Occasional Paper

Abortion: how early, how late, and how legal?

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Of all the sociomedical questions of our time, none is more frequently and hotly debated than abortion. Until now the debate has mostly been about the morality of abortion and whether the grounds for medical termination are too lax or too restrictive, either in theory or in practice. A lawyer who intervenes to ask "but what do you mean by 'abortion'?" might be dismissed by all sides as quibbling or side tracking. Yet abortion in the legal sense remains a serious crime, one of several in this area. And the trouble with crimes—especially those as ancient as abortion—is that their definitions and profiles do not automatically adjust to changing social or scientific developments. Doctors are quite familiar with the Abortion Act 1967; but that really tells us of only one circumstance in which the crime of abortion is not committed. Many doctors fail to see that Act in its setting, section 58, Offences against the Person Act 1861, and beside its ever-encroaching neighbour, the Infant Life (Preservation) Act 1929.

Several recent happenings, affecting doctors, hospitals, and health authorities, suggest that it would be helpful to take a good look at the condition of the law at the two extremes of gestation, where the scope of the crime of abortion begins and ends; and to look at the actual words of the law, which as often as not is paraphrased.

The unknowable embryo

In 1861 Parliament, restating legislation dating from 1801, made it a crime for anyone to do virtually anything "with intent to procure the miscarriage of any woman, whether she be or be not with child." It called the crime "abortion" but that word does not appear in the definition, only in the margin to s58. The section continues in full effect, save only where the Abortion Act applies. So on the face of it, all so-called contraceptive techniques that work after the moment of fertilisation, or are believed so to work, are illegal.¹ This would include interceptive methods (such as IUDs and some types of pill) and displanting methods ("morning-after" pills, prostaglandins, endometrial aspiration). In view of the legal uncertainties, a doctor who regularly performed menstrual extraction (a convenient but question-begging euphemism) might until recently have thought it best to play safe by complying hypothetically with the Abortion Act: although the girl's pregnancy, if any, cannot at such an early stage be diagnosed, it would be prudent to certify as for a termination, and certainly to notify if the pregnancy was subsequently confirmed histologically.

THE DPP AND MR GOLDTHORP

One such practitioner was Mr W O Goldthorp, the Manchester consultant gynaecologist, who in an article in the *BMJ*² described how he performed menstrual extractions from 10 to 18 days after a missed period. The Chief Constable of Manchester referred the matter to the Director of Public Prosecutions. Early in 1978 the DPP expressed the opinion³ that menstrual extraction in these circumstances was illegal, and that purported compliance with the Abortion Act made no difference. Mr Goldthorp thereupon ceased these extractions.

The DPP's opinion was based on his understanding of the Abortion Act, which gives protection to doctors "when a pregnancy is terminated."⁴ This was understood by the Lane Committee⁵ to exclude "speculative" operations, done before the existence of a pregnancy could be known. To fill this gap the committee proposed⁶ that the Act be amended by adding a new subsection: "In this Act references to termination of pregnancy include acts done with intent to terminate a pregnancy if such exists," but there has been no legislation to implement this. And since the Act in s5(2) states categorically that "anything done with intent to procure the miscarriage of a woman is unlawfully done unless authorised by section 1 of this Act," it seems to be a simple either/or choice. The DPP gave a further reason for his opinion: no doctor could hold the opinion in good faith, as required by the Act, that there was a risk to the woman or the child in the continuance of the pregnancy if he did not know that she was in fact pregnant.

If to some medical readers there seems an excessive literalism in these reasons it would be as well for them to realise that this is for better or worse part of our legal tradition in the interpretation of statutes. It serves to emphasise the importance of focusing on the actual words used by Parliament and not accepting some widely repeated paraphrase or believed meaning. We return to this point below. But on the question of menstrual extraction there is now further news: the DPP subsequently had his mind changed by his superiors, the Law Officers (the Attorney-General and Solicitor-General). In March 1979 they expressed the opinion⁷ (giving no reasons) that what Mr Goldthorp described in his article was protected by the Abortion Act; and that the Act's references to termination of pregnancy should be understood as including steps taken to terminate a pregnancy which two practitioners in good faith believe to exist.

In this unsatisfactory state of affairs it is difficult to say with confidence what the law is. If Mr Goldthorp or others have resumed these extractions there could be a test case, as the Lane Committee suggested. For the present we have the reasoned opinion of the DPP that the operations are illegal in all circumstances and the later bald statement of the Law Officers that words may be read into the Abortion Act, which would make them legal. (It is perhaps worth adding that the words suggested by the Law Officers might in any event still not confer protection, since the two practitioners do not positively "believe a pregnancy to exist" if they merely think that there is a chance it might. The Lane Committee's amendment is much clearer; but it would take a bold judge to read that into the unamended Act.)

Would a criminal court today adopt the DPP's opinion or the Law Officers' second thoughts? The answer—or rather the question—is complicated by the fact that, although anyone may bring a prosecution for abortion, the police have to inform the DPP.⁸ He is thus given an opportunity to intervene, but he is subject to the control of the Law Officers. And, while the DPP who gave the anti-Goldthorp opinion is still in the saddle, the Law Officers who overrode him changed with the Government in May. Here, then, is rich material—medical, legal, and political—for those who enjoy speculating on current affairs. But it would be well to keep in mind what we are pondering: the prospects of prosecuting highly respected medical men. Their crime (maximum penalty, life imprisonment) is their open and ethical performance, with skill and success, of routine procedures at just the time when these are medically most desirable. Should there be even a shadow of criminality over this situation?

This is not all. Even given that the Law Officers were right and there is no longer any question of these early postcoital extractions being regarded as criminal, this exemption is achieved only by complying with the Abortion Act. The effect of this is to declare all non-statutory extraction criminal where the operator thinks, even erroneously, that the woman might be pregnant. Now however satisfied he may be with his diagnosis of, say, amenorrhoea, would not an honest practitioner admit that there is almost always a chance that he may be mistaken, may perhaps have been misled by his patient, and that possibly she has a very early pregnancy? If he thinks that this a possibility then even though he does not believe it to be so, he extracts intending to remove the contents of the uterus, including any conception that may be present. It would seem odd (and perhaps even insulting to the patient) to insist on certifying under the Abortion Act in such a case. But if he does not, s58 is inescapable: "... whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully use any instrument... shall be guilty..." Perhaps the ultimate irony is that it is immaterial that she was never in fact pregnant at all. The crime is committed because of his conditional intent.

To summarise: if this account of the present law is correct, it follows that in all cases where very early, undiagnosable, pregnancy is a possibility, (1) no doctor is safe to perform a menstrual extraction, for whatever reason, without complying with the Abortion Act; and possibly also—(2) even with such compliance there may still be an offence.

THE MARIE STOPES CLINIC'S ADVERTISEMENT

The present problem is not confined to menstrual extraction but is part of the much larger area of doubt affecting what is tendentiously called postcoital contraception. According to s58 it is not contraception but abortion; and application need not be postcoital if the effect is postcoital, such as with the normal use of IUDs. But for the moment it is the postcoital use of IUDs that is under attack. The Marie Stopes Clinic in London recently advertised in women's magazines, offering to insert IUDs up to 10 days after intercourse. The DHSS warned the clinic that their advertisement might be illegal (presumably as an incitement to women to conspire at, or to abet, their own abortion; but the first crime does not exist⁹ and the second probably does not¹⁰). It seems that the clinic may have ceased advertising but is continuing the insertions.¹¹ For surely every doctor who inserts an IUD runs the risk that the woman may be a few days pregnant and knows it is virtually certain that if she is, the blastocyst or embryo will be expelled. Is the DHSS prepared to face the reality that IUDs are illegal in all circumstances? Or to insist that certification for abortion accompanies every insertion?

It is submitted that the law in these matters, hardly changed since the reign of George III, is in a disgraceful state of neglect and that some short, non-controversial reform is urgently

needed to put beyond prosecution all these methods of what may fairly if loosely be called "the new contraception."

The mature fetus

Terminations very late in pregnancy are beset by difficulties—not only the obvious medical complications but also the risk that the law will treat an operation as one of child destruction. This crime, quite distinct from that of abortion, was introduced by the Infant Life (Preservation) Act 1929 to protect the soon-to-be-born fetus, not yet within the law of homicide but perhaps beyond the law of abortion. Section 1(1) of the Act says "... any person who, with intent to destroy the life of a child capable of being born alive, by any wilful act causes a child to die before it has an existence independent of its mother, shall be guilty of... child destruction..." A proviso to this section allows for medical necessity: "Provided that no person shall be found guilty of an offence under this section unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother." This proviso confirms the legality of operations to kill the fetus when this is necessary, or believed necessary, to save the mother's life; and it may be that a court would construe "life" to include cases where very serious risk to the mother's health, short of death, was at stake. But there is no question of importing into the proviso the much wider Abortion Act grounds for termination. To make this clear, the Abortion Act itself states: "5(1) Nothing in this Act shall affect the provisions of the Infant Life (Preservation) Act 1929..." So when Parliament in 1967 declared the grounds for medical termination it also expressly declared that once a fetus is capable of being born alive, all medical terminations must cease save only where the mother's "life" is at stake.

The law as stated seems reasonably clear from the words of the Acts. Yet there is much misunderstanding of it among doctors and health authorities. Firstly, the 1929 Act is treated as if it made it an offence to destroy only a viable fetus, one capable of survival. But if Parliament had wanted to say that it could easily have done so. Instead it chose to say "capable of being born alive." Secondly, many doctors appear to believe that the law draws a line at 28 weeks, so that before that stage they are legally safe to terminate provided they comply with the Abortion Act. Again, this is not what the law says. Section 1(2) of the 1929 Act says "For the purposes of this Act, evidence that a woman had at any material time been pregnant for a period of 28 weeks or more shall be prima facie proof that she was at that time pregnant of a child capable of being born alive." So the prosecution have to prove that the fetus which was destroyed was capable of live birth. They are not precluded from doing this merely because the fetus cannot be proved to be of 28 weeks. The point of s1(2) is simply that they are taken to have proved it if they prove it was a fetus of 28 weeks (leaving the accused, if he desires, to prove that despite this maturity it was not capable of live birth). But the prosecution may be able to prove that the destroyed fetus, though of only, say, 25 or 24 weeks, was nevertheless capable of live birth. And if it was, the termination (in a non-proviso case) must have been illegal. Purported compliance with the Abortion Act gives no protection from prosecution: see s5(1) of the Act, quoted above.

It seems that with modern techniques of antenatal investigation, delivery, and intensive care the fetus must be regarded as becoming ever-earlier "capable of being born alive"; and doctors must be regarded as becoming ever-more aware of this. So that the crime of child destruction is thus expanding at the expense of what have been lawful Abortion Act terminations. To bring the point home to doctors, the Lane Committee proposed the repeal of s1(2) altogether, and the amendment of the Abortion Act to forbid abortion after the 24th week. These proposals have not been enacted; but for the reasons given it is suggested that they would do no more than publicise the law as it already is.

A further implication of the words "capable of being born alive" is that it is immaterial that the child is not in fact born alive. In a recent broadcast Professor Peter Huntingford stated that in performing these late terminations there were techniques to ensure that the fetus was not born alive, and implied that experienced doctors always employed these. This seems to concede that the doctors know they may be dealing with a fetus capable of being born alive and that they act wilfully to cause it to die before birth; which, in a non-proviso case, is a confession of child destruction. Professor Huntingford was merely commenting on the various recent cases, discussed below, in which aborted fetuses were said to have been born alive and allowed to die, and was explaining that this could and should be avoided. But, while feticide may be thought preferable to homicide, the law regards both as serious crimes.

The born fetus

If a fetus is actually born alive and dies thereafter, it is self-evident that, whatever its prematurity, it must have been "capable of being born alive." This effectively disposes of one of the main defences to child destruction. But that crime will none the less be inapplicable for another reason: it applies to the death of a child only "before it has an existence independent of its mother." (This state ends once the living child is separate from the mother's body, whether or not the cord is still connecting them.) If the operator meant the child to die while still a fetus, whereas in fact it survived to die when fully born, there are two crimes to consider: attempted child destruction, child destruction being intended; and actual homicide, because the death of a human being was achieved.

The idea of attempted child destruction may seem odd when the child has in fact been destroyed, but the law of the complete offence is strict as to the stage at which the destruction must have occurred. It would not, however, be a circumvention but rather a fulfilment of the law to charge with attempted child destruction in such circumstances, for here the attempt is the completed crime plus. The alternative of homicide (murder or manslaughter) may seem even odder, in view of the intent to dispose of a mere fetus; but there is a long line of authority for it. Thus in *R v West* (1848),¹² where a woman who tried to abort herself induced premature delivery of a child which died, Mr Justice Maule directed the jury that "... if a person intending to procure abortion does an act which causes a child to be born so much earlier than the natural time that it is born in a state much less capable of living and afterwards dies as a consequence of its exposure to the external world, the person is guilty of murder." Similarly in *R v Senior* (1832)¹³ a clumsy midwife who compressed the child's skull in the course of delivery, whence it died after birth, was held guilty of manslaughter by an appeal court of 13 judges. Though old, these cases are accepted as authoritative in all standard modern works on criminal law.

It follows that a doctor who has turned a safe uterine fetus into a hopelessly premature human being can only escape liability for homicide if he does everything in his power to support its life. And even so, the question of attempted child destruction remains.

Lest the views here expressed be thought of as those of a remote academic lawyer, the largely medical Lane Committee confirm and add to them: "[It] is unlawful for termination of pregnancy to be carried out by a method which destroys a fetus capable of being born alive, even if its chances of survival are slight or non-existent, unless this is done in order to preserve the life of the mother. ... If a live and apparently viable fetus emerges from the termination, there is a statutory duty to try and keep it alive, however unwanted or abnormal it may be, and for the mother and child to be cared for by a midwife for 10 days. Further, if after delivery a fetus shows signs of life, an offence is committed if its birth and death are not registered or if it is incinerated elsewhere than in a crematorium."¹⁴

THE WANSTEAD, WHISTON, AND BARNSELY CASES

It is surprising how in recent happenings and utterances doctors, hospital and health authorities seem to be in ignorance of the law.

In the Wanstead Hospital case¹⁵ it was alleged that an aborted fetus cried out, to the distress of patients in the gynaecological ward where the termination was performed, and where it was subsequently allowed to die. An investigation produced a public statement from the Redbridge and Waltham Forest AHA. This included the following, which it is instructive to compare with the version of the law offered in the present article. Consider in particular the passages for which italics have been supplied.

"The woman in question had a pregnancy terminated in strict accordance with the *Abortion Act*. ... A scan showed the period of pregnancy at the time of the abortion to be 19 weeks, ... well within the *Abortion Act* upper limit of 28 weeks. ... It is not known for certain whether a noise was emitted by the fetus. ... Such noises from *non-viable* fetuses are very rare, but not unknown. ... Qualified medical and nursing staff concluded that the fetus was *not capable of sustaining life* and thus did not use resuscitation equipment. ... It is the view of the AHA that the medical and nursing staff at Wanstead Hospital acted in a perfectly proper manner and that *their actions were fully within the law*."

In the Whiston Hospital case¹⁶ it was alleged that on 4 January 1979 a 22-week fetus was aborted and remained alive for two hours, during which time, according to the report, no attempt was made to keep it alive. The local MP, Mr Gordon Oakes, said that he would call for an investigation from the new Health Minister. In the Barnsley Hospital case¹⁷ it was alleged that a 23-week fetus was aborted when it was discovered that the mother had had German measles. The child, a girl, lived for 36 hours, during which she was named and baptised by the parents. There is some dispute whether the child was properly looked after. The hospital justified the abortion on grounds of possible abnormality. But no one seems to have observed that these are not within the proviso and that there must therefore have been at least attempted child destruction if the staff foresaw the possibility of live birth. The coroner found¹⁸ that the death resulted from prematurity and that there was no wilful failure by the medical staff. The child destruction aspect went unnoticed.

Conclusion

The present state of affairs is highly unsatisfactory. We have let sleeping dogs lie, but now the law has awoken and is barking at everyone in sight. No one is sure what the law is. So we have a Gilbertian paradox: the authorities are zealous to protect microscopic, even non-existent, embryos; yet they seem to countenance the destruction of near-human beings and the non-preservation of actual human beings. The problem is doubly Gilbertian because on one view of the law, the late terminations are clearly illegal whereas postcoital contraception is not. The law needs urgent reform to take account of the modern facts of life. Doctors need to play a much more prominent part in reform, informing themselves what the present law says and then pressing for the improvements they see as necessary. And, since reform will not come overnight, we need meanwhile to secure the intelligent and humane enforcement of the present law, leaving unhampered what can reasonably be described as family planning; yet preventing, save in real emergencies, what can reasonably be described as quasi-homicide.

Postscript

On 13 July Mr John Corrie, Conservative MP for North Ayrshire and Bute, introduced his Abortion (Amendment) Bill, which would amend the 1929 and 1967 Acts to make 20

weeks the upper limit for termination except to preserve the mother's life or (a new provision) where the child would be severely handicapped. Although the Bill was given a second reading by 242 votes to 98 it is not likely to get through unamended; in particular a compromise of 24 weeks seems probable. There is no proposal to amend the words "capable of being born alive" leaving still, even with the new limit, the possibility of overlap with child-destruction.

Notes

- ¹ Tunkel, V, *Criminal Law Review*, 1974, 461-471.
- ² Goldthorp, W O, *British Medical Journal*, 1977, 2, 562-564.
- ³ Letters of 9 and 10 March 1978 in reply to inquiry by Mrs Renee Short, MP.
- ⁴ Abortion Act 1967 s1(1). London, HMSO, 1967.

- ⁵ Committee on the Working of the Abortion Act (1974), *Report*, Cmnd 5579, para 91. London, HMSO, 1974.
- ⁶ Committee on the Working of the Abortion Act (1974), *Report*, Cmnd 5579, para 92. London, HMSO, 1974.
- ⁷ Quoted by the DPP in letter of 13 March 1979 to Mrs Short.
- ⁸ Prosecution of Offences Regulations 1946 (1946 No 1467, 6(2)(c)).
- ⁹ Criminal Law Act 1977 s5(7).
- ¹⁰ *R v Bodin*, *Criminal Law Review*, 1979, 176: inciting a person to be a mere secondary party to a crime, held not to be a criminal incitement.
- ¹¹ *News of the World*, 11 March 1979.
- ¹² (1848) 2 Cox's Criminal Cases 500.
- ¹³ (1832) 1 Moody's Crown Cases 346.
- ¹⁴ Committee on the Working of the Abortion Act (1974), *Report*, Cmnd 5579, para 278(vi). London, HMSO, 1974.
- ¹⁵ *Sunday People*, 25 March 1979; *Daily Telegraph*, 29 March 1979.
- ¹⁶ *Daily Telegraph*, 21 April 1979.
- ¹⁷ *Daily Telegraph*, 28 April 1979.
- ¹⁸ *Daily Telegraph*, 18 July 1979.

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MATERIA NON MEDICA

Contrasts

It was a week of contrasts: marsh and pinewoods; avocets and A10s; marsh harriers and Hercules; walking and chamber music; even the weather, in contrast to the wet first quarter of the year, was fine and warm.

A week's holiday before Easter gave all the family a chance to indulge their interests. For many years, holiday areas have been chosen with bird watching in mind, a hobby which the children have accepted with enthusiasm. Latterly, aviation has also lodged a claim. The east coast is a favourite spot. This year it was Suffolk and the area around Minsmere, one of the two Meccas for British ornithology. As luck would have it, close by are two large US Air Force bases, one of which has just become home to a strange creature, the A10. To my untutored eye this seemed a throwback to the 1940s in comparison to the sleek swing-winged planes that fly around north Oxfordshire. The angular, almost clumsy construction apparently gives good manoeuvrability at slow speeds, ideal for its job—tank tracking. Pairs of these whined around us all week, looking ungainly like herons, but wheeling about like lapwings. Pairing was obviously related to the season. There was a lot of it about, though not yet much evidence of nesting on the Scrape. Not that there seemed to be any room for nesting; black-headed gulls filled most of the available space, on island or water, and certainly their cries blotted out the sound of the enormous but lonely helicopter, which flew up and down the shoreline as if seeking a mate which had not yet returned.

It was wonderful to watch the avocets displaying on the reserve, and to see the marsh harriers, orchestrated almost by an enthusiastic warden in the Island hide. The harriers have been in the same place on every visit to Minsmere, almost as though they were kept, like the Tower ravens. It seemed much more exciting to see three further up the coast, lazily soaring and sweeping before they decided who would be the odd one out. One avocet too popped up on the marsh near Havergate, perhaps to underline the fact that they are not all kept birds.

The fine weather, with a hint of mist at dawn, lent a special feeling to walking along the edge of the marsh, with snipe roding and geese calling, but the real romance came with a beautiful moonlit evening and a Beethoven quartet—the Amadeus playing at the Maltings, and a redshank piping over the brilliant mudflats, surrounded by shimmering reeds. How well has the Maltings been rebuilt after the tragic fire, its simplicity matching that of its setting, and the deceptive ease of the string playing.

Our particular style of caravan life lived up to its usual inspiration, partly by the choice of sites, one a peaceful orchard with resident jays, the other buried in the pines, but also by the impulsive cooking, topped this time by a tasty kedgeree and draught Adnams, fetched from the Eel in the Boot in two thermos flasks. Even the journey home had its events—the first swallow, a Galaxy at Mildenhall (the largest air transporter, not chocolate) and some keenly anticipated fish and chips.

The contrasts could have been severe. In fact they were less contrasting than complementary, matching each other and giving a

great deal of pleasure, crowned by moonlight and music.—J S RODGERS (community physician, Headington, Oxford).

El Greco and muscular dystrophy?

"And so it was argued that El Greco's astigmatism forced him to elongate only when he was drawing imaginary figures—without a 'sitter' to portray."¹

There is a popular supposition in art theory that physical or mental abnormality may be not only a spur to an artist but perhaps causal to his art. Suffering and altered perception induced by physical deformity, mental precocity, instability, or an over-rich imagination impels the individual to extremes of physiological adjustment favourable to the creative act. This is not to deny the talent of the artist, who must be at home in his medium and its form of expression, but an artist's style is his own and springs from his own flawed or obliquely set identity or soul. There are many examples which are often advanced to support this theory: Byron's clubbed foot, Beethoven's deafness, Keats's tuberculosis, Dostoevsky's epilepsy . . . so the argument runs. The opposite view is taken by those who instance Bach or Haydn, Shakespeare or Michelangelo as gothic monuments to the normality of genius.

These thoughts were occasioned by the opportunity to study the beautiful, odd, manneristic paintings of El Greco during a recent visit to Toledo and Madrid. Many of the distortions in his paintings are acceptable as a necessary exaggeration, utterly personal to his artistic vision. One is struck, however, on scrutiny of his works, by a recurring theme in certain paintings of figures with characteristics suggestive of a muscular dystrophy or hereditary neuropathy. The face of San Sebastian is "dystrophic," as is that of Santiago el Mayor, and in the hands of the latter there is clear evidence of wasting of the small muscles in the thenar and hypothenar eminences. In his *Crucifixion* the angel at the foot of the cross has a pes cavus deformity; St John (*The Baptism of Christ*) has a fully developed peroneal muscular atrophy. In the *Adoration of the Shepherds* there is a clear suggestion of facioscapulohumeral dystrophy. From these few examples one is left to wonder at the cause of this reproduction in art of allusions to hereditary disorders by El Greco, which preceded their clinical observation and documentation by Dejerine, Charcot, Marie, Tooth, and others by over 250 years. Did he observe the models from life?

There is a legend that El Greco painted inmates of an asylum—St James's Hospital, Toledo, where the 13 canvases of Christ and the apostles remained until the dissolution of the institution in 1840. In this event, the discovery may be no more odd than Velazquez painting dwarfs and achondroplastics of the Spanish Court. It does not, however, explain the curious obsessional attachment of El Greco to this peculiar theme in a considerable number of his works. It adds yet a further enigma to the rich mystery of the wandering Greek aristocrat Domenikos Theotokopoulos, who came from Crete to Venice and then to the walled insular city of Toledo to end his life in a mystical solitude.—J R HERON (neurologist, Stoke on Trent).

- ¹ Trevor-Roper, T, *The World through Blinded Sight*, p 50. London, Thames and Hudson, 1970.