

Legislating Prenatal Care

Peg Tittle

ptittle7@gmail.com

www.pegtitle.com

'Prenatal abuse' may not be new; after all, tobacco and alcohol have been around for a long time. Our awareness of it is new, however: perhaps because the tendrils of our social system have lengthened; perhaps because medical technology has made it more possible to keep debilitated newborns alive. In any case, legislating prenatal care has become an important issue. And perhaps this is especially so because of increases in both the use of illegal drugs (which can *cause* harm) and the availability of fetal therapies (which can *prevent* harm).

Use during pregnancy of illegal drugs (such as crack cocaine and heroin) as well as legal drugs (such as alcohol and nicotine) can cause, in the newborn, excruciating pain, vomiting, inability to sleep, reluctance to feed, diarrhoea leading to shock and death, severe anaemia, growth retardation, mental retardation, central nervous system abnormalities, and malformations of the kidneys, intestines, head and spinal cord (Proudfoot 58; Mathieu 5). Refusal of fetal therapy techniques (such as surgery, blood infusions, and vitamin regimens) can result in respiratory distress, and various genetic disorders and defects such as spina bifida and hydrocephalus (Mathieu 7).[1]

One task is to sort out the difference, if any, between legally insisting that a pregnant woman *not* do X (e.g., drink alcohol) and legally insisting that she *do* X (e.g., take certain vitamin supplements). Rachels, examining the similar passive/active distinction in euthanasia, argues that because the intent (relieving suffering) and consequence (death) are the same, there is no moral difference. So too with prenatal care: because the intent (producing a healthy newborn) and the consequence (a healthy newborn) are the same, there is no moral difference between legislation that *prohibits* X and legislation that *requires* X.[2]

However, there is not necessarily a relationship between morality and legality. Canada and the U.S., unlike several European countries,[3] does not have 'Good Samaritan' laws: we are legally bound, generally speaking, not to harm others, but we are *not* legally bound to *help* them. Therefore, as far as consistency is concerned, one can more easily justify legislation against abuse than legislation in favour of care. However, this may simply make us consistent with an already poor situation--perhaps Canada *should* have 'Good Samaritan' laws.

This does, however, lead us to the crucial question 'When does lack of help become harm?'-'When does lack of care become abuse?' If we could establish an acceptable baseline, perhaps we could say that action less than that is illegal, more than that is optional. Such is the case with child abuse: beating a child is illegal, but allowing it to watch four hours of violent television programming every day is not.[4] Accordingly, one could argue that personal sacrifice should not be legally required in this case when minimal decency is all the law requires in other cases.[5] The woman should not be required to do *all* that is in the *best* interests of the zygote/embryo/fetus, but only what's 'reasonable', conforming to what Mathieu (43) refers to as a 'minimum needs' standard.[6]

Another approach would be a sort of 'cost benefit' analysis. For example, giving up alcohol

is little to ask to ensure a newborn free of mental retardation (Streissguth), but giving up one's job may be too much to ask to ensure the newborn is not a little premature.

Before we define what legislation is *reasonable*, however, we have to establish the right of the state to legislate in this case in the first place. How can we say on the one hand 'This is my body and you have no right to deny me an abortion' and on the other hand 'You *can* tell me what to drink and what not to drink when I'm pregnant'. To state the contradiction in other terms, how can we say prenatal abuse is a crime, is harming a person, but abortion is *not* a crime, is not killing a person. Obviously, one can't have it both ways: either women do or do not have the right to control their own bodies; either the fetus is or is not a person.

However, permitting abortion while prohibiting prenatal harm need not be contradictory. One, there are grounds other than the right to control one's body that justify abortion; for example, abortion could be permitted because the fetus is not an actual person. Even if it *is* a person, abortion may be permissible: it is sometimes acceptable to kill persons, most notably in cases of self-defence. Furthermore, there are other kinds of rights, dependent or not upon the personhood of the fetus, that can be invoked to support abortion (see Thomson and English).

And prenatal harm can be prohibited even if one does have the right to control one's body; after all, non-pregnant people presumably with the right to control their bodies are not permitted to cause *postnatal* harm. And personhood again may be irrelevant: the fetus may *not* be a person and still it may be *unacceptable* to cause it harm; the arguments of animal rights advocates such as Regan and Singer may be applicable in this case.

Two, one can argue for a continuum of rights. The right to control one's own body is not an 'all or nothing' right: not everything one does with one's body is legal or morally acceptable. For example, it's generally illegal for people to use their bodies to break other people's legs. With respect to the contradiction in personhood terms, well, in our society, not all persons have the same, or even equal, rights. An institutionalized person (whether in a hospital or a prison) doesn't have the same rights as a non-institutionalized person. More relevantly, a two-year old infant doesn't have the same rights as a twenty-year old adult. As Callahan and Knight (146) and Mathieu (118) point out, many rights are attached to age in a rather arbitrary fashion because the development of abilities is continuous rather than discrete. So while a fifteen-and-three-quarters-year old might argue that she is just as mature as her sixteen-year old friend and therefore should have just as much a right to get a beginner drivers' licence, a six-year old could not make the same argument.

With similar arbitrariness--and with similar justification because the continuousness of development *demand*s such arbitrariness--we could argue that an eight-month old fetus person doesn't have the same rights as a one-month old infant person, and that a one-week old zygote person doesn't have the same rights as the eight-month old fetus person.

The two important rights that concern us here, the right to life (or the right not to be killed) and the right not to be harmed, can be placed on the continuum such that, for example, only old fetus persons (and not young fetus persons, embryo persons, or zygote persons) have both the right to life and the right not to be harmed. Or we could say that all persons have the right not to be harmed but only fetus persons have the right to life. Thus one could condone (certain) abortion *and* condemn (certain) prenatal harm without contradiction (depending on where the lines are drawn).

Three, one can argue for a continuum of body: while the woman does have the right to control her body, what is considered 'her body' changes through the pregnancy parallel to the

changes in the personhood of the zygote/embryo/ fetus: the less it is a person, the more it is her body; the more it is a person, the less it is her body. Likewise, one can argue for a continuum of personhood: rather than assuming that the zygote/embryo/fetus is or is not a person, as if personhood is an 'all or nothing' attribute, it may be more reasonable, more reflective of our reality, to consider the many possible criteria--human genetic material, brainwaves, heartbeat, quickening, sentience, viability, social visibility, ability to communicate, self-motivated activity, capacity for rational thought, consciousness, interests of one's own, etc.--and establish some sort of continuum of personhood. One can then 'assign' fewer rights to 'lesser persons'. The acceptability of aborting a being with minimal personhood would not then contradict the unacceptability of harming a being with considerably more personhood.

Four, one can distinguish between the potentially born and the preborn according to the woman's intent. A little background is in order for this solution. The notion of 'potential person' figures prominently in the discussion about abortion. To some, it is the fact that a fetus is a potential person that justifies an anti-abortion stance. To others, potential persons have only potential rights (Feinberg). And the notion of 'future persons' is prominent in environmental ethics (though discussion tends toward 'duties toward' rather than 'rights of').

Adding the notions of 'actual persons' and 'conventional persons', Callahan and Knight make the following four-tiered distinction. *Actual persons* are human beings with those characteristics such as "a concept of oneself as an ongoing being with at least some kinds of plans and stakes" (145) that compel us to recognize strong moral rights; full emergence of these characteristics occurs long after birth. *Conventional persons* are human beings that are not yet actual persons but that have been born. "A prenatal human being is a *potential person* when it is the case that (1) it has the capacities to develop the kinds of characteristics that are relevant to compelling a recognition of a being as an actual person and (2) if its life were supported, it would be born, gaining conventional entry into the set of persons at birth" (152, my italics). Lastly, "a prenatal human being is a *future person* if (1) it is a potential person and (2) it will, in fact, gain conventional entry into the class of persons through birth" (152, my italics).

I accept Callahan and Knight's definitions of a potential person and a future person but I want to emphasize, indeed *specify*, that it is the woman who decides whether or not a prenatal human being will, in fact, 'gain such entry'. That is to say, the single determinant differentiating between potential persons and future persons is the woman's intent: *if she intends to carry the being to term and give it birth, then it shall be deemed a future person; if she does not intend to carry it to term and give it birth, it shall be deemed a potential person*. To underscore birth as the difference, and to eliminate the impression that a potential person is indeed some kind of *person*, I will henceforth refer to potential persons and future persons as, respectively, the 'potentially born' and the 'preborn'.

One can then argue that a woman has full/usual rights over her body when the potentially born are involved, but she has restricted rights when the preborn are involved. Her intent to carry the zygote/embryo/fetus to term and give it birth constitutes consent and entails a forfeiture of certain rights. The extent of forfeit or the nature of restrictions can be worked out according to the cost benefit strategy mentioned previously. Or, one can assign rights to the potentially born and the preborn such that permitting abortion and prohibiting prenatal harm are not contradictory.

One could also argue that the woman's intent that the potentially born be born (i.e., be a

preborn) constitutes a promise and that this promise is the basis for its right not to be harmed or killed--or at least for moral obligations on her part both not to harm it and to provide it with the life she has promised (not to kill it).[7]

Another approach is to argue that unlike a potentially born, a preborn does have a future, it does have interests, that can be jeopardized. This may be further grounds for granting it the right not to be harmed, or more specifically, the right to begin life with a sound mind and body. If it's illegal to drive while intoxicated, that is, to so put the lives of others at risk, surely it should be illegal to gestate while intoxicated, to similarly put the life of another at risk.

Such protection from harm and death would apply to third party actions as well. While not bound by promise, third parties are bound by the definition of the zygote/embryo/fetus as a preborn according to the woman's intent. Thus the hysterical husband-father who kicks a preborn through (and) a pregnant woman and who so kills it should, it seems to me, be held accountable for murder (as well as assault)--murder of a preborn, a new class of murder perhaps, but murder nevertheless. And the drunk driver who kills a woman and the preborn she was carrying should be accountable for *two* deaths.

Third party harm, especially when cumulative, would be harder to ascertain. For example, what about the second-hand cigarette smoke that causes harm? One person, one cigarette, does not cause significant harm; the amount that *does* cause significant harm will have come from various third parties. Do we hold the pregnant woman solely responsible? How reasonable is it to require that she leave the area? How reasonable is it to require that people refrain from smoking in the presence of a preborn? If 'the area' is her workplace, I believe the third parties' rights should be restricted--they should refrain from smoking. If 'the area' is the local pub, then the woman's rights should be restricted--she should not go to the pub.

The potentially born, on the other hand, would have no such rights. To say something is 'a potential X' is merely to state a possibility. It is not to predict; it is not to promise. Further, it is to state one possibility among many: a potential X is also a potential Y, or at the very least, a potential not-X. There are no grounds for claiming, then, that a potential X has *the right to become X* any more than it has the right to become Y or not-X. Thus a *potentially* born has no right to *be* born.[8]

However, given that a potentially born *may become* a preborn, I think we have the same moral obligation not to harm it--at least until the decision has been made.[9] An exception should be made, however, for harm that causes pain to a potentially born that is sentient:[10] I think sentience alone provides sufficient grounds for the 'right' not to be subjected to unnecessary pain.

Lastly, considering abortion and prenatal harm together is *not* considering apples and not-apples together (a contradiction); it's considering apples and oranges: in the case of abortion, we're discussing quantity (of life--to have or not to have), but in the case of prenatal harm, we're discussing quality (of care--better or worse).

Having established the logical permissibility of legislating against prenatal harm without also having to legislate against abortion, I now turn to justifying such legislation. The strongest grounds for such legislation are consequential. One solid ground in favour of state rights at the prenatal stage, at least in Canada, is that the state has responsibility at the postnatal stage. Rights and responsibilities must go together: whoever has the *right to* do or not do X must be the same person who takes the *responsibility for* doing or not doing that X. Therefore, if one is unwilling to let the State say what a woman must or must not do for a child as a preborn (and recall that since

the decision has been made to carry the fetus until it is a child, these terms can be used[11]), then one must also be unwilling to let the state do anything after for the child once it is born. Sole rights entail sole responsibilities. If the woman takes crack while pregnant (i.e. the state has no right to intervene), then the full cost for all medication, surgery, special schools, etc. needed for her brain-damaged child must be borne by her (i.e. the state has no responsibility to assist).[12] This is a very contractual analysis and one that I think is fair--in theory.

In practice, however, my guess is that a woman who so 'abuses' her preborn child is not going to suddenly stop once it's born; she will *not*, therefore, pay for the necessary medication, surgery, etc. And so the child, clearly an innocent victim, will suffer--unless the state takes responsibility at that time. But it's quite unfair to expect the state ([and] the taxpayers) to stand idly by and watch the abuse and then expect it to clean up the mess.

Thus, when it cannot convincingly be shown that the mother will indeed take full responsibility for her actions toward the preborn, the State should be able to intervene, temporarily denying her full and usual rights, in the interests of justice *and* the child. If that requires institutionalizing the pregnant woman for nine months to ensure that she doesn't take crack and that the preborn does, in fact, become a healthy newborn, then so be it: that's the price she pays for her choice--she could've aborted.[13]

[1] See Nolan (14-15) for a brief description of prenatal hazards and adverse effects of illicit drugs, tobacco, carbon monoxide, lead, alcohol, genetic conditions, infectious diseases, low birth weights, and treatment refusals; see also Mathieu (5-9) for a similar discussion.

[2] See also Sullivan, Foot, and others for a discussion of the passive/active distinction.

[3] Such countries include Czechoslovakia, France, Germany, Hungary, Italy, The Netherlands, Norway, Poland, Portugal, Rumania, U.S.S.R., and Turkey.

[4] Go figure.

[5] See Thomson for a discussion of 'minimally decent' and 'good' Samaritans.

[6] See Bayles for discussion regarding the weighing of the prevention of harms against women's rights. See also Mathieu (52-54).

[7] To say that a preborn has a *right* to life would mean also that I have a right to one of your kidneys (you promised). Or in the case of post-viability and Caesarean sections, it would mean also that I have a right to a kidney dialysis machine (the equivalent of the required life-sustaining incubator). On what grounds? Because I need it? I'm not convinced that needs can establish rights. Because you promised? Promises can't establish rights either (we don't usually have a *right* to receive that which we're promised). But promises *can* establish moral

obligations: one is simply morally obligated to keep one's promises. (The stronger promise of a contract might establish rights but contracts usually required two *consenting* parties.)

[8] As for the 'future loss' injuries caused by abortion (the accusation made by Don Marquis), Narveson responds quite capably: "For if you abort fetus x, then there will *not* be, later on, some person who is worse off than she would have been had there been no abortion. If an abortion is performed now, there is later *no person at all* who grew from that fetus. And so there is no later person who is now harmed, by comparison with how she would have been had an abortion not taken place, no person whose right to life was violated very early on" (Narveson 184).

[9] If the potentially born is to become an unborn/nonborn, then it seems odd indeed to even speak of harm--see previous note.

[10] In an ideal world, a potentially born that is not to become a preborn would be aborted before sentience developed.

[11] Normally, in abortion discussion, I object to 'preborn' 'child' as such terms load the argument.

[12] The neonatal intensive care alone may cost \$31,000; "estimates of the cost of life-long care for Fetal Alcohol Syndrome babies range from \$600,000 to \$2.5 million" (Oberman 515).

[13] She may well lose the child anyway--if she continues to use drugs which make her a negligent/abusive parent who causes harm to her child.

- Bayles, Michael. "Prenatal Harm and Privacy Rights." *National Forum* 69 (1989), pp.28-30.
- Callahan, Joan C. and James W. Knight, "On Treating Prenatal Harm as Child Abuse" in *Kindred Matters: Rethinking the Philosophy of the Family*, edited by Diana Tietjens Meyers, Kenneth Kipnis, and Cornelius F. Murphy, Jr. Ithaca: Cornell University Press, 1993, pp.143-170.
- English, Jane. "Abortion and the Concept of a Person" in *Contemporary Moral Issues*, edited by Wesley Cragg. Toronto: McGraw-Hill Ryerson, 1992, pp.75-82.
- Feinberg, Joel. *Harm to Others*. New York: Oxford University Press, 1984.
- Feinberg, Joel. "A Question about Potentiality" in *Moral Issues*, edited by Jan Narveson. Toronto: Oxford, 1983, pp.234-238.
- Foot, Philippa. "Euthanasia" in *Moral Issues*, edited by Jan Narveson. Toronto: Oxford, 1983, pp. 7-28.
- Marquis, Don. "Why Abortion is Immoral" in *Ethics: Theory and Contemporary Issues*, edited by Barbara MacKinnon. Belmont: Wadsworth, 1995, pp.157-165.
- Mathieu, Deborah. *Preventing Prenatal Harm: Should the State Intervene?* Dordrecht: Kluwer, 1991.
- Narveson, Jan. *Moral Matters*. Peterborough: Broadview Press, 1993, p.184.
- Nolan, Kathleen. "Protecting Fetuses from Prenatal Hazards: Whose Crimes? What Punishment?" *Criminal Justice Ethics* 9/1 (1990):13-23.
- Oberman, Michelle. "Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women who use Drugs" *Hastings Law Journal* 43 (1992):505-548.
- Proudfoot, Madam Justice. "Judgement Respecting Female Infant 'D.J.'" in *Contemporary Moral Issues*, edited by Wesley Cragg. Toronto: McGraw-Hill Ryerson, 1992, pp.57-59.
- Rachels, James. "Active and Passive Euthanasia" in *Ethics: Theory and Contemporary Issues*, edited by Barbara MacKinnon. Belmont: Wadsworth, 1995, pp.123-127.
- Regan, Tom. *The Case for Animal Rights*. Berkeley: University of California Press, 1983.
- Singer, Peter. *Animal Liberation*. New York: A New York Review Book, distributed by Random House, 1975.

Streissguth, A.P., H.M.Barr, P.D.Sampson, et al. "IQ at Age 4 in Relation to Maternal Alcohol Use and Smoking During Pregnancy." *Developmental Psychology* 25, no.1 (1989): 7-9.

Sullivan, Thomas D. "Active and Passive Euthanasia: An Impertinent Distinction?" in *Social and Personal Ethics*, edited by William H. Shaw. Belmont: Wadsworth, 1996, pp.107-111.

Thomson, Judith Jarvis. "A Defense of Abortion" in *Ethics: Theory and Contemporary Issues*, edited by Barbara MacKinnon. Belmont: Wadsworth, 1995, pp. 166-176.