

Confinement of Pregnant Women for Protection of the Unborn

Chris O. Abakare

Department of Philosophy, Nnamdi Azikiwe University, Ifite Road, 420110, Awka, Anambra State, Nigeria

Email: chrisabakare@gmail.com

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ABSTRACT

The conflict between the rights of women and unborn take an ugly turn when one speaks of confinement of women for protection of their foetuses. The very thought seems perverse because we delve into the negative aspect of the rights discourse - rights are in modern times used as weapon to correct moral depravity. The relationship between the mother and her foetus, particularly the aspect of maternal care towards the unborn is more a matter of course than rights'. Thus, in case of pregnant women-foetal relationship, what essentially was a part of maternal responsibility and innate to motherhood gets reduced to rights and becomes a matter of legal duty rather than a moral responsibility. From the moral-philosophical perspective, it may be viewed as a debasement of the relationship from both sides - the mother refuses to alter her lifestyle of addiction for the sake of the unborn upon which the latter is up in arms against the former with the charge of abuse. This work maintains that the rights discourse is ill equipped to understand the problem, as law cannot be perceived as the panacea of all ills.

Keywords: Confinement; Pregnant women; foetal relationship.

INTRODUCTION

In the USA and UK, since a long time there has been a demand and inclination amongst law enforcement agencies, Legislature, Judiciary and medical men to punish women for their actions during pregnancy which may affect the foetus they're carrying (Romero-Gonzalez et al., 2020). One of the hopes behind any such demand or effort is to gain legal recognition for foetal rights. As an obvious outcome, this recognition would require PW to restrict their lifestyles (couched in a number of rights) in favour of the foetus. In the western world, especially the USA, and UK to some extent, the medical personnel have already started employing tough measures against PW if they tend to jeopardise the health of the foetus. They seek court orders to force pregnant women to undergo caesarean sections or other medical procedures. Some advocates of foetal rights have argued that children should be able to sue their mothers for pre-

natal injuries caused by substance abuse. In fact, in cases where infants have been tested positive and died soon after birth, women have been charged with homicide or foeticide (Behera et al., 2019). Insofar as conviction is concerned, the Supreme Court of South Carolina, USA upheld the prosecution of a PW for ingesting crack cocaine during the third trimester of her pregnancy (Smith et al., 2020). The court held that a viable foetus was a child within the meaning of the state's child endangerment statute. The court defined a viable foetus as one that was capable of independent life apart from the mother.

Gone are the days when womb was thought to be a safe haven for foetal development. Since pregnancy involves considerable hardships for women in terms of lifestyle alteration, medication etc, some of them choose not to alter the same. Some others, addicted to alcohol and/or drugs or lifestyle of thrill and adventure, inadvertently end up threatening the life of the unborn. The proliferers and the advocates of legal personality for the foetus see it as an infringement of the latter's right by the would-be mother and brand objectionable behaviour as 'foetal abuse' by the mother. This is projected as not only moral debasement on part of the mother but also prosecutable behaviour in Criminal or Tort law when it results in damage or death to the unborn. Infact, some researchers have concluded that the standard of care expected to be displayed, and rightly so, by a PW is very high and hence life-style decisions that ignore the impact of behaviour on the foetus are ethically and perhaps even criminally suspect (Priaux 2015). 'Foetal abuse' cases involve pre-birth injury as it affects a live newborn when the woman chooses to carry the pregnancy to term despite knowledge of a potentially preventable defect earlier in the pregnancy [triggered mostly by substance abuse on part of the PW]. This literature has given rise to the term 'maternal-foetal conflict,' the notion that there may exist a conflict of interest between a woman and the foetus she is carrying. Concept of Maternal Foetal Conflict As per Rosamund Scott,

[M]aternal foetal conflict concerns two main senses in which a PW may cause pre-natal harm. First, she may refuse medical treatment, caesarean or other surgery...Second, aspect of her daily life may be detrimental to the well-being of her unborn child such as smoking, consumption of alcohol or drug taking or for that matter failure to take care in crossing a road (Scott 2002, p. 14).

It has been studied that toxic environmental substances and even small amounts of alcohol, caffeine, and marijuana ingested during pregnancy particularly in the early stages seem to have deleterious effects on the developing embryo. It is a known fact that cocaine use during pregnancy increases the risk of crib death by a factor of at least ten. It may also enhance the foetus' risk of stroke both in the womb and shortly after birth. Alcohol consumption by pregnant women may cause a variety of birth defects, including mental deficiency, growth deficiency, facial malformation, and nervous system dysfunction (Gal & Sharpless 1984). Pathologists have asserted that maternal use of cocaine had caused placental abruption (premature placental separation from the wall of the uterus), resulting in oxygen deprivation, brain swelling, and death (Logli 1990). Though most PW would like to see the pregnancy through ensuring the best health for their unborn, there is a small percentage for whom circumstances are not so conducive. As Joseph Losco and Mark Shublak put,

[M]ost women willingly take precautions against harming the foetus; therefore, most of the literature on maternal-foetal conflict concentrates on the very small number of cases in which the women have apparently ignored or chosen not to heed warnings from medical personnel regarding behavioural choices that placed the health of the foetus in jeopardy (Losco & Shublak 1994).

CONFINEMENT OF WOMEN FOR PROTECTION OF FOETUSES

The conflict between the rights of women and unborn take an ugly turn when one speaks of confinement of women for protection of their foetuses. The very thought seems perverse because we delve into the negative aspect of the rights discourse - rights are in modern times used as weapon to correct moral depravity. The relationship between the mother and her foetus, particularly the aspect of maternal care towards the unborn is more a matter of course than 'rights'. However, there have been cases, particularly in the US and the UK where the so called 'foetal rights' (the expression has been popularised to create the illusion as if foetus is a legal person with rights; though it is far from such recognition) have been used against the PW when such maternal care does not result as a default of the pregnant condition. So much so that in the US, the Judges in certain cases have resorted to forcible custody of the woman and hospital confinement to compel pregnant women to access pre-natal care or to agree to their doctors directions regarding medical treatment for the benefit of foetal health.

In the UK too, the situation is no different. The 1987 case of Angela Carder, a 27-year-old woman who had cancer that had gone into remission but recurred during her pregnancy, brought these issues to a head (Mishkin & Povar 1993). Fully competent, Carder made clear that she wanted everything possible done to save her life. However, during the 25th week of gestation, it became clear that Carder was dying. George Washington University Medical Centre, where she was a patient, tried to insist upon an early caesarean section delivery in order to save her foetus. She refused the intervention, which was nearly certain to kill her, with the support of her family, husband, and doctors, but the hospital obtained a court order and forced the delivery. Both Carder and her extremely premature baby survived the operation only very briefly. In 1990, the D.C. Court of Appeals posthumously vacated the court-ordered caesarean section, holding that Carder had the right to make health care decisions for herself and her foetus, and that only in the most exceptional circumstances should a PW's right to refuse interventions be called into question (Thornton & Paltrow 1991).

WAYS OF REGULATING PWS CONDUCT

Regulation of PW's conduct during pregnancy takes a number of forms viz-direct intervention, either through forced medical treatment or preventive detention; criminal prosecution; civil penalties/tort liability.

- 1. Direct Intervention:** In such cases the court, loosely speaking, assumes locus standi and acting on behalf of the foetus, orders bodily intervention because those seeking intervention (mostly physicians) believe that some act or omission on the part of the PW places the foetus at risk. Starting from the earliest version of court-ordered blood transfusions to forced caesarean sections courts certainly have come a long way at intruding into the private lives and decisions of PW.
- 2. Postnatal Sanctions:** In addition to direct physical intervention, a PWs conduct may be sought to be regulated indirectly through postnatal sanctions as criminal prosecution and tort liability including the removal of the child from the mother's custody based on a finding of neglect.

There have been several cases where incarcerated women were transported to the hospital in shackles and forced to labour and give birth while chained to a hospital bed (Sichel 2007). Though the concept is totally outrageous in the Indian context, it is nonetheless important to take note of because considering the importance of rights that the Indian society is progressively ascribing to; the day is not far when Indian women would also join the league of their European and American sisters and start viewing the foetus as an adversary within their bodies. This is where the seeds of conflict are sown. By characterising the broad problem of health care during pregnancy of women addicts as a narrow conflict between maternal and foetal rights, the current debate has obscured the range of conditions contributing to the problem, such as the lack of available pre-natal care and treatment programs for pregnant addicts (Higgins 1990). Also, the matter attains significance in the Indian context because as an advocate of legal personhood for the foetus, I see no contradiction in maintaining at the same time that foetal personality and set of rights need not necessarily be viewed in conflict with the rights of the PW. As in case of PW prone to substance abuse, treatment, therapy and persuasion may be a way to ensure that rights of both the entities remain sacrosanct. Punishment and punitive action, though advisable in certain rare cases, need not become the thumb rule.

DANGERS OF COERCION AND CONFINEMENT

Such incarceration may lead women to forego pregnancy altogether or to abort the unborn, to avoid confinement. Various activists, thinkers and scholars have presented the ill effects of foetal abuse legislations in different ways. For instance, it may discourage maternal/foetal bonding says a HLR note. This is because the unborn and the PW are placed in an adversarial position. Criminalising foetal abuse also emphasises an instrumentalist view of pregnancy that sees women as 'foetal containers' rather than sentient beings. In the paras that come, it would be discussed how foetal abuse legislations deprive women of control over their own bodies and pregnancies. Laden in the language of rights, which it need not be in practice, foetal abuse legislation forces women to see their foetuses as things that curtail their legal rights.

LEGISLATIVE INTERVENTION

In an attempt to tackle drug abuse by PW, countries like the USA have responded by increasing the legal regulation of women's conduct during pregnancy. This is achieved through arrest and prosecution of women under their general child abuse or narcotics distribution statutes. Some states in the US have laws that specifically regulate behaviour of PW to a certain extent (Silverman et al., 2001). These do not find favour with many segments of the society:

[T]hese laws are hostile to women. They are designed to punish them and thrust them into perverse conflicts with their own bodies, [and] are light years away from the best solutions. Alcoholism and drug addiction are illnesses. But the foetal protection movement has not been accompanied by any serious effort to provide women with the alcohol and drug treatment that they need or even, for that matter, adequate pre-natal care. That is not part of the agenda (Herbert, 1998, p. 12).

Just as the UK case of Late Angela Carder on forced C-section, one of the earliest attempts at criminal prosecution of a PW for her (mis)conduct during pregnancy involved a charge against Pamela Rae Stewart of California, USA in 1986 for wilfully omitting to furnish medical services to her foetus (Thompson 1988). The PW in question had displayed abusive

conduct towards the foetus by disregarding her physician's advice to discontinue amphetamine use during her pregnancy, to abstain from sexual intercourse because her placenta had detached, and to seek immediate medical attention if she began to haemorrhage. The child suffered brain damage and died less than two months after birth. Though the charges against the woman were dismissed for want of a proper legislation intending to criminalise women's abusive conduct towards the foetus during pregnancy, the case set the stage for an increased demand across the USA to bring charges against PW for alleged foetal abuse through ingestion of harmful substances.

FEMINIST ANGLE TO THE PROBLEM

The society as well as the law, or rather consequently the law, views PW who use or abuse drugs as evil because they tend to distort a foundational social belief and picture of a self-sacrificing good mother. It may be argued that the whole idea of detention, confinement etc and incarceration for the sake of foetal health is patriarchal in nature because it propagates standardization of motherhood. It promotes the utopic notion of a perfect womb as only those who meet the state-prescribed and enforced standard have the privilege of going ahead with the pregnancy without state interference. Viewed thus, such coercive measures in the name of promoting foetal health violate the PW's right to privacy and bodily integrity. Detention for the benefit of foetal health reduces pregnant women from citizens to 'foetal containers' (Gies 2000). These restrictions on women's physical liberty are Talibanistic solutions to the problem of maternal drug and alcohol use or other maternal behaviours that are considered harmful for the foetus. In a free democratic society, PW definitely deserve less coercive means of ensuring foetal and personal health/life. It is suggested that instead of wasting ones energies on punitive tackling of motherhood, the countries would be in a better position to overcome the difficulty by focusing on basic health care and drug treatment, therapy and rehabilitation of pregnant women addicts.

Less Restrictive Alternatives: Despite the fact that less restrictive alternatives to detention exist, many States invoke criminal law to address the difficulties that result from maternal drug and alcohol use. While the importance of such measures in proper situations cannot be undermined, it should be accepted that inculcating fear may not be the best way to engender maternal respect for the unborn. Hence the importance of quest for alternatives. The alternatives are however not highlighted because they require profound infrastructural changes and also a change of attitude towards PW addicts. They should be viewed as addicts with the special condition of pregnancy and not as PW who chose to be addicts later, thus deserving public censure. The National Association for Perinatal Addiction Research and Education, an organisation based in Chicago, USA that works to promote health and well-being of families affected by substance abuse, points out: 'These women are addicts who become pregnant, not pregnant women who decide to use drugs ...' (Garcia & Batey 1991, p. 46). Their substance abuse is best addressed through treatment, not punishment. The alternatives may include state-provided drug and alcohol rehabilitation for those who are interested, state-supported pre-natal care, and increased state-supported nutrition assistance programs. These are alternatives that not only do not create negative conceptions of women; they serve the dual purpose of preserving maternal privacy rights and at the same time are conducive to recognising the unborn as a legal person.

In the rarest cases, even if restriction of physical liberty of pregnant women is well-meaning, it is unwise because it deters the pregnant women from receiving pre-natal care. Perhaps the most important suggestions would be to ensure a wider availability of quality pre-natal care at a nominal price or free of cost, without the threat of confinement. As Lisa Finn suggests,

[M]ore drug and alcohol treatment facilities that specifically treat pregnant women should be established. The fact that vulnerable women are most frequently the ones that find themselves in an adversarial relationship with their caregivers suggests that we ought to look for social factors that create miscommunication and conflict rather than simply casting such women as bad mothers whose foetuses must be protected from their selfish decisions (Finn 1998, p. 133).

The crux of the matter in the context of foetal rights is that without proper attention paid to the needs of pregnant women, the argued rights of the unborn would remain at loggerheads with that of the PWs, whenever cases of foetal disability/death resulting from substance abuse or treatment refusal by PW come to the fore. Claims of wrongful death/life, or more properly dissatisfied life³⁶⁷ may also see an upward trend.

Higher Understanding of the Problem by PW and their Advocates: While searching for an alternative is wise and desirable at the same time it has to be accepted by women and activists across the globe that given the location of the foetus inside the womb, ensuring well-being of the foetus would inevitably involve some level of sacrifice by the PW and may also require some degree of interference with her bodily integrity and self-determination. Once it has been decided by a competent woman to carry the foetus to term, it is unfair to display obstinacy and jeopardise that life. The so called freedom of choice in this regard should have an expiry date (Chavkin, 1990). In the Hohfeldian language of rights, a foetus potentially has a moral claim against its mother for its protection, and its welfare is the legitimate concern of the State (Pedain 2003). However, simply stating thus would not solve the problem, as explained in the succeeding paras. Rights

DISCOURSE WHETHER ILL EQUIPPED TO UNDERSTAND OR TACKLE THE PROBLEM

The whole problem with the rights discourse is that it creates a hope of possible legal solutions as if law is the panacea of all ills. Thus, in case of PW-foetal relationship, what essentially was a part of maternal responsibility and innate to motherhood gets reduced to rights and becomes a matter of legal duty rather than a moral responsibility. From the moral-philosophical perspective, it may be viewed as a debasement of the relationship from both sides- the mother refuses to alter her lifestyle of addiction for the sake of the unborn upon which the latter is up in arms against the former with the charge of abuse. The best way to work out this problem of this conflict is to keep maternal care outside the subject matter of the rights discourse. It is when one characterises the relationship in terms of conflicting rights that the analysis gets distorted and becomes narrow. It obscures the truth of foetal dependence and importance of maternal responsibility towards it.

It is this useless and avoidable conflict that has prevented the development of any effective policy for protection and rehabilitation of PW addicts. At the same time, the much required recognition of foetus as a person also has not been achieved. The truth is that PW unborn relationship is not a matter of conflict but co-existence and interdependence. 'By characterising the issue of foetal endangerment as a choice between women's autonomy and

foetal health, the rights framework has led to policies that effectively protect neither' (Pedain 2003, p. 53). In cases of foetal abuse, instead of treating the matter as pertaining to law (where the foetus brandishes its weapon of 'rights' displaying to the mother that she 'must' abide by its prescription and stop the drug/alcohol intake or else face the wrath of the State in the form of coercive power to punish the breach of duty committed by the mother), the issue should be read as a matter of moral understanding characterised by a display of responsibility on part of the PW rather than as a display of right of self-determination, and lifestyle choice.

Finally, the law should persuade assist and educate, not penalise, the PW towards the need of foetal welfare and drawbacks of ingesting harmful substances. Not only does the characterization of maternal substance abuse as criminal projects the relationship PW-unborn relationship as essentially conflictual; since the woman 'doles' drugs to the foetus, the foetus becomes the victim of the mother's crime, and any image of the woman as victim, as diseased, disappears (Edozien & O'Brien 2017). It is worthwhile to note that both the World Health Organization and the American Psychiatric Association classify substance abuse as a disease (Lehman 2000). The American Medical Association explains that 'addiction is not simply the product of a failure of individual willpower. It is caused by complex hereditary, environmental, and social factors' (Chavkin 1991, p. 1556). Substance abuse is difficult to overcome, even for pregnant addicts who are especially motivated to stop.

Hence, it may be that the problem of maternal substance abuse does not derive from a woman's lack of incentive to protect the foetus, but rather from her lack of control over the conditions necessary to ensure foetal health. The woman does not deal drugs; she recognises the harm to the foetus and, despite that harm, cannot control her substance abuse. The harm to the foetus does not make the woman's addiction more criminal. Rather, it highlights the severity of her disease. Thus, the PW's conduct may not be to harm the foetus but more a result of force of habit, a habit that inadvertently damages foetal health. The best way, but not necessarily the only way³⁷⁸ in which law may legitimately strive to protect the interests of the foetus is with and not against the PW through ways already suggested above.

FOETAL ABUSE LAWS TRICKY TO FORMULATE

A 1988 HLR note argues that in balancing maternal privacy interest against the state's interest in protecting the life and health of the foetus, [the Legislature should draw and] courts should only uphold narrowly drawn statutes targeted at specific, egregious conduct (Neustadter 1994). The reason is clear-foetal abuse statutes should be carefully crafted by the legislatures and masterfully applied by the judiciary because they infringe upon a woman's constitutionally protected right to privacy, which is a serious matter. As Feinberg states,

by allowing state intervention in pregnancy in order to protect the foetus, the foetal abuse statutes wrest from competent pregnant women the power to make decisions that affect their own bodies (which forms the essence of the right to bodily integrity), placing it instead in the hands of the state (Raitt & Zeedyk 2020, p. 54).

Such laws affect almost all decisions that a PW makes with respect to her own body - decisions regarding eating, drinking, taking medication, or not seeing a doctor - may injure the foetus and thus take on legal significance if foetal abuse is criminalized (Goodwin 2014). Naturally, all these cannot attain the status of criminal acts all of a sudden. Without going into the details of what all conduct should be penalised and under what circumstances, it would be suffice to state that a meticulously crafted list should be drawn up and yet cases should be decided on the typical facts and situations of each episode.

Also it must be mentioned that a conduct that is patently objectionable and illegal/criminal for all persons, pregnant or not, does not pose a problem being legally regulated (McBride 2018). The most difficult case is presented by a statute that seeks to criminalise that conduct which is generally allowed but is disallowed for PW because of its linkage with foetal harm--for example, a statute criminalising alcohol consumption by pregnant women. In such cases, the onus would be on the Legislature to prove that such a ban is necessary to ensure foetal health. It must be remembered that the focus of foetal abuse laws should never degenerate into achieving punitive end (McBride 2018). By not exonerating such behaviour, the Law seeks to decrease foetal death through miscarriage; stillbirth and birth defects caused by pre-natal injury or abuse and not punish the PW/mother. One parameter that can be safely suggested is that penalization of any activity of the PW should be proportionate to the likelihood of harm that the act might result in to the unborn or the born child (Briggs & Roger 2012).

The harm that should be considered worthy of state interference/protection, as mentioned above, can be divided into 3 categories: protection of unborn from the risk of death through (1) miscarriage, (2) stillbirth and (3) birth defects caused by pre-natal injury or abuse triggered by the PW. If these are assured, the unborn would come a long way into being recognised as a legal person because these protections virtually ensure the right to life.

Upper Limit of Errant Behaviour: As already stated, educating women, ensuring adequate pre-natal care at nominal or free of cost, establishing rehabilitation centres for addicts who are pregnant, are far better approaches to the problem than imposing criminal liability. Since the proposed solutions have a humane angle to them, they tend to foster positive attitudes in women in difficult situations. Nonetheless, although the state can and should educate women about the effects on foetuses of certain activities during pregnancy, the law should take note of repeated offenders in matters of substance abuse for instance. To err is human and that calls for criminalization of only egregious conduct, but at the same time, to keep on erring is devilish which should not be spared.

Robertson argues that 'once a woman decides not to have an abortion, she [implicitly] waives the rights that would have allowed her to 'act in ways that would adversely affect the foetus' (Robertson 1983). This argument seems to base itself on the logic that by consciously deciding to carry the pregnancy to term, the PW has deliberately submitted herself to the rigours that the pregnant condition might entail.

CONCLUSION

Judges and legislatures have used the deprivation of physical liberty, and threats thereof, as a way to prevent drug use by pregnant addicts, to compel pregnant women to access prenatal care, or to force women to submit to their physicians' directions regarding medical treatment for the benefit of fetal health. In every case, the detention of the pregnant woman was predicated upon the "right" of fetuses to be born healthy. Even if the restriction of the physical liberty of pregnant women is well-meaning, it is unwise because it deters the pregnant women who most need prenatal care from receiving it. The restriction of the physical liberty of pregnant women is also unconstitutional because it results in an inappropriate restriction on women's right to be free from unwarranted physical restriction and on their privacy and liberty rights to reproductive decision making free of unwarranted state interference. Accordingly, detention, confinement, and incarceration of pregnant women for the benefit of fetal health violate women's constitutional rights and leave us with a jurisprudence of physical integrity and reproductive

rights that permits highly coercive action on the part of the state into one of the most intimate decisions and experiences of women.

If the state is permitted to detain and confine pregnant women for the benefit of fetal health, women are reduced to nothing more than fetal containers whose rights and liberties are dependent upon their acquiescence to mothering rules dictated by the state. Finally, if the health of the fetus is of central concern, more attention must be given to the health of women, poor women in particular. The experts in this area must be listened to, including experts from the public health and medical communities and the women themselves, who can best attest to their needs. Most importantly, there needs to be a wider availability of quality prenatal care that is inexpensive or free without the threat of confinement and more drug and alcohol treatment facilities that treat pregnant women. While these suggestions are not cost free, they are no more expensive than incarcerating and confining women during their pregnancies or treating infants born with problems resulting from prenatal exposure to drugs or alcohol, or insufficient prenatal care.

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