

The Fetus and Its Rights

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ABSTRACT

The moral, legal, and medical obligations to the fetus create a large number of serious legal and medical questions. The progressively increasing recognition of fetal rights in the field of law, such as tort, property, insurance, criminal procedure, and civil rights, raises questions that are related to the autonomy of the mother and the fetus.

During the last 40 years, the technology of primitive embryonic stem cells has developed so much that in the near future, it seems very likely many incurable and devastating diseases that plague humanity will be controlled by employing therapies with such cells.

An important, indeed, legal question is whether the ex utero ovum at the time of fertilization is considered a human being because, in this manner, it acquires the status of a natural person with all the legal rights that derive from it. According to theological and legal views, a human being deserves respect as a natural person from the very first moment of existence.

Thus, a question appeared with particular acuteness—"when does human life begin?" A question that has occupied philosophers, theologians, and other intellectuals for many centuries.

Today, the synthesis of scientific data, philosophical hypotheses, and problems of humanity has become a pressing necessity so that we can deal with the moral rights and social problems that come from the intervention of man in the various stages of life. The appropriate answer to the question, "when does human life begin?" and "how is human life defined?" is very perplexing. Today, dilemmas concerning the respect of human life from birth to death involve not only biology and medicine but also other sciences, such as philosophy, theology, psychology, sociology, legal, and political sciences, which have approached this issue from different points of view. There is a fine line between the responsibilities of science and those of metaphysics, and it seems that it depends on the philosophical principles of each of us.

The concept of ethics in medical practice is older than this science itself, while for centuries, it remains the doctor's obligation to protect his patient's interests. More specifically, those interests which are related to patient's health are the avoidance of premature death, the cure or treatment of a disease, injury, or disability, and the avoidance of unnecessary physical and mental pain. All these are not just subjective findings but must be accompanied by a careful clinical evaluation by the attending physician for the sole purpose of defining which approach will be most beneficial to the patient, among those available. In the texts of Hippocrates, the meaning of "benefit or not to harm," while in the Latin literature, the *primum non nocere* (first do no harm) dominates.

The concept of the fetus as a patient has recently emerged as a major topic in perinatal medicine because when the fetus is treated as an independent patient, it is recommended to apply directed treatment, that is, a method of treatment that will benefit the fetus. When the fetus is not treated as a patient, a nondirected treatment could be acceptable and ethically satisfactory.

The concept of the fetus as a patient essentially depends on various factors. One such factor is sustainability, which should be perceived with biological and technological parameters. When the embryo is viable, that is, when it has attained the maturity to be able to enter the neonatal period, with or without the assistance of technological support, or when it is presented to the doctor, then this fetus is considered a patient.

The way one perceives fetal legal rights depends, to a large extent, on the degree of moral meaning which is attributed to the various stages of human development—fertilization, implantation, formation, development, functional and anatomical maturation, sensation, and sustainability. According to a specific legal point of view (by Jeremy Bentham) "rights do not depend on the ability to think but on the ability to feel." But when does the fetus acquire the ability to think or feel? There is no clear answer here.

The genetic machine is like an atomic bomb, with the need for special care. As the capabilities of this technology increase, more prudence and maturity are required for its use. However, history teaches that each major step in modern biotechnology initially causes moral vertigo, which fortunately resolves quickly.

I close with the hope that most, if not all, understand the reflection arising from the acceptance of the notion that the embryo may have rights.

Keywords: Ethics in perinatal medicine, Fetal rights, Fetal viability, Human life, The fetus as a patient.

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The moral, legal, and medical obligations to the fetus create a large number of serious legal and medical questions. The progressively increasing recognition of fetal rights in the field of law, such as tort, property, insurance, criminal procedure, and civil rights raises questions that are related to the autonomy of the mother and the fetus.

Acceptance of the concept that the fetus does have rights instantly creates great problems and difficulties in the understanding of various serious questions such as:

- When do human life and personal status begin?
- Should the viability limit be regarded as a determinant factor of the legal rights of the fetus?
- Understanding the law regarding legal termination of pregnancy.

At the end of the 20th century, a great scientific achievement was achieved, that of creating a series of human primordial embryonic cells. In particular, the creation of culture conditions was achieved, which allowed the continuous proliferation of these cells for several months while their normal development to more mature or specialized cell types was prohibited. These embryonic cells, with appropriate stimuli, can theoretically evolve in all approximately 230 types of adult cells that consist of the 100 trillion cells human body. These cells derive from the blastocyst, a cell structure that is formed 5–6 days after fertilization of the egg and before its implantation in the endometrium.

During the last 40 years, the technology of primitive embryonic stem cells has developed so much that in the near future, it seems very likely many incurable and devastating diseases that plague humanity will be controlled by employing therapies with such cells. Chronic diseases such as diabetes mellitus, various cardiovascular disorders, liver failure-inducing disorders, Parkinson’s disease, Alzheimer’s, and multiple degenerative diseases of the central nervous system (CNS) maybe able treated in the future with the use of primordial embryonic cells. However, the techniques for transforming these cells into possible therapeutic tools are still experimental. The fertilization takes place *in vivo* in the fallopian tube and prior to the implantation into the uterus, the zygote undergoes mitotic divisions resulting in two cells, four cells, and so on, until these cell divisions lead to the formation of the blastocyst.

As the blastocyst is in the process of being implanted in the endometrium, fetal cells grow to create a bilaminar disk. The outer layer of the blastocyst implants within the vessels and the glands of the uterine epithelium. On the 5th day after fertilization, the implantation is complete. It should

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be emphasized that during this period, these cells have not been differentiated and the term “pre-embryo,” describes the stage of development between the first cell division and the formation of the blastocyst.

At this stage, it has not yet been determined with certainty whether or not the blastocyst will develop into a biological entity.

Understanding the process of human embryogenesis allows the scientific answer to the question—“when does human life begin?”

Today, the prevailing biological view is that the human embryo, from fertilization until the 14th day of development, has not yet acquired human existence from an ontological point of view and that new special rules govern the rights and claims of the so-called pre-embryos.

An important, indeed, legal question is whether the ex utero ovum at the time of fertilization is considered a human being because, in this manner, it acquires the status of a natural person with all the legal rights that derive from it. According to theological and legal views, a human being deserves respect as a natural person from the very first moment of existence. Human embryos that are created *in vitro* are considered human creatures with rights such as dignity and the right to life and deserve respect from the first moment of their existence. The production of human embryos that are intended for exploitation as available biological material is considered unethical.

In vitro fertilization, with all its extensions (technical donor insemination, uterus hosting for pregnancy, etc.), raises a wide range of legal and ethical questions in relation to fetal rights.

During the Clinton Presidency, the United States National Bioethics Committee allowed the research of cryopreserved embryos, that is, in blastocysts, while it prohibited human embryo cloning research for reproductive purposes.

The most serious objections were expressed by those who support the opinion that the fetus is considered a human being from the moment of conception, and so during the Bush Junior Presidency, funding for research programs with blastocysts was banned.

Of course, the concept that the research of human blastocysts, which would anyway be destroyed, may be considered a feticide and therefore is morally unacceptable was contradicted by many scientists arguing that the expectant results would improve the lives of countless patients. Therefore any action that suspends scientific progress in this field actually lacks ethics. This particular issue today still concerns the United States Senate and remains pending.

Thus, a question appeared with particular acuteness—"when does the human begin life?" This is a question that has occupied philosophers, theologians, and other intellectuals for many centuries.

For approximately 2000 years, the opinion of Aristotle prevailed, who supported that male sperm possesses a special power which, after 7 days, can transform the menstrual blood into a human being and later on, within 40 days, into a person with a sensitive soul. According to Hippocrates, the entry of the soul into the male fetus takes place on the 30th day of intrauterine life, while in the female fetus, this occurs on the 40th day. According to Plato, a man consists of two distinct entities—the body and the soul. The body is mortal and servile to the soul, which is greater and immortal. According to the Old Testament, human is bi-intelligent and bi-substance with an immortal soul, which lies in the hands of the creator.

Of course, since the scientific discovery of the whole fertilization process, most today admit that human life begins with fertilization.

The views of the Catholic Church are clearly outlined in the "introduction Donum Vitae," where it is stated that "man must be treated as a person from the moment of conception and that human his rights to life should be recognized as early as that period." In 1997, at the Third conference of the Roman Catholic Academy on life which took place in the Vatican, it was decided that by the union of the two gametes, a life is being created, and the embryo is considered a living human organism since that moment. The position of the Orthodox Christian Church, as formulated, supports that the process that shapes humans begins with the fertilized egg, regardless of whether it was formed *in situ* or *in vitro*. The zygote is destined to evolve and eventually become a human person. Both the fetus and the adult are potential human beings at different stages of development. For the Orthodox Church, the principle of life is not negotiable. It does not enter the logic of science to explain when this is called an "embryo," "genetic material," or "fetus" in English literature, when the cells of the embryo are undifferentiated, and when the main organs of the body have been formed. The Orthodox Church sees all this as an evolution of man in his mother's womb, in a similar manner to the evolution from birth until death; therefore, it affirms and insists on the sanctity of human life at all stages of development. The human fetus cannot be destroyed nor be used for experimental purposes, no matter how noble their goal seems to be.

Today, the synthesis of scientific data, philosophical hypotheses, and problems of humanity has become a pressing necessity so that we can deal with the moral rights and social problems that come from the intervention of man in the various stages of life. The appropriate answer to the question, "when does human life begin?" and "how is the human life defined?" is very perplexing. Today, dilemmas concerning the respect of human life from birth to death involve not only biology and medicine but also other sciences, such as philosophy, theology, psychology, sociology, legal, and political sciences which have approached this issue from different points of view. There is a fine line between the responsibilities of science and those of metaphysics and it seems that it depends on the philosophical principles of each of us.

Pregnancy is a special case in which the attending physician is called upon to make decisions for two patients, the mother and the fetus, and must find the golden ratio in those cases where the interests of one oppose those of the other. There are several concerns with regard to finding this golden ratio because one of the patients, the mother, has an independent morality entity with documented rights, while for the fetus, that is, the unborn child, there is no unanimity at the international level, as to when it is considered a patient with the independent moral entity.

Therefore, by accepting the fetus as a different person, new questions are created about the personhood of the fetus and its rights.

Another important dilemma is the right of parents to refuse the provision of medical services, and in those cases, the role of the obstetrician and the neonatologist is yet undetermined.

To approach the matter, we should define the limit of viability, and when the fetus is considered a patient with an independent clinical entity, we should delineate the rights of the mother, especially in those cases where she denies medical services.

The prevailing trend today is not to attempt resuscitation in premature babies of <23 weeks of gestation unless this is requested by the parents. For the period between 23 and 24 weeks, it is recommended to attempt resuscitation, as long as there is parent consent, while for preterm neonates older than 24 weeks of gestation, where viability exceeds 50%, it is recommended that resuscitation should always be attempted. The obstetrician apparently has a professional responsibility to both patients. Finding the golden ratio between professional obligations in these two independent existences constitutes an important moral concern in obstetrics.

The concept of ethics in medical practice is older than this science itself, while for centuries, it remains the doctor's obligation to protect his patient's interests. More specifically, those interests which are related to patient's health are the avoidance of premature death, the cure or treatment of a disease, injury, or disability, and the avoidance of unnecessary physical and mental pain. All these are not just subjective



findings but must be accompanied by a careful clinical evaluation by the attending physician for the sole purpose of defining which approach will be most beneficial to the patient among those available. In the texts of Hippocrates, the meaning of “benefit or not to harm,” while in the Latin literature, the *primum non nocere* (first do no harm) dominates.

The concept of adult autonomy gives exclusivity to the mother to make whatever decisions she deems appropriate for her health and prohibits the obstetrician from having the final opinion on these subjects. Only after thorough briefing and persuasion, and always with respect for woman’s opinions, the required therapeutic approaches are to be applied. The pregnant woman has the maturity and the knowledge and the right to decide what she wants for her life beyond the narrow limits of medicine, sometimes based on other criteria, such as philosophical or religious. Conversely, the fetus, because it has an insufficiently developed CNS, has not developed the concept of values and beliefs that demonstrate the individual’s moral autonomy.

So we easily conclude that a fetus cannot have a perception of his interests and therefore, one may claim that before the limit of viability, there are no obligations toward the fetus because this is not an autonomous moral entity.

The concept of the fetus as a patient has recently emerged as a major topic in perinatal medicine because when the fetus is treated as an independent patient, it is recommended to apply directed treatment, that is, a method of treatment that will benefit the fetus. When the fetus is not treated as a patient, a nondirected treatment could be acceptable and ethically satisfactory.

However, these distinct roles of directed or undirected treatment are usually difficult to apply in perinatal medicine because of the uncertainty regarding when the fetus can be considered a patient or not. The independent moral entity for the fetus means that it has one or more characteristics that render it independent from the pregnant woman or any other factor; therefore, the basic obligations toward it must be met both by the pregnant woman and her doctor.

To date, no agreement has been reached on when the fetus is considered to acquire an autonomous moral entity. Some believe that the fetus acquires an autonomous moral entity from the moment of conception or the moment of implantation. Others argue that this autonomy is acquired gradually, while others postulate that the fetus ultimately never acquires a clinical entity as long located inside the uterus.

However, it seems that there will be no final agreement to implement this issue. A golden intersection is to be found between theological and philosophical tradition, something that is difficult to accomplish at a state level and much more difficult on a global scale. Therefore, we should abandon the efforts to accept the fetus as a patient with an independent moral status and turn to alternative approaches, which will give us the opportunity, on the one hand, to analyze the

moral concept of the fetus as a patient, and on the other hand, to be able to apply the therapeutic approaches in the clinical practice of perinatal medicine. Such a position begins with the acceptance that the patient does not necessarily have an independent moral entity and that before or after birth, being a patient creates interest in applying various diagnostic and therapeutic coping strategies.

The concept of the fetus as a patient essentially depends on various factors. One such factor is sustainability, which should be perceived with biological and technological parameters. When the embryo is viable, that is, when it has attained the maturity to enter the neonatal period, with or without the assistance of technological support, or when it is presented to the doctor, this fetus is considered a patient.

Determining viability is based on biomedical and technological parameters, which differ from country to country. In Greece, as in the United States of America, the limit of viability is currently considered the 24th week of pregnancy.

In maternal-fetal medicine, when the fetus presents as a patient, the treatment of his health is justified. Aggressive management includes interventions such as intensive care, intrauterine fetal monitoring with various biophysics tests, suspending premature labor, and cesarean section. However, one should consider the existence and severity of various congenital abnormalities, the extreme conditions of premature birth, and the obligations of the pregnant woman. Indeed, it is a fact that in maternal-fetal medicine, the management of pregnancy relatively differs, depending on the presence or absence and the degree of severity of congenital fetal anomalies.

It is argued that the more severe the congenital anomaly, the more directed treatment should be avoided. More specifically, when there is a high probability of a correct and accurate diagnosis of the prenatal defect when there is a high probability of fetal or neonatal death, or when there is a high probability of severe irreversible mental retardation due to some congenital anomaly. It is recommended that the management of pregnancy should consist of informing the parents to be, about the severity of the damage, the prognosis, and the potential treatment options. The recommendation not to terminate a viable fetus with congenital abnormalities based on these criteria is a matter of ongoing clinical research.

Fetuses with lethal congenital anomalies are considered stillbirths; therefore, the treatment in such instances should focus mainly on protecting the mother’s health.

Choosing how to address the health of the fetus must weigh beneficial effects and moral autonomy as well as the independence of the pregnant woman. Such a balance should take into account that the pregnant woman’s obligation is to pose herself at a reasonably small risk with whatever interventions might be beneficial for the viability of the fetus. The uniqueness of perinatal medicine and maternal-fetal medicine lies in the fact that any intervention

in favor of the fetus passes through the body and the moral autonomy of the mother.

The third question is created by the notion that the fetus may have rights.

In understanding the Abortion Act, the United States Supreme Court, in a case in 1973, concluded that the fetus is not a natural person, however, without answering when the life of man legally begins. Hence, this allowed vague margins of free interpretation by the individual courts to protect the fetus's rights. Also, the Supreme Court supported that the state's interest in the fetus's life should be inferior to the woman's constitutional right to terminate the pregnancy until the fetus is viable. Because only when the fetus has the ability to live outside the womb from that moment on is abortion considered a crime. A fetus is not a person under United States law; thus, naturally, the fetus is not considered or recognized as a person with independent protectable status. Therefore, there is no possibility of compensation for prenatal injuries caused intentionally or by negligence. On the contrary, there has been a decision from another court where it is expressly emphasized that the child can and must be compensated for damage from prenatal injuries because the fetus is not simply a "part" of his mother but a special existence; thus it could claim legal inheritance or property rights.

Today, as long as the child is born alive, the state allows a lawsuit for the consequences of prenatal injuries. A significant number of courts recognize actions for tort against the fetus, even in extreme cases where there was medical negligence before the conception of this fetus. Beyond that, today, a significant number of courts recognize actions for tort against the fetus, even in extreme cases where there was medical negligence before the conception of this fetus.

Recognizing the right of the unborn children against the tort in the form of lawsuits for prenatal injuries does not necessarily mean that a fetus is a natural person. However, the majority of the United States allows compensation for the unjustified death of a viable fetus. The time limit of the viability of the embryo is also a critical point, based on which a pregnant woman, covered by the constitutionally protected right to privacy, resorts to termination of pregnancy without any legal implications to its detriment. One wonders if, in this case, the woman's right to terminate the pregnancy is determined only by fetal viability and if this is the reason why this constitutional mother's right is being incriminated.

And here is the big question:

- Sustainability is that which characterizes the beginning of life.
- And who has the right to take a life?

When a child is born with defects, few courts recognize a personal injury lawsuit in favor of the newborn, while the majority of courts allow an action for personal injury in favor of the child's parents. However, the view on lawsuits for compensation due to physical damage and mental suffering

is not generally agreed upon because life is not a subject of legal interpretation alone. For exactly the same reason, a doctor can also be sued if, due to a scientific deficiency, he was not able to diagnose the anatomical or genetic flaw on time, despite that nowadays there are many prenatal tools at his disposal for assessing the state of the fetus (including U/S 1st and 2nd trimester prenatal test, prenatal interventions). However, the view on lawsuits for compensation due to physical damage and mental suffering is not generally agreed upon because life is not a subject of legal interpretation alone.

In Minnesota, United States of America, the law prohibits lawsuits for damages which are based on the rationale that with proper prenatal monitoring and elective abortion, the birth of a defective child would have been prevented. The majority of courts emphasize that human existence, no matter how, is always preferable to nonexistence.

Another important question that arises concerns the extent to which the law protects or compensates a fetus whose health has been damaged prenatally as a consequence of the behavior of his mother. As an example, a pregnant woman who does not consent to a cesarean section, although indicated for medical reasons, and the newborn presents with mental retardation attributed to perinatal hypoxic ischemia. In 1987, the Illinois court in the United States of America upheld a legal action for prenatal negligence of a child against its own mother, whose careless driving resulted in an accident. A woman could therefore be held responsible for any conduct during pregnancy with possible negative consequences on the fetus.

The recognition of the right to terminate pregnancy does not mean that a woman is able to behave as she pleases, challenging the risk of possible prenatal damage to the fetus or giving birth to a defective child. A woman could therefore be held responsible for either misbehavior during pregnancy with possible negative consequences on the fetus, including insufficient diet, use of drugs without medical prescription, use of alcoholic beverages, and generally leading an unhealthy life.

An important, indeed, legal question is whether the ex utero ovum at the time of fertilization is considered a human being because, in this manner, it acquires the status of a natural person with all the legal rights that derive from it.

According to theological and legal views, a human being deserves respect as a natural person from the very first moment of existence. Human embryos that are created *in vitro*, are considered human creatures with rights such as dignity and the right to life, and deserve respected from the first moment of their existence. The production of human embryos that are intended for exploitation as available biological material is considered unethical.

In vitro fertilization, with all its extensions (technical donor insemination, uterus hosting for pregnancy, etc.), raises a wide range of legal and ethical questions about fetal rights. At present, fetal rights depend on whether they will be born alive or viable.



The way one perceives fetal legal rights depends, to a large extent, on the degree of moral meaning which is attributed to the various stages of human development—fertilization, implantation, formation, development, functional and anatomical maturation, sensation, and sustainability. According to a specific legal point of view (by Jeremy Bentham) “rights do not depend on the ability to think but on the ability to feel.” But when does the fetus acquire the ability to think or feel? There is no clear answer here.

The genetic machine is like an atomic bomb, with the need for special care. As the capabilities of this technology increase, more prudence and maturity are required for its use. However, history teaches that each major step in modern biotechnology initially causes moral vertigo, which fortunately resolves quickly.

I close with the hope that most, if not all, understand the reflection arising from the acceptance of the notion that the embryo may have rights.