

Book Review Reproduction and Autonomy:

“Regulating Reproduction: Law, Technology and Autonomy”
Emily Jackson, Oxford, 2001

Introduction

Often the pro-choice lobby relies heavily on a legal precedent to support their advocacy; *Roe v. Wade* is a battle cry throughout US pro-choice literature. But arguments become rickety when advocates for legislative change assume that selected legal precedents represent the truth. For Emily Jackson, author of *Regulating Reproduction: Law, Technology and Autonomy*, case law is enough to prove that the foetus has no right to life. She calls upon the law to be consistent in its treatment of the foetus as a non-person, thereby granting full reproductive autonomy to women. However, legal rights do not necessarily equate with natural rights.

Jackson, a lecturer in law at the London School of Economics and also an advisor to the Pro-Choice Forum in the UK, has written a book which appears to depict reproduction as a food chain, with women at the top. The continually expanding range of reproductive options comprise a kind of supermarket, and why should our purchases be restricted? Reproductive autonomy, a version of the ‘woman’s right to choose’ mantra, is the foundation of this book.

She introduces with the disclaimer that she does not defend reproductive rights as absolute; she is simply insisting that women’s reproductive choices always be treated with respect. However each chapter argues that since a woman’s autonomy and bodily integrity are at stake, her wishes in the reproductive sphere must always be honoured. It is difficult to see how this does not translate into absolute autonomy. Perhaps it is an attempt to pretend that autonomy is *not* her starting point, or her absolute, and to argue in individual reproductive situations that both biology and law demonstrate the woman’s natural right to have the final say.

Making choices

True to the pro-choice tradition, Jackson denies any ill effects of abortion for women, claiming in fact that “the mental wellbeing of a woman who does not want to be pregnant is, almost by definition, advanced by termination” (p79). I would be interested to hear of any research showing abortion to have tangible benefits for women. On the other hand, recent research published in the *British Medical Journal*¹ failed to detect any improvement in mental health for women who had abortions, and in fact found that married women were more likely to experience depression after aborting than after carrying to term an unplanned pregnancy².

But apart from making an unsubstantiated claim, Jackson is making a much deeper assertion about decisionmaking in general – that getting whatever we want will be best for us. Note the intricacies here; the decision a woman makes matters less than the fact that she made it. This is the crux of the liberal argument. Jackson acknowledges that autonomy is meaningless without a range of options and information (p5). But pro-choice ideology bucks against providing all the information to women³; it feels the need to portray abortions as good or at least benign⁴, and it marginalises the experiences of women who were coerced into, or hurt by, abortion⁵.

¹ Reardon D and Cogle J, “Depression and unintended pregnancy in the National Longitudinal Survey of Youth: a cohort study”, *British Medical Journal* Vol 324, 19 January 2002, pp151-152.

² View the debate following this article at www.bmj.com

³ In the ACT, Australia, a 1998 Act required women to be provided with an information booklet before having an abortion; pro-choice politicians campaigned against the provision of this information (see Joseph, M. “These changes won’t make abortion rare”, *The Canberra Times* 15 December 2001).

⁴ Abortion is claimed to be “a relatively benign procedure in terms of emotional effect” (Planned Parenthood Fact Sheet “The emotional effects of induced abortion”). “We should stop seeing abortion as a problem and start seeing it as a legitimate and sensible solution to the problem of unwanted pregnancy” (Ann Furedi, “Abortion rise reflects increased choices for women”, Press release from BPAS, 28/09/01). Abortion as “an empowering experience” or a “rite of passage into womanhood” (Ryan, Ripper and Buttfield 1994, *We Women Decide*, Women’s Studies Unit, Flinders University).

⁵ Tankard-Reist, M. (2000), *Giving Sorrow Words*, Duffy and Snellgrove, Sydney. Also Mathewes-Green, F. (1994) *Real Choices*, Sisters, Oregon; Multnomah Books; a collection of testimonies which shows how women’s needs have been misdiagnosed and treated with abortion.

Philosophically, the liberal position focusing on autonomy is problematic. Jackson says that “freedom of choice would be essentially meaningless if only rational and sensible decisions had to be respected” (p113), implying that she would, for example, support a woman’s decision to harm herself. Autonomy is presumed to be a good thing, regardless of the decision made. But the only good thing about freedom of choice is that it allows people to make good decisions.

Embryo ‘wastage’

In defending reproductive technologies Jackson says “an embryo will not autonomously become a baby, rather this collection of cells will perish unless subsequently implanted in a woman’s uterus and carried for at least five months. These are substantial prerequisites: most fertilised eggs fail either to implant or to complete their development, and the vast majority of this natural wastage remains unnoticed”. She then cites the Royal College of Obstetricians and Gynaecologists’ Ethics Committee: “It is morally unconvincing to claim absolute inviolability for an organism with which nature itself is so prodigal.” (p227)

Firstly this statement fails to recognise that the embryo is not an organism that is a biological and moral stranger to us. He or she belongs to the human species, just like an infant and an adult. Furthermore, 100% of human beings die. At times in Africa there was a 50% “wastage” of infants. And just as an embryo will not autonomously become a baby unless implanted; a baby will not become an adult unless cared for. Should we dispose of human beings as we wish simply because “nature itself is so prodigal” with all of us?

Foetal rights and autonomy

Without arguing from first principles, Jackson dismisses the foetus with statements such as these: “... a fetus does not have a legal personality” (p98) and “if the fetus lacks legal personality, it is perhaps illogical to endow it with the status of a patient which could confer upon it extraordinarily powerful rights over the bodily autonomy of the pregnant woman” (p129). She points out medical practices which shift towards reducing women’s reproductive autonomy; “Even if it is established law that the fetus is not a person, there is no doubt that the fetus is now widely understood to be a patient” (p127).

Is she accusing the medical and legal professions of sophistry, or simply saying that they are inconsistent? Her position on the foetus is not stated outright but emerges very clearly, and hiding behind legal definitions is unconvincing. Discussion of the moral status of the embryo (pp 226-230) seems a token gesture when throughout the book the foetus and embryo are assumed to have no legal personhood and therefore no moral status as a human being. Thus reproductive autonomy is not problematic.

In fact, Jackson’s fatal flaw in broaching the topic of autonomy is her assumption that legal ‘personhood’ has anything at all to do with the right to be alive.

An historical example of the irrelevance of legal personhood to human rights is the Canada Indian Act 1880, where “[a person] is a male person, including an Indian and excluding a person of Mongolian or Chinese Race”, thereby denying personhood to women⁶ and Asians. By 1925 Canada had recognised all races, and women, as persons. If Jackson had written her book in 1880, would she have accepted the legal definition of women as non-persons with no proper legal protection?

Furthermore, classifications of ‘personhood’ are not merely mistakes, nor random. The main reason a foetus has no “legal personality” is to facilitate legal abortion⁷. But Jackson’s assertion is that *because* the fetus has no legal personality, abortion must be made available.

She admits, though, that “in deciding the legal priority to be given to fetal interests, both biological ‘facts’ about fetal development and moral judgments about the status

⁶ Fleming J and Hains M, “What rights if any do the unborn have under international law?” *Australian Bar Review* Vol 16 No 2, November 1997.

⁷ Historically, induced abortion has been forbidden (e.g. *The Hippocratic Oath*) and pregnant women protected from the death sentence (e.g. *The International Covenant on Civil and Political Rights*, Office of the High Commissioner for Human Rights, General Assembly Resolution 2200A (XXI) 16 December 1966). Only very recently have these principles been rejected, in the context of relaxing abortion laws. See Overduin D. and Fleming J. *Wake up, lucky country!* Lutheran Publishing House, Adelaide 1980.

of the fetus seem to be much less important than normative decisions about the practical consequences of recognising different sorts of obligations". And the prohibition of abortion is the most loudly protested consequence of endowing the foetus with 'legal personhood'. Courts in the US and Australia have recently been grappling with cases of foetal or newborn death as a result of violence suffered by the mother⁸. Is the attacker merely to be charged with assault, or has something more serious been perpetrated? Pro-choicers panic when a court of law considers recognising that the foetus has intrinsic value, even when that judgment would be a woman-friendly decision.⁹

Jackson fails to grasp the reason why the foetus matters. In her appeal for "moral tolerance" (p9) she turns her back on humanity's chance for peace, liberty and justice; the unwavering principle that every single member of the human species is a life that must be protected.¹⁰

The Universal Declaration of Human Rights 1948 forbids discrimination on the basis of 'personhood'. It declares that "*everyone has the right to recognition everywhere as a person before the law*" (Article 6), and that "*everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind*" (Article 2).

Scientists can quibble over capricious demarcations of 'personhood' for research purposes – implantation, the primitive streak, or viability. What is clear, though, is that at fertilisation a unique human being exists. From that point onwards, the Declaration does not allow this human being to be conveniently classified as a non-person. No line can be drawn, and neither can human beings be catalogued according to ability or function (as feminists well know – the failure to be endowed with a penis does not constitute inferiority). The point of birth, the pro-chooser's favourite line in the sand, is equally arbitrary.

As a pro-choice advocate, Jackson rightly fears legal and medical trends recognising the foetus and embryo as a human being, for example antenatal care which treats the foetus as a patient, or technologies which lower the age of viability. These examples bring into sharp focus the inconsistencies in law and the incongruities of pro-choice ideology with justice.

Declarations of fundamental human rights have been written as minimum standards for how we are to treat each other, precisely because otherwise there would be no agreement as to what each human being is entitled, and the strongest would prevail over the weakest. The right to life is the centrepiece of these declarations, being the cornerstone of peace and social justice. The "basic principles of justice, liberty and moral tolerance" that Jackson calls upon might require respect for reproductive autonomy (p9), but they firstly demand a recognition of the right to life of all members of the human family, the right which gives meaning to all other rights. For the unborn, this is the right which she fails to respect throughout the book.

⁸ In Australia, a man who attacked a pregnant woman has been jailed for five years for the manslaughter of her prematurely-born twins (AAP, 30th January 2002). In Connecticut, Jenny McMechen was 36 weeks pregnant when she was shot twice in the back of the head. Her unborn son died as a result of the shooting. Prosecutors decided there was no legal justification in the state for a second murder charge. A bill is now being introduced that would hold criminals accountable when they attack pregnant women and kill or injure the unborn child. Pro-abortion groups testified against the bill (*Norwich Bulletin*, March 19 2002.). In South Carolina a woman who smoked crack cocaine while pregnant, and delivered a stillborn infant at 35 weeks of gestation, was found guilty of homicide for killing an unborn child through illicit drug use (*The Journal of Clinical Ethics*, Fall 2001, Vol 12 No 3, pg 324).

⁹ An example is the US government's proposal to provide health insurance for the unborn whose mothers have neither insurance nor welfare; pro-abortion advocates fear that recognizing the humanity of the unborn child will threaten abortion rights (Foster, S. "Providing prenatal care helps fetuses and women" *Detroit News* February 13 2000). Regarding rulings that hold an attacker responsible for the death of a foetus, one feminist notes that "by ascribing rights to the fetus, one is able to develop ways of 'protecting' it, but this approach will usually necessitate encroaching on the pregnant woman's autonomy". (Sweet, Robyn. "Legal issues in reproductive rights" *Journal of Law and Medicine* Vol 9, February 2002, pp 266-270).

¹⁰ "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"... "Everyone has the right to life, liberty and security of person". (Universal Declaration of Human Rights, Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948).