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Ethical and legal issues in reproductive health

Ethical and legal approaches to 'the fetal patient'

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Abstract

The concept of fetuses being 'patients' can serve a benign protective, cautionary purpose, alerting healthcare providers and pregnant women to the implications that medical treatment can have for fetuses. The concept allows women to provide the children they intend to deliver with the care they consider appropriate. A negative effect occurs, however, if healthcare providers decide to treat pregnant women according to providers' own views of the best interests of fetuses, and compromise patients' care and self-determination without their informed consent. Some activists advocate rights of fetuses for the purpose of limiting pregnant women's self-determination. Recognition that fetuses have legitimate interests, rather than rights, is common, and opens a way to balancing various competing interests without compromising patients' rights to decide on their medical care. Courts of law generally favor this approach, and tend to allow few limits on women's choice of indicated medical care while pregnant.

Keywords: Fetal patient; Fetal interests; Fetal surgery; Human rights; Abortion rights; Conflict of interest; Human beings; Persons

1. Introduction

Through modern ultrasonic and optic fiber technologies and microsurgical advances, fetuses, which were once invisible and directly inaccessible within a woman's body, are now imageable, visible, tangible and operable in utero. Further, access to chorionic, placental, and fetal tissues makes them amenable to genetic diagnosis, which discloses inherent characteristics, such as fetal sex, inherited traits, health status, and parentage. Visualization presents their individual appearances, and can show even unique features such as their fingerprints.

Advances in technology and surgical technique have caused or contributed to a cultural development that identifies fetuses in the popular mind as independent of their mothers, often presenting them as separate beings analogous to astronauts, floating freely in amniotic space, linked by an umbilical lifeline to a source of support. Knowledge of fetal characteristics personifies fetuses through information of what they look like in utero, and of their health needs and prognosis.

These advances have also contributed, however, to resistance to growing respect for women's autonomy and reproductive self-determination, symbolized in the eyes of some feminist advocates and many of their opponents in liberalized abortion laws. The historical evolution of abortion laws has been from a basis in criminal prohibition and punishment, to regulation by considerations of

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population health and welfare, and more recently to individual claims to human rights [1], including non-discrimination against women. Reactionary religious institutions and conservative politicians and governments have seized upon the promotion of 'fetal rights' as a surrogate cause through which to launch and maintain resistance to liberalized abortion rights in particular and women's full equality in general. The medical concept of fetuses as separate patients or parallel patients with the women who gestate them has become an instrument that protagonists of opposing preferences struggle to control.

The struggle has national and international dimensions. Because of United States' dominance of the international news media, observers in other countries usually know the domestic politics of the United States better than the domestic affairs of any other country than their own. Unless and until conservative governments in the United States, such as the present administration, are confident that they can achieve reversal of the landmark 1973 Supreme Court decision in *Roe* v. *Wade* [2], which recognized women's constitutional rights to abortion, they urge laws and policies that advance protections of fetal independence, including promoting fetuses as holding rights to care, as instruments in their campaign to delegitimate abortion rights.

The Roman Catholic church, through the Vatican's claim to represent the world's only true and Universal Church, has an explicit worldwide agenda opposing the internationally recognized concept of reproductive health, which includes abortion where lawful, inter alia by promoting fetal rights. Acting both directly and indirectly, such as through organizations like Human Life International, which claims branches and affiliates in almost 90 countries [3], and collaboration when expedient with conservative Islamic countries, such as at the UN Fourth World Conference on Women, held in 1995 in Beijing, the Vatican urges protection of unborn human life from conception over all competing interests. Evangelical Protestant Christian churches particularly in the United States are similarly making international efforts to challenge women's liberation [4], such as by promotion of claims on behalf of fetal life.

2. Benefits of 'the fetal patient'

By no means are all claims that fetuses be treated as patients in their own right primarily instrumental means to promote political agendas to curb women's rights. On the contrary, such claims can serve to advance common parental, social, and healthcare professional interests that children be born uninjured and healthy. It is legitimate and prudent to extend healthcare professionals' dedication to pregnant patients to their unborn children. The original medical incentive to address fetuses as patients retains full preventive and therapeutic validity.

Many treatments of pregnant women have implications for their fetuses. Surgical, drug, vaccination, dietary, exercise, and other forms of management available for pregnant women should be proposed in terms of their prospective benefits and risks both for the women and for their fetuses. Distinctions should be addressed between forms of care indicated for women themselves, and the treatment they should consider for the well-being of the children they intend to deliver. It is self-evident from the symbiotic relationship between pregnant women and their fetuses that care of one is liable to affect the other, but their separate interests do not necessarily coincide.

Women advised of the separate needs of their fetuses often accept medical interventions and diets, such as to include folic acid, and forgo medical and social lifestyle options, such as tobacco, alcohol, and vigorous employment or recreation, for the well-being of the children they intend to deliver. Pharmaceutical and other products beneficial to women are often labeled with warnings that their use may pose risks for pregnant women as such, and/or for their fetuses. Similarly, women sometimes face the dilemma that treatment indicated in their best interests, for instance for their health or capacity to discharge responsibilities they owe to others, such as their young dependent children or elderly relatives, poses risks for the health and very survival of their fetuses. In Britain, the Abortion Act of 1967, as amended, explicitly allows a woman's choice of abortion up to 24 weeks of pregnancy when medical practitioners find continuance of pregnancy to pose risk of

injury to the health of any existing children of the woman's family [5]. Women's dilemmas are usually of less deliberate and direct effect on fetuses. They may involve responsible risk-taking, or risk-avoidance, in selection of conduct. The benefit of considering the fetus as a patient is to allow women and families to make decisions informed about their predictable impact, including on their fetuses.

3. Limits on fetuses as 'patients'

Fetuses are not 'patients' in a real sense, but only by metaphor or analogy. Unlike born children, they cannot be treated without their mothers' bodies being affected. Child welfare laws can compel parents to act in their born children's best interests, or displace parents as decision-makers and appoint others to treat the children independently of parental involvement. There is generally no enforceable legal duty on parents to act in the best interests of fetuses in utero, however, and no means for others to treat fetuses without direct effect upon their mothers. In rare cases, courts have ordered pregnant women to be subjected without their consent to medical interventions in the interests of their fetuses, usually when the women were considered mentally unable to make decisions themselves. At the most invasive level, however, against women's mentally competent opposition, some courts have ordered cesarean deliveries. Indeed, in the notorious instance in Washington DC of Angela Carder, the woman survived her court-ordered cesarean section only long enough to see her prematurely born child die, and the ordered surgery was given as a cause on her own death certificate [6].

The disposition, or even occasional willingness, of physicians or hospitals to initiate legal proceedings if pregnant women decline to follow their advice directed to the interests of their fetuses seriously subverts the trust patients should be able to have in their healthcare professionals and institutions. The danger to professional relationships that arises when physicians regard themselves as independent caregivers to their pregnant patients' fetuses without such patients' consent concerns far less invasive procedures than cesarean deliveries. Those who appoint themselves physicians to fetal 'patients,' and then favor the interests of such 'patients' over the duties they owe to the pregnant women who came to them for conscientious care and advice, place themselves in a conflict of interest, and profoundly betray their true patients and professional responsibilities. In the case of all proposed treatments affecting them, patients should be able to rely on their physicians' honest and full disclosure of its purposes and foreseeable effects, and make decisions according to how they give priority to competing values. Physicians have no power independently to give priority to fetal interests, but must accept their patients' informed decisions on resolution of the competing interests the patients consider relevant. If physicians feel unable to do this, their duty is to seek to transfer care to colleagues who are not so constrained, or risk breaking faith with or abandoning their patients.

4. Ethical approaches

Physicians developed the concept of treating fetuses as if they were patients not in order to subordinate pregnant patients to fetal interests, but to alert themselves, and such patients, to the reality that treatment of pregnant women can have significant implications for their fetuses. It remains a cautionary concept, intended to prevent inadvertent injury to fetuses, and to spare families the distress of finding that treatment choices women make in good faith, by oversight cause birth defects or other injuries to the children they deliver. The concept reflects several key ethical principles, including the historic medical ethic to Do No Harm (non-maleficence), the affirmative duty to do good, by permitting patients to exercise choice protectively and for the benefit of children they intend to have (beneficence), and both central elements of the principle of showing respect for patients. The concept allows pregnant women informed choice of medical care, so respecting their autonomy, and also contributes to protecting the vulnerable. Women dependent on medical treatment and medical information are vulnerable, as are fetuses at risk of injury from ill-informed

medical decisions made by healthcare providers and patients.

Modern disagreement centers on application of the ethical principle of justice, which requires, among other considerations, that like cases be treated alike, and that differences between cases that are unalike be duly recognized. Some who approach ethical principles from a religious perspective or from acceptance that a fetus be treated as a person, find the circumstances of a pregnant woman and of her fetus to be equal and alike. Some, indeed, in their application of the religious concept of ensoulment, find fetuses more in need of protection of viability because they are ineligible for baptism before live birth, and their death before birth would deny their souls eternal salvation.

When a proposed medical intervention that is of relatively minor advantage for a pregnant patient may cause significant injury to her fetus, some, from spiritual and also pragmatic standpoints, consider it mandatory that the treatment be denied her. That is, they assert that protection of the vulnerable fetus overrides the claim to autonomy or self-determination that the woman may otherwise possess. Similarly, they assert that fetal protection mandates imposition of procedures that women decline if such procedures may benefit the fetus and/or the born child it may become. This is a basis on which applications have been made for court-ordered cesarean sections, and on which judges have occasionally granted them.

The alternative application of justice recognizes fetal dependency, but considers pregnant patients to be equated not with fetuses, but with patients who are not pregnant. That is, pregnant patients enjoy the same authority to make medical choices for themselves, and to make their own assessments of the significance of the effects of their choices on others, such as members of their families. This is the basis on which British law explicitly allows choice of abortion based on the effect continuation of pregnancy would have on the health of born children of pregnant women's families.

5. Fetal rights or fetal interests?

A question in both ethics and law is whether fetuses can be considered to have rights. Governmental initiatives to limit the constitutional right to abortion in the United States have also led a popular tabloid magazine, on its front cover, to ask ''Should a Fetus Have Rights?'' [7]. At the professional level, questions and presumptions about fetal rights are sometimes raised as a convenient way to take fetal interests into account when considering treatment options for pregnant patients. This fits within growing sensitivity to and accommodation of human rights, and the use of 'rights' language to urge protection, for instance, for animals in general, endangered species in particular, environmental concerns, and even historic sites and buildings. Rights are often invoked in order to trump or outbid other claims to entitlement. A critical approach to the nature of rights is required to understand their function and purpose.

The issue raises controversy in moral philosophy, jurisprudence and, for instance, theology, but a human rights approach is more rooted in popular perception, embodied in the understanding that rights empower the powerless. Powerful persons in a society need not invoke their rights, since they have privileges and the means to accomplish and acquire what they want. They often oppose the claims to possess rights that are made by individuals or groups they can subordinate. Powerful individuals and agencies in political, military, religious and comparable institutions have been in the forefront in opposing claims to rights of historically powerless or subjugated people or social classes, particularly women. Recognition and enforcement of their rights equip formerly powerless people and classes to achieve self-determination and freedom from discriminatory laws, policies and practices.

In terms of human rights, only human individuals can enjoy rights. The claims of those incapable of invoking their rights for themselves, such as infants and mentally disabled people, may be invoked on their behalf by others, such as parents, family members or public officers. Similarly, invoking rights of fetuses, animals, trees, and historic buildings affords them no new capacities, but is designed to empower capable individuals to act on their behalf. The claim that fetuses possess rights therefore serves to provide those who assert such rights with a basis, for instance in self-

justification and sometimes in law, to act in the name of fetuses. They may thereby advance their own political, religious or other beliefs about how fetuses should be protected. The claim of fetal rights is a form of self-empowerment by those who, as the individuals they are, have no standing or entitlement to intervene in decisions pregnant women and their families make. For physicians to invoke fetal rights in order to deny, or apply, treatment to their pregnant patients without such patients' informed and free consent, is a form of self-empowerment or paternalism that may constitute professional misconduct. It may also constitute legal breach both of their contracts with patients and of their fiduciary duty.

More legitimate than recognition of fetal rights is recognition of fetal interests [8]. It is commonly recognized, for instance, that future generations, future persons as yet unconceived, and children intended to be born have interests worthy of protection, such as to be born healthy and unimpaired. Individuals who plan distribution of their estates on death may include entitlements or interests of unborn and unconceived grandchildren and great-grandchildren. Legal systems that recognize rights only at live birth will usually suspend distribution of a deceased person's estate for up to eight months or so, when a will might create a gift for a conceived but unborn child, pending live birth. This does not recognize a fetal right, of course, since the right to inheritance accrues only at termination of fetal status on live birth, but it does recognize a fetal interest.

Ethical and legal consideration of fetal and other interests is often appropriate, and may be mandatory. For instance, some administrative and medical decisions may be judicially held improperly made when fetal interests are not taken adequately into account. However, when properly considered, interests may be legitimately subordinated to others, since they do not have the trumping effect of prevailing over other considerations that rights are often invoked to achieve. While women's interests will often prevail over fetal interests, for instance, such as when women want employment in toxic work settings [9], interests of the state itself in fetal life, particularly after fetal viability, may prevail in law over women's interests, except when women's rights to life and health are at risk [10].

6. Legal approaches

Attempts to find a legal basis of fetal rights in international human rights instruments are widely considered to have failed. The Convention on the Rights of the Child (the Children's Convention), which entered into international force in September 1990 and is ratified by every country except Somalia and the United States, explains in its preamble that ''the child… needs special safeguards and care, including appropriate legal protection, before as well as after birth'' (para. 9). However, Article 1 provides the definition that ''a child means every human being below the age of 18 years…''. In the laws of many ratifying countries, the status of a 'human being' commences at live birth (below). International human rights tribunals have almost invariably upheld national laws that accommodate lawful abortion against claims of breach of human rights of fetuses. Such laws apparently satisfy the test under the Children's Convention of providing 'appropriate' legal protection [11].

The American Convention on Human Rights similarly provides that the right to respect for life ''shall be protected by law and, in general, from the moment of conception'' (Art. 4). The words 'in general' indicate that the Convention does not necessarily give priority to fetal life over the life or health of born persons, since protection of prenatal life does not withdraw or diminish protection of the life or quality of life of born persons. In 1981, in the *Baby Boy* case [12], the Inter-American Commission on Human Rights applied the Convention to find that the United States Supreme Court's recognition of a constitutional right to abortion [13] does not offend the duty of protection of life under the Convention. The words 'in general' may, however, require countries to ensure provision of adequate prenatal care, nutrition and essential obstetric care for pregnant women.

The laws of few countries contain a crime of feticide or of deliberately causing injury to a fetus as such. Murder and manslaughter charges are

inapplicable, since they concern deaths of 'persons,' which in law fetuses usually are not [13]. Laws contain criminal offences of causing injury to pregnant women deliberately or by gross negligence, of course, and fetal loss or damage may increase the punishment on conviction, but such offences are usually inapplicable when the women themselves cause the fetal injury.

However, anyone may be convicted of murder or manslaughter if a fetus he or she injures in utero is born alive, thereby becoming a 'person' or 'human being' (the expressions in law are synonymous), but then dies as a result of criminal conduct causing the injury. Some American states have built on this principle by enacting laws to protect fetuses from violence while in utero. A basis for such laws can be found in Canada, where it has been observed that one in 12 women is a victim of violence, and that 40% of wife assault incidents begin during the woman's first pregnancy [14]. The United States Congress appears likely to discuss a proposed Unborn Victims of Violence Act late in 2003, raising the issue of whether treating an injured fetus would bring it nearer to becoming a patient.

Reacting to the growing incidence of births of children suffering effects of their mothers' use of alcohol or drugs while pregnant, some American courts have been willing to interpret their criminal child abuse laws to include viable fetuses [15]. However, the United States Supreme Court ruled it unconstitutional for a city hospital in South Carolina to conduct diagnostic tests, in collaboration with police personnel and prosecutors, to obtain evidence of pregnant patients' criminal drug use for purposes of law enforcement. The hospital's use of the threat of arrest and prosecution to force women into treatment was found objectionable [16]. Laws or policies that require or allow healthcare providers or institutions to become police informants, even for the purpose of fetal protection, fundamentally change the basis on which their services are offered, and are likely to be sought by pregnant women.

For purposes of both criminal and civil (that is, non-criminal) law, fetuses are not considered 'persons' or 'human beings,' since the term 'in being' means being born alive. The English Common law, widely prevalent in the English-speaking world and the (British) Commonwealth, is expressed in the Criminal Code of Canada. Section 223(1) provides that:

> A child becomes a human being… when it has completely proceeded, in a living state, from the body of its mother whether or not:
>
> a. it has breathed;
> b. it has an independent circulation; or
> c. the navel string is severed.

Compatibly with this definition, the crime of child destruction under section 238(1), consisting of unjustifiably terminating life during delivery, after abortion liability ends but before homicide liability begins, protects ''any child that has not become a human being.'' This is often called the 'born alive' rule of legal personhood. When fetal status ends by departure from the uterus during delivery, the child is clearly human, but before it has 'completely proceeded' from its mother's body, it is not 'in being.' Arguments in philosophy, biology, bioethics and elsewhere that fetuses are persons and human beings have little resonance in law outside the United States, where a majority of jurisdictions have come to recognize personhood at fetal viability [17].

The progress of fetal surgery to allow entire removal of a fetus from the uterine cavity and its post-surgical replacement raises the issue of whether it has ''completely proceeded… from the body of its mother,'' so that, by a literal reading of the historic law, it becomes a human being. Courts often prefer to keep historic laws up to date by reading them in light of contemporary developments [18]. Accordingly, 'completely proceeded' may be understood in terms not only of space, but also of time. A fetus removed for the purposes of treatment and replacement for continuation of gestation will be considered not to have proceeded completely, so as to retain its fetal status. Courts and wider society may not accept the alternative, that a human being will be entirely contained within another human being.

Under the 'born alive' rule, assault or negligence causing fetal injury that results in accidental abor-

tion or stillbirth allows the parents to claim compensation for their loss, but no claim can be brought on behalf of the fetus. However, once birth occurs, claims can be brought by or on behalf of the newborn for injuries suffered in utero [19]. In United States jurisdictions that recognize personhood at fetal viability, claims can be brought on behalf of post-viable stillborn fetuses [17].

An exception to the general rule has been recognized, under which a born alive child injured in utero due to its mother's negligence cannot succeed in a claim against her. The Supreme Court of Canada, reflecting law in the UK [19], has accepted maternal immunity from liability to children born alive for injuries in utero from both accidental [20] and deliberate [21] conduct, on policy and pragmatic grounds upholding women's autonomy and bodily integrity during pregnancy. However, physicians who are parties to pregnant women's negligent decisions that cause injuries to their embryos or fetuses later born alive, such as by inappropriate counseling, may face sole and full legal liability.

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