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When caesarian section operations imposed by a court are justified

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Author's abstract

Court-ordered caesarian sections against the explicit wishes of the pregnant woman have been criticised as violations of the woman's fundamental right to autonomy and to the inviolability of the person – particularly, so it is argued, because the fetus in utero *is not yet a person. This paper examines the logic of this position and argues that once the fetus has passed a certain stage of neurological development it is a person, and that then the whole issue becomes one of balancing of rights: the right-to-life of the fetal person against the right to autonomy and inviolability of the woman; and that the fetal right usually wins.*

Introduction

The recent British Columbia (BC) case of Baby Boy Roininen (1) saw the apprehension *in utero* of a child in the process of being born in order to provide it with what was considered to be appropriate medical attention so as to save its life. That attention essentially involved delivery by caesarian section, where the mother initially refused but ultimately granted consent. In the subsequent court proceedings Judge B K Davis found, *inter alia,* that the initial apprehension of the child while still *in utero* was in keeping with the relevant sections of the *Family and Child Services Act* of BC, and he went on to appoint the Superintendent of Child Welfare guardian of the now-born child. At the time of writing the case is under appeal.

Both the initial apprehension as well as the subsequent court order have had a mixed reception. They were welcomed by those who saw this as an appropriate intervention of the state to safeguard the life of an unborn child; they were rejected by those who saw them – and the threat of an imposed caesarian section associated with them – as gross violations of female autonomy, and of the right to the inviolability of the person. The issue that was here at stake was, of course, one of principle, with implications far beyond the Baby R case itself. In that sense, the case can serve as a focus for a general discussion of the ethics of apprehension *in utero* and imposed caesarians *per se.* The aim of this paper is to explore from an ethical perspective the various parameters that are here involved. The thrust of the argument will be that, on balance, in situations where the fetus has passed a certain stage of development, its rights take precedence over those of the mother and both apprehension and court order are appropriate should its life and/or welfare be in serious danger; and that further, should the state fail to act in situations of this sort, it would be fundamentally remiss in its duties (2).

Key words

Non-consensual caesarian; personhood; fetal person; fetal rights; maternal rights; right-to-life.

In order to avoid entanglement in the specifics of the Baby R case itself, I shall construct my analysis in general terms; and I shall group my remarks under two rubrics: considerations touching the fetus and considerations touching the mother. With respect to the fetus, I shall focus on three questions: *First,* Is the fetus ever a person? *Second,* if yes, at what stage of gestational development does it become a person – and why? *Third,* When it is a person, why should its rights, whatever they may be, automatically overrule the mother's right to autonomy and inviolability? As to the mother, I shall raise three related issues: *First,* Does the fact of pregnancy *per se* entail an abrogation of her right to autonomy and inviolability, or only pregnancy under certain conditions? *Second,* if only under certain conditions, what are they and what (if any) are their limits? *Third,* does this abrogation, insofar as it obtains, constitute discrimination – or, more appropriately, does it constitute ethically indefensible discrimination against women? However, before beginning the discussion of these issues I should like to preface my remarks with a few observations about rights and persons respectively.

Rights and persons

The issue at stake – Are actions of the sort involved in the Baby R case ethical? – may be perceived as centring on a conflict between maternal and fetal rights. An easy way of resolving that issue – or more correctly perhaps, of side-stepping it – would be to argue that since our society has not seen fit explicitly to bestow personhood on unborn fetuses and has not explicitly accorded them rights, there is – trivially – only one person involved in this sort of situation, and only one set of rights: those,

namely, of the mother (3). Therefore any problem that is here perceived is an artificial construct. At best, what it amounts to is a recommendation that the law be changed so as to grant the fetus personhood and rights. However, a court order is hardly the appropriate way to do this – and in any case begs the question.

Such an argument, however, is open to several objections. In the first place, it assumes a theory of the nature of rights which is not at all universally accepted: anyone who defends the doctrine of natural rights would immediately reply that rights – or at least that basic rights like that of autonomy, life, equality, justice, freedom, etc – are not created by social *fiat*. Instead, matters stand the other way around. Such rights arise from the natures of individuals as persons and from the contexts in which they find themselves. Laws are merely statutory recognitions of those natures and contexts. Such recognition may be absent because of a failure on the part of society to comprehend the moral structure of the world – the millennia-old failure of society to recognise women as persons, or to comprehend the immorality of slavery, etc, illustrates this only too well. One's failure to comprehend, however, does not establish the absence of what may well be there to be comprehended: to assume that it does, is to turn an autobiographical remark into a description of nature.

In the second place, even if we were to reject the doctrine of natural rights and instead adopt a conventionalistic approach, the argument would still fail. For even on this conception, rights would not be granted in an arbitrary fashion, without reason, but on the basis of criteria. *Which* criteria are selected may, of course, be arbitrary; but once the criteria have been identified, even this approach requires that they be applied consistently. That, however, entails that we may legitimately ask what the criteria for the ascription of rights are; and in the case of the right to life or autonomy, the answer is that a minimal condition for their ascription is personhood. More precisely, it emerges that while personhood may not be a necessary condition, it is certainly sufficient. It is this, however, that allows us to reject the previous reasoning. Instead of entailing that an investigation of the rights of the fetus is uncalled for because no such rights are explicitly recognised by statute, it requires that we investigate whether the absence of statutory recognition is a violation of the relevant criteria – and requires correction. In other words, it opens up the whole conflict-of-rights issue, and forces us to look and see.

Criteria for personhood

On either perspective on rights, therefore, it is legitimate to ask whether fetuses have rights, what the extent of such rights (if any) is, and how (if they obtain) they relate to maternal rights. Furthermore, on either interpretation we have to begin with the question whether a fetus is a person.

And here, again, it is tempting to settle the issue simply by replying in definitional terms: for instance, by saying that a person is any living biological entity that is a member of the species *homo sapiens*. Temptation, however, ought always to be resisted. Not only does such resistance build character, it also allows us to avoid mistakes. Because it is a mistake to define personhood in biological terms. Such a definition would require us to accept as persons individuals who according to generally accepted medical criteria are clinically dead: those, namely, whose biological processes are being functionally maintained but whose brains are irreparably destroyed, ie, those who are biologically alive but brain-dead. In other words, it would force us to include too much. At the same time, it would also force us to include too little: it would force us to reject as persons all those who, for whatever reason, do not have a paradigmatically human genetic code. Those suffering from trisomy 21, 13, etc. would here be implicated. A much more fruitful way to proceed is to begin with an uncontroversial and paradigmatic example of someone who is a person, determine his/her defining characteristics, and go on from there.

The standard paradigm of a person, of course, is the normal adult human being. If we take the physiological variations among adult human beings into account, as well as the fact that they vary in intelligence, emotional stability, training, etc; and if we remember further that we do not consider them to have lost their personhood when they are asleep, become anaesthesised or unconscious, etc, we find that what is central here, and indeed defining, as opposed to all other animals, is the presence of conscious self-awareness and volition, or the present capability for becoming thus aware and purposive without undergoing a fundamental physiological change (4,5,6). Upon further reflection, however, we find that we never have direct acquaintance with the awareness of others: we cannot read minds. Strictly speaking, therefore, our knowledge here is inferential and is based on two kinds of criteria: behavioural and physiological. That is to say, we assume the presence of awareness (and hence ascribe personhood) on the basis of the sapient and purposive behaviour that we observe in the relevant individual. Where such behaviour is absent, we turn to see whether the physiological structures that we otherwise know to be present in the unproblematic (behavioural) cases and which we take to be the ultimate basis of self-awareness and volition are present here as well; to wit, a nervous system that is sufficiently complex and functionally integrated to be able to serve as their foundation (7,8,9,10,11,12).

In the present context, it is the physiological criterion that is important. It spells out what is both a necessary and a sufficient condition for the ascription of personhood – even in the eyes of the law. An individual will be considered a person so long as he/she has an integrated functioning brain – ie, that is sufficient; but he/she will be a person no longer when that functioning structure is lost and irreparably

destroyed – ie, it is necessary. *Regina v Kitching and Adams* (13) marks the leading Canadian recognition of this fact.

Considerations touching the fetus

Having sketched the concept of personhood and indicated criteria for its use, we can now ask, is a fetus ever a person? The answer is that it depends. Since a fetus is a developing biological organism which undergoes ontogenetic development, we must examine its various developmental stages to see whether during any of them it satisfies the criteria that we have indicated. Examination shows that that while there are stages during which the criteria are not met – for example, from beginning of the fetal development to about seventeen weeks, and stages where it is doubtful – for example, seventeen to about twenty-two weeks; there are stages during which they are met, and where the fetus clearly is a person (14,15). Nor should this occasion surprise. A fetus in an incubator, even though he/she may only be five or six months old, is nevertheless recognised as a person; and its deliberate destruction, whether direct or indirect, is considered homicide rather than the killing of a mere animal.

Someone who opposes the recognition of fetal personhood may try to invalidate the cogency of this reasoning by focusing on the example of the incubated fetus and argue as follows: there is a fundamental difference between a fetus in an incubator and a fetus *in utero*, no matter what its stage of development. The fetus *in utero* is in a woman's body, whereas the fetus in the incubator is in the outside world. Furthermore, the fetus in an incubator is not essentially dependent on a biological support mechanism whereas the latter is. These differences are sufficient to ensure that the former is, but the latter is not a person.

However, when reduced to its bare logic, the argument hinges on two claims: 1) *where* an entity is determines *what* it is, and 2) the fact of biological dependence reduces an individual from person to non-person. Both of these claims are doubtful. As to 1), there are two ways of understanding this claim: literally, to the effect that there is something ethically special about a uterus as a place such that being located in it *ipso facto* turns whoever is in it, and who otherwise would be a person, into a non-person; and figuratively, to the effect that one's nature is functionally determined by the *locus* that one occupies in the web of relations in which one is embedded, where spatio-temporal relations like being-in-a-uterus are but a special case of this general rule.

Both ways of understanding this claim, however, must be rejected. As to the literal interpretation, no place other than a uterus is ascribed similar status-altering properties. Therefore what is here needed is some argument to show why the uterus *as a place* should be ethically special in this fashion. No argument is forthcoming – except, possibly, that a uterus is a place in which gestational development occurs. In other words, the fact of being so to speak the locus of gestation is what makes the difference. That consideration, however, if accepted, would have the unwelcome consequence that an incubator in which gestational development occurred would also share this property. Premature infants, therefore, who are in incubators, would not be persons either. Furthermore, even if this consideration were rejected, the matter of principle would still remain: it would still have to be shown why the fact of being a place in which gestational development occurs (and even the fact of contributing essentially to that development in a material fashion) should give that place the power to reduce the status of someone who otherwise would count as a person – for example, a fetus in an incubator – to that of a non-person. Merely to say that it does is to beg the question.

As to the figurative interpretation, there are situations in which it, or at least something very much like it, is true. For instance, one cannot be a mother without standing in a particular biological or conventional set of relations to another person; one cannot be a judge without standing in certain conventional legal relations to others, etc. In more general terms, the definitions of concepts like mother, judge, etc logically require that whatever is a mother, a judge or whatever must be embedded in a relational framework where the relations of that framework together with the otherwise existing nature of the individual determine what the individual is. However, two things are here of note. First, none of these relations, whether in the examples that we have mentioned or in any other, are *spatial* in nature. Ie, none of them involve locating the individual in a particular set of spatio-temporal relations that constitute the physical world. Second, the reason why embedding in a relational framework determines the natures of individuals where that is the case – motherhood, judgeship, etc – is that in these cases the concepts themselves are defined in relational terms. The concept of a person, however, as we have seen, is not relational. Consequently it does not fall under this rubric – wherefore 1) is irrelevant at best.

Turning to 2), clearly it is unsupportable in its generality. If accepted, it would require us to say that no one who is on a ventilator, a dialysis machine, etc is a person. While such a position is logically possible, it is doubtful that anyone seriously would want to support it in this form. Much more likely is the following version: the fetus, prior to birth, is dependent on a biological support mechanism that involves the mother – another biological mechanism. Therefore it really is part of the mother and not an entity in its own right; and a dependent part at that. It follows that it cannot be a person.

Even in so altered a form, however, claim 2) must be rejected. In the *first* place, the fetus, inclusive of its supportive placenta, is not a biological part of the mother (16). It is both physiologically and genetically a distinct organism, having its own physiological integrity, genetic code, etc. In the *second* place, the fact

of biological dependence, while true, is insufficient to establish non-personhood. An example will make this clear. Sometimes children are born joined with a common heart, liver, or sharing an intestine. The fact that they are thus biologically dependent – even in cases where one has all the major organs and the other is connected by an organic extension – is not taken to imply either that neither of them is a person, or that one is but the other is not. It is precisely because both are considered persons that such cases pose a moral dilemma. It is the existence of independent and functionally operative brains that is taken to be decisive. *Finally,* let us assume that transplantation technology has advanced to the stage where a human fetus may be implanted into an animal uterus – say, that of a sheep – as a surrogate womb. Let us also assume that the fetus who is thus implanted has developed to the seventh – or eighth – month stage; and let us assume finally that the scientists who have performed the implantation now wish to abort the experiment and kill the fetus: would they be allowed to do so? Or would they, if they killed the fetus (and saved the sheep?), be guilty of homicide? Despite the fact that this would be a novel situation, it seems clear that neither the fact that the fetus was in a sheep's *uterus* nor the fact that it was in the uterus of a *sheep;* nor, finally, the fact that the fetus was biologically dependent on the latter would detract from the fact that the fetus was a person because of its development and gestational age. Those who find this example conceptionally difficult because the situation has not as yet occurred need merely change the sheep to a brain-dead woman. There have been several cases where brain-dead women have been kept alive for the sake of their fetuses which were in the later gestational stages. It seems fairly clear from an ethical perspective that if these fetuses had been killed and the brain-dead mother otherwise kept alive, whoever killed them would not have the excuse that he/she had not killed a person.

It seems fairly clear, then, that after the fetus has passed a certain stage of development it is a person. When? Ie, what is that stage? Obviously the answer must be, when the fetus meets the criteria of personhood that anyone else must satisfy in order to be a person: when a functionally integrated and structurally developed central nervous sytem or brain is present. When is that point reached? At the very latest, by the 22nd week of gestation – depending on the individual. Nor is this a matter of arbitrary decision. It is a matter of empirical data open to investigation by CAT scan, Nuclear Magnetic Resonance (NMR) imaging, and the like.

We now come to the third question: does the fetus have rights; and if so, why should they, whatever they may be, automatically overrule the mother's right to autonomy and inviolability of the person?

Anent the first part of this question, the answer is contained in what we have already said. Since after a certain stage of development has been reached the fetus is a person, it follows that *ipso facto* it will have the same fundamental rights as all other persons. The only way to invalidate this conclusion would be to show that a fetal person is ethically distinct from other persons. Such a claim to difference, however, must not be question-begging but must focus on a factual parameter inherent in the fetus or its situation that serves to distinguish it logically from all others. In light of what we have said so far, it is difficult to see what such a parameter could be.

As to the second part of the question – why should fetal rights automatically override those of the mother? – the answer is that such an overriding is not a foregone conclusion. If a claim favouring fetal rights is advanced, then it must be supported by considerations which themselves are not question-begging – which means that in principle they must be available to all.

Are there such considerations? The answer is *yes.* One centres in the logic of rights, the other in the nature of their implementation. Rights can be ranked as to priority in various ways – for example, logically, naturally and voluntarily (17). The first and third are here important. Logical priority reduces to this: if someone has a right and that right can be exercised if and only if a specific condition is satisfied, then existence of the first right logically entails the right to bring about the condition, and the latter right is logically prior to and more fundamental than the former. Specifically, this means that since the right to a certain quality of life logically requires that the right-holder be alive, the right to life is presupposed and more fundamental. And so on. When this is generalised, it provides a non-arbitrary framework for balancing rights, determined solely by their logics and their natures. Furthermore, it means that when there is a conflict between a more fundamental and a less fundamental right then, unless the exercise of the more fundamental right is impossible or the right holder (either directly or by proxy) has waived it, the former right wins. It therefore follows that when the fetus's right to life conflicts with the mother's right to a certain quality of life, the fetus's right predominates. As to cases where both lives are equally in the balance – for example, in cases of uterine cancer or the like – here we would have a conflict-of-rights situation where both rights are equal as to fundamentality. A process of equitable balancing would then have to determine whether there are ethically distinguishing features that favour one over another. Considerations focusing on the origin of the problem itself as an ethical issue would here be relevant.

That is to say, it is a fundamental ethical principle that anyone who has an effective right claim may voluntarily subordinate it to a less fundamental one – or forego its exercise entirely. Furthermore, one may thus re-order rights not only by what one states explicitly but also by what one does: *de facto,* as it were (18). This means that by voluntarily allowing the fetus to become a person, possessed of a right to life, the mother has *de facto* accepted the conditions accompanying that action – which is to say, since she

was aware of the dependent nature of fetuses and children (or ought to have been thus aware) she has, through her action, voluntarily accepted the responsibilities attendant on the fact of such dependence and thereby has *de facto* subordinated her right to otherwise unhindered autonomy to the right to life of the fetus and to the conditions that follow from it. To be sure, in and by themselves neither of these considerations necessarily entail that the fetus may not be removed from the maternal uterus. This is ruled out only on the condition that such removal involves a violation of the right to life and personal integrity of the fetus. However, since death or serious injury are the usual consequences of such a removal, to all intents and purposes it does constitute a bar: the fetus may not be aborted after it has become a person. Furthermore, this assumes a society in which women have access to the means of terminating pregnancies prior to fetal personhood. That may, of course, not be the case. However, even when it is not, instead of allowing for abortions once the fetus has become a person, it mandates a revision of social policy so that this sort of situation will not arise. The personhood of the fetus would still leave abortion after that stage homicide.

Considerations touching the mother

Let us turn to the mother, and let us begin with the question whether pregnancy *per se* entails an unconditional abrogation of a mother's rights. Clearly, it follows from what we have said that the answer must be negative. The mother's rights are conditioned, not abrogated; and they are conditioned only in the sense that we have stated – in matters where the life and/or welfare of the fetus are foreseeably affected.

While the restrictions anent life may be clear from what we have argued, that may not be the case with respect to welfare. On this point, however, the reasoning goes like this: if the mother's actions are detrimental to the welfare of the fetus when the fetus has already become a person, then such action must be considered like any other action having injurious consequences on others – for example, children (19). It must be rejected as unethical. On the other hand, if the fetus is not yet a person, then we must distinguish between two cases: those where the fetus foreseeably will become a person, and those where it will not. In the first instance the case reduces to one where the agent – the mother – is causally responsible for initiating a chain of events which predictably will result in an injury. While the chain of events does not itself constitute an injury at the point of its initiation, the injury becomes complete in an ethical sense when the fetus becomes a person and the effects manifest themselves. Therefore, in this sort of case, the mother's deliberate failure to heed the welfare of the fetus will be as unethical as are actions on the part of society that will affect future generations. As to the second sort of case, where the fetus foreseeably will not (be allowed to) become a person, here the mother need not consider the welfare of the fetal non-person beyond the degree required in the case of similarly developed animals. But she must consider these. After all, the fetus *qua* merely living being would still be an animal. Whatever degree of protection is accorded to comparably developed animals must therefore be granted the fetus as well. While not influencing the fact of the action, it may well influence its nature.

I turn to the final question: do the restrictions on maternal liberty that we have sketched constitute ethically indefensible discrimination against women? The answer is no. While under current biological reproductive conditions they do affect only women and hence are discriminatory, this is not unethical. For, in order to be unethical, discrimination must not simply be distinguishing and differentiating but must also be in violation of some rights that the individual has *as person*. Otherwise, if we were unable to take into account material differences between individuals, we should not be able either to compensate for a handicap – ie, differentiate in a positive sense, so as to avoid inequity; or differentiate in a negative sense – for example, by using selection criteria for professional schools, sports teams, and the like. We can put the general principle that is here involved like this: if the allegedly discriminatory parameters involved are essential to or inherent in the nature of the enterprise, and if the enterprise itself is not unethical, then employment of the parameters themselves will not be unethical *per se*. As we said before, under current scientific and biological conditions childbearing occurs through pregnancy and is confined to women. However, neither pregnancy nor childbearing are unethical *per se*. Therefore the restrictions that devolve from the very nature of pregnancy and childbearing – restrictions that lie in the very nature of the enterprise – will not be unethically discriminatory either. Furthermore, it should be noted that these very restrictions, *mutatis mutandis*, will hold for anyone or anything that may provide a gestational place for a fetus: whether that be a man who has a fertilized ovum implanted in his abdominal cavity and who is subject to the appropriate hormone therapy to allow gestation; or a sheep, as our previous example had it; or some other surrogate womb, biological or mechanical.

However – and herewith we come to an important consideration which conditions everything that we have said – it is a fundamental ethical principle that an obligation cannot be imposed unilaterally. The person who acquires the obligation must be able to refuse it. In the present context this entails that no woman – or, more generally, no person – may ethically be placed into a position where she cannot escape acceptance of the obligation and the subordination of her rights. She must have a choice. This means that society has the obligation to allow each woman, insofar as this is materially possible, access to techniques and/or devices for preventing pregnancy in the first instance, or to terminate a pregnancy before the fetus has become a person. If society does not do this, then it will indeed be discriminatory in an unethical fashion; for in no

other case does society insist that someone must assume a certain obligation without any choice. One can only hope that the efforts which hitherto have been directed towards denying women's responsibilities towards fetuses that have become persons will more fruitfully – and more ethically – be directed towards making sure that society recognises its obligations.

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