

The rise of the fetal citizen

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Abstract

The use of fetal sounds and imagery in the cultural and political struggles over abortion has expanded markedly in the past half century. Technologies like ultrasound have not only helped us see the fetus, but have played a crucial role in the construction of value-laden notions about it. Biological facts have been used to leverage moral notions of, for example, what it means to be a 'person', ultimately leading us closer and closer to the creation of a new category of 'fetal-citizen'. Assuming a continued improvement in medical understanding of and public access to fetal development, I consider the further impact that access might have on pregnant women and fetuses. Will it simply degrade the concepts of 'person' and 'citizen' beyond usefulness, or is it likely to usher in a Handmaid's Tale dystopia in which reproduction is ever more tightly monitored and controlled? I conclude that we have already traveled quite some distance along what is essentially an uneasy combination of these two paths, and that this trend is likely to continue.

Key words: abortion, anti-abortion, Catholic, citizen, citizenship, concept, conception, contraception, embryo, fertilization, fetus, fetal citizen, IUD, IVF, miscarriage, nationalism, patriotism, personhood, person, pregnancy, pronatalism, stem-cell, surveillance, ultrasound, uterus, woman



**Figure 1: Woman + Fertilised Egg:
The Metamorphosis (Graphic by Zenaida)**

Introduction

The inside of a woman's body, in particular her uterus or womb, has become a public space, perhaps even a public square, populated – when she is pregnant – by a 'person'. Fetal heartbeats, 2-D 3-D and 4-D ultrasound imaging (now in colour!) have opened up her interior spaces to public gaze. And if that were all that was going on – if it were a simple 'window on the womb' (Boucher, 2004) scenario (as the title of a well-known anti-abortion video calls it) involving benign observers – this might be a benign trend. But it is not. For making her interior a public space has also made it a space to be kept under surveillance and, ultimately, controlled.

This surveillance and control can be seen in the criminalisation of pregnant women for behaviour characterised as child abuse or endangerment, in forced fetal surgery and cae-

sarian (Peach, 1993; Casper, 1998, Center for Reproductive Rights, 2000), in prosecuting women who have miscarried (Ketteringham, Korn & Paltrow, 2011) all of which are linked to the continued metamorphosis of embryo into person, and person into citizen (Petchesky, 1987 & 1990).

Much of the debate and controversy surrounding so-called ‘personhood’ initiatives are focused on the move from fertilised egg (or embryo/fetus) to person. Built into my discussion, however, is also the move from ‘person’ to ‘citizen’ (or from ‘personhood’ to ‘citizenship’), a move I consider to be largely non-problematic in the context of this paper. A citizen is simply a person tied to a particular nation or territory or, as *The New Oxford American Dictionary* (2005) defines it, ‘a legally recognised subject or national of a state or commonwealth’ or ‘an inhabitant of a particular town or city’.

That there is little or no moral (or ontological) distance – at least none that has significant consequences for this discussion – between person and citizen is not to say there exist contexts and discussions in which the distinction would be of great significance, or where conflation of these two terms would have a signal impact on questions at hand. But I hold that is not the case here. Fetal persons might, of course, be considered stateless until born, but this is an administrative matter. As a result, and for the purposes of my argument, these two terms are effectively interchangeable. Indeed, actively rendering them so plays an important part in making explicit the wider implications of personhood movements and trends.

The questions of just what it means to be a human being versus a person or citizen are questions philosophy should be well equipped to handle, but so far there’s been little agreement. Similarly, legal scholars and practitioners have failed to untangle the Gordian knot of personhood in the law (Harvard Note, 2001; Peart, 2006).

Philosophers have tended to require things like self-consciousness and thinking for an entity to be considered a person. For them, something being human and its being a person are not the same. Locke, for example, defined a person as ‘a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing, in different times and places’ (Locke, 1959, p. 448). The philosophers Peter Singer and Helga Kuhse (2002) argue all that can be claimed is that the embryo or fertilised egg is a living member of *Homo sapiens*, while Michael Tooley, in his landmark paper ‘Abortion and Infanticide’ (1974), argues ‘person’ is a moral concept such that persons have a moral right to life, while a human being – or member of *Homo sapiens* – may not. (He also claimed that: ‘An organism possesses a serious right to life only if it possesses the concept of a self as a continuing subject of experiences and other mental states, and believes that it is itself such a continuing entity’ (1974, p. 59). Clearly, this raises questions about whether or not an infant is a person and has a right to life – Tooley took the controversial position that infanticide is morally defensible – or indeed an adult with severe mental disabilities or a child in a coma. Since this paper is aimed at teasing out where the equivalence between fertilised egg and person/citizen takes us, I need not parse the problems of infanticide or euthanasia as they relate to this question.)

Lawyers have different considerations than do philosophers about what constitutes personhood. At certain times and in certain places, adult humans have not always been considered full persons under the law – for example slaves and women – while some non-humans have – for example, corporations (Harvard Note, 2001).

Religious positions vary, and I will not attempt to canvas them all. The church best known for its opposition to contraception and abortion, the Roman Catholic Church, recently lent its support to a personhood campaign in Europe (Craine, 2012). The Church itself contends that: ‘From the first moment of his existence, a human being must be recognised as having the rights of a person – among which is the inviolable right of every innocent being to life.’ (Catechism of the Catholic Church, n.d.)

Similarly, the anti-abortion organisation Personhood USA argues for a fairly strict identity between human and person, asserting that: ‘Personhood’ is ‘the cultural and legal recognition of the equal and unalienable rights of human beings’ (Personhood, n.d.).

For the Personhood lobby, then, it's pretty simple. There's no need to start drawing complicated distinctions between biological humans, human entities with functioning brains, fertilised eggs and 10-year-olds. They are one and the same. And this simplicity certainly makes for a powerful case when you're making it in a mass media culture that can really only deal with one idea at a time.

Very fine and convincing arguments can be made that a fetus is not a person in way you and I are people. We can draw complex distinctions, and argue that the sounds of fetal heartbeats and 4-D images of fetuses have no intrinsic meaning or value, only those we give them. We can try to explain why the image on the left (See Figure 1) is not the same as the one on the right, and many have done just that (e.g. Arthur, 2005; Boonin, 2003; Tooley, 1974).

But it's not what I want to do here. Rather, I want to acknowledge that this identity of embryo as tiny person/citizen, or something like it, has already taken root, in practice if not in statute, and proceed to tease out what that means and where it might take us.

Fetal-citizen equivalence

Aided by medical technology, by biological facts, what anti-abortion advocates might call the 'humanity of the fetus' has gained ground. To put it another way, technologies like ultrasound have not only helped us see the embryo (Verbeek, 2008), but they have played a crucial role in the construction of value-laden notions *about* it (Verbeek, 2008; Zechmeister, 2001).

It's a long-held philosophical tenet that facts don't tell us anything about value; that *is* cannot tell us anything about *ought*; that natural or biological facts are not a source of morality. And while that still holds, it is clear that in the case of the embryo, the blastula, the fetus, biological facts have been used, at the very least, to leverage moral notions about, for example, what it means to be a person/citizen (Franklin, 1991; Verbeek, 2008). Part of the reason this has gathered steam in recent decades is something of a convergence of medical science and anti-abortion rhetoric whereby the objective and ostensibly value-free claims of science regarding the fetus are supplementing, even superseding, value-laden religious anti-abortion argumentation (Boucher, 2004). In addition, parental and medical concern for the wanted fetus as patient tends to bolster anti-abortion claims of the personhood, if not primacy, of the fetus.

There is ample evidence that fetuses are indeed being treated as moral persons, hence citizens, well beyond religious or anti-abortion circles. Here are a few examples:

(i) In New Zealand, the Ministry of Health is working on a plan to enable it to assign NHIs or National Health Index numbers to fetuses. (NHIs are unique numbers to identify users of health and disability services and have traditionally been assigned at birth.) At time of writing, no agreement had been reached on whether or not there would be a minimum gestational age for assignment of the NHIs, though it is worth noting that discussion documents referred to this project as 'Assigning NHI Numbers to Unborn Babies' (National Health Board, 2011). (After concerns from consumer and women's groups, those spearheading the programme planned to engage in wider consultation.)

In addition, some District Health Boards have set up child protection alert systems that cover fetuses as well as children, and involve alerts for things like family violence and potentially 'harmful behaviours' by pregnant women (Wall, 2010; C. Parker, personal communication, December 13, 2011).

(ii) Prosecutions of pregnant women over fetal abuse or endangerment continue to proliferate in the United States, as well as forced caesarians and fetal therapies including surgery and blood transfusion (Peach, 1993; Casper, 1998; Schroedel, Fiber & Snyder, 2000; Kettering et al., 2006). A briefing paper by the Center for Reproductive Rights (2000, p. 2) stated that 'at

least 200 women in more than 30 states have been arrested and criminally charged for their alleged drug use or other actions during pregnancy’.

(iii) In New Zealand, there have already been cases of the state stepping in to control a pregnancy in the interests of the fetus, for example, Nikki’s case from 2002 when a fetus was made a ward of the court ‘to protect it against its mother’s decision to allow the birth to be filmed as part of a pornographic film’ (Peart, 2006, p. 461), and the Baby P case from 1995 in which the courts claimed jurisdiction over a fetus it considered needed care and protection because the mother was considered unreliable and was in a violent relationship with the father (Peart, 2006). More recently, a judge in New Plymouth jailed a pregnant woman convicted of drunk driving charges in order to protect her fetus (‘Jailed to Protect Unborn Child,’ June 11, 2012). ‘Prison must follow, in particular so the child you carry is not subjected to alcohol and the consequences that flow from that,’ the judge was reported as saying. The woman received a 12-month prison term.

If, then, society tacitly accepts something like the equivalence of the two images in Figure 1, it behooves us to ask what it means to say that from the so-called moment of conception, a woman has a tiny citizen/person inside her? Does it ultimately make a mockery of the very concept of person; or does it concretely expand that concept, leading us toward an increasingly fascistic state of surveillance and control over women and pregnancy?

One place to look for some insight is Poland. In her article, ‘The Purest Democrat: Fetal Citizenship and Subjectivity in the Construction of Democracy in Poland’, Janine Holc (2004) looks at the Polish Constitutional Tribunal’s 1997 decision declaring abortion unconstitutional, which brought into existence what Holc calls the fetal-citizen. She explains, among other things, how Poland’s traumatic transition away from communism played into this portrayal of the fetus as a democratic citizen fetus – a kind of blank-slate citizen, or future citizen, onto which the hopes and dreams of the nation could be projected, and she discusses some of the practical ramifications of the Tribunal’s judgment, including fetuses gaining property rights as well as the ability to claim damages and sue if their health is compromised before birth.

Holc’s paper is a nice signpost to what I’m calling the dystopic road; the path of ever increasing surveillance and control.

The dystopic road

Perhaps the most dystopic scenario for women is something like the one described in Margaret Atwood’s 1985 novel, *The Handmaid’s Tale*. Set in the imaginary theocratic fascist Republic of Gilead, which is somewhere in the United States, the book is written from the perspective of a handmaid named Offred. Fertility has declined precipitously in Gilead, and women who can become pregnant and give birth are essentially kept as breeding stock. In Gilead, all the abortionists have been hanged, their bodies put on display covered in white sheets: ‘Each has a placard hung around his neck to show why he has been executed: a drawing of a human foetus’ (p. 33).

It’s difficult not to see at least some parallels in the handmaids of Gilead being forbidden liquor, coffee and cigarettes and the increasing public and state surveillance and punishment of pregnant women (Oaks, 2000; Flavin & Paltrow, 2010; Cannold, 1998).

And why not? Once you have a citizen, a person, living inside you, with all the rights and moral status that citizenship and personhood attract, then the authorities gain the right of entry, and a regulatory role in how that fetal citizen is treated. Taking a competing rights frame, the more constitutional and legal rights apply to the fetus, the less they will be applied to women (Ketteringham et al., 2011).

Given that women's reproductive role has long been a basis for inequality and inferiority under the law (Peach, 1993), a good case can be made that transforming the fertilised egg into a citizen is a way of reinstating at least some of the control over women that has been lost in the wake of the sexual revolution and the pill. Rather than controlling women directly, that control is now exerted on behalf of an innocent fellow citizen.

What's more, as Holc articulates the Polish situation, this fetal citizen is not any citizen, but the 'purest' citizen (p. 758), so its rights and status tend to be privileged over those of the woman. This can be seen in personhood campaigns' use of the phrase 'innocent persons', rather than simply 'persons'. The proposed 2012 Colorado Personhood Amendment, for example, reads: 'In order to affirm basic human dignity, be it resolved that the right to life in this constitution applies equally to all *innocent* persons', (emphasis added) where ' "person" applies to every human being regardless of the method of creation' and ' "human being" is a member of the species *Homo sapiens* at any stage of development' (Colorado Personhood Coalition, n.d.). The section of the Roman Catholic Catechism cited above also specifies 'every innocent being'.

Other forces that are likely to arise when the fetus is classed as a citizen are those of nationalism and patriotism. Saving citizens is more heroic than saving stateless non-persons, so actors other than state actors will feel increasingly justified in stepping in to act as uninvited protectors. The extremist group Army of God profiles those who have assassinated abortion providers as 'American heroes', and one of its primary arguments for violent action is that citizens have the right to use force to 'protect your neighbor's life' (Army of God, n.d.). Under this scenario, a woman seeking an abortion, and those who aid her, are also potential traitors to the nation-state, just like the abortionists in Gilead.

Nationalism with respect to reproduction is not new: in New Zealand, as elsewhere, the first half of the twentieth century saw fears of 'race suicide' and (white) population decline lead to a variety of pronatalist policies (Brookes, 2001); more recently, pro-natalist and anti-abortion measures are on the rise in Russia and some other Eastern European nations in part driven by fears of population decline (Momaya, 2011). Thus, fetal personhood/citizenship piggybacks on an already well-established state interest in controlling reproduction, while offering it myriad new outlets and means.

Although there is no 'Personhood' movement in New Zealand that explicitly uses the term, the country's main anti-abortion groups do hold the same position as those actively campaigning for personhood, that is, that there is a right to life from the so-called 'moment of conception' (Right to Life, n.d.). This claim was made explicit in a seven-year-long court action by the anti-abortion group Right to Life in which it argued, among other things, that 'there is no logical or moral basis for placing a label of "nonperson" on the unborn child (who is both human and alive) simply on the grounds of age and development (that is, the unborn child is not old enough or developed enough to be a "person")' (*Right to Life v. Abortion Supervisory Committee*, September 3, 2010, p. 20). It ultimately lost its case in the Supreme Court in August 2012. (*Right to Life v Abortion Supervisory Committee*, August 9, 2012)

Where else might the dystopic road take us?

Monitoring and subsequent prosecutions of pregnant women would surely increase, and perhaps state authorities will need more specialised policing units that focus on fetal-citizens. The gap between fetus and woman, which some have called 'fetal separatism' (Ketteringham et al., 2011), and the adversarial frame of fetal-citizen vs. woman would surely grow, with women increasingly seen as what Peach (1993) called 'fetal containers' – and dangerous ones at that. There would likely be increased implications for miscarriage and stillbirth, including more

prosecutions of women, medical professionals and third parties for manslaughter or murder (Beety, 2011; Goldman, 2011). Indeed, obstetricians and others involved in pregnancy care would be at much greater risk of legal or disciplinary action and prosecution. Lower-level infractions could be treated as much more serious crimes, for example, failing to wear a seat-belt if that was seen as endangering a fetus; while legal activities like taking prescription medication or smoking could become criminalised (Beety, 2011). In other words, ordinary behaviour when it is the behaviour of a pregnant woman would be increasingly open to public opprobrium if not criminal sanction.

Many have pointed out that new technologies, like IVF and stem-cell research, would be either severely curtailed or outlawed (Goldman, 2011). What about natural embryo loss, estimated to be upward of 50%? One estimate puts the worldwide deaths attributable to natural embryo loss at upward of 220 million a year (Ord, 2008; Murphy, 1985). Will health spending and research need to be redirected toward protecting the lives of citizens by preventing this 'scourge' (Ord, 2008)?

At this point, the imagination can run rather wild. What about women entering states or countries in which a fertilised egg is classed as a person/citizen? Would they be screened at the border for IUDs (which can prevent a fertilised egg from implanting in the uterus)? Would travel be curtailed for pregnant women – or women suspected of being pregnant – as happened to the young rape victim known as X who tried to leave Ireland for an abortion in 1992? Could hostile partners or others falsely accuse a woman of being pregnant in order to see her prosecuted for fetal endangerment or for taking emergency contraception (Will, 2011)?

Null concept or 'tiered' categories

Another less disturbing possibility is that personhood efforts, particularly those that focus on the fertilised egg, will fatally undermine the very concepts at issue.

A concept is something like a category or a general notion, which is to say concepts 'apply to things in the world; things in the world "fall under them"' (Fodor, 1998, p. 24). Grasping the concept of 'person' or 'citizen' allows us to be able to pick out instances of those concepts: 'That is person over there!' But if a concept's boundaries expand too far, the things it picks out will become too varied, rendering that concept increasingly less useful *as* a concept.

In the context of this discussion, if a fertilised egg is a person and a citizen, even though it may yet divide and become two (identical twin) citizens or, most likely, die an unknown and unrecorded natural death, then what does it mean to be a person/citizen? (Or to fall under the concept 'person' or 'citizen'?)

Clearly it would mean being a person/citizen unlike those the concept has traditionally picked out – a person unable to think, speak, act, or survive outside the body of another person, at least not for quite some weeks after coming into existence. This in turn means that even though the law might be changed in myriad ways to account for this new 'citizen', there are equally many aspects of life *as* a citizen that would simply be precluded from applying to this group. And once expanded to pick out fertilised egg, the concepts of 'person' (hence 'citizen') will be increasingly susceptible to further leveraging, perhaps to incorporate sperm prior to fertilisation (since there is, so far as we know, no obvious 'moment' of fertilisation) or, in a post-cloning world, a human genome.

Another way of dealing with such a degraded concept – in practice, if not theory – would be the creation of new categories of person/citizen within the broader concepts. These could be akin to the kind of 'tiered citizenship' that Chambers (2007) sees in the infamous U.S. Supreme Court Dred Scott decision. Perhaps they would be based on the gestational age of the

fetus, or its brain activity; though as with the law as it is currently being practised, the categories or tiers would probably change according to the situation the fetus found itself in and the particular behaviour society was intent on curtailing.

The creation of ‘tiered citizenship’ or ‘tiered personhood’ (or new conceptions of persons/citizens) is itself a dangerous road along which to travel, as Chambers (2007) points out, citing governments restricting citizenship rights of certain groups, like felons or ‘enemy combatants’. (Chambers does note, however, that citizenship rights can be curtailed without the creation of new ‘tiers’ of citizen.)

An uneasy combination

The most likely outcome is an uneasy combination of the dystopic road toward increased surveillance and control, and the further degradation and possible refinement of the concepts of personhood and citizenship, though refinements that move these concepts inexorably farther from birth and closer to conception. Indeed, it seems clear looking at both medical and political trends that this uneasy combination has now been with us for quite some time, and that we have already travelled some distance along what I have called the dystopic road.

The direct access we now have to the embryo/fetus – together with the ever-growing body of research into the impact of environmental factors on the health and well-being of that fetus – means there is little or no possibility of our reducing state and public surveillance of pregnancy, hence of pregnant women. As that surveillance and control continue to expand, so too will efforts to broaden the concept of person/citizen to incorporate human life at its earliest biological stage, further weakening the protections pregnant women themselves have as authentic persons and citizens.

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