

## **Address by Dr Helen Watt - Abortion legislation and fetal anomaly: reducing harm without moral compromise**

All human individuals, including those still living in and nurtured by their mothers, have rights concerning their own lives, however long or short those lives may be. That view is of course contested, but I will assume its truth in this presentation in order to focus on other things. I will argue from – not for – a stance of opposition to discriminatory targeting of any innocent human being, whether on the basis of location, age, dependency, state of health or level of ability. We are all equal, at least as regards our moral right to immunity from deliberate lethal attacks we have done nothing to deserve.

Abortion for fetal anomaly in fact gives every sign of being a form of abortion especially likely to cause the woman anguish and complicated grief.<sup>[1]</sup> Complicated by the fact her baby's death was chosen by her, with whatever sadness and reluctance. The woman's violent loss of the child with whom she has lived for so many weeks can have a truly shattering impact on her, as research<sup>[2]</sup> and personal stories<sup>[3]</sup> show. Nor is it enough to appeal to the woman's guardianship of her pregnancy and claim that this extends to a right to end it, even if this is not in the woman's actual interests or those of her baby. It is no part of guardianship to choose to end a baby's life, even for altruistic motives, or to authorise its violent eviction from the very basic, archetypally maternal personal shelter and support the pregnant woman is providing.<sup>[4]</sup>

In this presentation, I want to explore, not so much the issue of abortion per se, as the issue of how lawmakers should respond to unjust laws or bills, with abortion for disability as a case in point. How should we address an existing law or bill that lethally discriminates against some human beings, assuming a scenario where we lack the political power to block the bill entirely, or – in the case of a law already passed – to repeal it entirely in the short term? If we fail to protect all human beings in our restrictive amendments, will we ourselves be guilty of unjust discrimination? Or does that depend on, to begin with, our exact aims and choices, and what we intend that others choose? Can the legal situation in Britain, for example, where abortion is allowed up to birth for disability be addressed without at the same time addressing the injustice of abortion on other grounds, and at earlier stages? What, in short, are the moral constraints on sincere and well-motivated attempts to extend the protection of the law to more threatened individuals, though still not to all?

### Selective bans versus 'regulation'

In looking at this question, I want to distinguish between two ways of addressing unjust laws and bills.<sup>[5]</sup> I will argue that the first approach is morally allowable in principle, even if in practice it can create confusions and/or fail to protect those who could – and therefore prima facie should – be protected by more inclusive moves. The second approach, while also sometimes tempting to those who want to save lives and limit harm generally is nonetheless unfortunately ruled out in principle, or so I will maintain. While I realise that my focus on means as well as ends may seem to some unreasonably restrictive, I would hope that many here would accept the general principle that 'the end does not justify the means' – or not, at any rate, some means. It is not just good ultimate motives, but good aims or intentions all the

way up our ‘chain’ of aims or intentions<sup>[6]</sup> that is necessary, if not always sufficient, for full respect for others and ourselves.

Let me begin, then, with the first approach to harm limitation: what I will call ‘selective banning’ i.e. focusing on one particular area in which it may be possible to achieve legal protection for some threatened human beings, or at least, to make some helpful public statement. For example, perhaps a liberalizing bill might be amended to prohibit abortion on the avowed ground of disability, even if abortion, at least before some general time limit, could still be performed on other grounds. Or perhaps abortions by D&E that dismember the fetus, and/or feticide, a lethal injection to the heart of the fetus, might be prohibited to allow at least some babies to survive those terminations which are not immediately destructive.

### Risks of ‘selective ban’ approach

I should emphasise again that there can be serious practical objections to selective bans – for example, where it is possible to be more ambitious in the scope of those protected and/or where we risk sending out bad social messages by the limited scope of our amendment.<sup>[7]</sup> Such bad messages could be sent out by (for example) an amendment prohibiting abortion except where the baby has anencephaly: a move that could create serious confusion generally and also present some problems when collaborating with those who positively want abortion to be available on that ground (I will come back to this later on). As well as the issue of undermining respect for anencephalic babies – already a targeted and highly vulnerable group – there is the likelihood of sending out a very demoralising message to those parents expecting or mourning such babies who do not in any way doubt their child’s right to live.

Paradoxically, a *less* inclusive, perhaps more clearly arbitrary amendment simply to prohibit abortion for a particular condition such as Down’s Syndrome and thus minimise the harm of a bill going through may carry a lower risk of giving bad messages than one prohibiting abortion for everything but anencephaly. Lawmakers and lobbyists could focus their efforts, not negatively on children with other conditions, but positively on those with Down’s, while saying openly that they are themselves opposed to all abortions: nothing is conceded about the propriety of abortions in other cases which the Bill does not address. Certainly, children with Down’s should not be presented as ‘honorary able-bodied’ people<sup>[8]</sup> to whom the lethal discrimination supposedly rightly applied to those with more serious conditions should not be extended. This is clearly a minefield, and there are other, very real risks, not least the risk of making the liberalising bill more palatable to fellow-legislators via the amendment and thus more likely to go through.

### In-principle permissibility of selective bans

Selective bans can, in short, raise genuine moral problems, and it can be wrong at least to propose and promote – if not necessarily to vote for – such prohibitions. All that said, though, selective bans as such clearly cannot be rejected out of hand. That applies particularly to countries like Britain where the abortion law is already a very bad one and where it would be very difficult if not impossible to reverse the damage all at once. More generally, any time we try to prevent any injustice, we are focusing on that specific evil and not on other evils, perhaps no less heinous, which are however left for another day. Even a proposed law prohibiting all abortions will not necessarily cover the destruction of IVF embryos, let alone other evils such as euthanasia, in a country that allows this. Failing a revision of the entire criminal code in such a way as to protect the rights of all, there is no escape from the need to single out particular threatened groups at particular times whom we may have some chance of

protecting. Such proposed selective legislation does not ‘permit’ the remaining injustices in the sense of *making* them permitted,<sup>[9]</sup> but simply *leaves* them permitted whether or not those still permitted are specifically mentioned in the Bill. Of course, that also applies to legislation which would prohibit abortions in certain locations, and which again, might acknowledge explicitly that abortions will remain permitted elsewhere – i.e. the legal availability of some abortions is unaffected by the Bill. Here too, choosing not to try immediately to ban all abortions need not involve the intention that any *be permitted* – any more than a triage nurse in A&E after a natural disaster need intend that those not chosen to be treated therefore die of their injuries. Also worth noting is the fact that those who oppose all abortion, whatever their view of *voting* for selective bans, will often welcome or initiate moves to *enforce existing* selective bans where again, such moves need not constitute complicity with those abortions that remain within the law.

#### Selective bans during and after the passage of laws

Note that ‘selective banning’ involves both attempts to amend existing legislation, and also attempts to amend proposed legislation during the passage of a relevant Bill. For example, in Britain some legislators (a minority) voted against extending abortion up to birth for disabled unborn children during the passage of the Human Fertilisation and Embryology Bill 1990. Voting against this clause at the time on the one hand, and after the Bill has been passed on the other, would seem to be somewhat similar morally, even if there may be differences too. If one is at least potentially allowable as a last-ditch form of damage limitation, the other may well be allowable on the same grounds. Looking back to the Abortion Act 1967, there were some who wished to remove the disability clause at the time it was being debated, while more recently, the Abortion (Disability Equality) Bill proposed by Lord Shinkwin, a disabled peer in the House of Lords, is aimed at removing the same clause. Again, if it was right to try to remove the clause 50 years ago, to limit the harm of the impending law in terms of targeting disabled babies in particular, then it seems right, at least in principle, to remove the clause now.

#### ‘Regulatory’ approaches to wrongful actions

I will return later to the opportunities and challenges that ‘selective ban’ approaches can present. For the moment, I will turn to a different approach to legislation: if selective bans are at least sometimes morally appropriate, what kind of legislative change am I claiming is always morally excluded? I will call this morally excluded change ‘regulation’ – by which I mean not just setting up a ‘regulatory body’, but any legislation that tells people how to *prepare for or perform* an unjust act, or otherwise aims to motivate them to perform or prepare in a certain way.

It can be very tempting to support legislation of this kind, in the hope of saving at least some lives and otherwise minimising harm; for example, harm to the woman who may find herself very quickly on the abortion ‘conveyor belt’, lacking all but the most minimal information on her abortion and on support available to have her child. However, as we think about requirements on abortion doctors, we need to remember that *preparing* to do wrong, as well as carrying out the final act perhaps in some amended version are themselves wrongful choices objectively, whether or not the person knows this. On a classic understanding of the principles of complicity, which though demanding are nothing if not logical, we may never intend a wrongful choice by another, any more than by ourselves. It would seem to follow that counselling or mandating the ‘lesser evil’ is something that has to be avoided:<sup>[10]</sup> muggers should not be told to steal in less violent ways, or child abusers to abuse children ‘more safely’. There is a crucial difference between, on the one hand, warning

people to avoid some particular wrongful act above all, and on the other hand, giving them instructions how to perform or prepare for a perhaps slightly mitigated, but still clearly wrongful act. (Of course, none of this would affect advice or instructions that apply once the deed is done: just as dangerous drivers are expected to stop and look after their victims, abortion doctors can be expected to offer aftercare, and inform women of post-abortion counselling, hopefully counselling independent of those who do or arrange abortions.)

#### Avoiding 'regulation': some ambiguities

A law requiring doctors to give details of the baby's disability on the abortion form, in the hope of preventing abortion for some less serious conditions, would appear to raise the objection that the doctor is being told effectively how to prepare for a possible abortion. Unless we are aiming not that any doctor use the form, but rather simply that it be circulated as a vehicle to advertise new abortion restrictions, it does seem that we are intending some doctors complete – or at least begin – specified abortion preparations. Similarly, to invite a doctor to make a case to a committee for ending the life of a particular disabled baby (as opposed perhaps to cross-questioning the doctor concerning the baby's medical condition) does seem on the face of it to be asking the doctor to prepare for a possible abortion, albeit in ways that allow the abortion to be blocked if the committee is not convinced. Even in the standard British case of a doctor filling out a form, there is a general problem with requiring paperwork asserting that the demands of the law have been met as a condition of the abortion going ahead. By requiring doctors to complete such forms, are we not mandating necessarily wrongful preparation for a wrongful life-terminating act?

It is worth noting that superficially similar measures may constitute either a selective ban of, or regulation of an unjust action, depending on the details. One example would be a mandatory time period in between receiving adverse prenatal test results and having an abortion. Such a delay is certainly very desirable in itself: it would give the woman who has just received highly distressing news a breathing space to think about her pregnancy, get more information and access positive help. In principle, such a mandatory delay could be a mere selective ban – i.e. abortions within a certain time-frame simply would not be permitted. However, adding detailed instructions could in fact turn this legislation into 'regulation', in that abortion doctors might be required to complete paperwork giving the date on which test results were communicated as a condition of the abortion going ahead. If so, this is something to avoid, as we would then be back in the area of intending preparation to end a life – or at very least, intending the doctor do something he or she will in practice do very much as part of such preparation. As regards medical records of test results being given, and which show the stage of the pregnancy, it may be only via such records that we learn that the law has been breached regarding waiting periods and/or upper limits for abortion. However, standard medical records can perhaps be regarded as 'existing background' rather than as something whose completion in a specified form we ourselves would be mandating.

Should abortion doctors be required to give women certain information before doing the abortion? That sounds again very welcome but again, there is a concern that this involves our intending that abortion doctors undertake something they, and perhaps we too, see as preparation for abortion – particularly when the doctor records on the abortion form that the information has been given. There is also a practical objection: gynaecologists, even those not themselves implicated in abortion, will have relatively little experience of caring for disabled children and may not always be best placed to give parents balanced and accurate information on what such care involves. I would argue that it is better to mandate such

information provision, not before an abortion, but after some already-completed action such as prenatal diagnosis (about which more shortly). In contrast, if we know that a doctor's sole or overriding motive in providing information and recording that this was done is to ensure that an abortion can go ahead legally should the woman still wish it, this motivation will be at least a causal means to our end, and perhaps one we intend ourselves once we realise what is going on. The doctor's aim to prepare is at any rate, an illicit and central part of what will promote the success of our overall plan.

#### Warning and punishing without complicity

We should also remember that it is possible to warn people of penalties for *not* doing something without telling people *to* do or otherwise intending they do what they would be punished for omitting. An example may help here: think of an older man who is pressuring a 16-year-old girl for sex. We can warn him that he will be punished for rape if he does *not* get the girl's consent without in any way intending he *get* her consent for what we may still regard as an act of sexual exploitation. Something similar can be said about abortion: we can warn an abortion doctor of legal consequences if he does not get the consent of, say, a mentally disabled woman without telling him *to* get her consent or otherwise intending that he do so. Of course, the doctor may well regard our warning as an instruction how to do an abortion within the law: we can only try as best we can to minimise the risk of giving any such misleading impression. In any event, it is much more justifiable to *penalize the absence* of consent from the woman should this absence be discovered than to give the doctor an abortion-focused consent protocol, with the intention that he use it.

#### Mandating information after prenatal diagnosis

In any case, these worries would not apply to information required to be given, not before an abortion as such, but simply after a prenatal diagnosis by those responsible for the woman's care at that point, whatever their connection with any possible abortion. Even if a particular test was morally unjustified, say, because it put the woman and her baby at unnecessary risk of miscarriage, having done the test and got a certain result, those responsible could have a legal as well as a moral duty to inform the woman and her partner of positive options and support available. (That would include discussing the possibility of fostering or adoption, at least in the case of parents not well placed to care for a child with a certain condition – for example, because their own health is very poor.) Many parents have said that they were inadequately informed about the condition diagnosed in their baby, and many have also said that the health care professionals they spoke to initially were in fact very negative and unsupportive about their child's condition.<sup>[11]</sup> It is worth remembering that parents may be particularly vulnerable on first hearing the diagnosis and have difficulty even processing the information they are given, strengthening the case for mandatory delay as well as the offer of help should the child be born. It would be good to see a requirement that couples receive information on support available as regards, say, special schools, financial help from the State generally and, for babies with life-limiting conditions, perinatal hospice support.<sup>[12]</sup> To avoid negative and inaccurate communications, written information might be required to be offered that has been prepared by a charity providing support to individuals with the condition together with their families and carers. Wherever possible, the information should be designed for giving post-natally, and ideally should not include any reference to abortion, least of all a mention of abortion as if this were a possible 'solution' to the 'problem' of carrying a disabled child.

In addition to any general information provided, there should be an explicit offer to connect the couple with an affected adult or with parents who have cared for a child with the relevant condition. Such people are perhaps more likely than most to take an attitude to the disability

which is both positive and realistic, and to show solidarity both with the couple and with the child they are expecting. Voluntary organisations exist connecting people in this way<sup>[13]</sup> - we will hear in the afternoon from Tracy Harkin of Every Life Counts – but there is no reason why the State should not signpost their services more often and indeed support such organisations, if only by helping with phone and travel costs of volunteers. Again, this offer should be required as following prenatal diagnosis, not as preceding abortion, not least because expectant parents who will in any case have their babies have a right to be supported too. More importantly, it is much easier to frame requirements for what happens *after* some wrongful procedure – including high risk and/or eugenic testing – than to frame requirements focusing on what happens *before or during* the wrongful procedure, at the risk of mandating or otherwise intending wrongful acts or preparations.

### Political collaboration without complicity

Earlier in this presentation, I mentioned problems that can arise for lawmakers collaborating with colleagues who are not merely modest in their hopes of damage limitation but positively want and intend abortion to be available on certain grounds. Of course, here as elsewhere, to call this a wrongful aim is not to make a judgement on the person who has that aim, who may be entirely in good faith, even if his or her position is morally and legally indefensible. Whatever someone's good faith, objectively wrongful choices on that person's part should not, I believe, be deliberately invited or otherwise intended by more consistent life-respecting colleagues. This can happen even without any interaction, as when those who would welcome a complete ban on abortion but rightly or wrongly suspect they cannot achieve this might count on the exception-free Bill they introduce being amended by those who want to keep some abortions available – following which (wrongly-motivated) amendments, the Bill would have more chance of being passed. Far better if the more consistent life-respecting lawmakers present a suitably modest proposal in the first place and simply invite other, less consistent lawmakers to focus on that proposal alone. After all, there is no need for any lawmaker to intend the continued availability of those abortions which are in any case untouched by the Bill concerned.

### Conclusion

I am aware that such interrogation of means may seem over-scrupulous to those confronting a culture where 'conditional parenthood' is tirelessly promoted, and more and more babies convicted of having a medical condition never see the light of day. In my defence, I can only say that those wishing to uphold human rights, including the right to life, should be in fact the first to oppose any suggestion that a good end justifies any means. If it were a re-zoning Bill in question, I hope that none of us would appeal explicitly to a corrupt politician to vote with the aim of crushing his enemies or endearing himself to organized crime. While we can certainly tolerate bad 'parallel' chains of reasoning whereby people have both good and bad motivations in what they do, we should never deliberately invite an intention which is corrupt or otherwise morally misguided. Good ends must be sought by good means only, and never by bad means.

As regards the legislation itself, I have been arguing that what I call 'regulation' where wrongful acts and preparations are intended by lawmakers, is wrong in principle: again, we must choose other, morally good means of making a bad situation better. These alternative means include selective banning of some bad actions and the mandating of other actions which are good or potentially good in the context in which they are mandated.

As regards abortion for disability in particular, the State certainly has a very strong interest in preventing this – in some ways even stronger than its interest in preventing abortion more generally. Aside from the loss to the child of its life – a massive impact in itself – and the ongoing damage to perceptions of parenthood which is no longer seen as calling for unconditional acceptance, the grief, regret and even despair caused for many aborting women is an extremely serious concern. Also highly concerning is the healthcare professions being alienated from their traditional role of promoting health and palliating suffering to assume the task of social exclusion and quality control of human lives. The aim should be to get – by good means only – as close as we can to a society that respects the rights of all, and supports all parents unequivocally in cherishing each and every child. Ireland today may not be exactly that society – too many slip through the network of support – but is close enough to win the admiration of those of us across the Irish Channel now aghast at the death toll 50 years after our own supposed reforms.

**ENDS**

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<sup>[1]</sup> Kersting, A., Kroker, K., Steinhard, J. et al. *Eur Arch Psychiatry Clin Neurosc* (2007) 257: 437. doi:10.1007/s00406-007-0743-1.

<sup>[2]</sup> A recent study comparing abortion to continuing the pregnancy in the case of a life-limiting fetal condition found that while both groups of parents were deeply affected by the experience, those who had abortions showed significantly more despair, avoidance and depression than those continuing the pregnancy. Cope, H., Garrett, M.E., Gregory, S., Ashley-Koch, A. *Pregnancy continuation and organizational religious activity following prenatal diagnosis of a lethal fetal defect are associated with improved psychological outcome. Prenatal Diagnosis* (2015) 35:761-8.

<sup>[3]</sup> For a pro-choice collection of such stories, see Brooks C. *Our Heartbreaking Choices: Forty-Six Women Share Their Stories of Interrupting a Much-Wanted Pregnancy*. Bloomington: iUniverse, 2008: 91. I take up some themes from this collection in Watt, H. *Abortion for Life-Limiting Foetal Anomaly: Beneficial When and for Whom?* *Clinical Ethics* (2017) 12: 1-10. doi: [10.1177/1477750916661979](https://doi.org/10.1177/1477750916661979).

<sup>[4]</sup> Watt H. *The Ethics of Pregnancy, Abortion and Childbirth: Exploring Moral Choices in Childbearing*. New York and Abingdon: Routledge, 2016, especially chapter 3.

<sup>[5]</sup> These approaches are not exclusive, and ‘regulation’ can of course be morally permissible where the action regulated is permissible or potentially permissible. For more on these issues, see Watt, H. *Addressing Unjust Laws Without Complicity: Selective Bans versus Regulation*, in Jason Eberl (ed), *Contemporary Controversies in Catholic Bioethics*. Cham: Springer, 2017. Other treatments of voting to improve unjust legal situations include Finnis, J. *Helping Enact Unjust Laws without Complicity in Injustice. American Journal of Jurisprudence* (2004) 49: 11-42 (reprinted with additional notes as “Just Votes for Unjust Laws” in *Philosophy of Law*, vol. IV of *Collected Essays of John Finnis*, 436-66. Oxford: Oxford University Press, 2011) and Harte, C. *Changing Unjust Laws Justly*. Washington: Catholic University of America Press, 2005. See also the debate between these authors in Helen Watt (ed), *Cooperation, Complicity and Conscience*. London: Linacre Centre, 2005.

<sup>[6]</sup> Watt H. Double Effect Reasoning: Why We Need It. **Ethics & Medicine** (2017) 33: 13-19.

<sup>[7]</sup> Harte 2005.

<sup>[8]</sup> See the Anscombe Centre Submission to the Parliamentary Enquiry into Abortion on the Grounds of Disability.

<sup>[9]</sup> Finnis 2004.

<sup>[10]</sup> Watt 2017.

<sup>[10]</sup> Watt H. *The Ethics of Pregnancy, Abortion and Childbirth: Exploring Moral Choices in Childbearing*. New York and Abingdon: Routledge, 2016, especially chapter 3.

<sup>[11]</sup> See e.g. Redlinger-Grosse, K., Bernhardt, B. A., Berg, K., Muenke, M. and Biesecker, B. B. The decision to continue: The experiences and needs of parents who receive a prenatal diagnosis of holoprosencephaly. *Am. J. Med. Genet.* (2002) 112: 369–378. doi:10.1002/ajmg.10657; Riordan, M. Maternal serum testing: Is invasive testing a passing era? *Bioethics Research Notes* (2012) 24: 7-11; McGovern, K. Continuing the pregnancy when the unborn child has a life-limiting condition. *Chisholm Health Ethics Bulletin* (2012) 17: 1-12.

<sup>[12]</sup> For information including a bibliography on the perinatal hospice approach following prenatal diagnosis of a life-limiting condition, see the website [www.perinatalhospice.org](http://www.perinatalhospice.org).

<sup>[13]</sup> Examples of such peer support networks include [anencephaly.info](http://anencephaly.info), Be Not Afraid, One Day More, Every Life Counts, and Prenatal Partners for Life.

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