

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 6 | Issue 3

2023

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French Law and Foetal Personhood: Reconciling Inconsistencies Between Civil and Criminal Law

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ABSTRACT

The legal personhood of prenatal life has been the subject of intense debate in French law, with differing opinions between criminal and civil law. While French criminal law denies personhood to the foetus, civil law has recognised it as a legal person for the purposes of inheritance and gifts. Furthermore, the French courts allow for the override of a pregnant woman's refusal of medical treatment in exceptional cases, such as those that could save the life of the child about to be born. This seeming inconsistency has raised ethical questions surrounding the onset of life and the criteria for legal personhood. This article proposes a novel legal theory called Foetal Bundle Theory, developed in the author's PhD research, to address this inconsistency. The theory posits that a foetus' personhood is best understood from a Bundle Theory perspective, which contends that legal nonpersons can hold legal rights. This notion presents a challenge to the conventional French understanding of legal personhood, which is based on the idea that personhood is closely linked to the capacity to hold legal rights and obligations. Foetal Bundle Theory offers a new perspective that reconciles the apparent inconsistencies in French law and provides a framework for addressing ethical and legal questions regarding the personhood of the foetus.

Keywords: Personhood, Foetal Bundle Theory; Unborn Children; French Law.

I. INTRODUCTION

The judgement delivered by the *Cour de Cassation* in the case of *Vo v France* ('*Vo*')² conformed to the dichotomy prevalent in French law between the biological concept of a 'human being' and the legal construct of a 'person'. A 'human being' is understood to come into existence at conception, although, there is no definitive consensus on this matter. Conversely, a 'person' is a legal term denoting an entity that has the *l'aptitude à être titulaire de droits et d'obligations* (ability to hold rights and obligations)³ ('Traditional View'). The ruling by the French court is

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² 53924/00 [2004] ECHR ('*Vo*').

³ B. Hess-Fallon and A.M. Simon, *Droit Civil* (4th edn, Sirey 1997) 73. See also the definition provided in the *Lexiques des Termes Juridiques* (14th edn, Dalloz 2003):

supported by the views of leading legal scholars in France who maintain that the distinction between 'human being' and 'person' is firmly grounded in the underlying principles of French civil law.⁴

According to French law, the starting point for human personality is at birth, with the unborn child considered a part of the mother until that point. For this reason, unborn children are not seen as separate victims of homicide until they are born. However, an exception to this general rule is that an unborn child can acquire certain rights from the moment of conception. The French Civil Code specifically outlines these rights as being limited to rights of succession, as well as the right to gifts and legacies.⁵ It can therefore be established that under French law, unborn children are not seen as legal non-persons *in totum*. Instead, there are circumstances by which prenatal life is endowed with legal personhood.

When examining the Traditional View in relation to contemporary theories of rights, inconsistencies arise. These theories attribute rights to entities that are not typically considered legal persons, such as prenatal life, while denying rights to entities that are commonly classified as legal persons, such as human children. As a result, it is necessary to modify either our rights theories, our beliefs about legal personhood, or our definition of legal personhood. His paper will argue for the latter option. Legal personhood is not a straightforward matter; it is a multifaceted property. A legal person is not only a holder of rights or a bearer of obligations; rather, legal personhood comprises divisible but interconnected incidents of legal personhood.⁶

I do not intend to abandon the notion that the legal personhood of X is linked to X's legal positions. However, I propose a significant revision to the presently predominant perspective. A noteworthy distinction between the implications of my theory and those of the Traditional View is that, in my theory, an individual can hold legal positions (rights and duties) without being a legal person. The crucial contrast between legal persons and non-persons is not always the possession of legal positions, but rather the specific legal positions they hold.

Section II of this paper explains Foetal Bundle Theory while Section III brings attention to the incongruities found within French law concerning the treatment of unborn children, focusing on their victimhood status. The final section will thus demonstrate how the incorporation of

Aptitude à être sujet de droit qui est reconnue sans distinction à tous les êtres humaines (personnes physiques) et, sous certaines conditions, aux personnes morales. (Ability to be a subject of law which is recognized without distinction to all human beings (natural persons) and, under certain conditions, to legal persons).

⁴ Laura Katzive and Christina Zampas, *Vo v France- 53924/00 [2004] ECHR: Written Comments* (Center for Reproductive Rights 2003) 4 citing Grégoire Loiseau, *Histoire d'une vie volée: le foetus n'est pas une personne* (Droit et Patrimoine 2001) 99.

⁵ Art. 725, 906. See P H Winfield, 'The Unborn Child' (1942) 8 *The Cambridge Law Journal* 76, 87 – 88.

⁶ Visa Kurki, *A Theory of Legal Personhood* (Oxford University Press 2019) vii – viii.

Foetal Bundle Theory will assist in reconciling these inconsistencies.

II. FOETAL BUNDLE THEORY

Foetal Bundle Theory is formulated by utilising Kurki's Bundle Theory of legal personhood and the principles of natural law to unborn children. This Theory can account for the fact that unborn children hold some claim-right but are not legal persons *tout court*. The contention that the mere allocation of a singular right or responsibility to unborn children would invariably confer upon them full legal personhood is a fallacious argument that lacks logical coherence. It is more appropriate to view prenatal legal personhood as a cluster property, where the attainment of personhood-related benefits and obligations can be gradually earned. This approach provides a better understanding of the complexities involved in determining the legal status of unborn children.⁷ Under Foetal Bundle Theory, unborn children can be classified as legal non-persons while still possessing certain legal rights. This is because the theory recognises that legal personhood is a complex collection of incidents, and that the possession of certain incidents can grant an individual some legal rights, even if they do not meet the full criteria for legal personhood.⁸

(A) Main Tenets of Foetal Bundle Theory

There are three main tenets of Foetal Bundle Theory:

1. The concept of legal personhood for prenatal life is a collection of distinct yet interconnected incidents.
2. These incidents mainly consist of granting specific types of claim-rights to prenatal life.⁹
3. This theory is based on natural law propositions.

(B) Incidents of Personhood

Bundle Theory distinguishes between two categories of incidents that are relevant to personhood: Active and Passive.

a. *Active Incidents*

Active incidents are primarily (though not exclusively) applicable to entities that possess cognitive capacities similar to those of a mentally sound adult human being. These incidents can be divided into two categories: Legal Competencies and Onerous Legal Personhood. Legal

⁷ Ibid 118.

⁸ Ibid 2.

⁹ Ibid 5.

competencies refer to the ability to utilise the other incidents of personhood without representation. Onerous legal personhood involves legal responsibilities in areas such as criminal law, tort law, and other forms of obligations.¹⁰

b. *Passive Incidents*

The concept of passive incidents can be divided into two categories: substantive incidents and remedial incidents.

Substantive incidents primarily pertain to non-procedural claim-rights and liabilities that can be held by an entity ('E'). If E is granted protection for their personal integrity, life, and liberty, then the world owes them a greater quantity of duties than it otherwise would. Additionally, if E possesses the ability to own property and receive special rights, they may acquire ownership-related claim-rights against the world, as well as special rights against specific parties. Finally, E may simultaneously be the property of party A and be endowed with various incidents of legal personhood. However, there exists a tension between these two attributes, as noted by Kurki. The present paper does not delve into addressing this tension.¹¹

The category of substantive passive incidents encompasses several elements, including: (i) fundamental protections, which relate to safeguarding an individual's life, liberty, and bodily integrity; (ii) the capacity to receive special rights; (iii) the capacity to own property; and (iv) being immune to ownership.¹²

Remedial passive incidents refer to the legal recourse available to an individual, referred to as 'X', in cases where their obligations and duties are not upheld. These incidents include: (i) legal standing, which pertains to X's ability to bring a legal claim; (ii) victimhood, which refers to X's status as a victim of a legal wrong; and (iii) the capacity to undertake legal harms, which relates to X's ability to seek legal remedies for any harm suffered.¹³

Foetal Bundle Theory offers significant flexibility, as it allows for unborn children to hold only select passive incidents, rather than all of them. Since prenatal life lacks the cognitive faculties necessary to receive Active Incidents, they may nevertheless possess claim-rights that arise from the passive incidents they have received. Moreover, legal personhood is not a prerequisite for unborn children to be entitled to these passive incidents. As a result, unborn children can be considered legal non-persons and still be afforded legal rights.¹⁴

¹⁰ Ibid 96.

¹¹ Ibid 95.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid 2.

(C) Natural Law Propositions

Natural law propositions are grounded in two fundamental goods: (a) the preservation of human life¹⁵ and (b) the promotion of good and avoidance of evil¹⁶ ('Goods'). Considering that:

- a. Unborn children are human beings from the moment of conception;¹⁷ and
- b. The Goods of natural law apply to all human beings,¹⁸

it follows that the treatment of unborn children ought to be consistent with these Goods. Similar to how human rights are safeguarded, or at least ought to be safeguarded, by the rule of law,¹⁹ these Goods must also be upheld. It is worth noting that natural law propositions are firmly rooted in international law that protects human rights,²⁰ such as the Right to life, liberty, and security of person ('Right').²¹

One way to protect this Right is to ensure that there are consequences for those who violate it, and to provide legal standing for victims of such violations. Similarly, to safeguard the Goods that apply to unborn children, claim-rights are granted to them. This is why Foetal Bundle Theory confers Passive Incidents (defined below) upon unborn children, to enforce these Goods and protect their claim-rights.

Foetal Bundle Theory's approach to personhood is not an 'all or nothing' proposition. As a result, this theory provides the best explanation for how fetuses have been and continue to be regarded as legal non-persons in general, yet can still acquire certain rights, such as legal standing as victims of homicide. This is a concept that is difficult to reconcile under the

¹⁵ Thomas Aquinas, *Summa Theologicae* Part II, I, Q. 94.

¹⁶ Ibid. See Raymond Belliotti, *Justifying Law: The Debate Over Foundations, Goals, and Methods* (Temple University Press 1994) 22.

¹⁷ Marjorie A England, *Life Before Birth* (2nd edn, Mosby-Wolfe 1996) 31; Keith L Moore, *Essentials of Human Embryology* (B.C. Decker Inc 1988) 2; Ida G Dox et al, *The Harper Collins Illustrated Medical Dictionary* (Harper Perennial 1993) 146; William Walters and Peter Singer (eds), *Test-Tube Babies* (Oxford University Press 1982) 160; Jan Langman, *Medical Embryology* (3rd edn, Williams and Wilkins 1975) 3; Douglas Considine (ed), *Van Nostrand's Scientific Encyclopedia* (5th edn, Van Nostrand Reinhold Company 1976) 943; T W Sadler, *Langman's Medical Embryology* (7th edn, Williams & Wilkins 1995) 3; Keith L Moore and T V N Persuad, *Before We Are Born: Essentials of Embryology and Birth Defects* (4th edn, W B Saunders Company 1993) 1; Maureen L Condic, 'When Does Human Life Begin? A Scientific Perspective' (2008) 1(1) Westchester Institute White Paper 1 - 32.

¹⁸ Joseph Boyle, *Natural Law Ethics in Theory and Practice* (Catholic University of America Press 2020) 26. See also; Germain Grisez, Joseph Boyle and John Finnis, 'Practical Principles, Moral Truth and Ultimate Ends' (1987) 32 *The American Journal of Jurisprudence* 99, 128.

¹⁹ *Universal Declaration of Human Rights*, UN Doc A/811 (1948), Preamble. See also; Isabella Bunn, *The Right to Development and International Economic Law: Legal and Moral Dimensions* (Bloomsbury Publishing 2012) 194.

²⁰ The following works provide this contention Carlos Romulo, 'On Natural Law and International Law' (1949) 35(8) *Virginia Law Review* 1052 – 1058; Mary Ellen O'Connell and Caleb Day, 'Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms' in Samantha Besson and Jean d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2018) 562 – 580 and Stephen Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12(2) *European Journal of International Law* 269 - 307.

²¹ *Universal Declaration of Human Rights*, UN Doc A/811 (1948), Article 3.

Traditional View, which holds that legal personhood is an all-or-nothing characteristic.

III. INCONSISTENCIES IN FRENCH LAW

A. Criminal Law

The *Cour de Cassation* has consistently ruled that no homicide charges can be brought against a person who causes the death of a foetus because the foetus is not legally considered a person. This ruling applies to both medical professionals and third parties, such as drunk drivers.²²

This Court has ruled in three cases that a foetus is not considered a 'juridical person,' which means that anyone who causes the death of a foetus cannot be charged with homicide.²³ Two of the cases involved medical malpractice, where the foetus died as a result of a physician's mistake. The third case involved the death of a foetus due to a motor vehicle accident.

*Vo*²⁴ involved a physician who mistakenly identified a pregnant patient and attempted to remove her intrauterine device (IUD) without proper examination, causing the rupture of the amniotic sac and the death of the foetus at around 20-21 weeks. The mistake occurred because two patients with the same surname were at the hospital, one pregnant and the other there to remove an IUD. The physician called out for Madame Vo and the pregnant patient responded.²⁵ Madame Vo decided to pursue a criminal prosecution instead of a medical malpractice case in France against the physician who caused the death of her unborn child. The physician was charged with unintentional homicide.²⁶ After a complicated procedural history, the case reached the *Cour de Cassation*.²⁷

²² Linda Fentiman, 'The "Fetal Protection" Wars: Why America Has Made the Wrong Choice in Addressing Maternal Substance Abuse - A Comparative Legal Analysis' (2008) Pace Law Faculty Publications 479, 525.

²³ Renee Lettow Lerner, 'The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'Assises' (2001) University of Illinois Law Review 791, 793.

²⁴ In the French legal system, criminal cases are usually not identified by the names of the defendants but rather by their decision numbers and dates.

²⁵ *Vo* (n 1) [11]-[12], [14].

²⁶ *Ibid* [17]-[18]. The term used to refer to the offense of "involuntary manslaughter" in the English version of the European Court of Human Rights decision in *Vo* is Criminal Code Article 319. This Article outlines the legal provisions under which the defendant was prosecuted. Article 319 provided that: 'Anyone who through his or her inadvertence, negligent act, inattention, negligent omission or breach of regulation unintentionally commits homicide or unintentionally causes death, shall be liable to imprisonment of between three months and two years and a fine of between 1,000 and 30,000 francs'. In a recent reorganisation of the Penal Code, the offense of "involuntary manslaughter" is now prosecuted under Article 221-6. This Article sets out the legal provisions governing the prosecution of this offense. Specifically, Article 221-6 defines involuntary manslaughter as causing death without intent to kill, but with the presence of a gross and obvious negligence or violation of a specific obligation of safety or prudence. The Article also outlines the penalties that may be imposed upon conviction, which may include imprisonment, fines, and other forms of punishment. This reorganisation of the Penal Code is intended to provide greater clarity and precision in the prosecution of criminal offenses, including those related to involuntary manslaughter.

²⁷ The physician doctor was acquitted by the Lyons Criminal Court on the basis that the foetus was not considered a legal person. However, the case was subsequently appealed to a higher court. *Vo* at 19-20. The Lyons Court of Appeal reversed the decision of the lower court, and found the doctor guilty of unintentional homicide. As a result, the doctor was fined heavily and given a six-month prison sentence, which was suspended. *Ibid* [21]. The physician

That court noted that due to scientific uncertainty regarding the stages of foetal development, it cannot uphold a homicide conviction for the death of a foetus. The court emphasised that penal laws should be strictly construed, and the uncertain and changing status of the foetus precludes the application of homicide charges.²⁸

Madame Vo appealed against the decision of the *Cour de Cassation* to the European Court of Human Rights, claiming that French law's failure to recognise a foetus as a person violated Article II of the *European Convention on Human Rights* ('ECHR'). However, the European Court of Human Rights upheld the decision of the *Cour de Cassation*. Article II provides that 'Everyone's right to life shall be protected by law'.²⁹

Madame Vo's appeal to the European Court of Human Rights was rejected. The court ruled that since France had provided appropriate administrative remedies for the malpractice, there was no need for a criminal sanction for the doctor's unintentional killing of the foetus.³⁰

The court acknowledged the diversity of viewpoints among European member states regarding the legitimacy of abortion, when life begins, and whether a foetus is a 'person'. In light of this, the court held that it would be inappropriate to impose a single moral code, and therefore left it up to individual member states to determine their own laws regarding the protection of foetuses.³¹

After *Vo*, the *Cour de Cassation* issued two opinions which reaffirmed their stance that birth is necessary for a homicide prosecution. The first case, known as the *Potonet* case, involved medical malpractice where a midwife and physician were charged with unintentional homicide for failing to act promptly when a pregnant woman alerted them to her foetus' irregular heartbeat during a difficult labour, ultimately resulting in a stillbirth. The *Cour de Cassation* explicitly stated that involuntary manslaughter charges were not possible because a foetus only becomes a person after birth.³²

The *Cour de Cassation* reiterated its position that birth is a necessary condition for a homicide prosecution in a case where a foetus died due to harm inflicted on a pregnant woman in a motor vehicle accident. In the case of *Grosmanin*, a driver was charged for causing harm to a pregnant woman and resulting in the death of her six-month-old foetus in a motor vehicle accident. While

appealed.

²⁸ Ibid [22].

²⁹ Ibid [46].

³⁰ Ibid [91]-[95].

³¹ Ibid [82], [87]-[95].

³² *Cour de Cassation, Chambre Criminelle, 2002-06-25, 00-81359* (Bulletin Criminel 2002) 531. See also; Fentiman (n 21) 525.

the Court convicted the driver for involuntary harm to the woman, it held that the driver Could not be convicted of involuntary manslaughter of the foetus. The Court held that the principle of ‘legality of offenses and punishments which requires a strict interpretation of penal law precludes the extension of the law on unintentional homicide to the child to be born, whose legal status is enshrined in particular texts dealing with embryos and foetuses’.³³ In a later case that took place in a lower court, the *Grosmanjin* decision was applied. The case concerned an automobile accident resulting in the death of both the pregnant woman and her foetus.³⁴

In conclusion, prenatal life is not considered a person under French law for the purposes of granting them victimhood status in a homicide. However, as the following section will note, prenatal life is considered a person, or at least, treated as such, in two circumstances:

- (i) Protecting the life of an unborn child by revoking a patient’s right to refuse unwanted medical treatment; and
- (ii) For the purposes of receiving inheritance and gifts.

B. Civil Law

a. Overriding the Patients’ Right to Refuse Unwanted Medical Treatment

French law and the medical community generally protect pregnant women’s right to control their bodies and healthcare, although occasionally these rights are overridden. An example of this was seen in 2002, when an administrative tribunal in Lille upheld a patient’s right to make decisions about her own healthcare, even though she was pregnant. The tribunal issued an injunction to prevent a hospital from performing a blood transfusion on a pregnant Jehovah’s Witness, which the patient objected to.³⁵

In contrast, in 2005, the National Consultative Ethics Committee for Health and Life Sciences (CCNE) issued an opinion which asserted that physicians had the right to overrule a pregnant woman’s refusal of treatment in exceptional situations, such as C-sections and blood transfusions, which are common in the case of women giving birth via C-section. The opinion acknowledged the complexity of such cases, taking into account the woman’s religious beliefs, cultural background, and the potential challenges of having a subsequent C-section in her home country if she had one in France. Nonetheless, the CCNE concluded that it was justified to disregard the woman’s wishes in order to save the life of the unborn child. It is worth noting

³³ *Grosmanjin* case: Cour de Cassation, *Assemblée plénière*, 2001-06-29, 99-85973 (Bulletin 2001) 19.

³⁴ *Elias* case, C.A. Metz, Chambre des Appels Correctionnels, 17 février 2005 (affaire n° A 04/00700 G. Kévin, CA n° 05/222).

³⁵ Tribunal Administratif de Lille, réf., 25 août 2002, no 02-3138.

that this opinion contradicts the general legal and medical practice of protecting pregnant women's autonomy and decision-making power over their own bodies and healthcare.³⁶

The Opinion emphasised that the legal and ethical complexities presented by patients' refusal of treatment could not be solved simply by applying the French legal obligation to 'assist a person in danger' in a reflexive manner. The issue required a more nuanced and individualised approach that took into account the specific circumstances and needs of each patient, as well as their right to make informed decisions about their own medical care.³⁷

b. *Inheritance and Gifts*

French law views a foetus as a person for the purposes of inheritance and gifts, providing it with protection under civil law. This view is supported by cases such as *Vo* where the Court noted the potential of a foetus to become a person and its protection under civil law, such as inheritance and gifts in France, is based on human dignity, but it does not grant the foetus the right to life under Article II of the *ECHR*.³⁸ Furthermore, Article 725 of the *Civil Code* provides that 'in order to inherit, one must exist at the time of the opening of the succession or, having been conceived, be born viable'.

In French civil law, unborn children are recognised as legal persons, as demonstrated by their protection under inheritance and gift laws. While there is a general emphasis on protecting pregnant women's autonomy and decision-making power over their healthcare, in exceptional situations, such as when the life of the unborn child is at risk, physicians may overrule a woman's refusal of treatment. The complexity of such cases requires a nuanced and individualised approach that considers the specific circumstances and needs of each patient.

Overall, the recognition of unborn children as legal persons in French law is based on the principle of human dignity, although it does not grant them the right to life under Article II of the *ECHR*.

In conclusion, French law presents inconsistency in how it treats the personhood status of a foetus in criminal and civil law. According to the *Cour de Cassation*, a foetus is not considered a 'juridical person' in criminal law, and no homicide charges can be brought against someone who causes its death. However, prenatal life is considered a person in civil law for the purposes of revoking a patient's right to refuse unwanted medical treatment and for inheritance and gifts.

³⁶ National Consultative Ethics Committee for Health and Life Sciences (CCNE), Opinion No, 87, Treatment Refusal and Personal Autonomy 6-7.

³⁷ Penal Code Article 63 states that "anybody who is able, without risk to himself or to a third party, to avoid either a crime or an offense against the bodily integrity of a person and who abstains from doing it will be punished to the same sentence as for the crime of a person who voluntarily abstains from securing someone."

³⁸ *Vo* (n 1) [84].

The conflicting approaches to the personhood status of a foetus in French law highlights the need for a revision of the current legal framework. Therefore, it is essential to re-examine and alter the way personhood is defined in French law to provide greater clarity and consistency in the legal treatment of foetuses.

The following section will use Foetal Bundle Theory to resolve this inconsistency present in French jurisprudential thought.

IV. RESOLVING THE INCONSISTENCY: AN ADAPTATION OF FOETAL BUNDLE THEORY

It has thus far been established that in French law, the following propositions are true:

C¹. The unborn child is not a legal person for the purposes of receiving victimhood in a homicide;

C². The unborn child is a legal person for the purposes of inheritance and gifts; and

C³. The unborn child is, or at least, treated as, a legal person in circumstances where the mother's refusal of medical treatment is disregarded to save the life of the unborn child.

As mentioned above, the Traditional View takes an 'all or nothing' approach to personhood. That is, if X has rights, they are therefore a person. However, as highlighted above, circumstances exist where whereby the foetus is not treated as a person in C¹, but is treated as such in C² and C³.

Given that French law deems an entity to be a person if it has the *l'aptitude à être titulaire de droits et d'obligations*, it is difficult to reconcile this view with the concept that unborn children are seen as legal non-persons in general but could nevertheless acquire rights to inheritance, gifts and have their life protected, in some circumstances, over the autonomous decision of the mother to refuse unwanted medical treatment. Because, on the Traditional View, prenatal life would be a legal person if it held any right at all. For instance, the *Cour de Cassation* in *Vo* ruled that a foetus could possess certain rights in other areas of law. Hence, advocates of the Traditional View are obliged to assert that foetuses are inherently persons, and therefore cannot contend that they are non-persons with no rights whatsoever. It is not feasible for the Traditional View to argue that prenatal life can be deemed a person in one circumstance, but not in another.

A consistent application of the Traditional View would provide legal personhood to the unborn child in C¹, C² and C³. Therefore, the unborn child would be a victim of homicide. This dilemma was recognised in *Vo* within the context of abortion. The Government argued that Article II of the *ECHR* does not protect the foetus' right to life as a person because the term 'everyone'

applies only postnatally. The right to life refers only to persons who have already been born alive, and it would not be consistent or justified to detach that right from the person.³⁹

If the foetus were considered a 'person' and had the right to life under Article II of the *ECHR*, it would create a situation where the mother's life and the foetus' life were considered of equal value. This would be a significant departure from the current legal frameworks in many states where abortion is allowed in certain circumstances, and it would be a step backwards historically and socially. Therefore, the government argued that Article II could not be construed as applying to the foetus and that the use of the term 'everyone' in the Convention only applies postnatally.⁴⁰

Similar reasoning was given in the 1975 United States case of *Roe v Wade*.⁴¹ The Court highlighted that the foetus was not considered a 'person' within the language and meaning of the *Fourteenth Amendment*,⁴² for if it did, it would trigger *Roe*'s 'collapse' clause:

If this suggestion of personhood [that prenatal life] is established, the...case [for legalising aborticide], of course, collapses, for the f[o]etus' right to life is then guaranteed specifically by the [*Fourteenth*] *Amendment*.⁴³

The Court therefore concluded, for this reason, amongst others, the unborn child is not considered a 'person' as provided by the *Fourteenth Amendment*.

The concept of foetal personhood is complex, particularly when considering the apparent discrepancy between legal non-personhood and the provision of victimhood. The traditional understanding of legal personhood, as the possession of rights and duties, fails to fully explain this phenomenon. Thus, a bundle theory approach that views personhood as a collection of rights, rather than an all-or-nothing designation, provides a more coherent understanding. Therefore, it is reasonable to consider a theory of legal personhood that acknowledges the possibility of legal non-persons, such as a foetus, holding legal rights.⁴⁴

Foetal Bundle Theory encompasses a number of aspects, one of which is its relation to natural law. The application of natural law to this theory can help to support claims regarding the identification of foetal victimhood. Specifically, this identification is grounded in the nature of the foetus itself. Although Foetal Bundle Theory can be applied to the concept of ownership and how the argument for bodily autonomy in support of a woman's right to terminate her

³⁹ Ibid [51].

⁴⁰ Ibid [52].

⁴¹ 410 U.S. 113 (1973).

⁴² As quoted by Justice Blackmun in *ibid* [156].

⁴³ Ibid (emphasis added).

⁴⁴ Kurki (n 5) 2.

pregnancy is incongruent with this framework, such an analysis is beyond the scope of this paper.

Nonetheless, it is noteworthy that this theory exhibits internal consistency in its treatment of the foetus as a legal non-person who can still be considered a victim of homicide while simultaneously not being viewed as a victim in the context of abortion. Despite the appearance of cognitive dissonance in this position, it can be seen as a coherent application of the theory.

If this Theory is applied to French law, the law may hold that foetuses are deemed as legal non-persons and yet, hold certain claim rights. For instance, while French law does not deem a foetus to be a person in cases of homicide, the application of this Theory needn't have to endow personhood to the foetus to hold claim-rights 'against the world' that protect them from physical harm. Therefore, the application of this Theory is internally consistent in providing the foetus with victimhood status in C¹, while also providing them with rights in C² and C³.

With regard to victimhood, the following passive incidents are afforded to unborn children:

1. Substantive Incidents: Protection of life, bodily integrity, and liberty; and
2. Remedial Incidents: Legal standing, the capacity to undertake legal harms, and victimhood.

(‘Passive Incidents’)

Foetal Bundle Theory provides several advantages as it separates the concept of right-holding from legal personhood. This allows jurists to openly explore the topic of prenatal rights without reservation, as they can acknowledge the existence of foetal rights without necessarily implying the legal personhood of the unborn. As a result, debates on foetal personhood can shift the focus from the question of whether unborn children can or should hold rights at all, to the question of whether foetuses should be granted specific legal entitlements — such as legal standing as a victim of homicide.

Granting an entity with passive legal personhood is typically rooted in acknowledging its inherent worth. Therefore, the extension of passive legal personhood to foetuses is more likely to be based on safeguarding prenatal life due to its inherent value rather than any vested interest in them, as argued by Crist and Berg.⁴⁵ Thus, there is a slight link between perceived ultimate value and purely passive legal personhood. However, there is a limited correlation between the recognition of inherent value and the bestowing of purely passive legal personhood. While

⁴⁵ Jessica Berg, ‘Of Elephants and Embryos: A Proposed Framework for Legal Personhood’ (2007) 59(2) *Hastings Law Journal* 369, 400; Juliana Vines Crist, ‘Myth of Fetal Personhood: Reconciling Roe and Fetal Homicide Laws, The’ (2010) 60(3) *Case Western Reserve Law Review* 851, 861.

acknowledging inherent value may be necessary to extend passive legal personhood, it does not necessarily follow that recognition of inherent value requires such personhood. In other words, it is possible to hold the view that prenatal life has inherent value at all stages of gestation, but still argue against granting them any form of legal personhood.

Foetal Bundle Theory can facilitate the organisation of political and ethical discussions surrounding foetal personhood. This theory is useful in legal reasoning in two primary ways.

First, it enables unborn children to possess legal rights without necessitating that they be considered legal persons.

Secondly, Foetal Bundle Theory can structure legal reasoning in numerous ways. For instance, Kurki provides a prototypical case in which legal personhood could be treated as a reason: 'X has been deemed a legal person with regard to incident A, and the question arises whether X should also be treated as a legal person with regard to incident B'.⁴⁶ For example, Bundle Theory suggests that if criminal liability can arise if bodily harm is done to a foetus, it could be argued that prenatal life should also have the right to receive and recover compensation from any person who has harmed them. This is because postnatal children have such a right, and by extending the criminal-law protection to prenatal life, it could be seen as an indication that prenatal children should be treated equally to postnatal children. According to the clustered nature of the legal personhood concept as derived from Bundle Theory, one can be a legal person for some functions and not for others. Therefore, it is possible to treat prenatal life as potential victims but not as potential tort-law plaintiffs, which is not theoretically dubious.

- *Application of Natural Law*

Foetal Bundle Theory provides a framework for understanding how an unborn child can be viewed as either a person or non-person while still holding passive incidents. However, natural law can aid in explaining why an unborn child is bestowed with these passive incidents. Natural law suggests that the unborn child has inherent value and dignity, which is the basis for their right to life, bodily integrity, and protection from harm. Therefore, natural law guides how foetal victimhood should be provided, grounded in the nature of the foetus and not determined by the mother's consent.

The Goods resulting from the inherent value of prenatal life lead to an intuitive desire to safeguard them, much like how the rule of law protects human rights.⁴⁷ Foetal Bundle Theory

⁴⁶ Kurki (n 5) 197.

⁴⁷ *Universal Declaration of Human Rights* Preamble. See also; Wiktor Osiatyński, *Human Rights and Their Limits* (Cambridge University Press 2009) 28.

proposes that one way to protect these Goods is by providing the foetus with Passive Incidents. This means that if a third party unjustifiably causes harm or death to an unborn child, the punishment for these actions should be the same as if the injury or death had occurred to an *ex utero* human being. The reason for this is that the foetus holds the same Passive Incidents as an *ex utero* human being, due to their inherent value as human beings.

Since Foetal Bundle Theory is guided by natural law precepts, the same Goods that guide the treatment of *ex utero* human beings are provided to prenatal life. It follows that these Passive Incidents are provided to the foetus as a means of implementing these Goods. However, since foetal victimhood is based on the nature of the foetus, it is important to note that victimhood should not be based on the will of the mother. A summary of this argument is as follows:

1. Foetal Bundle Theory provides passive incidents to unborn children as a means of protecting their inherent value.
 2. Natural law guides the bestowal of passive incidents to unborn children based on their inherent nature.
- ∴ Therefore, the provision of passive incidents to unborn children is grounded in natural law and intended to protect their inherent value.

In symbolic logic this reads:

1. $FB \rightarrow PI$
 2. $NL \rightarrow PI$
- ∴ $NL \wedge FB \rightarrow PI$

Let FB = Foetal Bundle Theory, NL = Natural Law, PI = Provision of Passive Incidents to unborn children

The concept of foetal personhood is complex and involves a nuanced understanding of legal personhood. French law recognises the unborn child as a legal person for inheritance and gift purposes but not as a victim of homicide. The traditional understanding of legal personhood, as the possession of rights and duties, fails to fully explain this phenomenon. Therefore, a bundle theory approach that views personhood as a collection of rights provides a more coherent understanding. The application of natural law to this theory can help to support claims regarding the identification of foetal victimhood. Foetal Bundle Theory exhibits internal consistency in its treatment of the foetus as a legal non-person who can still be considered a victim of homicide while simultaneously not being viewed as a victim in the context of abortion. Thus, this theory provides a more coherent and nuanced approach to the concept of foetal personhood.

V. CONCLUSION

In conclusion, the personhood status of a foetus under French law presents inconsistencies between criminal and civil law. According to the *Cour de Cassation*, a foetus is not considered a 'juridical person' in criminal law, and no homicide charges can be brought against someone who causes its death. However, prenatal life is considered a person in civil law for the purposes of revoking a patient's right to refuse unwanted medical treatment and for inheritance and gifts. The conflicting approaches to the personhood status of a foetus in French law highlight the need for a revision of the current legal framework to provide greater clarity and consistency. The Traditional View of legal personhood as an all-or-nothing designation fails to fully explain this phenomenon. Therefore, a bundle theory approach that views personhood as a collection of rights, rather than an all-or-nothing designation, provides a more coherent understanding. It is reasonable to consider a theory of legal personhood that acknowledges the possibility of partial or contingent personhood status for fetuses, which may vary depending on the context and circumstance. This approach can account for the fact that unborn children can hold certain legal rights while still being classified as legal non-persons

In light of the above, it is recommended that French law adopts Foetal Bundle Theory to resolve the inconsistent treatment of unborn children. By doing so, the law can provide greater clarity and consistency concerning the legal status of unborn children in French law.

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