) character to her acts and omissions in this respect. Thus, she regarded the idea that she might cause harm to her developing foetus as a result of smoking and drinking as *criminal*. In short, this woman thought it seriously wrong to engage in behaviours that might deprive her foetus of the future quality of life that it would otherwise enjoy. This example serves to illustrate the connection that James’ attempts to express as the recognition of a child, or rather, the ‘anticipation of the child as a future partner in human reciprocity.’²⁰⁵

200 Id at 40.

201 Mitchell, above n195 at 373.

202 Id at 397.

203 ‘Womb Boost for Expectant Parents’ *BBC Online* July 6, 2001: <<http://news.bbc.co.uk/2/hi/health/1424021.stm>> (7 November 2006).

204 Mitchell, above n195 at 397.

205 James, above n182 at 187.

C. *The Foetus that Exceeds its Legal Status*

The power wielded by the visual, and the personification that this entails for some women, can be enlisted by women themselves in an effort to secure public recognition for a being that has been privately acknowledged as a person. Renee Shields' personal tragedy provides an example that brings together many of the themes explored here. Ms Shields was seven months pregnant with a son she was planning to call Byron when she became the victim in a road-rage incident. She was the passenger in a car that was pursued and rammed into a telegraph pole. As a result of the injuries she sustained, her foetus was stillborn and she required an emergency hysterectomy. Her story was propelled into the public domain when it was widely reported that the person responsible for the accident could not be charged with any crime in relation to Byron's death because the law did not recognise the foetus as a person. Ms Shields, however, did regard her foetus as a person and, in this, she received considerable public support. As one report noted:

Mothers and fathers across Sydney took to the airwaves, calling for justice. "Who represents this tiny hero who had to have a burial by law and who is acknowledged in history by a birth certificate?" his grandmother Terry Shields asked. "The law plays now you see him now you don't. He is independent in death but no one is responsible for his death."²⁰⁶

In this passage, the lost foetus is a 'tiny hero', a description which, curiously, echoes Peteckesky's 'baby-man.' But the abiding sense here is of a foetus already embedded in a set of social relations through which his personhood materialises. Like the women quoted above who, upon witnessing visual images of their foetuses, start to think of them as persons, this provides another illustration of James' recognition of a child in the pre-birth space.²⁰⁷ Significantly, Byron not only has a name and a mother, but a grandmother — indicating a broad web of social relations — and, to enlarge this web even further, it is 'mothers and fathers across Sydney' who mourn his loss and call for justice on his behalf. Byron's grandfather, declared his status publicly: 'This child was a person. We went to the hospital and nursed this baby, he had hair, fingernails and was perfectly formed.'²⁰⁸ Another report observed that:

The most precious thing Ms Shields owns is a picture of Byron after he was born. The baby was perfectly formed and dressed in a yellow jumpsuit. It is a horrific reminder of her pain, but the picture sits proudly in an album next to an ultrasound of Byron taken two months before the accident.²⁰⁹

Renee Shields successfully lobbied government to have the law changed so that the destruction of a foetus can now be taken into account in determining the

206 Madonna King, 'Hearts and Minds Shape Laws' *The Courier-Mail* (1 October 2005) at 31.

207 James, n182 at 186.

208 Stavros Sofios & Anthony Peterson, 'Byron's Law Examined in Review' *Daily Telegraph* (26 September 2002) at 5.

209 Stavros Sofios, 'One Woman's War to Change a Century-old Law' *The Daily Telegraph* (27 June 2005).

criminal liability of an assailant.²¹⁰ The images of Byron were, according to one report, influential in her struggle. It was reported that she ‘got the backing of the Attorney General Bob Debus during an emotional private meeting when Mr Debus was left in shock after being shown a picture of a fully formed Byron in a yellow jumpsuit soon after the baby’s still birth.’²¹¹ It was also reported that Renee Shields attended parliament for the vote on the Crimes Amendment (Grievous Bodily Harm) Bill (2005), ‘crying quietly’ as she ‘clutched an ultrasound picture of her son Byron’.²¹²

In these reports, the image of the foetus/child invokes both the individual life and anticipated social relationships that had been tragically cut short. The image of the stillborn child, dressed in the manner of a newborn baby, enables the viewer to see not only an independent being but a *child* bearing the signs of parental love, care and longing. In her remarks to the press, Ms Shields again emphasised the analogy between late foetus and newborn infant by calling attention to the likely legal consequences had Byron been born:

If Byron had been born a week earlier he would have been lying in a capsule in the back seat. If he had died in this scenario the manslaughter charge would definitely have been applied. I cannot explain how irate this makes me... Unborn children should be acknowledged.²¹³

D. Law’s Response to the Dilemma

Byron Shields appeared to exceed his legal status because, at the time of his death, his immediate kin had already claimed him as a ‘person’ in the social sense described by James. This dilemma was sufficiently compelling to motivate the government to reform the law. The NSW Government had initially responded positively to Justice Finlay’s recommendation to enact new offences relating to the unlawful killing of an unborn child.²¹⁴ In the result, a different mechanism was adopted. The NSW parliament instead amended the definition of grievous bodily harm in the *Crimes Act* so that the definition now includes the ‘destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm.’²¹⁵ The effect of this amendment is that the death of a foetus *in utero* now amounts to grievous bodily harm of the mother for the purposes of ss33 and 35 (assault causing gbh and assault and with intent to cause gbh respectively), s52A (dangerous driving causing gbh) and s54 (unlawful or negligent act causing gbh). According to the government, the advantage of this method of recognising the harm occasioned by third party

²¹⁰ This is discussed in the following section.

²¹¹ Stavros Sofios, ‘Mother’s Courage Honours Baby Byron’ *The Daily Telegraph* (3 March 2005).

²¹² *Ibid.*

²¹³ Sofios, above n209.

²¹⁴ This point was raised by Andrew Tink (Member for Epping) in the debate on the Crimes Amendment (Grievous Bodily Harm) Bill: Andrew Tink, NSW Legislative Assembly, *Parliamentary Debates (Hansard)*, 22 March 2005: <<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA20050322>>.

²¹⁵ *Crimes Act* 1900 (NSW) s4.

foeticide is twofold: it specifically excludes the lawful termination of pregnancy and, in referring to a foetus without qualification, it is not limited to viable foetuses.²¹⁶

The government was adamant that the amendment should distinguish between foeticide caused by the violent acts of third parties and the lawful termination of pregnancy. However, it also acknowledged that these were 'a most difficult set of concerns to untangle'.²¹⁷ The Attorney General stated emphatically, 'this bill is not about abortion in any way'²¹⁸ which is why 'the Government has ... included for abundant caution, an exemption in this bill for medical personnel performing procedures that may result in foetal death.'²¹⁹

The decision to amend the definition of grievous bodily harm rather than to enact a new offence of unlawfully killing an unborn child followed the decision by the NSW Court of Appeal in *R v King*.²²⁰ This case concerned a charge under s33 of the *Crimes Act* 1900 (NSW) in circumstances where the accused had intentionally kicked and stomped on the stomach of a pregnant woman, causing her to give birth to a stillborn child. The Crown relied upon the death of the foetus as constituting grievous bodily harm to the mother but the count was stayed on the basis that as a matter of law, the foetus was a 'unique organism'²²¹ and not part of the mother. On appeal, it was held that the foetus could be regarded as a part of its mother for the purposes of s33 of the *Crimes Act*. The Court of Appeal noted that courts have adopted different approaches to the configuration of the maternal body for the purposes of homicide, assault and the civil law. The foetus has been regarded as a part of its mother, as a separate entity and as, as we have already seen, as a unique organism both distinct from, and connected to, its mother. The Court of Criminal Appeal resisted attempts to provide closure on this question. Spigelman CJ observed:

My review of the authorities indicates that there is no clear rule, applicable in all situations, as to whether the mother and foetus must be considered as one or separate. The answer will turn on the incidents of the particular legal situation under consideration including, where relevant, the scope, purpose and object of a particular statutory scheme.²²²

For the purposes of s33, the Court rejected the 'separate genetic bundle' analysis advanced by the House of Lords in *AG's Reference (No. 3 of 1994)*, preferring

216 As the Attorney General pointed out 'the offence that Mervyn Finlay ultimately recommended ... brought with it a range of unavoidable legal and contextual problems, such as ramifications for the law of negligence and for personal injury and victims compensation law. Again, by necessity it included, as recommended, a presumptive cut-off of 26 weeks, which meant that not all offenders who caused the loss of an unborn child would necessarily be caught by the proposed offence': above n214. He went on to cite the case involving Kylie Flick as an illustration of the unsatisfactory scope of the proposed offence: *Ibid*.

217 *Ibid*.

218 *Ibid*.

219 *Ibid*.

220 (2003) 59 NSWLR 472 (Spigelman CJ, Dunford & Adams JJ).

221 *Id* at 475.

222 *Id* at 490.

instead the approach taken by the New Zealand Court of Appeal in *Harrild v Director of Proceedings*.²²³ Thus, ‘the close physical bond between the mother and the foetus is of such a character that, for the purposes of offences such as this, the foetus should be regarded as part of the mother.’²²⁴ The Court was careful to confine its ‘connected tissue’ configuration of the maternal body to an interpretation of s33 of the *Crimes Act 1900* (NSW). It expressly left open the question of whether a different configuration might be applied to the common law of homicide²²⁵ and, presumably, other contexts as well.

Whilst the approach taken in *King*, codified by the *Crimes Amendment (Grievous Bodily Harm) Act 2005* (NSW) does not necessarily determine the question of whether the common law of manslaughter should encompass the death of a foetus, it does illuminate some issues common to both legal contexts. The recognition of the death of a foetus as grievous bodily harm to the mother is not only consistent with the biological facts concerning the intrinsic properties of foetuses. More importantly, it is consistent with the theory that foetuses may be claimed as persons in the social sense, by the emotional attachments, investments and commitments of their kin. Where this is the case, the deaths of these foetuses are appropriately acknowledged and recognised through the persona of the person most responsible for actualising their personhood in this social sense — the mother.

E. Is There an Argument that Birth is a Substantive Criterion?

The claim that the ‘born alive’ rule is, in modern times, outdated and indefensible rests on the assumption that being a member of the human species is sufficient to ground the law’s conception of personhood. But, as the foregoing analysis has shown, this criterion alone is not sufficient to rationalise the law in the distinct but, nonetheless, related contexts of abortion and child destruction, suggesting that a more complex and nuanced understanding of personhood is required for the common law as well.

Although there is authority to the effect that the ‘born alive’ rule is based on convenience rather than principle, it is worth examining whether a substantive basis for the rule could be advanced. A central point to be considered here is the extent to which a particular form of embodiment is or should be relevant to the law’s understanding of personhood. In *Iby*, the Court interpreted the ‘born’ limb of the test as if principally relevant to the issue of causation. But can a case be made for recognising the ‘born’ limb as being substantively relevant? Is it arguable that the individuated form of embodiment that is achieved at birth is an essential requirement of personhood?

223 [2003] 3 NZLR 289. The Court emphasised the close physical bond between the mother and the foetus so that ‘the foetus, even if a separate entity for some purposes, was “human tissue connected to and inside” the body of the mother’. Quoted in *R v King*, above n220 at 491.

224 *Ibid.*

225 *Ibid.*

The definition of person for the purposes of the civil law demonstrate that individuated embodiment is an important factor in that context. As Baker P observed in *Paton v British Pregnancy Advisory Service Trustees*:

The foetus cannot, in English law, in my view, have a right of its own at least until it is born and has a separate existence from its mother. That permeates the whole of the civil law of this country (I except the criminal law which is now irrelevant) and is, indeed, the basis of decisions in those countries where law is founded on the common law, that is to say, in America, Canada, Australia and, I have no doubt, in others.²²⁶

This insistence on being born makes considerable sense in the context of civil law where, as courts have repeatedly pointed out, conferring legal status on a foetus might bring the rights of the pregnant woman into direct conflict with those of the foetus. In *Re F (in utero)*, a case concerning the extension of the wardship jurisdiction to an unborn child, May LJ observed that the effect of the application would be to construct a situation of conflict between the legal rights of the pregnant woman and the unborn child, a scenario he thought 'most undesirable.'²²⁷ This disinclination to recognise foetal personhood appeared to rest on the understanding that 'the life of the foetus is intimately connected with, and [could not] be regarded in isolation from, the life of the pregnant woman.'²²⁸

Similarly, in *Re MB*,²²⁹ a case concerning a mother's refusal to consent to a caesarean section, the Court of Appeal refused to 'weigh in the balance the rights of the unborn child.'²³⁰ After detailed and wide-ranging consideration of the law, the court found no convincing authority to support a jurisdiction for balancing foetal and maternal rights. Following *Re F (in utero)*,²³¹ *Paton v British Pregnancy Advisory Services Board*²³² the court confirmed that 'the foetus up to the moment of birth does not have any separate interests capable of being taken into account'²³³ in the medical treatment context. It found that this position was consistent with both the common law²³⁴ and statutory²³⁵ recognition of the foetus. In a subsequent case concerning a competent refusal to undergo a caesarean section, the Court of Appeal affirmed its commitment to the principles enunciated

226 *Paton*, above n61 at 279. This passage was cited with approval in *Re F (in utero)* [1988] 2 WLR 1297 at 1299–1300 (May LJ) and 1302 (Balcombe LJ).

227 *Id* at 1301.

228 *Id* at 1306 (Staughton LJ), citing *Paton v United Kingdom* (1980) 3 EHRR 408 at 415.

229 [1997] 2 FLR 426.

230 *Id* at 444.

231 *Re F (in utero)*, above n226.

232 *Paton*, above n61.

233 *Re MB*, above n229 at 444.

234 The court looked in particular at the authorities concerning the right of action for *in utero* injury: *Burton v Islington Health Authority*; *De Martell v Merton and Sutton Health Authority* [1993] QB 204, and the common law offence of homicide arising from conduct prior to birth causing death after live birth: *Attorney-General's Reference No 3 of 1994* [1996] QB 581. The House of Lords decision was reported after *Re MB*.

235 In particular the *Offences Against the Person Act* 1861 (UK); *Infant Life (Preservation) Act* 1929 (UK); *Abortion Act* 1967 (UK) (as amended) and the *Congenital Disabilities (Civil Liability) Act* 1976 (UK).

in *Re MB*. In *St Georges Healthcare Trust v G*,²³⁶ the UK Court of Appeal stated that ‘although human, and protected by the law in a number of different ways ... an unborn child is not a separate person from its mother. Its need for medical treatment does not prevail over her rights.’²³⁷

In *Winnipeg CAFS v G*, McLachlin J (delivering the majority judgement) also stressed the significance of individuation to personhood in the context of an application for wardship of a foetus:

To permit an unborn child to sue its pregnant mother to be would introduce a radically new conception into the law; the unborn child and its mother in a mutually separable and antagonistic relation. Such a legal conception, moreover, is belied by the reality of the physical situation; for practical purposes, the unborn child and its mother-to-be are bonded in a union separable only by birth.²³⁸

Notably, individuated embodiment is also a matter of significance to some philosophers. Englehardt accepts that a conception of personhood can be grounded in social practices that have been ‘established to secure important goods and interests’²³⁹ such as concern for the welfare of children and care and sympathy for the weak and infirm. He argues that we have designated birth as the threshold for the imputation of personhood in this broader ‘social’ sense because it is from birth that infants become ‘embedded in a social matrix’²⁴⁰ upon which they are dependent for survival and in which they play an active role. Mackenzie also acknowledges the importance of the newborn’s positioning within a wider community from the time of birth. For her, the significance of birth:

... lies in the fact that at birth the infant becomes a member of the human moral community in its own right because its relationship with its mother and other human beings changes significantly. Not only is its body now separate from that of its mother, but it no longer needs to stand in a relation of moral and physical dependence on her in particular. Any responsible human adult will now be able to provide it with the care, nurture and moral protection required for it to flourish.²⁴¹

The argument can also be recast from the perspective of intrinsic properties. Bermudez, drawing upon recent research in developmental neurophysiology, argues for the moral significance of birth on the grounds that the newborn infant possesses certain morally relevant characteristics (in essence a primitive form of self-awareness) which can in principle only be possessed after birth. These characteristics develop through neonatal imitation behaviour and are, accordingly, possessed as a function of being outside the womb.²⁴²

Thus, it is possible to mount substantive arguments for the continuing recognition of birth as a necessary condition of personhood. It might be argued, in

236 [1999] Fam 26.

237 Id at 50 (Judge LJ).

238 *Winnipeg CAFS v G*, above n39 at 207.

239 Englehardt, above n123 at 190.

240 Id at 194.

241 Mackenzie, above n135 at 143.

242 Bermudez, above n113 at 388–394.

response, that there are distinctions between the meaning of personhood for the civil law and the criminal law, such that a different standard could apply to the criminal law. Caulfield and Nelson note that 'there is an argument to be made that the criminal law context presents a very different set of factors than does the civil law context'.²⁴³ In the former, unlike the latter, a foetus need not be alive as a prerequisite to criminal charges being brought '— rather, it is within the purview of the State to decide whether or not to proceed criminally'.²⁴⁴ Against this, some commentators have warned that the introduction of any exception to the 'born alive' rule 'could distort the law's concept of personhood'²⁴⁵ which may in turn have 'unintended consequences'²⁴⁶ for medical professionals and pregnant women.²⁴⁷ I agree that this would be problematic and, for this reason, abolition of the rule is undesirable. It is also unnecessary, given that the *Crimes Act 1900* (NSW) now provides a mechanism for imposing criminal liability for the death of a foetus arising from the acts of third parties. However, if courts decided to dispense with the rule, the conception of personhood developed here would provide a basis for distinguishing between foeticide caused by third party assaults and other causes such as abortion. In the latter, unlike the former, the maternal attachments and commitments that are essential to an enlarged conception of personhood are noticeably absent.

If the criminal law were to recognise foetal personhood in the context of third party assaults on pregnant women, it would need to be very clear about the basis for doing so. The basis would specifically *not be* that a late-term foetus is straightforwardly analogous to a newborn infant, as some biological, ethical and popular discourses claim. The law would need to acknowledge that the basis for extending the concept of personhood to foetuses in limited circumstances involves a richer understanding of personhood, one that combines the relational, emotional and social attachments of the maternal-foetal relationship with the intrinsic properties of the late-term foetus. Extending the concept of personhood to the foetus for the purposes of homicide on this basis would thus entail a range of other limitations. It would necessarily limit the enlarged concept of personhood to circumstances where the woman and her foetus are harmed by the acts of third parties, and it would necessarily exclude lawful termination of pregnancy.

243 Timothy Caulfield & Erin Nelson, 'Winnipeg Child and Family Services v DFG: A Commentary on the Law, Reproductive Autonomy and the Allure of Technopolicy' (1997) 36 *Alta L Rev* 799 at 803.

244 *Ibid.*

245 John Seymour, Submission to the Review of the Law of Manslaughter in NSW, quoted in *Finlay Report* above n45 at 99.

246 *Ibid.*

247 *Id* at 99–100. Indeed Finlay was sufficiently persuaded by the arguments that he concluded that the law of manslaughter should not be changed to allow a charge of manslaughter to be brought in circumstances where an unborn child dies: *Id* at 100.

5. *Conclusion*

The question of how to define the maternal-foetal relationship and thus the necessary conditions for legal personhood is a question of considerable complexity. The suggestion that technology has made the born-alive rule redundant does not, of itself, do much to illuminate the issues at stake. Modification of the rule would entail some judgement about what intrinsic properties or attachments or relationships are significant in the actualization of legal personhood. This would be so even if the law was to regard all embryos and fetuses as persons — in this case the relevant property would be being a member of the human species. Perhaps more obviously, if a different property was selected — say viability — this would imply something about the significance of this quality to the law's understanding of personhood.

I have argued that the law should resist pressures to enlarge its understanding of personhood on the basis of some straightforward analogy between late-term fetuses and newborn infants. The comparable intrinsic properties of late-fetuses and newborns is not alone sufficient to warrant the ascription of legal personhood to fetuses. The conditions that make late-term fetuses resemble persons certainly include intrinsic properties but, until the foetus achieves separation, they also include the investments and attachments of the mother. Foetuses cannot become actively embedded in a social matrix and, to the extent that the foetus becomes situated in a web of relationships, this is only achieved through its mother. However, after birth the baby can become actively embedded in a social matrix irrespective of its mother. It is in this sense that the experience of individuated embodiment has substantive significance.

It is for these reasons that I have argued that the born alive rule is defensible notwithstanding technological advances. If, however, the foetus was to be given enhanced recognition in law, this would need to be grounded in a richer and more complex understanding of personhood than is offered by crude comparisons between late-term fetuses and newborns. The law would need to develop an understanding of personhood that is neither entirely biological nor psychological in character, but which acknowledges, in addition, that personhood inheres in social relations and emotional attachments. From this basis, it might be acknowledged that a late term foetus is like a person for women who eagerly anticipate the arrival of their baby and to whom they feel they have already bonded. But it would also acknowledge, without contradiction, that women can decide to terminate pregnancies (even at a late stage) and thus avoid entering a maternal relationship with another.

A better way to acknowledge the harm caused by the killing of a foetus by a third party is, as the Court of Appeal found in *R v King* (now codified by an amendment to section 4 of the *Crimes Act 1900* (NSW)), through the persona of the mother. This alternative gives due recognition to the fact that where fetuses do resemble persons, it is in virtue of the value ascribed to them through their relations with kin, particularly mothers. It is both consistent with how some women value their fetuses and with a more complex understanding of pregnant embodiment.