
Reproductive autonomy and the ethics of abortion

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Abstract

Abortion is one of the most controversial issues in today's world. People tend to turn to the law when trying to decide what is the best possible solution to an unwanted pregnancy. Here the author's views on abortion are discussed from a lawyer's and a woman's point of view. By taking into consideration the rights of the fetus an "antagonistic relationship" between the woman and her unborn child may occur. Therefore, women should have more autonomy in the issue. The article concludes with examples of cases in the United States and Ireland where the rights of the fetus are considered more important than those of the mother because of existing laws. This article suggests that a more inclusive ethics of abortion is required rather than a new ethics of abortion when "translating fetal life into law".

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Practising lawyers generally have little time to reflect on matters of ethics. The law is a blunt instrument. Lawyers are often instructed to act for clients wishing to do things that would strike many people as immoral, but which the law entitles them to do. Evicting homeless people from one's property is an example. Lawyers are not expected or invited to pass moral judgments on their client. If they did, the client would probably go elsewhere! The Bar has a rule of conduct called the "cab-rank" rule. This obliges barristers to accept instructions regardless of the identity of the client, or the nature of the cause, or the barrister's own opinions about the client's conduct. Judges, likewise, must decide disputes according to law; their function is not to pass moral judgments on litigants. The reflections that follow, therefore, do not pretend to constitute some systematic overview but rather, some personal thoughts and ideas which may prompt further discussion.

So what can a barrister say on the ethics of abortion? Is a new ethics developing? Should there be one? These are interesting and important questions. As a lawyer with a commitment to autonomy, I see abortion as an issue that overwhelmingly concerns the autonomy and dignity of the pregnant woman herself. "Autonomy" derives from the Greek and means, literally, "self rule". If a woman who is pregnant wishes to stop being pregnant, why

should we prevent her? If we regard her pregnancy as a morally neutral state, there ought to be no satisfactory reason to prevent her. The way that humans reproduce, in common with other mammals, is simply a product of evolution. Biologically, the developing fetus is somewhat like an invading organism; if it were not for a complex system of compensating mechanisms, the woman's body would reject it in the same way as the body rejects a transplanted organ.

Attitudes to pregnancy are, however, inextricably bound up with how society views sex, women, and the fertile woman in particular. Pregnancy and birth are not minor inconveniences, such as having a cold. They constitute a major life event, which even when welcome causes immense discomfort and disruption to many women. Only recently Mrs Blair confessed that she had forgotten what an ordeal the last few hours of labour are. I have a dear friend who spent much of her two (planned) pregnancies being ill and unable to work. There exists a raft of laws to protect pregnant employees from unfair treatment because they are pregnant. Nevertheless, lawyers in the employment field still encounter cases where employers try to rid themselves of their pregnant employees. When a high-profile court case involving maternity rights is decided, leaders of industry often complain that this will have a chilling effect on employers' readiness to employ women of child-bearing age. I mention these factors simply to contextualise some of the difficulties that child-bearing women face.

If one is adamantly opposed to abortion, one is committed to some set of values which requires that women who become pregnant (whether intentionally or unintentionally) must endure the process of pregnancy and birth, *no matter how distressing, painful and risky it is for them*. The justification given for this is usually based on an abstract notion of the value of "fetal life", rather than on the ground that suffering is morally improving for the women concerned. Extreme opponents of abortion argue that abortion is equivalent to murder and that, no matter how much women may suffer, they cannot be allowed to "kill their children". But opposition to abortion entails a demand that women suffer, regardless of the circumstances in which they came to be pregnant, and despite the opportunities for ending pregnancy that exist. For those who believe that fetuses are full human beings, the justification is presumably that the woman's suffering is a lesser

evil than terminating fetal life. This raises the question whether they tolerate the taking of “innocent” human life in other circumstances, for example. NATO’s attack on Kosovo, or careless driving. Since an unwanted fetus is analogous to an invading organism, even if it is viewed as a human being, an argument can be made that the woman is entitled to refuse to act as a life-support system for it, and to abort in self defence. What about those who do not believe that fetuses are full human beings, but believe that abortion following consensual sexual activity is “wrong”? As the philosopher Janet Radcliffe Richards¹ has pointed out, the only time when we insist that a particular consequence must follow a particular activity, and do not allow people to escape the consequence, is when the consequence is intended as a punishment.² Apart from this punitive aspect of anti-abortion belief, it is also objectionable in ethical terms because it treats the pregnant woman as a means to an end: that of producing a baby.

Of course, many women will not accept the suffering which continuing with pregnancy would cause them (or their families), and take steps accordingly. In countries where safe abortion is illegal or unavailable, this results in self-imposed or “back-street” abortions and all the ills that flow from that: injury, infection, infertility, and even death. It is striking that complications from unsafe abortion are estimated to result in 13 per cent of maternal deaths worldwide.³ It is hard to see how such wastage of female life could be condoned in ethical terms. As Ann Furedi has said: “The issue is not so much whether or when the embryo/fetus is deserving of respect per se, but how much respect and value we accord to a life (that does not even know it is alive) relative to the respect and value we have for the life of the woman who carries it.”⁴

If we start from the premise that the promotion of freedom and the prevention of suffering are fundamental goals which society ought to support, then the prospect of women forced into suffering even—death—ought to worry us. Kant says that “a man is not a thing, that is to say, something which can be used merely as a means, but must in all his actions be always considered as an end in himself”.⁵ Denying women abortion is, on this analysis, unethical because it subordinates women to a reproductive end.

The present tendency to characterise questions about abortion ethics in terms of concerns about fetuses, or even fetal “rights”, tends to sideline women and the realities of women’s lives. Such sidelining of women is not entirely accidental; it is trite that many “fetal rights” proponents are opposed to the present increase in women’s freedoms, and want to roll them back. Others who speak of fetuses as having “rights” assume that fetuses either have, or should have, rights, without necessarily explaining why this should be so, or why it should result in another person’s loss of autonomy.

To put women back centre-stage, we should ask: why do women want abortions? Research has

shown that the most commonly reported reason worldwide is that women wish to postpone, or stop, childbearing.⁶ Abortion is a form of family planning, though it may not be “politically correct” to say so. What other reasons do women give for wanting abortions, worldwide? They include:

- disruption of education or employment;
- lack of support from father;
- desire to provide for existing children;
- poverty, unemployment or inability to afford additional children;
- relationship problems with husband or partner, and
- a woman’s perception that she is too young to have a child.

To compel such women to bear unwanted children is in my view a form of ethical despotism: in Mill’s words: “compelling each to live as seems good to the rest”.⁷ If people are to be free, that freedom must include freedom to make these difficult and extremely personal choices.

Is the law informed by a consistent set of ethical principles? In England, Scotland, and Wales, abortion is permitted by the 1967 Abortion Act (amended by the Human Fertilisation and Embryology Act 1990), when two medical practitioners decide, in good faith, that one of the following grounds applies:

1. That the pregnancy has not exceeded its 24th week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family.
2. That the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman.
3. That the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated.
4. That there is a substantial risk that if the child were born it would suffer from such mental or physical abnormalities as to be seriously handicapped.

Grounds 1 and 3 call for balancing exercises. Ground 2, which is based on necessity, does not. Ground 4 calls for an assessment of the likely severity of fetal handicap.

Doctors may take into account the pregnant woman’s actual or reasonably foreseeable environment, in assessing the risk of injury to her health. The World Health Organization (WHO) defines health as a “state of complete physical, mental and social wellbeing that does not consist only in the absence of infirmity”. According to evidence-based guideline no 7, issued in March 2000 by the Royal College of Obstetricians and Gynaecologists (RCOG), *The Care of Women Requesting Induced Abortion*,⁸ most doctors apply the WHO definition of “health” in interpreting the Abortion Act.⁹ The RCOG’s guideline development group views induced abortion as a health care need.¹⁰ It also states that, among information on other topics which should be available to women, “abortion is safer

than continuing a pregnancy to term and complications are rare”¹¹

Janet Radcliffe Richards criticises the existing law:

“... as things stand at the moment there is no real concern to estimate the value of the unborn child, or for the degree of suffering which would justify an abortion. All the law does, in effect, is make sure that a woman may not decide for herself whether to have an abortion, and send her to someone else in the position of a suppliant for favours, or even a culprit. It does nothing else ... as the law now stands there is no reason whatever for stopping where we are, and not going forward to a state where all women who want abortions can have them.”¹²

If having an abortion is safer than carrying a pregnancy to term, then all pregnant women who wanted a termination below 24 weeks should qualify under ground 1 above. So perhaps the law is not so bad, after all.

In Northern Ireland, however, the 1967 Abortion Act does not apply. Doctors there do perform abortions on the ground of fetal abnormality. They can also perform abortions in cases where the woman’s mental or physical health or wellbeing, or her life, are at real and serious risk. In this context, “real and serious” mean, simply, “genuine” and “not minor or trivial”. Thus, a woman does not have to show a life-threatening risk to her health, or even a “very serious” risk, to qualify for a legal abortion. Ironically, in the absence of any prescribed statutory formalities for abortion, Northern Ireland has on the face of it a more liberal abortion regime than the rest of the United Kingdom. In practice, though, the reluctance of the medical profession to perform abortions has a chilling effect. Most women seeking terminations have to travel to England or Scotland, at their own expense.

There are irreconcilable conflicts between what might be called the fundamentalist approach to the issue of abortion, which sees life as starting at conception, and what might be called the sceptical view, by which life begins when we attribute enough value to it to warrant its protection. Under English law, a fetus is not a “person”. Furthermore, a woman may decline medical intervention that would preserve the life of her fetus, and is free to let nature take its course, even where this may cause the death of her fetus. The justification for this is, firstly, that the common law respects the pregnant woman’s autonomy; and secondly, that the common law does not coerce people into being “Good Samaritans” and saving others (assuming, for argument’s sake, that the fetus is an “other”). The common law tradition is essentially liberal. The vice-chancellor, Sir Robert Megarry, put it like this in 1979: “[England] is a country where everything is permitted except what is expressly forbidden”.¹³ If everyone could be compelled by law to do what others considered “right”, we should have no freedom, only moral dictatorship.

The case of *St George’s Healthcare NHS Trust v S*,¹⁴ decided in 1998, was a landmark case involving

reproductive autonomy in another context: that of the pregnant woman’s freedom to decline invasive treatment. The Court of Appeal upheld the common law rule that competent adults can refuse medical advice and intervention, despite being pregnant. Ms S was compulsorily detained under the Mental Health Act 1983 because she was refusing hospitalisation for pre-eclampsia. She was then forced into an unwanted caesarean, purporting to be authorised by a court order, which was made without any notice to her. She later recovered very substantial damages for trespass. The Court of Appeal stressed the importance of protecting individual autonomy, regardless of sex:

“while pregnancy increases the personal responsibilities of a woman it does not diminish her entitlement to decide whether or not to undergo medical treatment. . . . Her right is not reduced or diminished merely because her decision to exercise it may appear morally repugnant . . . the autonomy of each individual requires continuing protection even, perhaps particularly, when the motive for interfering with it is readily understandable, and indeed to many would appear commendable . . . if it has not already done so, medical science will no doubt advance to the stage where a very minor procedure undergone by *an adult* would save the life of *his or her* child, or perhaps the child of a complete stranger . . . if however *the adult* were compelled to agree, or rendered helpless to resist, the principle of autonomy would be extinguished.”[italics added]

St George’s wanted to appeal to the House of Lords to ventilate the arguments (among others) that a fetus was a “person” and that a pregnant woman could be deprived of her autonomy at the stage of fetal viability. These were interesting arguments for a National Health (NHS) trust, which presumably carries out abortions for fetal abnormality and other reasons, to pursue. If such arguments had been upheld on appeal, they would have had momentous implications for abortion law. St George’s was refused leave to appeal by the Court of Appeal, and initially began proceedings for leave to appeal in the House of Lords. These were abandoned before the House of Lords had made a final decision on whether to grant leave.

Another interesting feature of the case is that Ms S’s detention and forced treatment were prompted by concerns that she was refusing treatment for a disorder of pregnancy, pre-eclampsia. This could have killed her and her fetus, had it deteriorated into full-blown eclampsia. The irony is that Ms S could have sought a late abortion, on the ground that the continuation of her pregnancy posed the risk of grave and irreparable injury to her health and a serious risk to her life (grounds 2 and 3, referred to above). She was not seeking a late termination, but if she had, her situation would have been covered by the Abortion Act. That she wanted to let nature take its course was certainly eccentric, but ethically less troubling (if you dislike the idea of late termination) than if she had sought a late abortion.

Many people attribute a higher value to fetal life when fetuses reach viability. Thus, some people are troubled at the idea of, or opposed to, late terminations, whilst regarding early terminations as unproblematic or at any rate less problematic. But as Justice Ginsberg of the United State Supreme Court has recently pointed out: “the most common method of performing previability second trimester abortions is no less distressing or susceptible to gruesome description”.¹⁵ In practice, late terminations are rare. The majority are done for fetal abnormality in what were otherwise wanted pregnancies; a minority are done to save the woman’s life, or to prevent grave permanent damage to her health.

The question is, again, how to assess when life begins, in an ethical sense. Legally, as I have said, the fetus is not a “person”, and does not become a rights-bearing entity until it is born. But attempts to pin down “viability” as a criterion for abortion run into the problem that viability depends partly on where the fetus happens to be; if it is in an area with excellent facilities for the care of very premature babies, then it may be considered “viable” at an earlier gestational age, than if it were somewhere else. On any view, this is arbitrary.

In the United States’ constitutional jurisprudence, access to abortion is a constitutionally protected right. Subsequent to fetal viability, the state may regulate and even prohibit abortion as a means of promoting its interest in the potentiality of human life. However, a woman remains constitutionally entitled to an abortion post-viability, where this is necessary to preserve her life or her health.¹⁶ Her interests in preserving her own life and health will “trump” the state’s interest. It is also worth noting that fetuses are not recognised as “persons” under the US constitution; if they were, it would be difficult, if not impossible, to derive any right to abortion under the constitution. Even if a pregnant woman’s life were at stake, it would be more difficult to argue that this should justify killing fetal “persons”: our response to people who are dangerously ill is not to kill other people. (Otherwise, every time someone needed a life-saving transplant, we could justify killing someone else to provide the needed organ). Some form of “self-defence” argument would have to be invoked.

Some people argue that it is arbitrary not to bestow “personhood” on a fetus until it is born. They ask rhetorically: *What is it about the passage through the vagina that makes such a difference?* Of course, if you can only envisage a vagina instead of a woman giving birth, you may have difficulty acknowledging the critical role that a woman plays in giving birth, and why (in turn) society views birth as the critical moment. This is, as much as anything, a mark of respect for women’s role in giving birth.

Some obstetricians regard pregnant women as “two patients” in the maternity care context. To a blunt lawyer, this is incongruous in the extreme. One wonders, is the fetal “patient” a “person”? Presumably so, because the idea of a patient who is

not a person is bizarre. But in legal terms, as I have said earlier, the pregnant woman is only one person. Whom do doctors advise? Who takes the treatment decisions? The woman. Generally, midwives and obstetricians talk about “babies” rather than fetuses, presumably because that is how the women whom they attend regard their fetuses. But is the fetus really a second patient? If it were such, one might expect doctors would have to open up a separate file for the fetus, which is not customary (as far as I know) in maternity hospitals. Perhaps having “two” patients makes an obstetrician a “super-doctor”, which is why the idea has gained ground!

There are conceptual difficulties to do with attributing personhood to an entity which is invisible, inaccessible, physically contained in and attached to the woman, which entirely lacks capacity, and which cannot interact with others at all, prior to birth. In everyday life, such an idea, if given legal effect, would lead to some strange outcomes. Pregnant women might have to purchase two tickets every time they used public transport to avoid being prosecuted for fetal “fare-dodging”. More seriously, if fetuses were “persons”, this would open the way to lawsuits for alleged wrongdoing by pregnant women whose conduct allegedly compromised fetal wellbeing in some way. In the words of a 1993 Canadian Royal Commission on New Reproductive Technologies (cited in the *St George’s* judgment): “each choice made by the woman in relation to her body will affect the fetus and potentially attract tort liability”.¹⁴

One can make a case for saying that a pregnant woman is entitled to be regarded as two persons, not as a means of subordinating her interests and autonomy, but rather to enhance it. (I have problems with this argument, however, and it doesn’t work in terms of abortion). Quite simply, one could say that, given the increased needs which pregnancy brings, the pregnant woman is entitled to call for special care and treatment for herself and for her fetus. In theory, the pregnant woman could act as the fetus’s proxy, with sole authority to advocate on its behalf, and to determine what happens to it. The problem with translating the idea of “two patients” into legal terms, however, is that “fetal rights” proponents have deployed this concept not as a means of improving care for pregnant women, but as a pretext for coercion: state intervention which forces pregnant woman into an antagonistic relationship with their fetuses. In other words, state control of pregnant women.

An illustration of the coercion to which this can give rise, is provided by certain US states. In South Carolina and California, drug-addicted pregnant women attending antenatal clinics have been arrested and charged with criminal offences, after they tested positive for drugs whilst pregnant. The MSUC hospital in Charleston, South Carolina pursued a particularly punitive policy against addicted African-American women in the 1980s and early 1990s. Pregnant women attending for antenatal care were tested for drugs without their

knowledge and, if the tests were positive, the women were arrested and taken into custody by the police. An appeal to the US Supreme Court, in a case called *Ferguson v City of Charleston*, recently succeeded: the Supreme Court decided in March 2001 that covert drug-testing was unconstitutional.¹⁸

The South Carolina Supreme Court gave a ruling in 1997, in a case concerning another drug-addicted pregnant woman, *Whitner v State*.¹⁹ She was convicted of criminal child neglect for (in the words of prosecutors) failing to provide proper medical care for her unborn child, and jailed for eight years. He was born healthy, but a test showed prenatal exposure to cocaine. The ruling is that a viable fetus is a “person”, and that acts which endanger fetal health—including drinking and smoking—can be prosecuted under child abuse laws. After this ruling, the Attorney-General’s office in South Carolina announced that anyone who had, or who took part in, a post-viability abortion could be prosecuted for murder and receive the death penalty.²⁰ Here are some examples of how the decision has been applied:

“*Whitner* has not been limited to women who use illegal drugs. Following the decision a pregnant woman in South Carolina was arrested because she was pregnant and used alcohol. When a thirteen-year-old girl experienced a stillbirth her parents were arrested: one charge was for unlawful conduct to a child because the girl’s parents had allegedly ‘failed to get proper care for the fetus’. A woman who suffered a miscarriage was arrested and charged with homicide by child abuse. The prosecutor admitted there was no evidence of drug use but nevertheless insisted that the miscarriage was a ‘crime’ for which the woman had to take responsibility.” (L M Paltrow, personal communication, 4 May 2000)

Another example of state control is provided by the Republic of Ireland, where the constitution gives the “unborn” a right to life equal to that of the “mother”. Even rape is not recognised as a legal basis for abortion, though this could be the subject of a challenge before the European Court of Human Rights in Strasbourg. In two dramatic cases

involving child victims of sexual assault, the X and C cases,^{21 22} Irish courts have become involved in the question whether such victims are free to travel to England for lawful abortions. Where children become pregnant, and family courts have to consider their welfare, the Irish courts will only permit travel abroad for abortions when the children can show their lives are in danger. This is surprising, given that the Irish people voted to give women freedom to travel in 1992. So there are some stark examples from both sides of the Atlantic of problems that arise when ethical absolutes about fetal life are translated into law. Perhaps it is not so much a new ethics of abortion that is required, as a more inclusive one.

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