



# Less nonsense upon stilts: the analysis of rights in medical ethics

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Bentham's famous remark was a response to the assertion of natural (or human) rights that did not depend on law or some other foundation for their normative force.<sup>1</sup> Whatever we make of that claim, it flags a problem for making and evaluating rights-based arguments in medical ethics. He wasn't trying to say that rights are all meaningless, nor that we can readily do without them. Rather, it's an objection to a particular way of asserting rights where they are taken to express free standing claims that don't require further defence or justification. Whether or not the rise of human rights in medical law has enriched the ability of the courts to deal with complex issues in a nuanced way is debatable, but there's no doubting their prominence and unavailability.<sup>2</sup> For medical ethics, rights analysis requires paying heed to the kind of rights in play when arguing about ethics, as well as what's distinctive about rights analysis. For many, rights operate as strong moral assertions intended to override other, less weighty, considerations and Ronald Dworkin claimed that we should view rights as a way of expressing particularly important claims that should constrain the state in its actions.<sup>3</sup> Rights imply duties and focussing on a right's correlative duty can often shed light on the scope, applicability and strength of a right. Weighing competing duties is central to analysis in medical ethics and this is a useful way in which we can analyse rights-based arguments. This issue of the *Journal of Medical Ethics* includes papers that are exemplars of rights analysis and illustrate what that means when different kinds of right are in tension.

Horner and Burcher foray into the legal and ethical complexities that surround commercial surrogacy arrangements.<sup>4</sup> Central to adjudicating rights claims is determining the scope, applicability and strength of specific rights. Commercial surrogacy arrangements will typically involve reaching an agreement that describes the duties of the various parties. This means that rights will be created and agreed that apply to the gestational surrogate, the intended parents and the healthcare professionals involved in

the procedure. As Horner and Burcher observe, these are enforceable legal rights that derive from the validity of a signed contract. Surrogacy contracts can include an agreement to not engage in behaviour that would be harmful to the gestating fetus and to act in ways that promote its healthy development. They investigate whether contractual rights of that kind negate the right to medical confidentiality that patients, and by implication gestational surrogates, hold. A surrogacy contract might include an agreement to share medical information relevant to the health of the fetus with the commissioning parents. Should the medical confidentiality of surrogates be respected in the same way as for all patients, or does the existence of a contract with the commissioning parents mean that medical information pertinent to the health of the fetus can be shared? Does the surrogate's waiver of confidentiality via a legal contract mean they no longer have the confidentiality right that follows from the doctor-patient relationship? Horner and Burcher argue that "...the physician's professional and ethical obligations as a medical provider do not change based on the parental arrangement over the future child." In support of that claim they invoke a number of considerations such as an argument for medical confidentiality. They say, "From the outset, the surrogate may already fear being open and honest with her physician, even regarding accidents or mistakes, because she knows that what she tells her physician may be told to the IPs, and she may be open to legal liability for breach of contract." They also consider arguments by analogy that compare instances where the right to confidentiality is overridden and conclude that they are not usually comparable to the situation of a gestational surrogate.

While the issues associated with commercial surrogacy are complex and significant, it's hard to think of an issue that involves a sharper conflict between rights than compelled caesarean section. It pits the profoundly important rights to bodily integrity and self-determination against preventing harm to a fetus that is about to be born. Kingma and Porter hone in

on a central issue that bears on this tension: whether parental obligation tips the balance in favour of compelled caesarean.<sup>5</sup> Argument by analogy and other forms of consistency argument are perhaps the most commonly used forms of analysis in medical ethics<sup>6</sup> and they are particularly useful once we have determined the rights that are applicable to a situation and need to test and weigh their strength. Kingma and Porter create an argument by analogy to see whether, if it is the case that parental obligations are applicable to a pregnant woman undergoing caesarean, they're sufficiently weighty to justify overriding other rights that she holds. The argument can be expressed as follows.

1. Assume for argument's sake that a pregnant woman undergoing caesarean has parental obligations to the child not yet born.
2. Parental obligations are obligations that all parents have to their children in virtue of being parents.
3. Therefore fathers have similar duties to their children as pregnant women do to their unborn child.
4. A father who could save the life of their child by donating an organ has a parental duty to do so, but would not be compelled to do so at the expense of other rights he holds.
5. Therefore, consistency implies that even if a pregnant woman has a parental duty to have a caesarean, that does not mean her other rights should be overridden.

Kingma and Porter are careful to explore points of difference between compelled caesarean and compelled organ donation, and those who wish to engage with this argument are likely to push further on the validity of this comparison. Both of these papers demonstrate how analysing the duties implied by a right can progress debate about contested and mortal issues. It can also illuminate and draw on the justification underpinning a specific right. No nonsense, no stilts.

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