

ABORTION

Much like procreating itself, pregnancy is an experience that many value,¹ but no person should be forced to undertake gestational work unwillingly.² As Overall puts it, ‘pregnancy is such a demanding, all-enveloping, potentially transformative physical and psychological process that no woman[/person] should have to go through it against her[/their] will.’³ I believe this to be an intuitive and simple claim, and further, I would argue that novel procreative technologies, including technologies enabling gestation, have no bearing on the morality of abortion whatsoever. Unwilling pregnancy is never justifiable. As I argue in this chapter, abortion decisions are about more than bodily autonomy (as they can encompass decisions beyond whether to end a pregnancy), however, since pregnancy is bodily work matters of bodily integrity will always be pertinent and must remain in the foreground of our thinking about the importance of access to abortion into the future (encompassing novel technologies enabling gestation). The right to end a pregnancy always belongs to the person undertaking pregnancy (whether they are an intended parent or not).

The literature on ectogestation is dominated by work questioning the ethics of abortion if gestation beyond bodies becomes possible. Many scholars have argued that if the justification for abortion is that persons should not be forced to facilitate gestation with bodily work unwilling, Artificial Amnion and Placenta Technology (AAPT) ought to be welcomed as a means of freeing people from the burden of forced pregnancy without this necessarily resulting in fetal death.⁴ In response, there is a growing body of feminist

¹ See Chapters 2 and 3.

² Judith Jarvis Thomson, ‘A Defense of Abortion’ (1971) 1 *Philosophy & Public Affairs* 47–66; David Boonin, *A Defense of Abortion* (CUP 2003); Maggie Little, ‘Abortion, Intimacy, and the Duty to Gestate’ (1999) 2 *Ethical Theory and Moral Practice* 295–312, 303.

³ Christine Overall, ‘Rethinking Abortion, Ectogenesis and Foetal Death’ (2015) 46 *Journal of Social Philosophy* 126–40, 127.

⁴ Peter Singer and Deane Wells, ‘Ectogenesis’, in Scott Gelfand and John Shook (eds), *Ectogenesis: Artificial Womb Technology and the Future of Human Reproduction* (Rodopi 2006) 9–25; Eric Mathison and Jeremy Davis, ‘Is There a Right to the Death of the Foetus?’ (2017) 31 *Bioethics* 313–20; Christopher Kaczor, *The Edge of Life: Human Dignity and Contemporary Bioethics* (Springer 2005); Christopher Kaczor, *The Ethics of Abortion: Women’s Rights, Human Life, and the Question of Justice* (Taylor & Francis 2010); Christopher Kaczor, ‘Ectogenesis and a Right to the Death of the

literature that challenges the strength of this claim.⁵ The focus on abortion in the ectogestation literature detracts attention from considering the possibilities of what this technology, and indeed other novel technologies enabling gestation, have the potential to do. The focus on how ectogestation ‘diminishes’ the justifications for abortion (as defenders of this view would put it) exemplifies how procreative technologies can be used to structurally oppress and abuse people. I believe the arguments against abortion in the advent of this technology are a distraction,⁶ and that such claims embody a nefarious use of ectogestative technologies. This chapter offers a summary of the arguments and the reasons why they are unpersuasive. I consider the implications of how we frame a defence of abortion in light of AAPT and what this might mean in other contexts. Most importantly, I reflect on *why* the literature is dominated by theorizing about abortion, the problems this focus causes, and feminist legal futures for abortion and procreative justice.

In this chapter, I first explain the importance of abortion as a basic tenet of procreative justice and offer arguments explaining why the development of novel technologies enabling gestation has no bearing on the importance of abortion access. Second, I outline the claims made in the bioethics literature that ectogestation is an ‘alternative’ or ‘solution’ to abortion, or that it can offer a ‘compromise’ position on abortion, as well as the feminist responses to these arguments. The arguments presenting ectogestation as ‘the end of abortion,’

Prenatal Human Being: A Reply to Räsänen’ (2018) 32 *Bioethics* 634–38; Bruce Blackshaw and Daniel Rodger, ‘Ectogenesis and the Case Against the Right to the Death of the Foetus’ (2019) 33 *Bioethics* 76–81; William Simkulet, ‘Abortion and Ectogenesis: Moral Compromise’ (2020) 46 *Journal of Medical Ethics* 93–98; Christopher Stratman, ‘Ectogestation and the Problem of Abortion’ (2021) 34 *Philosophy & Technology* 683–700; Christopher Kaczor, ‘The Artificial Womb and the End of Abortion’ in N Colgrove, BP Blackshaw, and D Rodger (eds), *Agency, Pregnancy and Persons: Essays in Defense of Human Life* (Routledge 2022); Michal Pruski and Richard Playford, ‘Artificial Wombs, Thomson and Abortion – What Might Change?’ (2022) 19 *Diametros* 35–53.

⁵ Christine Overall, *Human Reproduction, Principles, Practices, Policies* (OUP 1993); Leslie Cannold, ‘Women, Ectogenesis and Ethical Theory’ (1995) 12 *Journal of Applied Philosophy* 55–64; Amel Alghrani, ‘The Legal and Ethical Ramifications of Ectogenesis’ (2007) 2 *Asian Journal of WTO & International Health Law and Policy* 189–212; Sarah Langford, ‘An End to Abortion? A Feminist Critique of the “Ectogenetic Solution” to Abortion’ (2008) 31 *Women’s Studies International Forum* 263–69; Emily Jackson, ‘Degendering Reproduction?’ (2008) 16 *Medical Law Review* 346–68; Claire Horn, ‘Ectogenesis is for Feminists: Reclaiming Artificial Wombs from Antiabortion Discourse’ (2020) 6 *Catalyst: Feminism, Theory, Technoscience* 1–15; Claire Horn, *Gestation Beyond Mother/Machine: Legal Frameworks for Artificial Wombs, Abortion and Care* (PhD thesis, Birkbeck University of London 2020); Elizabeth Chloe Romanis and Claire Horn, ‘Artificial Wombs and the Ectogenesis Conversation: A Misplaced Focus? Technology, Abortion, and Reproductive Freedom’ (2020) 13 *International Journal of Feminist Approaches to Bioethics* 174–94; Evie Kendal, ‘Pregnant People, Inseminators and Tissues of Human Origin: How Ectogenesis Challenges the Concept of Abortion’ (2020) 38 *Monash Bioethics Review* 197–204.

⁶ I had thought, to avoid contributing to the distraction, that I would not include a chapter about abortion in this book at all. It came to be on the insistence of reviewers.

I argue, are premised on several excessive abstractions and misconceptions. As Patterson-Brown and Watson recently put it, proposing ectogestation ‘as a substitute for abortion is a dangerous waste of time.’⁷ Third, following on from this argument, I reflect on why and how abortion has come to dominate the thinking around ectogestation and the harms that this propagates. I draw inspiration from the feminist philosophy of science literature⁸ to demonstrate the problematic operative background assumptions within the debates on ectogestation, leading to an excessive focus on abortion. Finally, I reflect on what debates about abortion and ectogestation mean for legal frameworks, considering that abortion is criminalized in *most* jurisdictions. While it is evident in England and Wales that novel forms of assisted gestation pose no direct threat to abortion access within the contemporary legal framework (because of how the law is constructed),⁹ this is not as clear in other jurisdictions. This matters against the context of the echo chamber of arguments and campaigning against abortion in the ectogestation context and in the contemporary climate. I explore how we must orient towards better legal futures that are properly attentive to the importance of abortion. This is all in recognition of the fact that pregnancy is bodily work.

Abortion and Abstraction

Debates about abortion in the philosophical literature situate themselves in abstraction, treating decisions about continuing a pregnancy similarly to other hypothetical moral dilemmas. Some degree of abstraction is taken to be necessary in analytical philosophical method. Ruddick writes that ‘philosophical discussion is of course abstract and is meant to be.’¹⁰ However, there is increasing recognition of the importance of abstracting *appropriately*—particularly in applied ethics. As Basu has explained, ‘[i]t is naïve and irresponsible to think that philosophy takes place in a vacuum, and not in a society rich with real-world consequences and practical import.’¹¹ Abortion, specifically the question whether it is justified and under what circumstances, remains a

⁷ Benjamin Patterson-Brown and Katie Watson, ‘No Substitute: The False Promise of Artificial Womb Technology as an Alternative to Abortion’ (2023) 23 *American Journal of Bioethics* 87–89, 88.

⁸ I am grateful to Dr Eric Bayruns García for pointing me in the direction of this literature and acknowledging that he will find it irritating that I have done so in a footnote.

⁹ This will be demonstrated in the last section of this chapter.

¹⁰ Sara Ruddick, *Maternal Thinking: Towards a Politics of Peace* (Beacon Press 1989) 96.

¹¹ Rima Basu, ‘Risky Inquiry: Developing an Ethics for Philosophical Practice’ (2023) 38 *Hypatia* 275–93, 277.

matter of philosophical fascination, with multitudes of papers rehashing the same ground published every year. Against this intellectual echo-chamber, the real-world context is rather jarring.

Abortion is common. One in three women* in England and Wales¹² and one in four women* in the United States¹³ have an abortion by the time they are forty-five. In 2020, there were 18.6 (legal) abortions per 1,000 women* in England and Wales,¹⁴ and 11.2 (legal and recorded) abortions per 1,000 women* in the United States.¹⁵ Furthermore, for abortion-seekers, abortion is a *necessity*. As Janiak and Goldberg have observed, despite the tendency for abortion to be categorized as a choice or an option in the face of unwanted pregnancy, most abortion-seekers do not feel that their abortion is a matter of choice at all; ‘the notion of continuing this particular pregnancy is absolutely out of the question for them.’¹⁶ Abortion is generally supported by the public in Western high-income economies. In the UK, a YouGov poll (reporting in 2023) suggests that 88 per cent of adults believe that women* should have the right to abortion.¹⁷ The Pew Research centre estimates that 61 per cent of Americans are in favour of abortion being legal in all or most cases.¹⁸

Legal context is also important: abortion rights and access remain illusory and fragile in many places. Across the UK, abortion access is improving, but it remains a crime in England and Wales under the relevant legislation.¹⁹

¹² Genevieve Edwards, ‘1 in 3 women has an abortion, and 95% don’t regret it – so why are we so afraid to talk about it?’ (2015) *The Independent* <<https://www.independent.co.uk/life-style/health-and-families/features/1-in-3-women-have-an-abortion-and-95-don-t-regret-it-so-why-aren-t-we-talking-about-it-10392750.html>> accessed 15 August 2023. The term woman is used in the source of the data and so I have used it here.

¹³ Rachel Jones and Jenna Jerman, ‘Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014’ (2017) 112 *American Journal of Public Health* 1225–1345, 1288. The term woman is used in the source of the data and so I have used it here.

¹⁴ Department of Health and Social Care, ‘Abortion statistics, England and Wales: 2021’ <<https://www.gov.uk/government/statistics/abortion-statistics-for-england-and-wales-2021/abortion-statistics-england-and-wales-2021>> accessed 14 August 2023. Statistics in England and Wales are reasonably accurate because registered medical practitioners are required (per the Abortion Act 1967) to notify the Chief Medical Officer of every abortion. The word women is used in the source and so I have used the same language.

¹⁵ Katherine Kortsmitt and others, ‘Abortion Surveillance—United States, 2020’ (2022) 71 *Surveillance Summaries* 1–27 <https://www.cdc.gov/mmwr/volumes/71/ss/ss7110a1.htm?_cid=ss7110a1_w.html> accessed 14 August 2023. It is important to note that these statistics are likely to be an underestimate given the difficulty many people have accessing abortion through formal channels in the United States. The word women is used in the source and so I have used the same language.

¹⁶ Elizabeth Janiak and Alisa Goldberg, ‘Eliminating the Phrase “Elective Abortion”: Why Language Matters’ (2016) 93 *Contraception* 89–92, 91.

¹⁷ YouGov, ‘Should women have the right to an abortion?’ <<https://yougov.co.uk/topics/politics/trackers/should-women-have-the-right-to-an-abortion>> accessed 14 August 2023.

¹⁸ Pew Research Center, ‘Public Opinion on Abortion’ <<https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/>> accessed 14 August 2023.

¹⁹ Elizabeth Chloe Romanis, ‘Abortion Access and the Benefits and Limitations of Abortion-Permissive Legal Frameworks: Lessons from the United Kingdom’ (2023) 32 *Cambridge Quarterly of*

There is public support for decriminalization,²⁰ but political attempts to decriminalize in England and Wales have fallen short.²¹ In the United States, the constitutional abortion right was dismantled by the Supreme Court in 2022²²—stripping people with the physiology to become pregnant of a right that had existed, at least in name, for the past fifty years.²³ The last two years have seen increasingly hostile attempts by state legislatures across the United States to enact restrictions on abortion access.²⁴ In many states, these attempts have not greatly restricted access, since it had already been all but impossible.²⁵ In those places where abortion is criminalized, the effects of the criminal law (invasive investigation and punitive consequences) are borne disproportionately by marginalized populations.²⁶ Abortion access is a pressing issue, even in US States that have not taken steps to prohibit abortion, as well as in other jurisdictions with abortion-permissive legal regimes.²⁷ For people who need access to abortion, the mainstream philosophical literature is often not speaking to the problems they are facing.

Basu argues that:

in a world where transmisogynistic violence is rampant, to contribute to a philosophical discourse that would further encourage such violence carries with it high moral risks and those risks ought to constrain how we conduct philosophical inquiry on such matters.²⁸

Against the abortion context outlined, that the philosophical literature continues to focus on the justifications for abortion, as opposed to issues of access

Healthcare Ethics 378–90, 380; abortion is criminal per the Offences Against the Person Act 1861, ss 58 and 59 and Infant Life (Preservation) Act 1929, s 1.

²⁰ Anne Marie Gray and Kaye Wellings, 'Is Public Opinion in Support of Decriminalisation?' in Sally Sheldon and Kaye Wellings (eds), *Decriminalising Abortion in the UK: What Would it Mean?* (Policy Press 2020) 17–36.

²¹ There was a successful *partial* decriminalization of abortion in Northern Ireland with the repeal of the relevant sections of the Offences Against the Person Act 1861, but the same provisions remain in force in England and Wales. In Scotland, abortion is a crime by virtue of the common law.

²² *Dobbs v Jackson Women's Health* 597 US 215 (2022).

²³ See Elizabeth Chloe Romanis, 'The End of (Reproductive) Liberty as We Know It: A Note on *Dobbs v. Jackson Women's Health* 597 USC (2022)' (2023) 23 *Medical Law International* 71–87.

²⁴ *ibid* 79–84; Emily Ottley and others, '*Dobbs v Jackson Women's Health Organization* (2022): Consequences One Year On' (2023) 31 *Medical Law Review* 457–68.

²⁵ See Jordan A Parsons and Elizabeth Chloe Romanis, *Early Medical Abortion, Equality of Access, and the Telemedical Imperative* (OUP 2021) Ch 3.

²⁶ Michele Goodwin, *Policing the Womb: Invisible Women and the Criminalization of Motherhood* (CUP 2020) 11.

²⁷ Romanis, 'Abortion Access' (n 19) 382–83.

²⁸ Basu (n 11) 279.

and the related ethical problems,²⁹ epitomizes the moral risks that Basu describes. Boonin, in the preface to his famous philosophical defence of abortion, wrote that it is ‘distasteful . . . to think of abortion as purely a theoretical issue . . . grappled with only in the abstract and impersonal terms.’³⁰ He continues, ‘abortion is not like other intellectual puzzles where little is at stake beyond the mere display of philosophical acumen, and it is objectionable to think of it as if it were.’³¹ In academic discussion, determining what is an ethical issue for debate, and the terms on which the debate is engaged in, is a political choice. As I have argued with Horn elsewhere, suggesting that the morality of abortion provision is a thorny philosophical problem is political in that ‘it passes judgment on whether the community should allow the availability of a choice that many pregnant persons would consider a personal and private matter’³² and that is certainly a matter of (medical) necessity. There is a clear potential for translational harm from the focus in the debate as ‘ethical argumentation is often translated directly to political argumentation.’³³

Even setting this issue of the influence of ethical argumentation aside, some academic questions, or ways of posing a question, can be seen to inherently demean or dehumanize the persons about whom the question/s are asked.³⁴ There is a tendency in the argumentation around abortion, and especially surrounding ectogestation, to ignore people with the physiology to become pregnant and to negate their experiences of unwanted pregnancy. At times, the complete decentralizing of pregnant people in the discussion verges on dehumanization. These individuals, and the material knowledge generated from their experience/s, are abstracted from the inquiry in the way that abortion is predominantly discussed—most obviously in that abortion is described as the problem, rather than *unwanted pregnancy*. There is also disregard for the necessity of legal abortion to evade the negative health consequences associated with criminalizing the practice.³⁵

In the philosophical literature, the conversation around abortion has been dominated by two strands of debate. The first, and most dominant until recently, centres around the question of whether a fetus is a person. Most scholars who focus on this question take the position that the permissibility of abortion

²⁹ Margaret Matthews, Aashna Lal, and Danielle Pacia, ‘The Role of Epistemic Injustice in Abortion Access Disparities’ (2022) 22 *American Journal of Bioethics* 49–51; Romanis, ‘Abortion Access’ (n 19).

³⁰ Boonin (n 3) xiv.

³¹ *ibid.*

³² Romanis and Horn (n 5) 181.

³³ *ibid.*

³⁴ Basu (n 11) 278.

³⁵ See Fiona De Londras and others, ‘The Impact of Criminalisation on Abortion-related Outcomes: A Synthesis of Legal and Health Evidence’ (2020) 7 *BMJ Global Health* e010409.

is determined by the answer to this question.³⁶ Work that takes the status of a fetus as the material matter is an example of this abstraction from real-world considerations taken too far. As Little explains, centring this question of fetal personhood means that:

we can end up thinking of fetuses, not just as persons, but as persons *atomistically situated*, as physically individuated and separate—as though the bundle of specified rights at issue for the fetus are the same bundle we commonly face walking down the street in everyday life.³⁷

To focus on fetal status and fetal attributes is to abstract away the most crucial aspect of its existence: that it is a part of a pregnant person.³⁸ Disappointingly, however, authors who take the approach that I advocate are routinely asked to provide a detailed defence of the position that the fetus is not a person³⁹ (a task that some feminist philosophers have risen to),⁴⁰ whereas scholars who make the opposite assumption seemingly are not challenged to justify their starting positions in this way.

The second dominant framing of the philosophical debate about abortion sets aside the question of fetal personhood (taking it to be irrelevant) and instead focuses on the matter of whether any person⁴¹ has the right to demand the use of another's body for survival.⁴² While this approach does have the advantage of centring the pregnant person, it too has suffered from some problems resulting from abstraction. First, while this discussion (including the famous violinist analogy by JJ Thomson)⁴³ does emphasize the bodily work involved in sustaining a gestation, this is often in a narrow sense. For example, where people make arguments about an obligation to sustain a pregnancy, they mostly neglect the social—in addition to the physical—consequences of pregnancy. They abstract away material conditions that make pregnancy a huge ask, for example, rising maternal mortality rates in high-income economies⁴⁴

³⁶ This is the position of some scholars who believe the fetus is a person as well as scholars who do not eg Kate Greasley, *Arguments about Abortion: Personhood, Morality and Law* (OUP 2017) 86.

³⁷ Little (n 3) 299.

³⁸ See Chapter 2.

³⁹ Romanis and Horn (n 5) 185.

⁴⁰ Mary Anne Warren, 'On the Moral and Legal Status of Abortion' (1973) 57 *The Monist* 43–61; Mary Anne Warren, 'The Moral Significance of Birth' (1989) 4 *Hypatia* 45–65.

⁴¹ Scholars making this argument often assume that the fetus is a person to strategically show the strength of the argument.

⁴² Thomson (n 3).

⁴³ *ibid.*

⁴⁴ Birthrights, 'Systemic Racism, Not Broken Bodies: An Inquiry into Racial Injustice and Human Rights in UK Maternity Care' (2022) <https://www.birthrights.org.uk/wp-content/uploads/2022/05/Birthrights-inquiry-systemic-racism_exec-summary_May-22-web.pdf> accessed 28 November 2023.

(embedded institutional racism means this particularly impacts racialized groups)⁴⁵ and the economic costs of pregnancy (in a capitalist world in which discrimination against pregnant people, particularly from the working classes, is rife). Further, it abstracts away from the fact that unwanted pregnancy is experienced only by a subset of people;⁴⁶ people with the physiology to become pregnant, who are often discriminated against in other contexts based on *assumptions about* their sex assigned at birth and corresponding assumptions about gender. As many feminist scholars have recognized, the importance of having access to abortion is not just in the preservation of bodily autonomy, but in that there can be no *meaningful* equality for people with the physiology to become pregnant without the availability of abortion.⁴⁷

Absent the ability to end a pregnancy, anyone who is or *can* become pregnant is denied that their body (and conception of self) is their own.⁴⁸ There are objectors to abortion who may not follow this line of reasoning on the basis that they believe there is moral responsibility for the creation of a fetus where persons engage in consensual penis-in-vagina sex.⁴⁹ Their argument would suggest that persons with the capacity to become pregnant have individuation: they can refuse to engage in activity that risks them becoming pregnant or they can use contraception. This position is steeped in the responsabilization of people who can become pregnant for the consequences of sexual activity, to the exclusion of the responsibility of people who can inseminate.⁵⁰ Power dynamics around sexual activity can mean that, even where sex is consensual, people with the capacity to become pregnant (gendered as women) are burdened with contraceptive responsibility, but it can be hard for them to assert that people with penises (gendered men) also exercise responsibility. What I mean by this is that the gender dynamics around sex, accompanied by social norms and expectations, often mean that it is hard for people being penetrated

⁴⁵ See Dána-Ain Davis, *Reproductive Injustice: Racism, Pregnancy, and Premature Birth* (NYU Press 2019); Keisha Ray, *Black Health: The Social, Political, and Cultural Determinants of Black People's Health* (OUP 2023).

⁴⁶ David O'Brien, 'Fairness, Care, and Abortion' (2023) 40 *Journal of Applied Philosophy* 658–75.

⁴⁷ Drucilla Cornell, *The Imaginary Domain: Abortion, Pornography and Sexual Harassment* (Routledge 1995) 33; Rosemary Nossiff, 'Gendered Citizenship: Women, Equality, and Abortion Policy' (2007) 29 *New Political Science* 61–76; Elizabeth Chloe Romanis, 'Abortion & "Artificial Wombs": Would "Artificial Womb" Technology Legally Empower Non-gestating Genetic Progenitors to Participate in Decisions about How to Terminate Pregnancy in England and Wales?' (2021) *Journal of Law and the Biosciences* <doi:10.1093/jlb/lsab011> accessed 4 September 2024.

⁴⁸ Cornell (n 47) 47.

⁴⁹ Timothy Kirschenheiter, 'Responsibility Arguments in Defence of Abortion: When One is Morally Responsible for the Creation of a Fetus' (2023) 29 *The New Bioethics* 340–51.

⁵⁰ Arianne Shahvisi, 'Towards Responsible Ejaculations: The Moral Imperative for Male Contraceptive Responsibility' (2020) 46 *Journal of Medical Ethics* 328–36.

to demand use of a condom.⁵¹ Other contraceptive methods for people with physiology assigned female at birth (AFAB) place emphasis on altering (temporarily or longer-term) that person's fertility by altering their hormonal profile and/or physicality (eg altering cervical mucus). The side effects of such measures ought not be downplayed: they can fundamentally change a person's mood, appetite, appearance, and consequently, for many, sense of self. The (un)acceptability of contraceptives is a highly individuated matter contingent on individual embodied experience.⁵² Moreover, the chorus that people ought to protect themselves from pregnancy by 'just using long term contraception' is ignorant of the context in which they are made. Marginalized and racialized populations have long been coerced into the use of long-acting reversible contraceptives with eugenic undertones.⁵³ Whatever contraception is used, where the individuals involved are fertile, there is *never* a zero chance of becoming pregnant when engaging in penis-in-vagina sex. Moreover, as the most important response to this line of argumentation, it is not being able to undo a pregnancy that results in a lack of control over one's body once pregnancy is established. Insisting that a pregnancy could have been prevented in the first place is of little utility to person's experiencing the *dysphoria* of unwanted pregnancy. As Tongue has described this dysphoria, bodily changes in pregnancy (where unwanted) that are 'experienced subjectively by each pregnant person, can represent estrangement from . . . one's body'.⁵⁴

A final critique is not an issue with abstraction but rather with framing and the story that is told in describing pregnancy as 'sustaining' the life of another entity. Much work frames continuing a pregnancy as a 'rescue', or aiding a more vulnerable entity that cannot survive on its own. As such, some scholars have deployed care-based feminist challenges to abortion, arguing that there can be a duty to rescue.⁵⁵ I argue that such arguments are also flawed because of an inaccurate framing of pregnancy, which continues to neglect the material conditions I highlighted earlier in this section.

As Pattinson explains of thought experiments in general, '[s]ome of the most demanding ethical and legal challenges are presented by the very complexity

⁵¹ Leah East and others, 'Condom Negotiation: Experiences of Sexually Active Young Women' (2019) 67 *Journal of Advanced Nursing* 77–85, 78.

⁵² Jenny Higgins and Nicole Smith, 'The Sexual Acceptability of Contraception: Reviewing the Literature and Building a New Concept' (2016) 53 *The Journal of Sex Research* 417–56.

⁵³ Krystale Littlejohn, *Just Get on the Pill: The Uneven Burden of Reproductive Politics* (University of California Press 2021).

⁵⁴ Zoe Tongue, 'Locating Abortion and Contraception on the Obstetric Violence Continuum' (2024) 17 *International Journal of Feminist Approaches to Bioethics* 1–24, 14.

⁵⁵ Gina Schouten, 'Fetuses, Orphans, and a Famous Violinist: On the Ethics and Politics of Abortion' (2017) 43 *Social Theory and Practice* 637–65.

and uncertainty that it is so tempting to ignore.⁵⁶ In trying to find the ‘purest’ form of ethical problems, it is often the case that detail that makes the problem messy, complex, and puzzling is removed, and as such the answer produced by ethical reasoning is of little utility where these details are added back in. Abstract discussions about abortion (of which the ectogestation debate is one example) have failed to centre pregnant persons, their needs, and what is at stake when making procreative decisions.⁵⁷ Much, if not most, philosophical reasoning about abortion is abstracted from the material conditions in which people experience the need to end a pregnancy. The literature that has emerged about ectogestation is no exception. Stratman writes that ‘the possibility of ectogestation will radically transform the problem of abortion.’⁵⁸ Similarly, Hopkins asks ‘would such technology [ectogestation] actually fix the social problem of abortion by giving everyone what they want?’⁵⁹ These statements exemplify that much (if not most) speculative work about AAPT embodies the same issues as scholarship about abortion in contemporary context by describing abortion as the problem, rather than recognizing it as *a solution* to an unwanted pregnancy.

The Ectogestation-Abortion Debate

As long as there has been a bioethical and legal literature about ectogestation, it has focused on the putative implications of this technology for abortion. This literature centres around the claim that that, with AAPT available, it will become possible to, conceptually and practically, separate ‘the termination of pregnancy and the death of the fetus.’⁶⁰ As Freitas put it in 1980, if ectogestation were available, ‘unwilling pregnant women have an alternative to feticide or unwanted childbirth.’⁶¹ From these observations comes the central claim, recurring in the literature, that:

⁵⁶ Shaun Pattinson, *Law at the Frontiers of Biomedicine* (Bloomsbury Publishing 2023) 4.

⁵⁷ Katrina Kimport and Monica McLemore, ‘The Problem with “Justifying” Abortion: Why Real Reproductive Justice Cannot Be Achieved by Theorizing the Legitimacy of Abortion’ (2022) 9 *Women’s Reproductive Health* 27–31, 29.

⁵⁸ Stratman (n 4) 683.

⁵⁹ Patrick Hopkins, ‘Can Technology Fix the Abortion Problem?’ (2008) 22 *International Journal of Applied Philosophy* 311–26, 315.

⁶⁰ Mathis and Davidson (n 4) 313–14; Blackshaw and Rodger (n 4) 77–78; Stratman (n 4) 684.

⁶¹ Robert Freitas, ‘Fetal Adoption’ (1980) 40 *The Humanist* 22–23.

Freedom to choose what is to happen to one's body is one thing; freedom to insist on the death of a being that is capable of living outside's one body is another.⁶²

Essentially, the argument goes: a pregnant person has the right to end an unwanted pregnancy but does not have the right to the death of the fetus.⁶³ This position is also put in terms that clearly indicates what they are taking the central problem to be. Ectogestation has been described as an 'alternative to',⁶⁴ a 'compromise' in place of,⁶⁵ a 'solution for',⁶⁶ and 'the end to'⁶⁷ abortion. Most people who take this position state it thus, with little defence, and attention directed rather to counterarguments, rather than substantiating the case for moral or legal interference with the private choice to seek abortion.⁶⁸ These arguments have not gone unanswered. There has emerged a body of feminist literature defending a moral right to abortion in the advent of ectogestation,⁶⁹ and imagining legal frameworks that might best protect access to abortion.⁷⁰ Much of this work serves to ground the analysis by highlighting material conditions and explanations as to why we should not ignore them. Thus, this work removes some of the unjustifiable abstraction around ectogestation and abortion that has become so common.

Bodily autonomy and ending a pregnancy

Kaczor advocates that the disagreement about abortion in the context of ectogestation comes down to what abortion is taken to mean. If abortion is defined as 'the right not to be pregnant' then partial ectogestation, he writes, 'would solve the problem.'⁷¹ He claims that since most scholarship (mostly that by philosophers and medics) defends abortion as a right of evacuation at present, this at least changes the nature of the abortion conversation. A defence

⁶² Singer and Wells (n 4) 12.

⁶³ Perry Hendricks, 'There is No Right to the Death of the Fetus' (2018) 32 *Bioethics* 395–97.

⁶⁴ Simkulet (n 4) 93.

⁶⁵ Hopkins (n 59) 312.

⁶⁶ *ibid.*

⁶⁷ Singer and Wells (n 4); Kaczor, 'The Artificial Womb and the End of Abortion' (n 4).

⁶⁸ Indeed, at least one philosopher who made the case against abortion in the advent of this technology—see Stratman (n 4)—has since published a piece explaining why there ought to be no legal interference with the choice to seek abortion.

⁶⁹ See (n 5).

⁷⁰ Claire Horn, 'Abortion Rights after Artificial Wombs: Why Decriminalisation is Needed Ahead of Ectogenesis' (2021) 29 *Medical Law Review* 80–105; Horn, *Gestation Beyond Mother/Machine* (n 5).

⁷¹ Kaczor, 'The Edge of Life' (n 4) 107.

of abortion must, he argues, shift to an explicit defence of the right to fetal death.⁷² This framing seeks to treat the matter of a person's bodily autonomy as now entirely irrelevant. In this conceptualization, bodily autonomy is sufficiently realized in the ending of a pregnancy, such that moral demands can be made of persons in *how* that ending of the pregnancy is undertaken. However, such an understanding fails to appreciate both the material differences between extraction for ectogestation and abortion,⁷³ and the proper substance of a right to bodily autonomy.

Describing ectogestation and abortion as simply two forms of ending a pregnancy, however, is to significantly abstract away from what each process involves. This is a strategy that is common amongst those making the argument against abortion in light of ectogestation. For example, Stratman postulates that:

It is not incoherent or implausible to think that fetal transfer would involve a surgery that is at least equally or, perhaps, even less invasive and risky than current lethal forms of terminating one's pregnancy.⁷⁴

Similarly, Kaczor writes:

Ex hypothesis, partial ectogenesis, as imagined in the future, would not be dangerous for women. Many procedures that were dangerous and invasive 40 years ago, now are safe. Even so, the choice would presumably not be between no danger and danger, but between the dangers of abortion, the dangers of ectogenesis, and the dangers of later term childbirth.⁷⁵

Extraction for ectogestation is simply *not* the same procedure as an abortion, nor is it one that harbours comparatively similar risks. Fetal transfer to AAPT could feasibly not occur before the entity had obtained fetal physiology,⁷⁶ which, at the very earliest, would be thirteen weeks gestation⁷⁷ (though in all likelihood, because of the size of AAPT, it would be much later in gestation that an entity could be supported).⁷⁸ Yet, most abortions in high-income economies

⁷² *ibid.*

⁷³ Romanis, 'Abortion & "Artificial Wombs"' (n 47).

⁷⁴ Stratman (n 4) 688.

⁷⁵ Kaczor 'The Edge of Life' (n 4) 108.

⁷⁶ Seppe Segers and Elizabeth Chloe Romanis, 'Ethical, Translational, and Legal Issues Surrounding the Novel Adoption of Ectogestative Technologies' (2022) 15 Risk Management and Healthcare Policy 2207–20, 2209.

⁷⁷ Romanis, 'Abortion & "Artificial Wombs"' (n 47) 7.

⁷⁸ This fact of how the device functions was discussed at a recent meeting of the US Food and Drug Administration Pediatric Advisory Committee Meeting about artificial wombs on 19 and 20 September

like England and Wales take place before nine weeks' gestation.⁷⁹ Thus, any requirement to undergo fetal transfer as one's means of securing freedom from pregnancy amounts to placing upon pregnant people an obligation to remain pregnant for a period against their will. Even if this were not the case, however, the nature of the processes of extraction versus an abortion are illustrative of how they should not be considered comparable in the way that the abstracted argument makes them seem.

A transfer to AAPT is complex and intricate, since interventions are necessary to ensure that there is no fetal-to-neonatal physiology transition during extraction and transfer.⁸⁰ This means a caesarean section,⁸¹ and it would likely be a more technical and elaborate surgery since it would be undertaken earlier in gestation.⁸² Studies on animal models have thus far attempted only to undertake transfer by caesarean section to maintain as much control as possible over the entity during the process. A caesarean section involves the pregnant person being administered anaesthesia, after which an incision is made through both the abdominal wall and the uterine wall to extract the fetus.⁸³ As a major surgery, it poses substantial risks to the pregnant person including those associated with the use of anaesthetics, blood loss, surgical injuries to the bowel and/or bladder, and an increased likelihood that any future pregnancies would have to be delivered surgically.⁸⁴ By way of contrast, most abortions in high-income economies like England and Wales are medication abortions,⁸⁵ which involve the administration of two medications orally/vaginally in a twenty-four to forty-eight-hour window.⁸⁶ The World Health Organization (WHO) recommends medication methods of abortion until twelve weeks' gestation.⁸⁷ Possible side effects from these medications are mild; stomach

2023, see < <https://www.fda.gov/advisory-committees/pediatric-advisory-committee/2023-meeting-materials-pediatric-advisory-committee> > accessed 16 November 2023.

⁷⁹ Department of Health and Social Care (n 14).

⁸⁰ M Beatris van de Hout-van der Jagt and others, 'Interprofessional Consensus Regarding Design Requirements for Liquid-Based Perinatal Life Support (PLS) Technology' (2022) 9 *Frontiers in Pediatrics* <doi.org/10.3389/fped.2021.793531> accessed 4 September 2024.

⁸¹ Seppe Segers and others, 'The Ethics of Ectogenesis-aided Foetal Treatment' (2020) 34 *Bioethics* 264–370, 367. Though some have hypothesized that a vaginal delivery may not be wholly impossible if the physiological challenges can be overcome see *ibid*.

⁸² Romanis (n 47).

⁸³ I am grateful to Dr E Joanne Verweij for discussion of this process.

⁸⁴ See National Health Service, 'Risks – Caesarean Section' <<https://www.nhs.uk/conditions/caesarean-section/risks/>> accessed 20 November 2023.

⁸⁵ 87% of abortions in England and Wales in 2021 were medication abortions: Department of Health and Social Care (n 14).

⁸⁶ World Health Organization, 'Abortion Care Guideline' <<https://www.who.int/publications/i/item/9789240039483>> accessed 6 November 2023, 68.

⁸⁷ *ibid*.

pain, indigestion, diarrhoea, vomiting, and headaches.⁸⁸ Medication abortions (in which a miscarriage is triggered by drugs) are thus clearly far less invasive, enable a person a greater degree of personal privacy (in many jurisdictions, the medications can be lawfully administered at home),⁸⁹ and involve a much lesser degree of risk to the pregnant person's health and life than a caesarean section for fetal transfer.⁹⁰ Where medication abortion is not appropriate or an alternative is preferred, abortion-seekers can have a surgical termination, such as vacuum aspiration or dilation and evacuation. Sometimes these procedures can necessitate local or general anaesthetic, or conscious sedation, but in comparison to caesarean section are both a much briefer and less complex procedures (vacuum aspiration can take between three and ten minutes; dilation and evacuation between ten and thirty minutes).⁹¹ While these procedures carry some risks associated with surgical intervention, they are much lesser than a fetal transfer surgery would be because of the lower level of complexity, how routine these procedures are, and because they are less invasive (not involving incision through muscle and then an organ).

The risks associated with abortions, whether medication or surgical, are so much lesser that we should consider Kaczor's comparison between 'the dangers of ectogestation' and 'the dangers of abortion'⁹² to be clearly disingenuous. In response to these comparisons, he has since claimed that technological possibilities ought not to be discounted; '[g]iven the advancements of the last 100 years, I would hesitate to rule out technical possibilities' of fetal extraction becoming comparable methods of abortion' Kaczor argues.⁹³ Such a position is plainly fanciful, and a clear move back into unjustifiable abstraction,⁹⁴ given the reality that a fetus is a part of a pregnant person (it is embedded into the uterine wall), and the necessity of the entity to be extracted to have developed sufficiently (so that it has fetal physiology) before extraction.

Bohn posits that, where a pregnant person wants to end their pregnancy, '[n]o one mandates that she have a procedure; they merely restrict which procedures she[/they] may choose.'⁹⁵ The argument she is making is that where

⁸⁸ British Pregnancy Advisory Service, 'Pills by Post – Abortion Treatment at Home: Expected Effects of Treatment' <<https://www.bpas.org/abortion-care/abortion-treatments/the-abortion-pill/remote-treatment/>> accessed 20 November 2023.

⁸⁹ Parsons and Romanis (n 25) 89.

⁹⁰ Romanis, 'Abortion & "Artificial Wombs"' (n 47) 12.

⁹¹ For a full description see Parsons and Romanis (n 25) 2–3.

⁹² Kaczor 'The Edge of Life' (n 4) 108.

⁹³ Kaczor, 'The Artificial Womb and the End of Abortion' (n 4) 181.

⁹⁴ It is unclear how Kaczor imagines an entity might be extracted non-invasively.

⁹⁵ Jessalyn Bohn, 'The Feminists' Dilemmas' in Colgrove, Blackshaw, and Rodger (eds), *Agency, Pregnancy and Persons* (n 4) 201.

ectogestation is available—pregnant persons would not be mandated to remain pregnant, or to end their pregnancy, but if they do choose to end that pregnancy they would just have the one available option of doing so. What this fails to recognize is that decisions about *how* to end a pregnancy are as much a matter of person's bodily autonomy as the matter of deciding to end the pregnancy. As Kendal explains, proper recognition of bodily autonomy means a pregnant person 'has a right to choose from among her[/their] treatment options' including those that are conducive to transfer to AAPT and those that are not.⁹⁶ Given the varying impact that the termination choices above have on person's bodies, and in different ways, the decision a person may want to make in this situation will be personal, based on their preferences about physical risks as well as their sense of physical self. The argument given against abortion in favour of fetal transfer as sufficient to protect bodily autonomy only recognizes a narrow conception of bodily autonomy;⁹⁷ as a matter of, in this context, only deciding to not be physically pregnant, rather than as a matter of making decisions about one's physicality. Forcing someone to have an invasive surgery must be considered to be as serious as forcing them to continue a pregnancy unwillingly and, of course, would go against norms of consent and constitute a major human rights violation. It is for this reason that some (though, sadly, few) proponents of ectogestation as an alternative to abortion recognize that fetal extraction cannot be morally *required* of pregnant people, because people must be permitted to choose less invasive procedures.⁹⁸

Beyond bodily autonomy

Horn argues that continuing to focus on a defence of abortion rights on the basis of bodily autonomy 'leaves abortion rights contingent on the degree to which a convincing argument can be made that a procedure is physically invasive'⁹⁹ and thus 'on its own is insufficient'.¹⁰⁰ Such a move is also one into abstraction, since it, to some degree, is negating some of the material physicality of abortion that I have argued it is problematic to abstract from. However, recognition that abortion is a matter of bodies *and* of imagined futures does

⁹⁶ Kendal (n 5) 199.

⁹⁷ This is very clear in work by Bohn in which she suggests that offering an ectogestation-compatible procedure in place of abortion, or induced labour in place of a requested caesarean section, is respectful of people's bodily autonomy. See Bohn (n 95) 200.

⁹⁸ Mathison and Davis (n 4).

⁹⁹ Horn 2020 (n 5).

¹⁰⁰ Horn, 'Ectogenesis is for Feminists' (n 5) 7.

make visible that abortion embodies other meanings and sources of importance for people experiencing unwanted pregnancy. Many commentators have emphasized that in the ‘perverse daydream’ of ectogestation in place of abortion¹⁰¹ there is a lack of consideration of the abortion-seeker’s rights *not* to reproduce.¹⁰² As Langford explains, for many, ‘[t]erminating a pregnancy is but a means to an end. The end is preventing motherhood.’¹⁰³ Similarly, Jackson has observed that few abortion-seekers want to simply avoid pregnancy and labour; their aim is to evade biological parenthood.¹⁰⁴

Objectors to this line of argumentation assert that the choice to abort should not be recognized as rejecting biological parenthood, because they subscribe to the misconception that once pregnant, a person is already a parent.¹⁰⁵ I have already fully refuted this conceptualization of pregnancy and parenthood in Chapter 2.¹⁰⁶ The reality is that termination of pregnancy (and not the coerced use of AAPT) is the only way for persons to conclusively reject the social burdens of motherhood that, through both social and legal mechanisms,¹⁰⁷ are strongly imposed on those who gestate and birth.¹⁰⁸ Bringing an unwanted child into the world is something that is deeply distressing to birthing people.¹⁰⁹ Kaczor has suggested that ‘if we consider psychological burdens, then abortion may be (all things considered) more burdensome than partial ectogenesis.’¹¹⁰ This position, however, is based on the dubious claim that abortion causes psychological harm to pregnant people,¹¹¹ as opposed to the concrete psychological harms of being forced to procreate.

Critics of the argument that pregnant people must be entitled to reject procreating (and thus may have an abortion rather than having to opt for ectogestation to end their pregnancy) often espouse a chorus of ‘but what about men [or the non-gestating genetic progenitor] too?’¹¹² The argument

¹⁰¹ Patterson-Brown and Watson (n 7).

¹⁰² *ibid.*

¹⁰³ Langford (n 5) 265.

¹⁰⁴ Jackson, ‘Degendering Reproduction?’ (n 5) 362.

¹⁰⁵ Christopher Kaczor, ‘The Artificial Womb and the End of Abortion’ in Colgrove, Blackshaw, and Rodger (eds), *Agency, Pregnancy and Persons* (n 4) 183.

¹⁰⁶ See also Zaina Mahmoud and Elizabeth Chloe Romanis, ‘On Gestation and Motherhood’ (2023) 31 *Medical Law Review* 109–40.

¹⁰⁷ Such as how gestation is determinative of parentage at birth (see Chapter 6) and a number of criminal offences that make anonymous birth unlawful in England and Wales.

¹⁰⁸ Romanis, ‘Abortion & “Artificial Wombs”’ (n 47).

¹⁰⁹ Cannold (n 6).

¹¹⁰ Kaczor, ‘The Artificial Womb and the End of Abortion’ (n 105) 181.

¹¹¹ EM Dadlez and William Andrews, ‘Post-Abortion Syndrome: Creating an Affliction’ (2010) 24 *Bioethics* 445–52.

¹¹² Iain Brassington, ‘The Glass Womb’ in Frida Simonstein (eds), *Reprogen-Ethics and the Future of Gender* (Springer 2009) 197–210.

is that we cannot afford respect to a pregnant person's right not to procreate without violating the other genetic progenitor's right to procreate. While a person does not have a right to use another person's body to fulfil their desire to procreate, some argue that the ectogestation context is different: that it allows one to respect pregnant person's bodily autonomy and the other genetic progenitor's right to procreate simultaneously.¹¹³ As I have set out, forcing ectogestation as the only means of ending an unwanted pregnancy does not actually respect pregnant persons' bodily integrity and autonomy in a meaningful way and is overly abstracting. For argument's sake, however, let's engage in abstraction from the body to illustrate how this argument remains flawed when contemporary social conditions are taken duly into consideration. Gendered and sexed socially enforced norms of parental responsibility mean that the implications of unwanted procreation are much greater for people who have birthed (predominantly women). As Jaggar has explained, social conditioning, reinforced by law,¹¹⁴ means 'most women's lives are totally changed as the result of the birth of a child, while men can choose how much they wish to be involved.'¹¹⁵ Moreover, the law constructing motherhood from gestation in a way that is practically immutable¹¹⁶ entrenches the centrality of the person who gestated in a born child's life. Consequently, those who gestate but do not parent are socially vilified as not only 'bad mothers' but 'bad people,' whose behaviour is unexplainable by reference to traditional notions of gender.¹¹⁷ A potential mother must always, therefore, have the responsibility for deciding whether to continue a pregnancy (and they, of course, can consult the other genetic progenitor if they wish).¹¹⁸ Such conditions are deeply socially-engrained.¹¹⁹

Abortion is not only about bodily autonomy and procreative autonomy, but it is also a basic tenet of equality for people who have the capacity to become pregnant. Without recognition of the moral right to abortion, Cornell explains, 'there can be no meaningful equality for women'¹²⁰ (and other people with the capacity to become pregnant). Where a person is denied the ability to make decisions about becoming or remaining pregnant, they are denied the ability

¹¹³ *ibid.*

¹¹⁴ For example, with the passing of policies that result in people who birth being the primary care giver of a child.

¹¹⁵ Alison Jaggar, 'Abortion and a Woman's Right to Decide' in Alison Jaggar (ed), *Living with Contradictions: Controversies in Feminist Social Ethics* (Routledge 1994) 283.

¹¹⁶ See Chapter 6; Mahmoud and Romanis (n 106).

¹¹⁷ Romanis, 'Abortion & "Artificial Wombs"' (n 47) 33.

¹¹⁸ Jaggar (n 115) 283.

¹¹⁹ See analysis in Chapter 6.

¹²⁰ Cornell (n 47) 22.

to think of themselves as an integrated self with (through their decisions) some control over their selfhood and its boundaries.¹²¹ Without the ability to make choices about pregnancies, their biological capacity for pregnancy becomes thus cemented as a fundamental aspect of that person's being; should they become pregnant, they cannot end that state of being. The State is enabled to 'conscript women [and people with the capacity to become pregnant] to give their bodies against their will to deliver children at its legal demand'.¹²² This has the effect of reducing people who can become pregnant to only that capacity, and consequently, treating them as 'second-class citizens'.¹²³ Abortion enables people with the capacity to become pregnant to engage in sexual activity without feeling defined and restricted by the possibility of pregnancy. Without it, procreation is state-mandated in a manner that reinforces biological essentialism (around 'biological' procreative destiny).

Kaczor has disputed abortion as necessary for equality by posing the following question:

If half of all CEOs in Fortune 500 companies are not female, doesn't this show that women are not yet equal to men? In the United States, we've had abortion on demand since January 1973.¹²⁴

Setting aside the obvious inaccuracy in describing the *Roe* era in the United States as 'abortion on demand,' when there were such severe problems with access across much of the country¹²⁵ (and the nonsense notion that the number of female CEOs is indicative of equality across society), Kaczor misunderstands that abortion is necessary but not sufficient for social equality. Abortion is important to ensure that we recognize the individuation of people who can become pregnant, but it does nothing to address systemic sexism and racism in capitalist structures (and no one was claiming that it did). The United Nations Committee on the Elimination of Discrimination Against Women concluded in 2018 that criminalization of abortion, and denying abortion, amounted to discrimination because it denied a service that some need (only people with the physiology to become pregnant).¹²⁶ Denial of abortion, of course, can

¹²¹ *ibid* 47.

¹²² Rebecca Cook and Bernard Dickens, 'Human Rights Dynamics of Abortion Law Reform' (2003) 25 *Human Rights Quarterly* 1–59, 44.

¹²³ *ibid*.

¹²⁴ Kaczor, 'The Artificial Womb and the End of Abortion' (n 4) 190.

¹²⁵ See Parsons and Romanis (n 25) Chapter 3.

¹²⁶ They used the language of woman here, I have adjusted this to better reflect who can become pregnant: United Nations Committee on the Elimination of Discrimination against Women, 'Inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional

exacerbate the inequalities embedded in capitalist societies, because unwanted pregnancies can have serious social, economic, health, and cultural consequences,¹²⁷ and denying abortion can therefore enforce on people life conditions (motherhood) that often result in structural discrimination.¹²⁸ There is no reason to suppose that coerced uses of AAPT to end pregnancies would result in a different outcome than that forced pregnancy already has in contemporary conditions—including entrenching social scripts rooted in misogyny (about the role of bodies assigned female at birth).¹²⁹

The substance of the abortion right

I agree that the substance of the moral right to abortion encompasses more than a recognition of a pregnant person's bodily autonomy, not least because the reproductive justice framework highlights how entangled any notion of bodily autonomy is with context: that is the safe environment, resources, and other support a person must have to make decisions.¹³⁰ It is insufficient for the State to refrain from interference with the moral right to abortion, for the right to abortion to have real meaning there must be 'the establishment of conditions in which safe abortions are available to women[/people] of every race, class and nationality'.¹³¹ Horn has argued that conceptualizations of the abortion right in the ectogestation debate which continue to centre bodily autonomy leave 'abortion rights contingent on the degree to which a convincing argument can be made that a procedure is physically invasive'.¹³² She continues that the right constructed in this way is therefore always precarious and lacks any care for pregnant persons.¹³³ However, to decentre bodily integrity as a crucial aspect of the abortion right is, again, a move into abstraction that could have significant implications. I am not arguing that we should return to thinking of abortion rights as *strictly* a matter of bodily autonomy and nothing else, but

Protocol to the Convention of the Elimination of Discrimination against Women: report of the Committee on the Elimination of Discrimination against Women' <<https://digitallibrary.un.org/record/1480026?ln=en>> accessed 16 November 2023.

¹²⁷ Kate Hunt and Mike Gruszczynski, 'The Ratification of CEDAW and the Liberalization of Abortion Laws' (2019) 15 *Politics & Gender* 722–45, 730–31.

¹²⁸ See Cook and Dickens (n 122) 44.

¹²⁹ Patterson-Brown and Watson (n 7) 89.

¹³⁰ Loretta Ross and Rickie Solinger, *Reproductive Justice: An Introduction* (University of California Press 2017) 9.

¹³¹ Cornell (n 47) 33.

¹³² Horn, *Gestation Beyond Mother/Machine* (n 5) 99.

¹³³ *ibid.*

rather than in broadening the recognition of what abortions are for, bodily integrity ought not to be completely disregarded. Not least because of the centrality of this concept in both legal and medical frameworks.

The physicality of the work of gestation sustained by pregnancy is not something that can or should be set aside in thinking about abortion rights. First, it sets aside some of the important aspects of decision-making about abortion that will be material to pregnant people. For many who wish to have an abortion, the desire is not just to have one, but to have it *as soon as possible*. Our bodies are fundamentally tied to our sense of physical integrity and of being. The physicality of pregnancy, where that state of being is unwelcome (because of the awareness that abortion is necessary/the pregnancy is unwanted), can cause serious distress and discomfort for individuals. For some, it may be distressing because it changes their boundaries of being. It is for this reason that delays in accessing abortion can be a serious affliction; persons are forced to remain in a dysphoric state where their conception of themselves and their being are misaligned with their embodiment. Once we recognize the central problem as unwanted pregnancy, these bodily harms—in addition to the reproductive and social harms of forced pregnancy—become visible. Even where arguing for abortion rights, reasoning that does not start from the body can perpetuate the same notion of the fetus as atomistically situated which I highlighted earlier in this chapter as having substantive harms.¹³⁴

Second, disregarding the centrality of bodily autonomy opens up the possibility of persons other than the pregnant person making claims that they are entitled to participate in decision-making about abortion. Some persons, such as the sperm contributor, may argue that they are equally impacted, in terms of their psychosocial wellbeing, by the existence of a child and consequently, that they should have a say in abortion decisions.¹³⁵ While the availability of novel forms of assisted gestation, alongside surrogacies, should not be considered to have a significant impact on the availability of abortion, there are some instances where there are multiple people who might believe they have a stake in abortion decisions. The social harms of forced reproduction are significantly impacted by gendered and sexed norms, and this can to some extent account for differences between persons making claims about abortion. After all, the social implications of persons understood to be ‘mothers’ choosing not to

¹³⁴ Barbara Katz Rothman, *The Tentative Pregnancy: Prenatal Diagnosis and the Future of Motherhood* (Viking 1986); Rosalind Pollack Petchesky, ‘The Power of Visual Culture in the Politics of Reproductions’ (1987) 13 *Feminist Studies* 263–92; see also Ch 2.

¹³⁵ Joona Räsänen, ‘Ectogenesis, Abortion and a Right to the Death of the Fetus’ (2017) 31 *Bioethics* 697–702.

parent are far greater than for persons understood to be ‘fathers.’¹³⁶ However, the reality remains that being attentive to the geography of gestation is critical in explaining who can make decisions about continued gestation. Where gestation is sustained by a pregnant person, any decision about continued gestation impacts primarily on their bodily boundaries and selfhood and, as a consequence, that decision must be theirs. While disagreements about abortion in surrogacies are rare,¹³⁷ where these occur the decision (and the consequences) must belong to the surrogate. Similarly, they would be entitled to refuse to end a pregnancy. This is also relevant in the case of UTx. Surgeons undertaking the procedure have noted that complications from rejection could arise and observed that ‘the life and health of the recipient should always be the priority, even when threatened during a pregnancy before expected neonate viability.’¹³⁸ It is important that pregnancy termination remains lawful because it will be necessary to terminate pregnancies, even where a person has undertaken UTx because they really wanted to be pregnant, to save pregnant person’s lives. Surgeons have also noted the possibility that in such cases regnant people may refuse hysterectomy (and the ending of the pregnancy) and in such cases, they note, ‘the medical team must thoroughly counsel the patient concerning the consequences’ and provide psychological support and immune suppression treatment.¹³⁹ Such an approach is important because forcing the end of a pregnancy where a person refuses should be as of much concern as forcing a person to remain pregnant.

The relevance of bodily integrity thus explains why a person cannot be forced to continue an unwilling pregnancy or undergo extraction for ectogestation, but also why decisions about continued gestation where the entity is being gestated in AAPT might reasonably involve more than one person.

The Focus on ‘Abortion Solutions’

New procreative technologies often raise questions about abortion. Acknowledging the ectogestation and abortion conversation as ‘another disheartening example of bioethicists’ obsession with high-tech

¹³⁶ Romanis, ‘Abortion & “Artificial Wombs”’ (n 47) 34.

¹³⁷ Deborah Forman, ‘Abortion Clauses in Surrogacy Contracts: Insights from a Case Study’ (2015) 49 *Family Law Quarterly* 29–54, 30–31.

¹³⁸ Mats Brännström and others, ‘Uterus Transplantation: From Research, through Human Trials and into the Future’ (2023) 29 *Human Reproduction Update* 521–44, 534.

¹³⁹ *ibid.*

hypotheticals',¹⁴⁰ Patterson-Brown and Watson declare that '[e]thicists should be clear and consistent in delineating the appropriate use of' ectogestation, rather than looking at it as an abortion alternative.¹⁴¹ That the focus has, nevertheless, been primarily on abortion justifications is telling; fetal extraction is argued for as a reasonable alternative to abortion procedures precisely because the wrong 'problem' is consistently identified by scholars in procreative ethics. Lloyd observes that 'background assumptions and values can play a role in specifying the very object of inquiry'.¹⁴² While she was writing about science rather than ethics, her observation is just as true of ethics and of law as academic disciplines. What is identified as the pertinent or pressing ethical or legal question is revealing about the background assumptions and values of the thinker situated within their discipline, or even of the discipline itself. The bioethics/ethico-legal literature's echo chamber questioning the permissibility of (or, in response, reiterating the permissibility of) abortion has become damaging in that it is distracting us from the appropriate moral and legal questions.

The language used to describe ectogestation, as the 'solution' or 'compromise' to abortion, and also to describe abortion itself in the ectogestation literature, is emblematic of the background assumption at play: that abortion always needs explanation and justification. This reiteration of abortion as the problem has become so normal that it is seemingly accepted as objective to approach unwanted or dangerous pregnancies as questions about the permissibility of abortion, rather than how these conditions can be alleviated (with the most obvious *answer* being abortion). This way of thinking about abortion is highly pervasive. The permissibility of abortion is treated as one of the fundamental problems in applied ethics: it is the subject of as many books and is featured on every applied ethics/bioethics syllabus. As I have observed with Horn elsewhere:

[A]uthors who take the position that abortion is in need of some greater justification beyond that of respecting the importance of a private choice of termination are less frequently subject to challenge for their starting position than those who approach ethico-legal issues from the starting point of abortion as healthcare.¹⁴³

¹⁴⁰ Patterson-Brown and Watson (n 7) 88.

¹⁴¹ *ibid.*

¹⁴² Elisabeth Lloyd, *The Case of the Female Orgasm: Bias in the Science of Evolution* (Harvard University Press 2005) 242.

¹⁴³ Romanis and Horn (n 5) 185.

With the starting point of abortion needing justification being so widespread, it can consequently be difficult for scholarship that centralizes the problem of *unwanted pregnancy* (eg looking at abortion access) to be published¹⁴⁴ or seriously engaged with. This is because it starts from a fundamentally different premise. This leaves us with the question of how and why the literature on ectogestation (and abortion more generally) has come to be dominated by the premise that abortion is the moral problem to be addressed.

What is taken to be a suitable starting assumption for inquiry is, inevitably, the result of disciplinary practices, which are, in turn, contingent on who makes up the community and constructs the dominant culture of the discipline. Where marginalized groups are excluded from recognition as ‘qualified’ researchers within a discipline, it is inevitable that the social values, interests, and agendas that might better reflect their experience are excluded from determinations about the ‘objective approach’ to identifying problems in need of investigation.¹⁴⁵ Traditionally, philosophy (and applied ethics) paid little attention to those issues impacting on the lives of people with the physiology to become pregnant. This can be related both to the historical exclusion of women from the discipline, but also to the way in which women have been (and often are still) characterized as ‘less qualified thinkers’ within philosophy.¹⁴⁶ Where a group of people (women and/or people with the physiology to become pregnant) are excluded or taken less seriously, there is the exclusion of knowledge rooted in their (range of) life experiences. This necessarily means that how certain contexts are understood lacks the benefit of the knowledge generated from the experiences, and the interpretations of, women/people with the physiology to become pregnant. In this way, thinking about pregnancy is easily abstracted from context. Finn has noted that in bioethics and philosophy, pregnancy and birth have not been considered issues of significant philosophical value, with the comprehensive body of literature on abortion being a ‘glaring anomaly’.¹⁴⁷ She explains, however, that this seeming anomaly actually makes perfect sense; philosophy has historically had consistently little interest in persons

¹⁴⁴ My paper with Claire Horn was rejected by a number of prominent bioethics journals before finding its home in the *International Journal of Feminist Approaches to Bioethics*. One editor at a leading journal commented that we should ‘try a feminist journal’: this experience solidifies how feminist scholarship in ethics is often siloed into narrow spaces with limited engagement outside those who are already interested in feminist perspectives.

¹⁴⁵ Sandra Harding, ‘Rethinking Standpoint Epistemology: What Is “Strong Objectivity”?’ (1992) 36 *The Centennial Review* 437–70, 459.

¹⁴⁶ This second point is especially important because of the distinction between descriptive and substantive representation. See analysis on this distinction in the context of women in philosophy see Suki Finn, ‘Being-from-Birth: Pregnancy and Philosophy’ (2023) 19 *European Journal of Analytic Philosophy* S7–S32, 13.

¹⁴⁷ *ibid* S19.

undertaking pregnancy and their experiences—but a focus on abortion is not actually on these people, rather it is a focus on the fetus.¹⁴⁸ In centring the fetus, and simultaneously excluding people with experiences of pregnancy, it is easy to see how abortion was centred as the matter for investigation, rather than there being recognition of the impact of *unwanted pregnancy* and this being the starting point from which to reflect on the ethical issues surrounding pregnancy. The disciplinary norm is analysis based on an androcentric centring of the fetus—ethical conversation centres reflection about the fetus. Theorizing about ectogestation with a focus on abortion emerges naturally as the continuance of the side-lining of the experiences of pregnant people in place of the focus on the fetus. In so doing, the literature consistently systematically contributes to the continued marginalization of people who have, will, or could experience unwanted pregnancy.

I would argue that there is a need for a course correction in the literature: we should stop problematizing abortion itself by stepping back and starting from the point of centring the experience of unwanted pregnancy.¹⁴⁹ A focus on abortion as the problem has led to an excessive focus on the permissibility of abortion as we debate novel forms of assisted gestation in cases like ectogestation, rather than considering how we might provide alternative procreative experiences (as has been the primary focus of this book). Further, it has contributed to problematizing abortion provision in circumstances where it is, and ought to be recognized as, routine. Once we recognize that abortion remains necessary notwithstanding technological developments including novel forms of assisted gestation, the law as a barrier to abortion access becomes a more visible part of the philosophical conversation about the regulation of pregnancy.

Legal Futures

There has, in the last decade, been a general trajectory across the globe towards liberalization of abortion,¹⁵⁰ recognition of abortion as a human right,¹⁵¹ and acceptance of the importance of abortion access.¹⁵² Yet the two jurisdictions

¹⁴⁸ *ibid.*

¹⁴⁹ See also Horn, 'Abortion Rights after Artificial Wombs' (n 70).

¹⁵⁰ See Lisa Remez and others, 'Global Developments in Laws on Induced Abortion: 2008–2019' (2020) 46 *International Perspectives on Sexual and Reproductive Health* 53–65, 58. There are some countries, such as the United States, that are obvious outliers in recent regression.

¹⁵¹ *eg* United Nations Committee on the Elimination of Discrimination against Women (n 126).

¹⁵² See World Health Organization (n 86).

in which I have lived while writing this book (the United States and England and Wales) have been different stories. In 2022, the Supreme Court of the United States, overruling fifty years of established precedent, ruled that the US Constitution conferred no right to abortion,¹⁵³ which has had a devastating impact.¹⁵⁴ In England and Wales, abortion access has improved in the years since 2020 as a result of the legalization of telemedical abortion care pathways.¹⁵⁵ However, abortion remains criminalized and there is a growing trend of prosecutions of abortion-seekers who have their abortions outside the heavily medicalized circumstances in which it is legal.¹⁵⁶ Against this context, there might reasonably be concerns about the introduction of novel technologies enabling gestation (especially ectogestation) because of the impact they may have on the legal availability of abortion in contemporary legal frameworks. In jurisdictions where abortion is criminalized, technologies like ectogestation pose a greater threat to abortion access in a number of ways. Indeed, even some commentators who have advocated that abortion is morally questionable in light of AAPT have argued that criminalization and infringements on legal access are harmful and propagate 'systematic misogyny'.¹⁵⁷ Thus, I argue, building on the work of Horn,¹⁵⁸ that for a future with both novel technologies enabling gestation and reproductive justice, decriminalization of abortion is a necessity. Decriminalization alone, of course, is not *sufficient* to ensure access to abortion care,¹⁵⁹ but the point is that where there is criminal regulation of abortion, the potential for novel developments to come to limit abortion access is much greater.

Criminal law, to varying degrees, remains at the heart of abortion regulation almost universally (Canada being the only jurisdiction in the world where abortion is *fully* decriminalized),¹⁶⁰ though the nature and degree of that criminalization varies. In its construction, the criminalization of abortion in

¹⁵³ *Dobbs* (n 22).

¹⁵⁴ Elizabeth Chloe Romanis, 'The End of (Reproductive) Liberty as we Know It: A Note on *Dobbs v. Jackson Women's Health* 597 USC __ (2022)' (2023) 23 *Medical Law International* 71–87; Emily Ottley and others, '*Dobbs v Jackson Women's Health Organization* (2022): Consequences One Year On' (2023) 31 *Medical Law Review* 457–68.

¹⁵⁵ Parsons and Romanis (n 25).

¹⁵⁶ Sally Sheldon and Jonathan Lord, 'Care not Criminalisation; Reform of British Abortion Law is Long Overdue' (2023) 49 *Journal of Medical Ethics* 523–24, 523; Elizabeth Chloe Romanis, '*R v Foster*: Exemplifying the Urgency of the Decriminalisation of Abortion' (2023) 31 *Medical Law Review* 606–14.

¹⁵⁷ Christopher Stratman, 'Ectogestation and the Good Samaritan Argument' (2023) *Journal of Law and the Biosciences* <doi.org/10.1093/jlb/lbad012> accessed 4 September 2024.

¹⁵⁸ See Horn (n 5).

¹⁵⁹ Romanis, 'Abortion Access' (n 19) 385–86.

¹⁶⁰ Following the Supreme Court decision in *R v Morgentaler* [1988] 1 SCR 30.

England and Wales is one of the strictest on paper in Europe,¹⁶¹ and most convoluted in terms of the disjuncture between law and practice.¹⁶²

In England and Wales, abortion is a criminal offence. Unlawful procurement of miscarriage, carrying a maximum penalty of life imprisonment, is committed where a pregnancy is intentionally ended.¹⁶³ The Abortion Act 1967 has amended the parameters of the offence (the *actus reus*) in dictating that unlawful procurement of miscarriage is lawful under certain conditions dictating why, when, and where the abortion takes place.¹⁶⁴ These conditions are heavily proscriptive, and disproportionate given the safety and efficacy of abortion, particularly as concerns medication abortions at earlier gestations.¹⁶⁵ In practice, the majority of abortions are conducted under the ‘socio-medical’ ground¹⁶⁶ for abortion: where the pregnancy is less than twenty-four weeks’ gestation and continuing the pregnancy is a greater risk to the physical or mental health of the pregnant person or any existing children of their family than termination.¹⁶⁷ This ground has come to be interpreted broadly by the health profession and dedicated abortion service-providers: effectively, every pregnancy is legally terminable before twenty weeks’ gestation.¹⁶⁸ While this is the case, a person having an abortion must still comply with the conditions set out in the Act—they must have medical permission,¹⁶⁹ and they must administer abortion medications at their legally recognized home address¹⁷⁰ or a licensed clinic,¹⁷¹ or where the abortion is surgical, in a licensed clinic.¹⁷² Where they do not comply with legal requirements, abortion-seekers face all of the difficulties of a criminal investigation, trial, and potentially imprisonment.¹⁷³

There have been longstanding calls to decriminalize abortion in England and Wales¹⁷⁴ because the criminalization of abortion is in disjuncture with the

¹⁶¹ Sally Sheldon, ‘British Abortion Law: Speaking from the Past to Govern the Future’ (2016) 79 *Medical Law Review* 283–316.

¹⁶² Romanis, ‘Abortion Access’ (n 19).

¹⁶³ *Offences Against the Person Act 1861*, ss 58 and 59.

¹⁶⁴ *Abortion Act 1967*, s 1; Elizabeth Chloe Romanis and others, ‘The Excessive Regulation of Early Abortion Medication in the UK: The Case for Reform’ (2022) 30 *Medical Law Review* 4–32.

¹⁶⁵ See *ibid.*

¹⁶⁶ While this is sometimes termed the ‘social’ ground for abortion, ‘socio-medical’ is more accurate since the termination must still be justified in medical terms: Parsons and Romanis (n 25) 17.

¹⁶⁷ *Abortion Act 1967*, s 1

¹⁶⁸ Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing 2001) 80.

¹⁶⁹ *Abortion Act 1967*, s 1(1).

¹⁷⁰ *Abortion Act 1967*, s 1 (3D) as inserted by *Health and Social Care Act 2022*, s 178(4).

¹⁷¹ *Abortion Act 1967*, s 1 (3).

¹⁷² *ibid.*

¹⁷³ See n 156.

¹⁷⁴ International Federation of Gynecology and Obstetrics, ‘FIGO Calls for the Total Decriminalisation of Safe Abortion’ <<https://www.figo.org/resources/figo-statements/figo-calls-total-decriminalisation-safe-abortion>> accessed 14 August 2023.

necessity of abortion and no longer serves the purpose it was originally designed for: to address safety concerns about abortion when performed by unskilled persons.¹⁷⁵ Horn has argued that the need to decriminalize abortion is particularly pressing in the wake of new technologies: most especially, that of AAPT.¹⁷⁶ As I have outlined elsewhere, it is unlikely that as the law is currently constructed in England and Wales (the AA 1967) the advent of AAPT would pose a direct threat to abortion access. The 'socio-medical' ground still renders lawful early pregnancy termination,¹⁷⁷ and there is no requirement that a pregnant person eligible for lawful termination should consider or be required to choose any method of ending a pregnancy (including opting for use of APPT).¹⁷⁸ This is not the case in plenty of other jurisdictions, however, where the legality of abortion is tied directly to determinations about fetal viability.¹⁷⁹

Even in jurisdictions like England and Wales where there is not a direct threat to abortion access in the current construction of the law, this does not mean that the criminalization of abortion does not pose a threat to abortion access. Where abortion is part of the criminal code this inherently emboldens restrictions. As Baehr explains, 'if you repeal something from the law, you take it out of the law entirely. If you legalize something, you grant control to the state'.¹⁸⁰ Indeed, in England and Wales the underlying criminal offences are broad and can be broadly construed and the AA 1967, which has narrowed the boundaries of criminality, could be amended. In England and Wales, the two greatest threats to abortion access following ectogestation are in how health professionals interpret abortion legislation, and in any potential parliamentary intervention to create new restrictions.¹⁸¹

In the United States, how state legislators will respond is of great concern. With the overturning of the constitutional right to abortion, meaning States have the ability to legislate on abortion however they see fit, it is a scary prospect. In terms of what might be anticipated, while many commentators imagine

¹⁷⁵ Jackson, *Regulating Reproduction* (n 168) 84; Sally Sheldon and Kaye Wellings, 'Introduction', in Sheldon and Wellings (eds), *Decriminalising Abortion in the UK* (n 20) 9.

¹⁷⁶ Horn (n 70).

¹⁷⁷ Amel Alghrani, *Regulating Assisted Reproductive Technologies: New Horizons* (CUP 2018) 148; Emily Jackson, 'Degendering Reproduction' (2008) 16 *Medical Law Review* 346–68, 362; Elizabeth Chloe Romanis, 'Challenging the "Born Alive" Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood' (2020) 28 *Medical Law Review* 93–123, 116.

¹⁷⁸ Romanis, 'Abortion & "Artificial Wombs"' (n 47) 10.

¹⁷⁹ For example, the Netherlands, see explanation and critique: Sam Halliday and others, 'The (mis) use of fetal viability as the determinant of non-criminal abortion in the Netherlands and England and Wales' (2023) 31 *Medical Law Review* 538–63.

¹⁸⁰ Ninia Baehr, 'Deregulating Abortion' in Alison Jaggar (ed), *Living with Contradictions: Controversies in Feminist Social Ethics* (Routledge 1994) 272.

¹⁸¹ Romanis, 'Challenging the "Born Alive" Threshold' (n 177) 117.

that abortion would not be banned but that use of AAPT would be mandated in place of ‘conventional’ abortion, this is plainly fanciful. As Paterson-Brown and Watson have observed, ‘in the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, it is hard to imagine that a state which now has the power to force a pregnant person to be a walking womb against their will would give them the ‘option’ of an extremely expensive, less proven way to gestate.’¹⁸² Since abortion prohibitions in anti-abortion States are motivated by fetal-centric considerations (with little to no regard for the bodily integrity of pregnant persons), in the United States—and indeed, other jurisdictions that restrict abortion and recognize ‘fetal rights’—AAPT is likely to only fuel bans on abortion, rather than to enable people to ‘opt out of pregnancy’.¹⁸³

Despite the fact that the World Health Organization and international human rights bodies (such as the Committee of the Elimination of Discrimination Against Women) have recommended against criminal regulation of abortion,¹⁸⁴ it remains an enduring reality across the globe. This is a contemporary problem, but as ever, looking to the future to consider possibilities like AAPT reveal the extent to which the criminal regulation of abortion—even that which is generally understood as permissive today¹⁸⁵—undermines the notion of (reproductive/procreative) justice. Generally, where there are improvements in technology around pregnancy and technology—be that ultrasound (that allowed the fetus to be crystallized in images), uterus transplantation (that, for some, reifies the specialness of gestation), or AAPT (that can perform gestational work in place of persons)—there are calls to restrict abortion. A just procreative future means choices about pregnancy and gestation—this must encompass recognition of the harms of unwanted pregnancy.

¹⁸² Patterson-Brown and Watson (n 7) 88.

¹⁸³ Romanis and Horn (n 5).

¹⁸⁴ World Health Organization (n 86) 24; United Nations Committee on the Elimination of Discrimination against Women (n 126).

¹⁸⁵ For example, because abortion is not criminal in the circumstances in which most people will seek it.