

# The flawed logic of our abortion laws

An unrealistic emphasis on autonomy turned ‘viability’ into the sole criterion for aborting a foetus. This makes no sense today

BY JAMES MUMFORD

Perhaps it's the last great taboo. We have no problem sitting on the bus and telling our children about sex, moving effortlessly even in public from testing times-tables to expounding the birds and the bees. We fully endorse our teenagers being taught about contraception in their personal, social and health education classes. We're no longer queasy about the most graphic images of war, and most watersheds have been removed. We have no qualms about bringing up death and we joke about disability. And we're not coy in our conversations about gender.

But when it comes to abortion, well, that really is off limits. We suddenly get squeamish. An issue too emotive to engage with, too hot to handle. (Witness *New Statesman* columnist Mehdi Hasan's vilification on Twitter as being “anti-women” when he raised the subject). Because—and I write with a gentle heart, and not unaware of my Y chromosome—the argument is over, the consensus unquestionable, the debate dead.

Our silence is so astonishing because the reality is so widespread. With nearly one in five pregnancies ending in termination—nearly 190,000 a year in England and Wales—here is a truly classless concern, touching so many, talked about by so few.

When the issue last hit the headlines, in March 2012, it was only because it had a gender angle. You may recall: a number of abortion clinics were found by the *Daily Telegraph* to have been offering illegal sex-selection terminations. The Health Secretary Andrew Lansley's statement was revealing: “Carrying out an abortion on the grounds of gender alone is in my view morally repugnant.” Doing it more indiscriminately, he appeared to be saying, is OK.

Abortion is now a non-issue because, in the public mind at least, the debate has been framed as a stand-off between religion and secular philosophy. While faith is thought to elicit a broadly pro-life position, reason supposedly supports a pro-choice one. But since faith rests on unverifiable claims—you can almost hear the mental cogs grinding—it can hardly provide a platform for policy, leaving us with an intellectually unassailable justification for abortion.

The problem is, however, that when you click the “Accept” button confirming those terms and conditions, something important happens: you inadvertently smuggle in the assumption that the philosophy underpinning the pro-choice position was, in itself, coherent. That it was robust and truthful. That it made sense of the world as it is, not as we might have wanted it to be. That it had an essential purchase on reality. That it was timeless truth rather than a particular paradigm riding high at one particular moment in history—in short, a specific strain of liberal, Anglophone, late-20th-century moral and political philosophy.

But now there are many thinkers—most prominently, postmodern ones—who lead us to question how good that philosophy was. How good in terms of accounting for the human condition. How good at fitting the facts.

It is with the whole concept of “viability” that the philosophy really falls

down. Forty-six years ago, when parliament passed the Abortion Act, it did not declare all pregnancy terminations legal. It didn't say that every creature resident in its mother's womb was now outside the protection of the law. Rather, it established what was effectively a two-tier response to abortion, with broad defences covering abortions carried out in the early part of pregnancy and a more restrictive response to those carried out after 28 (now amended to 24) weeks. Why 28 weeks? Because, crucially, that was when the foetus was thought to be “viable”, described in an earlier piece of legislation, the Infant Life (Preservation) Act 1929, as the point at which the foetus was “capable of being born alive”. This was the point that was picked, the point when the state accepts a compelling interest to safeguard human life, when we may rightly think of the new one as our equal (of sorts), as an entity that is to be afforded increased protection.

Six years later, the American judiciary followed the British legislature in also selecting viability as the threshold below which termination was permitted. In the landmark case *Roe v. Wade* (1973) Justice Blackmun defined viability similarly: as the moment when a foetus becomes “potentially able to live outside the mother's womb, albeit with artificial aid”.

That adverb was in fact something of a misnomer. By “potentially” Blackmun and Western civilisation with him didn't really mean “potentiality” in the strict philosophical sense. Less developed foetuses are potentially separable from their mothers simply by virtue of the fact they are human and that's what humans tend to become. No, “viability” designated instead an actual here-and-now capacity for independent existence, by which of course was meant birth. These entities still deserving of defence could be born now. They could survive the onset of breathing and oral feeding—that's what the word “viability” encapsulated and what, since that time, has never really been contested. The only question has been when that moment comes—to which the answer depends in part on the state of medical technology.

It was no coincidence that our culture chose viability as the pivotal point. There are other contenders: emerging biological characteristics such as the primitive streak; the detection of a heartbeat or brainwaves; the onset of foetal movement (the “quickening” so important to medieval thinkers); even the emergence of self-consciousness. But in an individualistic culture that ever since Rousseau has prized autonomy and detested dependency—“each of us, unable to dispense with the help of others, becomes so far weak and wretched”, the fanatical Frenchman wrote in *Emile*, his manual on education—it is no surprise that we took viability, the first shoots of autonomy, as the all-important cut-off point.

But step back a second. Because what are we really talking about here? What is the phenomenon in question? The natural reality in view? It is that human beings first appear in a state of radical dependency. We do not arrive in the world like the Greek gods—fully formed, instantly recognisable, immediately adult. We are not sown from

‘We do not arrive in the world like Greek gods—fully formed, immediately adult. The animal that is to be king of the jungle begins as a weakling prince’



*Pro-choice demonstration: Framing abortion as a stand-off between religion and secularism has made it a non-issue in the public mind*

the dragon's teeth, as in the autochthonous myth of the founding of Thebes, springing up as autonomous individuals.

On the contrary: the animal that is to be king of the jungle begins as a weakling prince. Without exception we all appear in the world in the same way—in situations of total dependence, in the context of wholly asymmetrical relationships with our maternal hosts. And so the reality any discussion of morality, any wrestling with right and wrong, must take into account is what the German-Jewish philosopher Hans Jonas called “the radical insufficiency of the begotten”. Nor is there anything pathological about our weakness, the fragility which characterises our earliest stages of development. Nothing has gone wrong to make this our way of appearing in the world.

Yet if this is the way human beings come forward, what sense did it ever make to elevate viability into the ultimate criterion for entry into the community of people who, in the eyes of the law and in the standing of society, matter?

Nor is it as if our dependency stops there, with our delivery from the womb. Justice Blackmun gives it away: viability is the moment when the foetus is “potentially able to live outside the mother's womb, albeit with artificial aid”. In the case of our species, living outside our mother's womb is not the same as standing on our own two feet. Living apart from our mother does not entail achieving independence or living strictly “unaided”. It means simply that we might be kept alive by the efforts of others. That a ventilator might work. That intensive care could be lifesaving.

The ancient world was more explicit about an indignation we seem to share. In his *Natural History* Pliny the Elder commiserated: “But man alone on the day of his birth Nature casts away naked on the naked ground, to burst at once into wailing and weeping, and none among all the animals is more prone to tears, and that immediately at the very beginning of life . . .” It was as if our dependency was a great embarrassment, the secret that could prove the undoing of the species.

But in our time, importantly, it is feminist philosophers who lead us to contest the basic veracity of viability. Liberal political society, writes Seyla Benhabib, should not assume “a strange world” where “individuals are grown up before they have been born”. The fantasy of detachment, the illusion of the asocial, the mirage of self-sufficiency—these could only have been sustained in a patriarchal culture which has systematically sidelined the “different voice” of female experience. And, we might add, a culture which involves a good deal of amnesia. For when it comes to abortion I can only insist on autonomy, or on its first flicker that is viability, by forgetting that I—the one now making the decision, the one asserting my independence, the one enjoying my independence—was “of woman born”. I can only avoid contradiction by indulging in what Freud termed “the neurotic's family romance” of rejecting his parents.

All this may seem a far cry from the agony of an unplanned pregnancy, from the lonely moment I have not personally experienced when a woman, or perhaps a couple, wake up, take the test and begin to realise the enormous negative ramifications of that positive result. And nor do I think we can simply turn the clock back, make all abortion illegal, and instantly criminalise tens of thousands of women. But recognising the adoption of viability to have involved a category mistake of profound proportions does raise unsettling questions. It is a state of affairs which is disconcerting, even without bringing in other issues such as late-term abortions on grounds of disability. It does disrupt the neat narratives we tell ourselves about the world we have built since the Second World War. What happens daily on such scale across our hospitals and our clinics, while hundreds of counterpart couples simultaneously in their homes fret about infertility, does complicate our claim to be an ever more serene society. But above all, exposing viability throws us back on the reality of vulnerability and thus the very meaning of human rights. §