

At the Moment of Conception: Defining Life, Unraveling Law

SUSAN E. HERZ

The Defining Moment Happened with Relatively Little Fanfare

Since November 2, 2002, every state's abortion law has stood at risk of complete revision. With one easily overlooked sentence, federal regulators declared in October 2002 that effective the following month, states could make available healthcare coverage directly to organisms at the moment of conception.¹

The relationship between abortion and healthcare coverage is not immediately obvious. A little background information should make the dots relatively easy to connect.

Rewind to January 22, 1973

The U.S. Supreme Court is overturning a Texas antiabortion statute and, in the process, carefully limiting every state's interference with abortions. In large part, the decision in *Roe v. Wade* represents a compromise crafted when opposing camps fail to offer evidence establishing when personhood begins. A rare audiotape shows that, at one point during the prior year's oral arguments, one of the judges and Robert Flowers, the lawyer defending the Texas law, have engaged as follows:

Flowers: Gentlemen, we feel that the concept of a fetus being within the concept of a person . . . is

an extremely fundamental thing.

Court: Of course if you're right about that, you can sit down. You've won your case.

Flowers: Yes, sir. That's exactly right. We feel that this is the only question really that this Court has to answer. We have a—

Court: You think the case is over for you? You've lost your case if the fetus or the embryo is not a person, is that it?

Flowers: Yes sir, I would say so.²

Texas loses its case. The state fails to prove that the fetus or embryo is a person. Indeed, despite considerable prodding by the Supreme Court Justices, neither side can offer evidence substantiating when life begins. The Court strikes down all state abortion statutes and declares and applies a constitutional right of privacy greatly limiting the government's right to interfere with fetal life.³

Fast-Forward to November 2, 2002

The Bush administration allows states to offer certain healthcare coverage directly to zygotes. To accomplish this, the federally administered State Children's Health Insurance Program (SCHIP) decrees that for purposes of Program eligibility, childhood begins at the moment of conception.

There Is the Link

Texas and others have their long-awaited Exhibit A—a regulation purporting to establish when life begins.

When the Supreme Court Justices tackled the question of life's beginning, they found it unanswerable. Noting that generations of scholars in the domains of philosophy, medicine, and theology had produced no definitive resolution, the Court declared that legal training made judges no better equipped for the task.

Thirty years later, however, federal administrators weighed in, boldly defining life's inception by regulatory fiat, dismissing much public comment as beyond the scope of the SCHIP. When their regulation encounters a challenge, some will argue that Bush's policymakers have put to rest centuries of multidisciplinary discourse, finally resolving when life begins, or at least producing evidence of current societal beliefs. Some will say that providing prenatal care is a prudent way of promoting healthy beginnings for newborns.

Others will argue that, although offering healthcare directly to zygotes may seem a compassionate gesture, the larger context suggests that other interests may have inspired the initiative. After all, the same care could be provided by offering it to the mother. Bush's gesture allows a woman to remain ineligible for healthcare while the organism in her belly steps to the head of the line. Additionally, the President appears relatively untroubled about permitting 15% of the country's *born* population to live without healthcare. It takes effort to speculate that the SCHIP amendments were intended for any purpose other than making state abortion laws fair game.

So, on January 22, 2004, 31 years after *Roe v. Wade*, we awake to a bumper crop of developments and questions.

Some Developments

Antiabortion advocates have lost little time preparing for a legal overhaul. Already, on November 1, 2002, Louisiana began producing and selling license plates proclaiming "Choose Life." As we go to press a majority of states boast similar initiatives in various stages of development. By July 2003, more than half the states had passed laws to protect "unborn victims of violence," and a companion bill was finding its way through Congress. Meanwhile, another seven states sought to criminally punish women who use drugs or alcohol during pregnancy. Georgia's legislature considered a bill requiring that, prior to receiving abortions, women go to court to obtain fetal death certificates. President Bush has encouraged a ban on abortions, using public forums, the federal budget, executive orders, and judicial nomination processes to advance the cause. Advocates on both sides of the aisle know that Bush's next Supreme Court Justice nominee may tilt a divided Court, this time terminating the zone of decisional privacy that currently permits lawful abortions.

Some Questions

Will the SCHIP Regulation Survive a Challenge?

If childhood begins at conception, what will happen when a woman's uninsured health interests differ from those of her insured unborn child? What ethical guidelines will assist healthcare providers with loyalties legally divided? What effect will this have on medical research? Who will census-takers count? Those answering the door plus the "child" conceived last night? How will they undertake this count? What about tax deductions? What will

IRS audits entail? And how will the IRS handle miscarriages? What about medical examiners? Will they provide death certificates for every miscarriage? Will this regulation expand the definition of child abuse and neglect to include actions and inactions by pregnant women such as drinking wine and failing to follow medical advice? Will various public and private service providers carry a new legal duty to ascertain whether conception has occurred? What will all this mean about the right to privacy—that right we once held so dearly, that right to be left alone?

If the SCHIP Regulation Survives a Challenge, Will the Roe Holding Survive the Regulation?

If a zygote is a child, then will using a “morning after pill” constitute murder? Will prescribing and dispensing such pills constitute “aiding and abetting”? What will happen to women undergoing abortions several weeks after conception? How will we build enough jails? Who will care for a woman’s children while she is serving time for murder? Will healthcare professionals risk their licenses if they assist a woman? Whose interests are served by the SCHIP construct? Will we find our nation divided again? Will we find our families divided again? Our homes? Our hearts? Will we visit anew unfold-

ing stories of children borne of incest, of rape, of women of insufficient maturity? Will we visit anew growing statistics showing women’s lives lost to backstreet abortions?

Bush’s Choice

Thirty-one years ago, the *Roe* Court began by acknowledging the emotional and sensitive nature of the abortion controversy. The Supreme Court expressly sought to resolve the issue free of emotion and personal preference.

An honorable Bush administration should do no less.

Federal regulators can still replace the SCHIP amendment with regulations providing prenatal care for all pregnant women. Zygotes would receive quality care, and women would retain their rights to make one of life’s most difficult and most personal decisions. At least in this arena, our families, our nation, and our collective spirit would enjoy some measure of peace.

Notes

1. *Federal Register* 67(191), 2002 Oct 2:61956–74.
2. Irons P, Guitton S, eds. *May It Please the Court: 23 Live Recordings of Landmark Cases as Argued before the Supreme Court*. New York: New Press; 1993.
3. *Roe v. Wade*, 410 U.S. 113, 93 Sup. Ct. 705 (1973).