

# In defence of gestatelings: response to Colgrove

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## ABSTRACT

Ectogestation—that is, ‘artificial’ or extramammalian pregnancy—may soon be within technological reach. This confronts us with questions about the correct moral and legal attitude towards the subjects of this technology, which are called ‘gestatelings’. Colgrove argues that gestatelings are a kind of newborn, and consequently should have the same moral and legal protections as newborns. This paper responds that both claims are unsupported by his arguments, which equivocate on two understandings of the term ‘newborn’. Questions about the appropriate moral and legal status of gestatelings are therefore (once again, and correctly) left unanswered, but in the course of attempting to answer them, we are well advised to continue using the term gestateling.

## INTRODUCTION

Ectogestation<sup>1</sup>—that is, ‘artificial’ or extracorporeal pregnancy—may soon be within technological reach.<sup>2</sup> What legal and moral protections should the subjects of this technology, which are physiologically and developmentally like fetuses, but outside a maternal body, receive? Following Romanis,<sup>3</sup> call these subjects ‘gestatelings’.

Colgrove,<sup>4</sup> this journal, argues that gestatelings ‘are a kind of newborn’<sup>4</sup> and concludes on that basis that they ‘share the same moral status as newborns’<sup>4</sup> and ‘deserve the same moral treatment and protection as newborns’.<sup>4</sup> This is a substantive conclusion because, compared with embryos and fetuses, ‘newborns tend to receive the highest moral status and highest levels of legal protection’.<sup>4</sup> It then follows, says Colgrove, that ‘[w]hatever restrictions and safeguards are in place concerning medical research of newborns should be applied to gestatelings’.<sup>4</sup>

I argue that none of these conclusions follow from Colgrove’s argument.

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## TWO UNDERSTANDINGS OF ‘NEWBORN’

First, consider what, in Colgrove’s conclusions, is meant by the term ‘newborns (in the full sense of the word)’.<sup>4</sup> The image invoked here is that of an infant, term or premature, which is indeed legally recognised as a person with all associated rights and protections. Let us call this understanding of newborn, *newborn<sup>B</sup>*.

It is surely these protections that Colgrove pinpoints when contrasting the protections and safeguards awarded to *newborns* (aka *newborn<sup>B</sup>*) with those given to fetuses and—significantly—embryos.

Nonetheless, in most of his paper, Colgrove employs the term ‘newborn’ in a different, on the face of it unfamiliar, way: a newborn is a developing mammal at any development stage that has been ‘born recently’.<sup>4</sup> Call this understanding of newborn, *newborn<sup>C</sup>*. By ‘born recently’, Colgrove means ‘removed from the maternal mammal, alive’. It follows that a fetus or embryo extracted alive at 34, 20, 14, 8 or 4 weeks’ pregnancy—even an embryo extracted just after conception from the fallopian tube—is a *newborn<sup>C</sup>*.

## MORAL STATUS

The above immediately makes clear that Colgrove’s statement ‘gestatelings share the same moral status as newborns’<sup>4</sup> either does not mean what it seems to imply, or is unsubstantiated. If Colgrove means ‘the same moral status as newborns<sup>C</sup>’, then this does not, on its own, mean what is seemingly implied: that gestatelings have the same moral status as infants (or ‘newborns<sup>B</sup>’). For to establish the latter, it has to be either demonstrated, or assumed, that *newborns<sup>C</sup>* have the same moral status as *infants* (or ‘*newborns<sup>B</sup>*’). But no such argument is provided by Colgrove. And if Colgrove meant to state ‘the same moral status as *newborns<sup>B</sup>*’, then his claim is simply unsubstantiated, and for the same reason: in inferring from the premise ‘gestatelings are newborns’ (aka *newborns<sup>C</sup>*) to the conclusion ‘gestatelings have the same moral status as newborns’ (aka *newborns<sup>B</sup>*), Colgrove equivocates on the meaning of ‘newborn’.

Of course, one could plug the gap by holding the substantive view—or adopt the substantive assumption—that human embryos/fetuses have full moral status (or at least the same moral status as infants) from very early on in development.<sup>i</sup> Then, indeed, *newborns<sup>C</sup>* have the same moral status as *newborns<sup>B</sup>*, and the argument works. But only by also rendering it obsolete; with this assumption in place, gestatelings would have the same moral status as *newborns<sup>B</sup>* irrespective of whether they are embryos, fetuses or *newborns<sup>C</sup>*—as all are already assumed to have equivalent moral status. There is then no need for Colgrove to hang his conclusion on the argument that gestatelings are a kind of newborn (rather than a kind of fetus); it follows directly from the assumption.

Absent such an assumption, all Colgrove in fact states, and can claim to establish, is that a gestateling *at a given stage of development* has the same moral status as an embryo/fetus extracted alive—aka a ‘*newborn<sup>C</sup>*’—*at the same stage of development*. This is significant—and significantly different from what Colgrove’s original claim implied—because the relevance of development for moral status is a matter of considerable controversy, on which people hold a wide variety of views.

## LEGAL PROTECTIONS

Whatever those views and assumptions, it certainly does not follow from Colgrove’s argument that ‘whatever protections apply to newborns (in an experimental or clinical setting) should be extended to gestatelings’.<sup>4</sup> Since Colgrove has only argued that gestatelings are *newborns<sup>C</sup>*, this, again on pain of equivocation, does not licence the conclusion that gestatelings should have the same protections as *newborns<sup>B</sup>*.

At best, all Colgrove can establish is that whatever protections and restrictions are in place concerning *newborns<sup>C</sup>* of a given developmental stage should be applied to a gestateling of a similar developmental stage. But those restrictions look very different for early embryos, presently covered by embryo legislation, and infants (or *newborns<sup>B</sup>*)<sup>5</sup>—and they are simply not defined for the intervening period.

The difficult question of what protections (or moral status) *newborns<sup>C</sup>* should have prior to around 24 weeks therefore remains

<sup>i</sup>I thank an anonymous reviewer for pushing me on this.

unanswered. And this question neither can, nor should, be circumvented by semantic redefinition of the term ‘newborn’.

### WHAT IS ‘BORN RECENTLY’?

By Colgrove’s definition, a developing mammal extracted alive at any state of pregnancy counts as having been ‘born recently’.<sup>4</sup> But one might well question whether that does not stretch our understanding of birth beyond recognition. Surely neither an early embryo, harvested from the fallopian tube, nor a 14-week fetus expelled alive (however briefly) from the uterus, can reasonably be said to have been ‘born recently’ and—therefore—a newborn<sup>C</sup> in Colgrove’s terminology?

I think so. But although Colgrove acknowledges that questions about the correct (re)definition of birth could be asked, he nonetheless insists that he is not being uncontroversial here: quoting the WHO definition of ‘live birth’<sup>ii</sup> he states that ‘refusing to acknowledge that subjects of partial ectogenesis have been born would either demonstrate a misunderstanding of terms like ‘live birth’ or would rely on a highly unconventional use of the term’.<sup>4</sup>

But that seems overconfident; one might just as well appeal to the fact that no jurisdiction would be tempted to issues a certificate of life-birth for an 18-week fetus—let alone an early embryo—even if the heart or umbilical cord briefly pulsed.<sup>6</sup> These are considered miscarriages, not live (or even still-) births.

Even so, what is or is not deemed ‘conventional’ is ultimately besides the point here. The possibility of ectogenesis presents novel territory for the extensions of existing and familiar categories such as

<sup>ii</sup>“the complete expulsion or extraction from its mother of a product of conception, irrespective of the duration of the pregnancy, which, after such separation, breathes or shows any other signs of life—for example, beating of the heart, pulsation of the umbilical cord or definite movement of voluntary muscles—whether or not the umbilical cord has been cut or the placenta is attached”.<sup>4</sup>

birth, fetus, newborn—and so on—which will always we be unconventional in at least some sense.<sup>1 3 6 7</sup> What is needed, in light of this, is an actual motivation for interpreting their definitions one way or another—rather than an appeal to arbitrary and partial elements of existing convention.

The real challenge is to determine the legal and moral categories that are both metaphysically accurate and morally helpful in this context, so that our moral and legal protections ultimately best reflect moral concerns that are in fact warranted.

### CONCLUSIONS

Colgrove’s argument alone cannot establish that gestatelings have the same moral status, let alone that they deserve the same legal protections, as newborns/infants (aka newborns<sup>B</sup>). His argument fails because it equivocates on the meaning of newborn. All Colgrove in fact can establish is that gestatelings of a given developmental stage may need to be given the same moral status and legal protections as newborns<sup>C</sup> of a similar developmental stage. Since the extensions of newborn<sup>C</sup> and gestateling appear to overlap completely prior to viability, however, one might think that is not much of a conclusion at all.

It is worth remembering where this discussion started: Romanis<sup>3 7</sup> proposed the term gestateling because the terms ‘newborn’ and ‘fetus’ would be descriptively misleading and ‘the ethical tethers associated with these terms could perpetuate misunderstanding and confusion’.<sup>3</sup> Colgrove’s paper does indeed mislead and it is, perhaps, precisely such an ‘ethical tether’ that Colgrove<sup>4</sup> successfully trades on when publishing the invalid inference from the claim that infants are newborns<sup>(C)</sup>, to the claim that they have the same moral status and deserve the same protections as infants/newborns<sup>(B)</sup>. This seems rather to confirm the wisdom of erring on the side of safety by continuing to use the term gestateling, at least for now while we are still tackling the real underlying questions about gestateling’s moral and legal status.

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