Late Term Abortion

How do metaphysics and ethics

Introduction

Ethics is not the same thing as the law, but the law attempts to reflect the broad ethical views of society. In socially divisive issues like abortion, the law struggles in these attempts, as there is no consensus that it can reflect. If ethics reflects social change and shifts in metaphysical beliefs, it will not be surprising that the law will also change to accommodate this evolution. As belief in non-material entities including human souls continues to weaken, the law of abortion is gradually changing in a more secular direction.

Some recent events

Many readers will be familiar with the Melbourne case from almost a decade ago, when a distressed woman, who was 32 weeks pregnant, requested a termination of the pregnancy, having recently learned that the foetus had a non-lethal form of dwarfism. The woman was assessed by the multidisciplinary team, which included a psychiatrist, as being suicidal, as a result of her apprehension of the difficulties she envisaged would lie ahead if she continued with the pregnancy. A termination was carried out, but was followed by considerable outcry which resulted in suspension of a number of doctors by the medical board, numerous investigations by the board, police, the coroner and the hospital, and eventual reinstatement of the doctors.

These events occurred under the former Victorian regime where child destruction consisted of unlawfully destroying the life of a child “capable of being born alive”. While the scope of the capacity was never defined in the statute, a 32 week foetus would certainly have fallen into the category. But like many abortion laws, the use of “unlawfully” presumably would have provided a defence to the doctors, had they ever been prosecuted, given that the patient was suicidal. They would certainly have used this defence. Objectors to the termination, of course, were of the opinion that continuation of the pregnancy did not present a serious threat to the mother’s life and health, that dwarfism is an insufficient justification for termination, and that she should have been managed differently. The Victorian child destruction law has now been repealed by the Abortion Law Reform Act 2008 (Vic), which has decriminalised medical abortion.

In late 2008, a Cairns teenager was prosecuted for importing misoprostol and organising her own abortion at 8-9 weeks gestation, thus transgressing section 225 of Queensland’s Criminal Code, which states that it is an offence for a woman to procure her own miscarriage. Had she been aware that two north Queensland doctors are certified to prescribe mifepristone (RU486) in conjunction with misoprostol, and availed herself of this, she would have been able to procure a legal termination. The case is yet to be finalised.

These developments serve to demonstrate that abortion remains a vexed social issue, that the law is in transition, and that the law has long found it impossible to provide coherent regulation of abortion, late term abortion and child destruction, in terms of providing uniformity across a community with a variety of views, and under a federal system with state-based criminal law.

Abortion law, child destruction law and their discontents

Abortion law is certainly in transition. Three jurisdictions have effectively decriminalised abortion in recent years (Victoria, ACT and NT), although terminations must be carried out by doctors, and there are increasingly stringent conditions on later abortions in NT. In WA, abortion remains a crime, but amendments to the Health Act allow for lawful abortion before twenty weeks. NSW and Qld retain common law defences to abortion, but it remains on their Criminal Codes. In SA and Tasmania, abortion also remains a crime, but there are statutory definitions of lawful abortion.

Child destruction laws exist in Queensland, WA, NT and Tasmania. NSW has a crime of inflicting harm on a child during or after delivery, which is more specific regarding time than the other child destruction laws. Although the ACT has decriminalised abortion, it has retained the offence of child destruction. Victoria has repealed the law on child destruction, as mentioned above, but it remains a crime in SA, beyond 28 weeks.

It is little wonder that commentators consider the landscape of abortion and child destruction across Australia to be a mess, and call for uniformity. Uniformity would provide greater certainty and assurance for doctors and women, but of course the uniformity that is usually called for is of a liberal kind, i.e. along the lines of Victoria’s recent change. Where change has occurred during the last century, it has certainly been in a more liberal
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direction, in both new statutes and the case law. While WA, SA, Queensland and Tasmania have all recently indicated that they have no current intentions of changing existing laws, it would not be going too far to predict that the state jurisdictions are likely to continue to move, albeit slowly, in a more liberal direction. The addition to the Victorian legislation of a controversial conscientious objection clause, whereby doctors who morally object to abortion are required to refer a woman seeking abortion to a doctor who does not object, underlines the progressive weakening of the hitherto more conservative public policy positions.

The Australian Medical Association (AMA) has adopted a neutral stance on abortion, insisting that, where the procedure is legal, doctors who participate observe appropriate training and facility standards. The AMA also supports the use of medical agents, where these are deemed to be more clinically appropriate than surgical procedures, in securing a safe termination. The AMA has also called for clarification of abortion law, in pursuit of greater uniformity.

Ethical positions on abortion and child destruction

The “mess” that is Australian abortion and child destruction law is the result of several factors. We have seen already that the criminal law, of which all abortion law was originally a category, is state-based, and while there were significant congruities across the fundamental criminal statutes, the development of the criminal case law was also state-based, and proceeded at different rates depending on the contingent fetching up of cases in the courts.

While a clear liberalising trend is easily identified amongst the cases, this occurred at different stages in different states, although the superior courts also looked across borders and sometimes adopted precedents from the other jurisdictions. The liberalising trend, at a more fundamental level, developed on the basis of the attenuation of the influence of Christianity and its informing metaphysics on public policy positions, as more secular forces simultaneously moved into the picture, including the ascendancy of individualism and human rights including women’s rights and women’s liberation, the spread of education and the general erosion of traditional authorities, and the effect of science as a new way of understanding the world.

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Three basic ethical positions can be identified in relation to abortion.

• The so-called conservative view on abortion is the view that abortion is always or almost always seriously wrong, because the foetus has a full right to life, equivalent to the right to life which most people attribute to adults, and usually to children. The bases of this view can differ to some extent. Some people believe that a foetus has a right to life because, from the moment of conception, it has within it a soul, and it is this soul which is the essence of the person that the foetus will become; indeed the soul is the person from that moment. This version is usually a religiously based view.

• A second version holds that because a foetus is a human being, i.e. a member of the human
species, this confers special status. This too is often a religious based view, where membership of the human species is of special concern to the divine power which created humanity as the supreme species. These two views of course may be viewed as two sides of the same coin, on the basis of the belief that only human beings have souls.

- Thirdly, a foetus may be viewed as being a potential person, i.e. not yet a full person as we understand that concept in a common sense way, but a creature which has the potential to develop into a person. On this view, the rights of a person should be attributed to a potential person. Alternatively, abortion may simply be seen as infringing the rights of the person which the foetus will become, since it prevents the development of that person from the foetal stage.

In contrast, a liberal view often follows the following pattern. Any coherent right requires a corresponding interest, and an interest requires the relevant concept. So, for example, since a cat has no concept of education as we understand it, we cannot sensibly believe a cat to have an interest in education, and consequently any meaningful right to an education. Since the cat would not benefit from an education, it would be crazy to attribute to it the right to one. Similarly, a right to life will require a concept of continuing life. Since only persons can have a concept of continuing life, (and also employ rationality and participate in social interaction), and because foetuses don’t have these concepts or engage in these practices, it follows that foetuses cannot sensibly be construed as having a meaningful right to life. Another way of saying this is that, unlike adults and children, who anticipate their future lives, a foetus cannot be harmed by being killed, since it cannot anticipate itself as continuing into the future. Or, alternatively still, it cannot matter to a foetus whether it is killed or not, because it is not self-aware.

Another version of the liberal view is to say that you cannot infringe the right to life of the person the foetus will become, by killing the foetus, since there is not yet any particular, identifiable person who it will become, and a right to life requires a particular person. The rights of no particular person can be infringed by killing any foetus. So the argument goes.

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Now many people are surprised or shocked by this approach – it implies that any creature who lacks a concept of their own continuing existence as an individual does not qualify as having a right to life, and this would imply that infants and very young children, or those who are severely intellectually impaired (e.g. people with profound dementia) do not have a right to life. However, we do seem to be surrounded by practical examples of just these implications. For example, we often consider it acceptable to withhold medical treatment if someone with severe dementia contracts an infectious disease, whereas we would consider it both immoral and illegal not to intervene in the case of an ordinary adult, since our omission would amount to bringing about his death. (There is, of course, an additional element to the argument, and that is that there is a difference between active killing and withholding life-saving treatment. But the vast majority of liberals do not consider that the action/omission distinction holds any moral significance, so the liberal will count the example as legitimate).

One interesting, and perhaps initially counterintuitive aspect of the liberal view, is that while the committed liberal will not attribute a right to life to a foetus for the reasons above, she will nevertheless insist on not harming the foetus, either in the abortion process, or in other ways, such that the foetus suffers at the time, or in the future, once it is born. (The liberal, for example, while approving abortion, will also consider it appropriate that a child, who is harmed in utero as a result of the mother’s behaviour, or a doctor’s negligence, should have the right to seek redress and compensation). This may seem strange, because it appears that the liberal is prepared to accept a large degree of harm (killing) but not prepared to accept a smaller degree of harm (say, pain during an abortion procedure), whereas our priorities are usually the other way round – we generally think we should try harder to avoid greater harms than smaller ones.

But the liberal is distinguishing types of harm, not degrees of the same type. The liberal will insist that while it is acceptable to kill a foetus, because it cannot be harmed by being killed, it can be harmed if it is made to feel pain, just as an animal can. We wince and even “apologise” when we step on the dog’s tail, because we infer from its yelp that it feels the pain, even though we do not attribute a strong right to life to the dog. At this point, the liberal’s opponents will often return to the conservative argument about the importance of the human species, to the effect that you cannot compare dogs and human foetuses, but liberals will stand their ground and direct attention to how we treat animals, competent persons and incompetent human beings, and argue that it is not membership of a particular species which is of moral importance. And they will demand of their conservative opponent a good account of why membership of the human species is significant. If the conservative bases his views on a religious account, the liberal will say that this is all well and good, but does not have any meaning or relevance for him, and that there is no reason he should be bound by it. And he will reasonably query what kind of grounds there could be, other than religious ones, for attributing special status to human beings.

Finally, there is an intermediate view, the big central portion of the bell curve of moral opinion. Intermediaries generally believe that abortion is morally significant, but not always wrong. The foetus is not owed a strong right to life, but its life has significant value, and that value increases as it develops in utero. The incremental value is sometimes demarcated by certain lines, such as sentience, viability or birth. The incremental idea may also include an element of potentiality, borrowed from the conservative camp. For example, a later term foetus’s potential might seem to be stronger than that of a newly conceived foetus.

The intermediate position is apparently safe; it tries to reach a compromise – not too radical, not too conservative. But consider those lines of demarcation. Do they mark anything of distinctly moral significance? For example, what is the significance of viability, if medical science continues to bring the time of viability closer to conception? The implication would be that an abortion performed ten years ago, which was morally acceptable then (i.e. to those who place significance on viability), would no longer be acceptable, and this surely is very odd. The intermediate also faces the
problem of specifying when and why the foetus moves from having some intrinsic value which falls short of a full right to life, to the point where that right is to be attributed.

It is not surprising that the law has aimed for a similar kind of compromise, as it struggles to accommodate disparate and evolving views. To the extent that the law gets involved in such counterintuitive implications of the intermediate view, however, it fails the test of coherence. Think of another intermediate dividing line, sentence. If you believe that it is morally permissible to abort only pre-sentient foetuses, you may need to revise your views about inflicting pain on animals, unless you are prepared to run the special species argument mentioned above, in which case you need to have a good account of this as well. Each ethical position has implications that you might not have considered, but which could cause trouble!

The most accurate portrayal of the development of the law in the abortion area may be to say that while the law has appeared to provide an intermediate position, in fact it has enabled a more and more liberal one to take hold, even while the law as written continues valiantly to uphold some rights in the foetus. This is supported by the fact that for many years, despite abortion’s prima facie criminal status, roughly 100,000 abortions are performed in Australia each year. This number is far in excess of that which intermediates, and certainly conservatives, would be prepared to allow as exceptions to their various lines of moral significance. In terms of coherence alone, this number would be strongly consistent with the liberal view on abortion, which amounts to allowing abortion at any stage of gestation, as long as this does not involve pain and other kinds of suffering as side effects.

**Late term abortion and child destruction**

“At any stage of gestation”? Surely the intermediate is on stronger ground when he objects to late term abortion, at least in cases where there is no strong countermarking risk to the mother from continuing the pregnancy. The late term foetus is indistinguishable visibly from the neonate, is sentient, and is viable. While people often have difficulty spelling out the viability is morally significant, they nonetheless see it as a significant line. A number of jurisdictions retain the crime of child destruction, and some of these base it on the concept of viability, although the terminology is often inexact. For example, the Queensland Criminal Code states

Any person who, when a female is about to be delivered of a child, prevents the child from being born alive by any act or omission of such a nature that, if the child had been born alive and then died, the person would have been deemed to have unlawfully killed the child, is guilty of a crime and is liable to imprisonment for life.17

Such child destruction statutes attempted to ‘plug the hole’ between abortion and homicide. On the one hand, because a foetus is not a legal person, homicide law cannot apply. (In Queensland, for example, section 292 of the Criminal Code states:

A child becomes a person capable of being killed when it has completed proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel-string is severed or not.

On the other hand, due to the temporal, developmental and visual proximity of a child “about to be delivered” to one who has been delivered, the statutory sentence for the crime in Queensland is life imprisonment. The consistent liberal, on the basis of her theory of concepts, interests and rights, would allow even such late terminations without qualification. Intermediates, and even some conservatives, will allow them in cases of gross foetal abnormality and serious risk to the mother’s life or even health. The majority of late terminations, in fact, are carried out for just these reasons. It is estimated that 1-1.5% of Australian terminations are performed after 14 weeks, and that most of these are because of severe foetal abnormality, which is detected later in pregnancy.

A small proportion is performed for serious physical or psychiatric morbidity in the mother.

In a national sense, the law on late term abortion, like abortion law in general, is in disarray. It remains a crime in some states as described, generally with the exception of serious risk to the mother’s life or health. Fetal abnormality is sometimes cited explicitly, but is often implicitly included under the maternal risk clauses, as constituting a cause of serious harm to mental health. In other states such as Victoria, the crime has been repealed. In WA, a committee must approve abortions later than twenty weeks gestation.

**Conclusion**

The decriminalisation of abortion presupposes acceptance of the liberal view. This is a coherent view, although it will not find moral favour among conservatives and intermediates. We need to remember that coherence is not the same as moral truth or legitimacy, so that a staunch conservative should recognise that current legal developments are proceeding towards a more uniform and coherent position, even though it is not the position he supports. The intermediate ethical view is the most incoherent, because it includes a large number of possibilities about where to “draw the line” between morally acceptable and unacceptable abortions, all of which have serious and unanswered problems. But for a long time it has held sway in the law, based on principles of democratic compromise, and the apparent basis in common-sense that there must be a change in moral status between conception and birth, that the value of the foetus increases with gestational age, even if that value is not equivalent to a right to life. It appears that following an interregnum of understandable incoherence which reflected a broader social transition from a more strongly religiously based society to a more secular one, we are currently witnessing the birth of another coherent phase, this time of a secular kind.

**References**

5 de Crespigny & Savulescu, above n. 1; see also R de Crespigny & J Savulescu. Pregnant women with fetal abnormalities: the forgotten people in the abortion debate. (2009) 19 Med J Aust. 100-103
11 Singer, above n 9, pp 49-59.
12 Cal 313(1).