

# Case commentary: absent fetal hand

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This commentary refers to the article, Absent fetal hand: a case report, published in *Australasian Journal of Ultrasound in Medicine* May 2010 13 (2).

This case raises difficult ethical issues about the use of medical imaging in pregnancy, including the role that a diagnosis of foetal disability or abnormality should play in decisions about late terminations. In Australia, late termination is typically understood as a termination of pregnancy after 20 weeks gestation, although this limit appears largely arbitrary. The gestational stage at which the termination occurs in this case is almost 20 weeks. Even just short of the 20-week mark, the case is troubling.

In New South Wales, attempts to procure an abortion are dealt with in sections 82–84 of *The Crimes Act 1900*<sup>1</sup>. *The Act* does not specify the criteria for unlawfulness, but recent interpretations have allowed that an abortion can be lawful if skilfully performed by a medical practitioner with the woman's consent, where the practitioner holds an honest view that continuation of the pregnancy could endanger the woman's mental or physical wellbeing. The grounds for such belief could be economic or social, as well as medical. Thus, unlike some states in Australia, the NSW law on abortion does not include explicit reference to foetal abnormality as grounds for termination. Presumably, though, it may be considered as contributing to the deleterious effect on the woman's wellbeing if continuing the pregnancy. The law in New South Wales also differs from several other states in that it does not include the charge of child destruction, and makes no reference to foetal age<sup>2</sup>.

In ethics, the discussions of late terminations tend to revolve around a number of crucial issues. Perhaps least controversial of these is the idea that a termination is justified when continuing the pregnancy threatens the health of the woman; this is the notion of maternal interest. The related principle of autonomy suggests that a woman's own values and interest in terminating or continuing a pregnancy should be paramount in determining the effect of a pregnancy on maternal interests. The role that foetal abnormality may play in justifying late term abortion is also increasingly controversial, especially with improvements in prenatal testing, such as through the use of ultrasound.

## Maternal interests

Some influential commentators have argued that foetal abnormality should not be given any weight in considering the ethics of late termination. For instance, Julian Savulescu has argued that the inclusion of a foetal abnormality criterion is discriminatory and eugenic<sup>3</sup>. More specifically, he objects to the notion that terminations should be permitted for serious abnormalities where they are not permitted when a fetus has a mild or no abnormality. This distinction effectively discriminates against fetuses with a disability. Instead,

he argues, the only criterion used in determining the ethics of late terminations should be that of maternal interests, that is, risks to the mother's health and wellbeing, where those risks and their impact are hers to judge according to her own beliefs and values.

The advantage of this approach is that it affirms a fundamental right of women to terminate a pregnancy. Thus, on this view, the problem in this case is not that the woman requested a late termination, but that she did so on the basis of foetal abnormality. However, the rejection of a severity criterion means that we should be relieved that the termination was performed for what may well be considered a non-serious foetal anomaly (insofar as it is not life-threatening).

## Autonomy and beneficence

A different approach, proposed by Frank A Chervenak and Laurence B McCullough, argues that a fetus can itself be thought of as a patient, and thus subject to the principle of beneficence that typically guides the doctor-patient relationship<sup>4</sup>. For this approach, obstetric ethics would entail two key principles – the principle of respect for autonomy, which ensures that the integrity of the woman's values and beliefs and her own perspective on her interests is given sufficient weight in treatment decisions, and the principle of beneficence. This latter principle requires that the physician act in the best interests of the patient, which in relation to pregnancy can include both the woman and the fetus.

In this view, the status of the fetus as patient is intrinsically related to its achieving a future independent moral status, and this is largely determined by viability. For the pre-viable fetus, the connection with an independent moral status is entirely dependent on the pregnant woman's decision to confer patient status to the fetus. After viability, however, the patient status of the fetus is no longer dependent upon the woman's autonomous conferral of that status, but upon the medical technologies and practitioners that can sustain its life<sup>4</sup>.

In terms of elaborating beneficial treatment of the fetus as patient in the situation of a diagnosis of an abnormality, Chervenak and McCullough, are thus led to differentiate between abnormalities on the basis of severity. They argue that the certainty or very high probability of death, or of a "severe and irreversible" deficit in cognitive development would justify termination of pregnancy after the 24 weeks gestational age that they take as indicative of viability<sup>4</sup>. Importantly, these conditions are both sufficient and necessary: an abnormality that did not meet these standards would not provide grounds for an ethically permissible termination.

In the case considered here, the fetus is pre-viable; thus, from this perspective, its moral status would be entirely dependent on the autonomy of the woman. This would indicate that the termination of a pregnancy following diagnosis of the isolated absence of the left hand would be permis-

sible at 19 weeks, or even 23 weeks, since the fetus' link with a moral future is entirely contingent on the woman's autonomy. But it would not be permissible at 24 weeks or after, since the fetus would then also be protected by the principle of beneficence.

This perspective places a great deal of weight on viability in determining the moral status of the fetus, and the treatment options that ought to be pursued. Given that viability is itself not a strictly biological condition, but is instead dependent on available technologies, and consequently, on what many take as morally irrelevant factors such as geographic and historical location, it is hard to see that it will carry that weight.

### Disability in context

However, the troubling aspect of this case is not whether or not the fetus was viable, but that a relatively minor anomaly is seen as good reason to terminate in the first place. This is perhaps all the more troubling for the link that is made between disability and gender, where it is thought that the cosmetic impact of missing a hand would be greater for a girl. This would seem to exaggerate the importance of sexual attractiveness in female gender identity, and at the same time diminish the possibilities for sexual attractiveness of people living with disabilities. This gives too much credence to stereotypical gender norms, as well as to restrictive ideas about the possibilities for rich and varied lives that exist for people with disabilities. Thus, while it may be legally important to protect access to terminations on the basis of women's autonomy, from the perspective of ethics, it may also be legitimate to question the content of beliefs and values that underpin the kinds of decisions that seem reasonable to take in the first place.

This points toward a problem with both the positions outlined above, for while it may be asserted that women's autonomy should be paramount in decisions about the ter-

mination of pregnancy, it is also important to recognise that autonomy is not merely an individual capacity exercised in isolation over and against the intrusions of others. Instead, autonomy can only be achieved in a personal context of relationships of dependence and care, as well as within a broader context of often deeply entrenched social norms. Indeed, at times, autonomy may only be achieved in reflection upon the ways that those norms shape one's own beliefs and values.

In this light, it seems right that an option for termination was made available, for the responsibility for a decision to terminate should ultimately rest with the woman involved, and others should respect her right to make that decision. But it is also understandable that the doctors were initially reluctant to perform the termination for the reasons given. The political context of later terminations in which doctors operate in Australia is volatile, the laws confusing and a clear guiding morality unavailable. Furthermore, it is possible to respect a right to make a decision, while also believing that the decision made is regrettable. Indeed, this appears to be a central tension in this case.

### References

- 1 *The Crimes Act*. Federal Government Australia. Available online at [http://www.austlii.edu.au/au/legis/nsw/consol\\_act/ca190082/](http://www.austlii.edu.au/au/legis/nsw/consol_act/ca190082/) [verified April 2010].
- 2 Kerridge IH, Lowe M, Stewart C. *Ethics and Law for the Health Professions*, 3rd ed. Sydney: Federation Press; 2009.
- 3 Savulescu J. Is Current Practice around Late Termination of Pregnancy Eugenic and Discriminatory? Maternal Interests and Abortion. *Journal of Medical Ethics* 2001; 27 (3): 167.
- 4 Chervenak FA, McCoullough LB. Ethical Issues in the Diagnosis and Management of Genetic Disorders in the Fetus 2004. In: Aubrey Milunsky editor. *Genetic disorders and the fetus*. Baltimore: Johns Hopkins Press; 1999. pp 1130–50.
- 5 Chervenak FA, McCoullough LB. *Ethics in Fetal Medicine*. Balliere's Clinical Obstetrics and Gynaecology 1999; 13 (4): 491–502.

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