Hastings Law Journal

Volume 37 | Issue 5 Article 1

1-1986

Transition from Fetus to Infant: A Problem for Law Ethics

Albert R. Jonsen

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

 Part of the Law Commons

Recommended Citation

Albert R. Jonsen, *Transition from Fetus to Infant: A Problem for Law Ethics*, 37 HASTINGS L.J. 697 (1986).
Available at: https://repository.uchastings.edu/hastings_law_journal/vol37/iss5/1

This Foreword is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository. For more information, please contact wangangela@uchastings.edu.

Transition from Fetus to Infant: A Problem for Law and Ethics

By ALBERT R. JONSEN*

It is unusual—perhaps unheard of—for an "ethicist" to author a preface to an issue of a law journal. However, the nature of the subject addressed by this symposium, *Issues in Procreational Autonomy*, demands something unusual: the topic evokes profound personal emotions, excites bitter social debates, draws upon a long tradition of moral reflection, and raises deeply embedded principles of the common law. Mothers and fathers, physicians and lawyers, philosophers and theologians express vital interest in the issue and in its policy and legal implications. The fetus *in utero* and the infant *extra uterum* are affected radically and ultimately, for law and policy can mean for them life and death. History and anthropology also must be explored, for other times and other cultures view the fetus and newborn so differently that our implicit and explicit values, even when clear, are called into question. With all this involved, the topic certainly goes beyond the usual pale of the law. Where, in fact, it does belong is unclear. Thus, a practitioner of the new discipline of medical ethics—which has unclear conceptual boundaries—may be just the person to preface the more specific considerations of lawyers.

Indeed, the Supreme Court of the United States issued the writ that permits persons like myself to engage in this legal discussion. In *Roe v. Wade*,[1] the Court comments,

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[2]

This comment deserves exegesis. First, despite the Court's skepticism, the famous decision ranges widely over medical and social history, philo-

* Professor of Ethics in Medicine, School of Medicine, University of California, San Francisco. B.A., 1955, M.A., 1956, Gonzaga University; S.T.M., 1963, Santa Clara University; Ph.D., 1967, Yale University.

1. 410 U.S. 113 (1973).

2. *Id.* at 159.

sophical opinion, and theological doctrine. Even if no consensus can be found, all this, to a greater or lesser extent, is relevant to thinking about the problem, for our current views are shaped by our past, and our current efforts to reformulate require careful criticism of that past. In questions so profound as the "beginning of life" or its "nature and destiny" or its "value," consensus is not to be expected. Humans live so variably and in such diverse situations that they must see themselves and their nature in different ways. However, if consensus is not the point, wisdom is. We must strive to see ourselves and our perennial problems, not merely in the narrow perspective of pressing issues, but in the larger view of our cultural tradition. This is one justification for the presence of philosophers and theologians.

A second word in the Court's remark deserves attention, namely, "speculate." Speculation is the paramount activity of philosophers and theologians. This does not mean that they engage in, as Webster's says, "idle," "casual," or inconclusive[3] ruminations about things (though they may occasionally do so). Rather, it refers to their efforts to view things in broad perspective; the word literally means to observe from a watchtower. It is the privilege of philosophy and theology to stand apart from immediate and pressing events in order to discern meaning and value. This is a task not accomplished quickly, for questions are perennial. For this reason, the speculation of philosophers and theologians does look inconclusive, and no consensus appears. Yet, their speculation is fruitful, for it reminds us that any current resolution must be reviewed and revised, and that any contemporary opinion will be outmoded.

Thus, the Court was quite right in saying it "was not in a position to speculate" about the beginning of life. Courts do not enjoy the privilege of philosophical or theological speculation, though they may on occasion usurp it. They are governed by the immediate and the pressing. They must resolve disputes; they must render judgments. They must be constantly vigilant that the particular decisions they hand down do not undermine the general structure of the law. Their determinations must be practical, applicable to the worlds of economics, business, medicine, and so forth. Thus, precisely as a court, they are not in a position to speculate, although they can be informed and illumined (and possibly confused) by the speculations of others.

This is germane to cooperation between lawyers and philosophers in an area such as the policy and law about the fetus and the newborn. The speculations of philosophers and theologians will take a broader and

3. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2188 (1976).

longer perspective than the determinations of the law, yet both are necessary for a satisfactory appreciation of the nature of the problem. The law must be patient with the speculation and sit still to learn from it; the speculators must be tolerant of the practical and procedural demands of the law. Nowhere more than on the border between medical law and medical ethics is this patience and tolerance needed. Nowhere, in my opinion, can cooperation be more profitable than at this border.

It is at this border that we see familiar legal doctrines such as trespass, homicide, battery, and contract challenged by the invasiveness of modern technology, the ability to sustain organic life in the absence of personal life, the multiple touchings and maulings inflicted for the sake of fleeting benefit, the complexity of the relationship between a patient and many physicians. It is also at this border that we see abstractions about the value of life, its quality, and its sanctity challenged by the concrete realities of harms, costs, incompetence, and neglect. True, this border has long been the scene of skirmishes, particularly under the banner of malpractice. It is important not to allow the skirmishes to escalate into terrible strife over the questions of life and death, for, in these matters, there is enough suffering. Medical law and medical ethics must enter into conversations at the border.

The conversations about the life and death of the fetus and the newborn, and about the rights of parents, infant, and the state, have barely begun. But, unfortunately, they have been more shouting matches than conversations. *Roe v. Wade* was engendered in controversy that has grown in complexity and acerbity. Two well-known cases, those of Infant Doe of Bloomington[4] and Baby Jane Doe of Long Island,[5] pushed what had been a relatively quiet conversation about neonatal intensive care into the center of debate and led to the issuance of federal regulations[6] and a case before the United States Supreme Court.[7] Questions that were entirely speculative a decade ago, such as *in vitro* fertilization and embryo transfer, burst into full-blown ethical and legal problems before ethical and legal concepts were mature enough to accept them. The prospect of efficacious medical and surgical interventions on the fetus *in utero* raises ethical and legal questions previously unthought of.

At the center of all these discussions is the fetus. We should be

4. *In re* Infant Doe, No. GU 8204-004A (Monroe County Cir. Ct., Ind. Apr. 12, 1982), *cert. denied sub nom.*, Infant Doe v. Bloomington Hosp., 464 U.S. 961 (1983).

5. Weber v. Stony Brook Hosp., 95 A.D.2d 567, 467 N.Y.S.2d 685, *aff'd*, 50 N.Y.2d 208, 456 N.E.2d 1186, 469 N.Y.S.2d 63, *cert. denied*, 464 U.S. 1027 (1983).

6. 45 C.F.R. § 84.55 (1985).

7. Bowen v. American Hosp. Ass'n, 106 S. Ct. 2101 (1986).

careful about objectifying "the fetus": even if it is considered by some not to be a "person," we have all, without exception, been fetuses, and every future member of our race will be one. Thus, whatever their moral and legal status, they are quite unique entities. This is perhaps what makes it so difficult to determine precisely what their legal and moral status actually is or should be. Determining legal and moral status consists of placing something or someone into a clearly defined class, so that actions toward that class can be categorized and responsibilities determined. The definitions of the classes are usually based to some extent on the nature of the thing and, to some extent, on artificial or conventional views of it. Thus, animals are distinguished from persons largely on the basis of perceived differences of nature; professionals are distinguished from nonprofessionals largely by convention.

The fetus, however, lives in several worlds and its nature is by no means clear. It is *en ventre sa mere*, but it is there precisely to exit and enter the social world. It is thoroughly dependent on maternal "life support," but can, if ready, become independent of that system with astonishing speed. It is, for the last few weeks of its interuterine life, very much like it will be in its extrauterine life, but if expelled slightly too early, it suffers major disadvantages for survival in a world of ambient oxygen. Indeed, the premature—clearly an infant for purposes of the law—is much more a "born fetus" in terms of its physiology. It is unfinished in its intrinsic "life-support systems," that is, its cardio-pulmonary capabilities.

Add to these anomalies the perplexing question of who can lay legal and moral claim to the fetus or the newborn. If, as noted above, it can become physiologically independent with astonishing rapidity, it remains radically dependent on mature members of its species for a long period of time. Its survival depends, not merely on the maturity of its lungs and the post-natal recycling of its circulation, but more on its being taken up into the arms of nurturing parents and protected from myriad environmental threats. To whom does the fetus "belong"? The answer seems to many moderns quite obvious: it must belong to the person in whose body it is being nurtured. *Roe v. Wade* seems to accept this common notion. Yet, on examination, the truth of this notion is far from obvious. Some might assert a paternal claim, stronger or equal to, the maternal. In ancient Roman law, the *Lex Julia*, it seems, vested in the father all rights over the fetus engendered by him. The fetus itself, some assert, has claims in its own right that ought not be overridden by parental choices. Finally, the state may exercise the suggestively named right of parens patriae. But, even apart from the difficulty of sorting out all these possi-

ble claims and justifying them, the very notion of "belonging" may be questioned: in what sense should concepts developed primarily to deal with property be applied to the young of the species, born or unborn?

All these matters will not be resolved at the bar; they must be thought through by scholars, their dimensions appreciated by the public, and policies both realistic and sensitive crafted by administrators and legislators. The symposium that appears in this journal should be part of the discourse that must go on between law and ethics. Mostly the voices of the lawyers are heard (although one of those lawyers is also a moral philosopher), but perhaps the interesting questions they raise and the approaches they propose will engender a response from the other participants in this crucial conversation. I hope that Hastings College of the Law and its sister institution, University of California, San Francisco, might become the forum for such a continued and informed conversation.