

Response to a response

L Gormally

In their response, The role of the church in developing the law: response to commentators, Professors Skene and Parker make a number of criticisms of my commentary, some contestable, some plainly mistaken.¹

Their first criticism is that I am “incorrect” and “misleading” in describing the New South Wales Crimes Act as “[a] statute which provided that abortion was a criminal offence”. They give as their reason that: “The criminal offence created by section 83 of the *Crimes Act* 1900 (NSW) is not abortion. It is *unlawful* abortion. Because the word ‘unlawfully’ appears in the act, it is clear that the law states that it is sometime *lawful* to undertake an abortion.” They then explain the interpretation of the cognate provision in the Victorian legislation provided by Justice Menhennit in *R v Davidson* [1969] VR 667.

The reason they offer for their criticism fairly summarises the moves made by Macnaghten J in his direction in *R v Bourne* (1938) and by Menhennit J in *R v Davidson*. But it is far from “clear” (as Professor Skene must surely know) that the use of the word “unlawfully” supports those moves. It was and remains a matter of real controversy whether the use of the expression “unlawfully” has the meaning which Menhennit J attached to it.

Section 83 of the *Crimes Act* (based on s 59 of the *Offences Against the Person Act* 1861) provided:

Whosoever—unlawfully administers to, or causes to be taken by, any woman, whether with child or not, any drug or noxious thing; or unlawfully uses any instrument or other means, with intent in any such case to procure a miscarriage, shall be liable to penal servitude for ten years.

Consider that provision alongside other provisions in the *Crimes Act* 1900 which also make use of the term “unlawfully” and which could not conceivably support the kind of moves made by Macnaghten J and Menhennit J. Section 71—for example, provided:

Whosoever unlawfully and carnally knows any girl of or above the age of ten years, and under the age of fourteen years, shall be liable to penal servitude for ten years.

Section 73 provided:

Whosoever, being a schoolmaster, or other teacher, or a father, unlawfully and carnally knows any girl of or above the age of ten years, and under the age of sixteen years, being his pupil or daughter, shall be liable to penal servitude for fourteen years.

No one would think it a reasonable inference from the use of the word “unlawfully” in s 73 that “the law states that it is sometimes lawful” for fathers and teachers to have sexual intercourse with girls between the ages of ten and fifteen!

“Unlawfully” in sections 71 and 73 is clearly mere surplusage and it is arguably so in section 83. Exshaw described Macnaghten J’s interpretation of the term in *R v Bourne* as “judicial legislation”.² The same might be said with good reason of Menhennit J’s interpretation in *R v Davidson*.

Secondly Skene and Parker claim that I am also “misleading” in saying that the law lords in *Bland* held that “it was lawful to aim at a patient’s death by a course of conduct classifiable as an omission”. Their reason? “Bland died from his condition not from non-treatment.” That claim is arguably erroneous, but the argument need not be pursued since the claim is also irrelevant. What the law lords held is to be determined by looking at the text of their judgments. Let it suffice to quote three of their lordships (the other two not dissenting). Lord Mustill: “The proposed conduct has the aim...of terminating the life of Anthony Bland, by withholding from him the basic necessities of life...The conduct is intended to be the cause of death.”³ Lord Browne-Wilkinson: “This is a course of action designed to cause certain death...What is proposed...is to adopt a course of action with the intention of bringing about Anthony Bland’s death...the whole purpose of stopping artificial feeding is to bring about the death of Anthony Bland.”⁴ Finally, Lord Lowry: “The intention to bring about the patient’s death is there”.⁵ That intention, providing it could be said to be accomplished by conduct classifiable as “omission”, is what their lordships ruled to be lawful.

Thirdly, Skene and Parker are critical of my view that *Re A (children) (conjoined twins: surgical separation)* “arguably served to highlight an undesirable restriction of parental rights in current English law”. What was said in my original commentary perhaps insufficiently explained the reasons for the contention. What I had in mind was that “[b]ecause the statutory duty of the court is to reach an ‘independent judgment’ on the child or children, there are no threshold criteria in English law determining what failure in reasonableness on the part of parents triggers the exercise of the court’s judgment”.⁶ Strictly speaking, whether the parents are being reasonable is not the issue the court has to decide. By contrast the position of principle stated by the Archbishop of Westminster in his submission to the Court of Appeal was that “Respect for the natural authority of parents requires that the courts

L Gormally, Ave Maria School of Law, Ann Arbor, Michigan, USA; lukeg@globalnet.co.uk

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override the rights of parents only when there is clear evidence that they are acting contrary to what is strictly owing to their children". That principle would require the courts to distinguish between reasonable and unreasonable parental refusal. It is not that the Archbishop of Westminster (or I) think that parents ought never to be overruled by the courts as acting unjustly in refusing treatment of their children. Rather, the thought is that the position of parents as the natural guardians of their children's interests should not be completely usurped by the courts. A number of commentators on the conjoined twins case thought that, consistent with respect for the lives of their children, the parents had reasonable grounds, in the light of what they understood the doctors to be proposing, for refusing consent to surgery.

Fourthly, Skene and Parker's assertion that they "do not accept Gormally's assertion that much church doctrine is rationally grounded" seems to ignore philosophical defences of doctrines I mention. (On the absolute impermissibility of intentional killing of the innocent, see—for example, *Euthanasia, Clinical Practice and the Law*, and on the absolute impermissibility of lying see—for example, *The Virtues* by P T Geach).^{7, 8} The teaching that it is never permissible intentionally to kill the innocent is a doctrine which in 1995 Pope John Paul II solemnly confirmed was not open to revision.⁹ Skene and Parker are mistaken in believing that there are good reasons for thinking this is not a doctrine of the church. Whatever the law may hold, the church's teaching has been that private individuals may not intend to kill even an unjust aggressor in self defence, though they may aim to disable the aggression with force of a kind they foresee may cause death.

Skene and Parker are only partially correct in saying that "the notion that abortion is the killing of an innocent 'person' is one that has not always been part of the doctrine of the Roman Catholic Church". It is still not a definitive part of church doctrine, though recent authoritative statements hold that there is a strong rational case for saying that the embryo from conception is an individual human being and therefore, by that very fact, a human person. The church has always taught that intentional abortion is a grave moral wrong, but not precisely because the "conceptus" was held to be an individual human being; many thought that what was destroyed in abortion was, at least in the earliest stages, in process of becoming a human being. This view

was, to a significant degree, influenced by erroneous biology which held that an individual human being (a "homo") came into being only at some stage subsequent to conception. The erroneous biology did not, however, lead church authorities to say early abortion was permissible. What it did influence was a distinction between canonical penalties for early (non-homicidal) and later (homicidal) abortion. Skene and Parker are mistaken in thinking that authoritative church teaching regards intentional abortion—as opposed to unintended harm to or loss of the unborn child—as permissible where the mother's life is at risk. The church permits lifesaving surgery upon the woman's body (as when a damaged fallopian tube is removed) in cases where it is foreseen, but not intended, that this will cause the death of her child. (For a reliable scholarly account of Catholic teaching on abortion see *Abortion: The Development of the Roman Catholic Perspective* by J Connery).¹⁰

There is only one critical, but minor, observation in my commentary that Skene and Parker allow to be "fair". Readers may judge from the above whether they have been fair and accurate in contesting the truth of some of my other observations. Nothing in their response serves to undermine the thesis of my commentary that the interventions by Catholic bishops in the three cases considered by Skene and Parker were not aimed at developing the law but at providing argument, otherwise unavailable, in defence of its original intent, as well as, in the Australian cases, safeguarding institutional interests at stake in the decisions. Those are standard reasons for allowing interventions from persons or bodies not party to the original litigation.

REFERENCES

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- 3 [1993] 1 All ER 885.
- 4 [1993] 1 All ER 880.
- 5 [1993] 1 All ER 876–7.
- 6 Gormally L. The Maltese conjoined twins. Religion, ethics and the law in England. *Second Opinion* 2001;8:36–52 at 39.
- 7 Gormally L, ed. *Euthanasia, clinical practice and the law*. London: The Linacre Centre, 1994:esp 37–50, 126–33.
- 8 Geach PT. *The virtues*. Cambridge: Cambridge University Press, 1977:111–17.
- 9 Pope John Paul II. *Encyclical letter: evangelium vitae*. Vatican City: Libreria Editrice Vaticana, 1995:s57.
- 10 Connery J. *Abortion: the development of the Roman Catholic perspective*. Chicago: Loyola University Press, 1977.

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