Forced Caesarians and Maternal-Fetal Rights

By James L. Nelson, Ph.D.

For all the theoretical attention that has been showered on it during the last twenty years, the moral character of the maternal-fetal relationship remains poorly understood. Abortion has been a heart-breaking issue for us, but consider the added complexities that emerge in a pregnancy which a woman intends to complete, or which has been continued past the point of fetal viability. Do the fetuses involved in such pregnancies have moral or legal rights enforceable against the women whose bodies they inhabit? Ought women whose working conditions pose heightened levels of fetal risk be reassigned or discharged? Should women be prosecuted for behaviors which may be damaging to the fetuses they carry? May women be forced to undergo Caesarian section operations if such procedures would be life-saving or risk-reducing for their fetuses?

Recent articles by Eike-Henner Kluge (1) and Mary Anne Warren (2) specifically address the issue of forced Caesarian from very different, although complementary perspectives; considering them together may have some lessons for other cases of maternal-fetal conflicts. But, beyond that, juxtaposing these discussions at least hints that the standard approaches to issues of this sort--trying to determine whose rights trump whose--come under significant strain. Seeing conflicts between maternal and fetal interests on the model of a clash of rights may generate something that comes uncomfortably close to an antinomy: two sound arguments entailing contradictory conclusions.

Kluge's discussion begins with the 1987 British Columbia Roininen case, in which a baby in the process of being born was delivered via Caesarian in order to receive medical attention deemed necessary to save his life. Ms. Roininen initially refused to consent to the operation, but ultimately granted it; Kluge's account of the case leaves it unclear just when this permission was obtained. In any event, the case was litigated and Judge B. K. Davis found that a nonconsensual Caesarian operation was justified under British Columbia's Family and Child Services Act.

Kluge applauds this decision, arguing that fetuses are persons at least by 22 weeks of gestational age, that there is no good reason to hold that they are unlike other persons in not having a right to life, and that their right to life must take precedence over the right of the women who harbor them to consent to a major operation. Therefore, given the advanced state of Ms. Roininen's pregnancy, she was obligated to undergo the Caesarian, and others were permitted to perform it against her will, a conclusion that is bolstered by the fact that she did not avail herself of the opportunity to abort her fetus before it came to term.

Kluge considers the claim that such a policy constitutes ethically indefensible discrimination against women, and concludes that it is without merit; not all differences in the way people are treated count as instances of immoral discrimination. Kluge argues that if certain kinds of discrimination are essential to a practice, and that practice is itself not immoral, then those discriminatory patterns will not be immoral. As pregnancy and childbearing are not in themselves wrongful, and the restrictions on women's freedom are necessary to the enterprise, given the superiority of the fetus's interests in the matter, those restrictions are ethically justifiable. However, all of the above only holds, in Kluge's opinion, if women have ready access to birth control and to abortion before the point at which a fetus acquires personhood; otherwise, a woman would have been forced to accept the obligations of pregnancy, and that is unacceptably discriminatory, since "in no other case does society insist that a person assume a certain obligation without any choice" (3).

Warren takes a very different view of the matter. As is well known, her conception of the necessary conditions for personhood is much different from Kluge's;

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her classic essay "On the Moral and Legal Status of Abortion," argued that consciousness, reasoning, and the presence of self-concepts are at least jointly sufficient for being a person, and are also such that if a being possessed no capacity for any of these traits, that being would not be a person, and hence could not be meaningfully said to have a right to life.\(^4\) However, she has recently modified her position, and is now apparently willing to ascribe equal basic moral rights to infants, despite the fact that they do not clearly satisfy several of her basic conditions of personhood.\(^5\) Yet, despite the fact that infants have rights, and that late-term fetuses are not clearly morally distinct from infants, Warren regards forced Caesarians as serious wrongs inflicted upon women. As she sees it, "it is impossible to treat fetuses in utero as if they were persons without treating women as if they were something less than persons"\(^6\). Regarding fetuses as persons would severely limit women's agency and threaten their personal security.

Warren cites the case of Angela Carder, who died in June of 1987, two days after a court ordered Caesarian was performed. Ms. Carder was suffering from cancer, and was not expected to live much longer. Physicians agreed that her fetus was probably not viable, and that she would probably not survive the surgery. The events proved them right: over the protest of Ms. Carder, her family and her physicians, hospital administrators were successful in obtaining a court order to perform the Caesarian which neither Ms. Carder nor her baby survived.

Warren points out that this sort of negation of the liberty, privacy and life of women can be expected to be repeated if fetuses are seen as fully moral persons, given the increasing availability of medical techniques for treating the fetus, and our increasing awareness of the multiplicity of behaviors that may be implicated in fetal damage. She draws our attention to a bill recently introduced in the Australian state of New South Wales which would make pregnant women liable to criminal prosecution if they smoke, eat unhealthy food, or engage in any action which can be shown to adversely affect the health of a fetus.

As both philosophers recognize, seeing fetuses as the holders of a full complement of human rights does more than make abortion extremely problematic. What Warren stresses is the extent to which women would have their privacy stripped away, their ability to effectively refuse even the most intrusive violations of their bodies, their rights to make choices about eating, drinking, recreating, sexuality, employment. It would certainly seem open for Kluge to point out that the fetus's rights as a person are every bit as ignored as the pregnant woman's, if there are not restrictions on her freedom; the fetus's access to sustenance and medical care, and to freedom from being endangered by the actions to others, are all dependent upon her.

Warren argues that it is proper to attenuate the rights of the fetus, as they are not based on morally considerable properties intrinsic to the individual, but rather largely on "extrinsic" considerations concerning the interests of others, and honoring them would seriously distort and endanger the woman's intrinsic personhood; Kluge holds that fetal rights are based directly on fetal properties, and that the logic of the moral concepts involved force us to allow that in general they will override women's rights. This puts Kluge and Warren within a fairly familiar kind of moral argument—whose analysis of rights, with which attended conception of their stringency, is the most defensible?

But what seems more interesting is to consider the consequences of Warren's strategy of pointing out the lack of compatibility between full fetal and maternal moral rights if we granted a Kluge-style account of the rights of the fetus—an intrinsic account, in which the full and equal moral rights of mature fetuses are granted on the basis of their own properties.

If, as Warren suggests, it is impossible to treat both woman and fetus as though they were full and equal bearers of rights, and, as Kluge suggests, the considerations that support assigning rights to individuals hold equally for (neurologically mature) fetuses and adults, perhaps we need a different moral framework for thinking about how to resolve differences in maternal-fetal interests. Several contemporary philosophers have claimed that standard ethical perspectives—emphasizing impartiality as a moral minimum standard, casting justice as the prime virtue, and stressing rights as the most significant idea in moral discourse—can't fully illuminate the moral character of human relationships. If they are right, then it should come as no surprise that a standard, rights-driven analysis should be extremely problematic when it comes to the relationship of pregnancy.\(^7\)

To sort out pregnancy's moral complexities, we may need to turn to the kinds of alternative moral frameworks currently being developed primarily by feminist thinkers, frameworks which stress a flexible response to particularities in place of the attempt to forge general policies based on overall calculations of the various stringencies of competing rights. To the extent that Warren's work does show that practical incoherency results from trying
(Forced Caesarian continued)

to see both fetus and woman as holding rights over against each other, it suggests that decisions about Caesarian operations and other maternal-fetal conflicts may need to be understood quite outside an exclusively “justice perspective” orientation. Carefully thinking about moral conflicts in pregnancy—to say nothing about thoroughly motivating and defending such a view—is an immense task. But presumably it would see the parties to the pregnancy as all of great moral significance, but none carrying moral trump cards; it would place decision-making close to the situation; not in the arenas of social policy or the judiciary, except as those bodies would allow the decision to be made at a fine-grained level, but in the hands of the pregnant woman; and it would see the woman’s decisions as informed by a concern for the significance of the fetus’s life—as well as of her own life and projects, and of the lives and projects of others to whom she is importantly related as well.

(1)Eike-Henner Kluge, “When Caesarian Section Operations Imposed by a Court are Justified,” The Journal of Medical Ethics 14, no.4 (December 1988), pp. 206-211.


(3)Kluge, “When Caesarian Section Operations Imposed by a Court are Justified,” p. 211.


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**CASE STUDY: Conceiving Children to Use for Tissue Transplantation**

Two years ago, Abe and Mary Ayala’s sixteen year old daughter Anissa was diagnosed as suffering from chronic myelogenous leukemia. Unless a suitable donor could be found, Anissa’s life expectancy was no more than three to five years (she is still alive at present). Neither the parents nor Anissa’s brother are compatible and the National Bone Marrow Donor registry has been unsuccessful in locating a possible transplant candidate. With time running out, last year the Ayalas decided to have another baby in the hope that the new infant would be a successful match. Although the odds were only one in four, tissue typing of the baby born in April, Marrissa Eve, indicate that she is a nearly identical match. With the bone marrow transplant, her sister now has a 70% chance of surviving her illness.

**First Commentary: Tom Tomlinson, Ph.D.**

This case raises two sorts of ethical questions: whether what the Ayala’s did was wrong; and if it is wrong, whether there is any ethically defensible policy that could effectively prohibit it.

I think there is little question that the act of using Anissa’s sister as a bone marrow donor is not in itself wrong. Had Marissa already been born, there would have been no objection to using her as a donor. The procedure poses very little risk to her (chiefly from anesthesia), and would in all likelihood be lifesaving for her sister. Since there is so little risk in bone marrow donation, the parents’ consent on behalf of Marissa poses no significant “conflict of interest”, unlike more problematic situations like sibling kidney donation. Although Marissa would be “used as a means” to save her sister’s life, this fact would not be morally relevant, both because such use posed little threat to Marissa’s interests, and because we would have on the face of it no cause to doubt that her parents valued her for other reasons as well. She would be used as a means (as we all are), but not merely as a means, which is the crucial modifier in the Kantian injunction to respect persons as ends in themselves.

If the motive of using Marissa as a means to save her sister’s life is not enough to condemn the decision to use her as a bone marrow donor, I can’t

(Tomlinson Commentary continued on following page)
see how the same motive is sufficient to condemn the decision to conceive her, unless in this different context such a motive indicates that Marissa would be treated merely as a means. But there is no good reason for drawing such an implication. In all the news reports I've seen, persons who have talked with the Ayala's have no qualms about their sincerity or their devotion to their new daughter. Moreover, except for the saintly (who thankfully have few offspring in any event), most of us conceive children out of a complex mixture of motives (when the conception is "motivated" at all), most of them self-interested, and few of them as altruistic as the Ayala's concern with saving Anissa's life—without discernably evil results. Some naively pious commentators on this case have claimed that children "should be conceived for their own worth". No. Children, once conceived, should then be treated with due regard for their intrinsic worth. But there are no reasons for thinking that Marissa, or any other infant under similar circumstances, wouldn't be so treated by her parents. Except in the most extreme cases, where there is only a single overarching or malevolent motive, there is no natural connection between motives for conceiving children, and later motives and feelings which support nurturance and love. Good thing, too, since the survival of the species has depended on it.

Another argument against the Ayala's decision draws a connection to fetal tissue transplantation. After all, if someone with the Ayala's motives discovered that the fetus is not a suitable match, they could just as well decide to abort that fetus, hoping for better luck with the next one. If we rightly condemn conception and abortion for the purpose of transplanting fetal tissue, then shouldn't we also condemn what the Ayala's did? This is an obvious non sequitur. Even if we condemn all such abortions, it will be because by killing the fetus, we violate the respect owed to the intrinsic value of fetal life. Using the fetus as a means is incompatible with respecting it as an end in itself. Using Marissa as a means for obtaining bone marrow is not incompatible with respecting her as an end in herself.

But let's suppose what the Ayala's did is in fact wrong. Ethically, Is there anything we can do about it? Probably not. Prohibiting conception of siblings for the purpose of later bone marrow donation wouldn't be enforceable, since enforcement would require knowing the parents' motives, which they would be unlikely to share with physicians or others once such motives are a criminal offense. The alternative is to prohibit infants from being bone marrow donors. But this alternative would punish even the innocently motivated, and most of all would punish the Anissas by letting them die for the sake of the mere possibility that their parents were acting wrongly. This would be too high a price for ensuring sanctified conceptions.

Second Commentary: Leonard Fleck, Ph.D.

Since I agree with the moral analysis of this case by my colleague, I would like to consider some futuristic alternate versions of this case. My objective will not be to provide resolutions for the moral problems I will pose. Rather, it will be sufficient to introduce and delineate these issues so that they may be the object of future-directed but present-day moral conversation.

SCENARIO A: Imagine that the Ayala's live in Oregon, that they are poor, and that they are dependent upon the Oregon Medicaid program. Bone marrow transplants cost in the vicinity of $100-150K, and hence, they are not among the procedures that are funded by Medicaid. Oregon wants to be able to provide Medicaid services to 100% of those below the poverty level, as opposed to the current 58%. In order to do that, Oregon has decided not to fund very expensive life-sustaining medical interventions. Would Anissa have been treated unjustly if such a policy were in place? In asking this question, I remind the reader that it cannot be appropriately answered from the perspective of some ideal theory of justice. Oregon, like all other states, has only limited resources that can be deployed to meet the health needs of the poor. So I would argue that a non-ideal conception of justice would have to be used to answer our question. Though I cannot fully explicate the argument here, I believe a rational poor person, thinking about their likely health needs from behind a veil of ignorance, would prefer to have a slightly less comprehensive package of health benefits rather than having a 42% chance of having no assured access to the health care system at all. On the other hand, there is the claim that the poor are being discriminated against in these circumstances, that they are being employed as the front-line troops in the battle to cap state budgets (and taxes), and that it is both indecent and unjust to deny sick vulnerable people desperately needed health care, without which they will surely die.

SCENARIO B: It may seem that the answer to the Oregon Medicaid problem would be some form of national health insurance. Certainly, if we were to adopt some version of a Canadian style health insurance program, there would be something much closer to equal access to health care since everyone would have the very same package of health benefits. There would be no invidious distinctions related to socio-economic status. However, no one should see this as a moral panacea so far as health resource distribution is concerned. For there will still be very real and legitimate limits on what we ought to spend as a society on health care, including life-saving health options. Thus, we can pose our question again. Would we, as a society, have treated Anissa unfairly if we refused to cover bone marrow transplants as part of the national health insurance package? That is, the public judgment would have been made that it was not costworthy to use our
health resources in this way, given alternate uses for those same resources. Or course, in the actual case Marissa is a very good match for Anissa, which means there is a 70% chance that the transplant will be successful and that Anissa could look forward to an indefinite life expectancy. A statistic like that would strongly incline me to want to have that instance of the procedure covered by the national health package. But what if the match were not so good, and the likelihood of a successful transplant dropped to 25% or 10%? Could we then justify procedures like that being included in the national health insurance package, especially when we consider the very broad range of other health needs that would then go unmet? I do not mean to suggest that there are easy or obvious answers to any of these questions. But these are questions that will most assuredly have to be answered in the future.

SCENARIO C: The most difficult challenges will be posed by this last scenario. Suppose that we do have a comprehensive national health insurance program. And suppose that what Anissa really needed to cure her medical problem was a transplant of fetal brain tissue, a good match again being essential for success. The surgery would be expensive, but less so than in the earlier examples. There is strong moral and religious opposition to the very idea of doing such surgery, and even more so to the idea that such surgery would be publicly funded (just as is the case with Medicaid funded abortions). What would be an appropriate policy judgement in this case, given our commitments to justice, liberality, and saving lives that can be saved at reasonable expense? Among these moral values, the focus of my concern in this scenario is that of liberality. As we see further technical advances in genetic engineering and reproductive technologies, we will have to confront this issue in a principled way that protects the value of liberal tolerance without risking tolerance of what ought to be intolerable.

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**An Update on the Year’s Activities of the Center for Ethics and Humanities in the Life Sciences**

**Selected Publications and Presentations by the Members**

Howard Brody, M.D., Ph.D.

Books (authored)

_The Healer's Power_. New Haven: Yale University Press (accepted for publication; anticipated late 1990)

Book Chapters:


Selected Articles:


Leonard Fleck, Ph.D.---Selected Publications and Presentations


"Justice, HMOs, and the Invisible Rationing of Health Care Resources,"  *Bioethics*, 4 (April, 1990), 97-120.


"National Health Insurance: How Just Must We Be?"  *Biomedical Ethics Reviews* (1990), edited by James Humber and Robert Almdreder (New York: Humana Press, 1990), forthcoming, 100 pp. in manuscript.


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Tom Tomlinson, Ph.D.---Selected Publications and Presentations


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James L. Nelson, Ph.D.---Selected Publications and Presentations


Former Staff Members Head West

The Center would like to extend its congratulations and best wishes to Paul J. Reitemeier and Katherine Breck who are leaving MSU this summer for Omaha, Nebraska. Ms. Breck and Mr. Reitemeier will be married on August 10 of this year, in East Lansing and moving west the following week.

Mr. Reitemeier has been a valuable member of the Center serving in a variety of roles since he came to East Lansing in 1984. He was editor and contributed to the Medical Humanities Report from 1984 to 1989, Ethics-in-Formation from 1988 to 1990 and Bioethics Update from 1985 to 1987. He has taught six different sections of Philosophy 340: Medical Ethics for MSU’s philosophy department and served five terms as a preceptor for HM 514: Focal Problems in the College of Human Medicine. He has also published book reviews in Teaching Philosophy and Ethics. Mr. Reitemeier has just been awarded a dissertation fellowship from the College of Arts and Letters (his fourth since coming to MSU) so that he may complete work on his doctoral thesis, “Physician Integrity and the Role of Gatekeeper.” He will be taking a position on October 1 as assistant professor in the Department of Preventive and Societal Medicine at the University of Nebraska Medical Center. His duties will include teaching medical ethics to residents, medical, nursing and allied health students, serving on hospital ethics committees, publishing on health policy issues and conducting consultations as needed.

Ms. Breck has served as co-editor of Ethics-In-Formation, as well as office administrator and membership manager of the Medical Ethics Resource Network. She has also worked as an effective and energetic liaison between the Center and Representative David Hollister’s office in the Michigan House of Representatives. Ms. Breck is completing two masters degrees, one in Philosophy and one in Health and Humanities. She will be one of the first three students to complete the requirements for the newly established Interdisciplinary Program in Health and Humanities, receiving her degree sometime this summer. Once in Omaha, Ms. Breck plans to continue her interest in hospice care.

Rodger Jackson--editor

IPHH Director Takes Sabbatical

Peter Vinten-Johansen will be on sabbatical for the 1990-91 term. In his absence Tess Tavormina, Ph.D. of the English Department will be heading the Interdisciplinary Program in Health and Humanities. Professor Vinten-Johansen plans to use his sabbatical to continue research for his book on the Danish painter Edvard Munch.

Letters to the editor:

The Center recently received this letter from philosopher Greg Pence of the University of Alabama at Birmingham. We appreciate any criticisms, suggestions or questions our readers may have and invite them to write us care of: Center for Ethics and Humanities in the Life Sciences, C-201 E. Fee Hall Michigan State University, E. Lansing, MI 48824-1316

Dear R. Jackson,

This is just a note to tell you how much I enjoy receiving your Medical Humanities Report. I am not sure why I get it free (a grant you have?), but I certainly appreciate your efforts and those of everyone at Michigan State. I especially enjoyed the issue on animal experimentation. Keep up the good work.

Best wishes, Greg Pence

The Medical Humanities Report is a newsletter published three times a year since 1979 by the Center for Ethics and Humanities in the Life Sciences. The funding for publishing the newsletter is part of the Center’s annual budget. The MHR’s primary purpose is to examine various ethical issues connected with the life sciences as well as provide a forum for keeping people aware of the myriad of activities conducted by the Center. Of the 2500 copies printed quarterly, roughly seventy percent are distributed to departments and personnel on the Michigan State campus. The remaining thirty percent are sent to interested parties throughout the United States and around the world.--Rodger Jackson--editor

A tenth century Chinese encyclopedia divides animals into the following categories: a) belonging to the Emperor, b) embalmed, c) tame, d) suckling pigs, e) sirens, f) fabulous, g) stray dogs, h) included in the present classification, i) frenzied, j) innumerable, k) drawn with a very fine camel hair brush, l) fast cetera, m) having just broken the water pitcher, n) that from a long way off look like flies.*
The Center for Ethics and Humanities in the Life Sciences will be sponsoring an intensive summer institute in medical ethics, August 18-25, at Shanty Creek Resort (about 30 miles north of Traverse City near Lake Michigan). This Institute is designed to meet the educational needs of members of institutional ethics committees, faculty in colleges of medicine and nursing, and hospital administrators. Topics will include informed consent, treatment refusal, withdrawing life-sustaining treatment, confidentiality, ethical issues in neonatal care, reproductive rights issues (maternal-fetal conflicts), AIDS-related issues, "gatekeeper" issues and health policy. But the primary emphasis of this Institute will be skill-building, especially skills needed to engage in productive moral conversation. Hence, a substantial amount of time will be spent in small groups. The Institute will be staffed by nationally known faculty including Professor James Childress, Ph.D., of the University of Virginia and Professor William Winslade J.D., Ph.D., of the University of Texas Medical Center in Galveston as well as faculty from the Center. Program costs and a brochure will be available after March 26.

For further information call (517)-355-7550 or write to the Center.