SHOULD THE 'BORN ALIVE' RULE BE ABOLISHED?

PATTY VELIZ DISCUSSES THE COMMON LAW 'BORN ALIVE' RULE IN RELATION TO WOMEN'S CHOICE AND HEALTH RIGHTS

"Where an offence involving killing or death of a newly born child arises as an element of a criminal offence, there is a long-established common law rule that the element cannot be established unless the baby was "born alive". The issue that arises... is what is meant by the words "born alive"?"

Spigelman CJ in *R v Iby* (2005) 63 NSWLR 278

Spigelman CJ has suggested the abolishment of the 'born alive' rule[1] on the basis that current medical technology serves as a more accurate measure for determining life.[2] Legal commentators and lobbyist alike have fuelled argument for the abolishment of the rule by drawing on a range of highly emotive cases dealing with the violent consequences of third party offence on pregnant women.[3]

This article will review some of these arguments, with the view that the rule provides more than just a legal standard for establishing or acknowledging the existence of life; but rather that it serves also as a safeguard for women's reproductive rights and autonomy, and those of their health care providers. I will explore the consequences of abolishing the rule, with specific focus on the implications for women and their health rights, the effects of assigning legal personhood to a foetus, and society's approach in addressing violence against women.

The rule as common law applies to all Australian

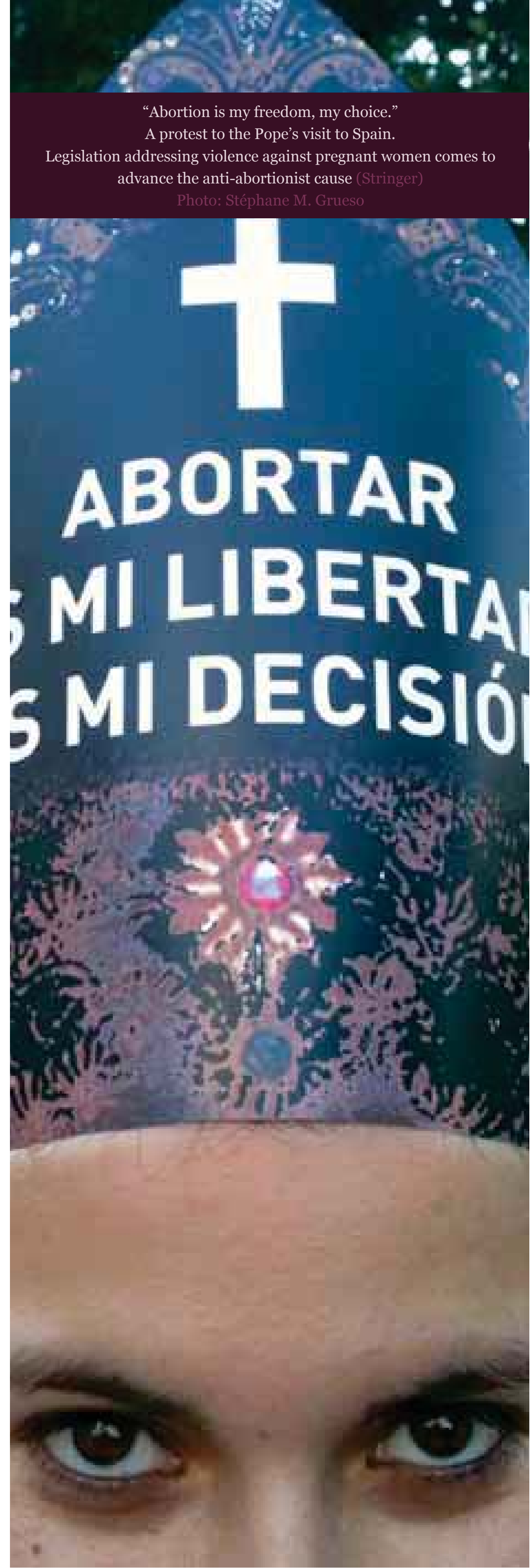
jurisdictions, with varying implications dependent on the statutory developments of each state, however I will focus on the law in NSW.

ADDRESSING VIOLENCE AGAINST WOMEN

Medical technology has allowed women a unique insight into the life of their "unborn child".[4] Savell reveals that foetal imaging enhances the relational bond between woman and foetus, giving the foetus a physical likeness and allowing women to witness 'baby-like behaviour' before the foetus is born.[5] These images create an almost undebatable argument for those advocating the abolishment of the rule on the grounds that death of a foetus is equal to that of any living person.

When an offender's violent actions result in the "death" of a foetus, it is these images which make illogical the 'excusing' of such actions simply because the foetus is not "born alive". However, as Stringer points out, it is not the rule itself that creates this "illogical argument", but rather 'the law's unwillingness to recognise loss or damage to pregnancy in the course of violent assault as harm to the woman, regardless of whether or not her pregnancy results in a life birth.'[6] This article does not attempt to minimise the loss experienced by women in these situations, but rather, highlight that these incidents are often used by lobby groups to advocate for the abolishment of the rule, clouding the demands for a response to violence against pregnant women and women generally.

The media is ready to scrutinise judgements of cases such as *King* and *Iby*, yet very little attention is given to the numerous cases of violence against women that fill the courts every day.[7] A safeguard



"Abortion is my freedom, my choice."
A protest to the Pope's visit to Spain.
Legislation addressing violence against pregnant women comes to advance the anti-abortionist cause (Stringer)
Photo: Stéphane M. Grueso

Foetal imaging enhances the relational bond between woman and foetus, creating an almost undebatable argument for those advocating for the abolisment of the rule *(Savell)*
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of the rule is that it prevents cases of violence against pregnant women becoming solely about the acknowledgement and rights of the foetus, with little regard for the rights of women. Advocates for the abolishment of the rule would argue that eliminating the rule would assure that these violent offenders are accountable for their actions. In NSW however, legislation allows for offenders causing destruction of the foetus to be charged with grievous bodily harm, with penalties of up to 25 years. Nonetheless, some women who have experienced the loss of a foetus through violence, such as Brodie Donegan, who was run down by an intoxicated driver when 32-weeks pregnant, advocate for additional penalties that acknowledge specifically the destruction of the foetus.[8] While changing the law in this way would acknowledge that many women perceive their unborn child as having a separate identity to their own, there are potential risks in reforming the law. Creating a new offence, or allowing the death of a foetus to be considered manslaughter could potentially 'downgrade other harms, such as, for example, the total loss of reproductive capacity which some might regard as more serious than the loss of one foetus.'[9] Such an example could be replicated in regards to various other harms inflicted on women as a result of violence.

WOMEN RIGHTS, LEGAL PERSONHOOD AND THE FOETUS

The law governing abortion in NSW is a mixture of statutory provisions and common law principles, providing no certainty of 'choice rights' for women.[10] This is another example where the rights of women have taken a backseat to the agenda of conservative policy-makers and anti-abortion lobby groups. In contrast, pro-choice activists have campaigned for the legalisation of abortion for years, with no avail. Yet statutory measures protecting the unborn foetus have been progressively introduced throughout Australia.[11] More significantly, the offence of killing an unborn "child" has been enacted in all jurisdictions other than NSW and South Australia, and only recently repealed in Victoria.[12] Stringer describes this as a strategy imported from the US, whereby legislation addressing violence against pregnant women 'comes to advance the anti-abortionist cause through the conferral of enhanced legal status upon foetuses.'[13] For example, the enactment of the *Unborn Victims of Violence Act* 2004 (US) overturned the rule on grounds that the rule was a key obstacle to legal redress in cases of violence against women resulting in stillbirth; since 'the victim of the assault – according to this reasoning, the foetus – was not a legal person at the time of the assault', it could not be regarded in law as a crime victim.[14] Interestingly, in the report accompanying the Act, the rule was referred to as 'obsolete' in view of advances in reproductive technology, echoing the obiter of Spigelman CJ in *Iby*.[15]

Reflecting on the above argument, it is therefore not unrealistic to envisage that the abolishment of the rule could lead to similar legislative developments in Australia. These legislative changes would create a paradigm which 'posits maternal autonomy and foetal interests as inherently conflictual', restricting women's health rights and initiating major changes to the law in order to accommodate the legal personhood assigned to the foetus.[16]

On the first point, women's health rights would be restricted in regards to abortion and other

reproductive health services. For example, where current common law in NSW allows for the broad consideration of physical, mental, economic and social factors impacting the individual woman to determine a lawful abortion, the rights of the foetus could override any one or all of these factors, negating women's access to lawful abortions and placing them at risk of unsafe and unlawful practices. Further, this paradigm could restrict maternal civil liberties and create a scenario similar to that of the US where coercive government intrusions into women's fundamental liberties have resulted in penalties for prenatal negligence, criminal charges for prenatal child neglect, pregnant women being imprisoned and civilly committed, and court orders forcing women to undergo Caesarean sections against their will.[17] Ordolis also points to the detrimental affect this paradigm may have on women seeking treatment or assistance with drug and alcohol abuse, for women who may be homeless, poor, young, Aboriginal or belonging to any vulnerable group which governments or society assigns as a risk to the foetus.[18]

The issues outlined above also impact the providers of health care services for women. Medical and other health staff are left vulnerable to criminal charges and other legal implications where they choose to assert the health rights of women beyond those of the foetus. Advocates for the abolishment of the rule however, may draw attention to a recent South Australian case where Barrett, a midwife, present at the homebirth of Tate Spencer-Koch, who died as a result of sustained hypoxia during delivery, is now being investigated in a coronial inquest after evidence of pulseless electrical activity in the heart after the baby was separated from the mother confirmed the child was 'born alive'.[19] This case raised issues regarding the application of the rule to the reproductive and delivery choices of women.[22] It is argued however, that the criminal law is an inadequate tool and ineffective means of dealing with issues pertaining to women's reproductive choices. Ordolis, Hickman and Cannold all stress that forced intervention of any kind violates women's reproductive autonomy, and suggest that these issues are better dealt with through health authorities and regulating bodies.[21]

On the second point, assigning legal personhood to the foetus would most definitely lead to changes in the current law. Savell notes that according to the court, the purpose of the rule was not to 'articulate the conditions of personhood in any substantive sense'; yet interestingly enough abolishing the rule achieves just that.[22] Foetal personhood results in a shift away from the 'relational' or the 'connected tissue configuration' which NSW courts have been gradually adopting; that is, the understanding that pregnancy is "not-one-but-not-two".[23]

Legal pragmatism, on the other hand, has led to the absence of a unifying principle regarding pre-birth rights, which means that no singular rule of law has been developed with respect to being or becoming a human, but rather a collection of discrete and increasingly divergent legal categories.[24] This divergence within the various areas of law is an indication that abolishing the rule could easily reinforce the rights assigned to foetuses[25] from one area of law to another, including the criminal law. For example in patent law, the foetus is assigned as having human life when the sperm enters the ovum.[26] Peek J in Barrett confirms this transferability, by responding with a resounding "no" to Savell's

question on whether the abandonment of the rule could be confined to the criminal law alone.[27]

The born alive rule should therefore not be abolished to ensure that strategies addressing violence against women remain a priority for criminal justice; to prevent an adversarial relationship between the rights of women and her unborn foetus; and to safeguard women from anti-abortionist agenda that limit their rights and access to reproductive health services. Maintaining this common law rule will allow are a more accurate reflection of community values and standards in regards to the legal determination of life. That is, the rule can be allowed to develop organically as relevant cases arise, constructing a meaning to life that is encompassing of the many voices and diverse discourse within the community, rather than being manipulated by a select few with power to influence the legislature.

REFERENCES

1. Hereafter 'the rule'.
2. R v Iby (2005) 63 NSWLR 278, 288; hereafter Iby.
3. R v Iby (2005) 63 NSWLR 278; R v King (2003) 59 NSWLR 472, hereafter King; Harriff v Director of Proceedings [2003] 3 NZLR 289; Attorney General's Reference (No 3 of 1994) [1997] 3All ER 936; R v F (1996) NSWLR 245; R v Hutty [1953] VLR 338; cf. Barrett v Coroner's Court of South Australia (2010) 108 SASR 568.
4. Hereafter refered to as 'foetus' in place of 'unborn child', 'child', or 'baby', as well as the use of 'woman' in place of 'mother' to maintain a neutral tone in the argument.
5. Kristin Savell 'Is the 'Born Alive' Rule Outdated and Indefensible?' (2006) 28 Sydney Law Review 625, 656.
6. Rebecca Stringer 'Fact, Fiction and the Foetus: Violence Against Pregnant Women and the Politics of Abortion' (2006) 25 Australian Feminist Law Journal 99, 101.
7. David Brown et al, Criminal Laws: Material and Commentary on Criminal Law and Process of New South Wales (The Federation Press, 5th ed, 2011) 681-682.
8. Richard Noone, 'Bring justice to our unborn Zoe, say parents Brodie Donegan and Nick Ball', The Daily Telegraph (Sydney), May 24, 2010.
9. Submission of Women's Legal Service NSW (26 July 2010) cited in Michael Campbell QC, Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child (October 2010).
10. R v Wald (1971) 3 NSWDC 25; CES v Superclinics (Australia) Pty Ltd (1995) 38 NSWLR 47; Crimes Act 1900 (NSW) ss 82, 83, 84.
11. Michael Campbell QC, Review of Laws Surrounding Criminal Incidents Involving the Death of an Unborn Child (October 2010), Schedule 8: Summary of Child Destruction/Kill Unborn Child Legislation in Other Australian Jurisdictions and New Zealand.
12. Kristin Savell, above n 5, 647.
13. Rebecca Stringer, above n 6, 99.
14. Rebecca Stringer, above n6, 100-101.
15. Rebecca Stringer, above n6, 101; R v Iby (2005) 63 NSWLR 278, 288.
16. Emilia Ordolis, 'Maternal Substance Abuse and the Limits of the Law: A Relational Challenge' (2009) 46 Alberta Law Review 119, 119.
17. Ibid 122.
18. Ibid 124-130.
19. Barrett v Coroner's Court of South Australia (2010) 108 SASR 568.
20. Katrina Stuart, 'The last vestiges of life' (2010) 18(1) Journal of Law and Medicine 28, 30-31.
21. Emilia Ordolis, 'Maternal Substance Abuse and the Limits of the Law: A Relational Challenge' (2009) 46 Alberta Law Review 119; Anna Hickman (2010) Born (Not So) Free: Legal Limits on the Practice of Unassisted Childbirth or Freebirthing in the United States, 94 Minnesota Law Review 165; ABC Radio National, 'The Sood Abortion Trial', The Law Report, 29 August 2006, (Leslie Cannold).
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24. Pam Stewart and Anita Stuhmcke, 'Legal pragmatism and the pre-birth continuum: An absence of unifying principle' (2007) 15(2) Journal of Law and Medicine 272, 272.
25. Referred to zygotes and embryos in the different stages of the development.
26. Patent Act 1990 (Cth), s 18(2) cited in Pam Stewart and Anita Stuhmcke, 'Legal pragmatism and the pre-birth continuum: An absence of unifying principle' (2007) 15(2) Journal of Law and Medicine 272, 275.
27. Barrett v Coroner's Court of South Australia (2010) 108 SASR 568, 598.