



# 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?

Elizabeth Chloe Romanis <sup>\*,†</sup>

Durham Law School, Durham University, Durham, UK

\*Corresponding author. E-mail: elizabeth.c.romanis@durham.ac.uk

## ABSTRACT

‘Artificial womb’ technology is highly anticipated for the benefits it might have as an alternative to neonatal intensive care and for pregnant people. In the bioethical literature, it has been suggested that such technology will force us to rethink the ethics of abortion. Some scholars have suggested that a pregnant person may be entitled to end a pregnancy but, with the advent of ectogestation, they may not be unilaterally entitled to opt for an abortion where the other genetic progenitor does not agree. Following two high-profile cases in England and Wales in the late 70s and 80s, English law is clear that genetic progenitors who do not gestate have no say in abortion decisions. It might be argued, however, that ectogestation casts doubt on the exclusion of all claims by genetic progenitors. In this article, I assess what a legal challenge to a decision to opt for abortion might look like with the advent of this technology, by examining whether genetic progenitors have

<sup>†</sup> Dr. Elizabeth Chloe Romanis is an assistant professor of Biolaw at Durham Law School, Durham University. Chloe recently passed her Wellcome Trust-funded PhD at the University of Manchester. She was awarded the University of Manchester distinguished achievement medal for humanities research student of the year 2020 for her thesis on artificial womb technology. Chloe has published extensively on the ethico-legal issues in gestation surrounding the development of artificial womb technologies as an alternative to neonatal intensive care. Her broader research interests include abortion law and policy, choice in childbirth and decision-making in obstetrics and feminist legal theory. Chloe currently teaches Contemporary Issues in Biolaw and Contract Law at Durham Law School.

the locus standi or grounds to seek an injunction to prevent abortion. I argue that such a challenge is unlikely to be successful.

KEYWORDS: abortion, artificial wombs, putative fathers

## I. INTRODUCTION

'Putative fathers'<sup>1</sup> are legally impotent in abortion decisions in England and Wales. The law vests all decision-making power concerning abortion in doctors, in consultation with pregnant people.<sup>2</sup> The interests of genetic progenitors who do not gestate in abortion decisions are afforded no legal recognition.<sup>3</sup> This is unsurprising because decisions during pregnancy concerning the fetus necessarily involve the pregnant person's body.<sup>4</sup> However, developments in reproductive medicine have improved the ability of all persons with the capacity to become pregnant to control, by limiting or enhancing, their ability to reproduce<sup>5</sup> including alternative routes to gestate,<sup>6</sup> or potentially to opt out of gestation.<sup>7</sup> Reproductive liberty has come to be perceived as a fundamental freedom, which is sometimes claimed to be 'gender-neutral'.<sup>8</sup> Despite reproductive liberty often being seen as gender-neutral, decisions about beginning or ending a pregnancy are still limited to the discretion of those persons who do the gestation. Some bioethicists, however, have argued that anticipated 'artificial womb'

- 1 In surveying the literature on this issue, and in attempting to write about it, one of the more difficult tasks is determining the appropriate language to use to describe the various people who consider themselves invested in a decision about abortion. The terms 'mother' and 'father', when making reference to the genetic relationship of genetic progenitors to a fetus, are inappropriate, because they imply a parenting relationship that does not yet exist. 'Putative' is therefore used to indicate that the male genetic progenitor of a fetus may consider themselves to be, or that they will be soon in the future, a father.
- 2 David Nolan, *Abortions: Should Men Have a Say?* in ABORTION LAW AND POLITICS TODAY, 221 (E. Lee, eds, 1998). I refer to pregnant people, rather than pregnant women, in recognition of the fact that not all persons with the physiology to get pregnant, and who need abortions, identify as women. This is not to deny that the vast majority of people who do get pregnant and need abortions identify as women or that this has been an important part of the historical and structural oppression of pregnant people, but to be inclusive to all of those persons who are non-binary or identify as men and may also be in need of abortion care. I have, however, specifically referred to pregnant women where quoting directly from other people, or where the law specifies pregnant woman rather than pregnant person, as there are times when this might be material. I have also specifically used the term woman where this is clearly how a specific person identifies to avoid misgendering them.
- 3 Marie Fox, *Abortion Decision-Making—Taking Men's Needs Seriously*, in ABORTION LAW AND POLITICS TODAY, 202 (E. Lee, ed., 1998).
- 4 There are convincing metaphysical arguments that the foetus is a *part of* the pregnant person's body. See Elselijn Kingma, *Were you a part of your mother?* 128 MIND 609 (2019).
- 5 E.g. Jennifer Bard, *Immaculate Conception? How will Ectogenesis Change Current Paradigms of Social Relationships and Values?* in ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION, 149 (S. Gelfand and J. Shook, eds, 2006); Rosemary Tong, *Out of Body Gestation: In Whose Best Interests?* in ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION, 59 (S. Gelfand and J. Shook, eds, 2006);
- 6 Gestational surrogacy, uterus transplantation and potentially ectogestation (facilitated by 'artificial womb' technology).
- 7 See, for example, the ability to opt out of gestation later in pregnancy facilitated by 'artificial womb' technology: Natasha Hammond-Browning, *A New Dawn: Ectogenesis, Future Children and Reproductive Choice*, 14 CONTEMPORARY ISSUES IN LAW 349 (2018); Elizabeth Chloe Romanis, *Artificial Womb Technology and the Choice to Gestate Ex Utero: Is Partial Ectogenesis the Business of the Criminal Law?* 28 MED. LAW. REV. 342 (2020).
- 8 J RAYMOND, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN'S FREEDOM*, 79 (Spinifex Press, 1995).

technology would mean that genetic progenitors who do not gestate<sup>9</sup> should have a greater say in abortion decisions.<sup>10</sup>

Two research teams in the United States and Western Australia/Japan have continued to publish successful results<sup>11</sup> of animal testing of 'artificial womb prototype devices' since they first announced successful designs in 2017.<sup>12</sup> The intention is that, by continuing the process of gestation ex utero, these devices might be able to reduce the incidence of morbidity and mortality amongst neonates delivered prematurely.<sup>13</sup> By continuing the process of gestation, these devices assist in the continued process of creation of human entities artificially. This process is termed partial ectogestation;<sup>14</sup> the transfer of an fetus that was initially gestated in a pregnant person's womb to an 'artificial womb' to allow it to develop to term (around 37 weeks).<sup>15</sup> Partial ectogestation is sought after as an alternative to dangerous/uncomfortable pregnancies for pregnant people experiencing health risks,<sup>16</sup> and a superior alternative to conventional neonatal intensive care.<sup>17</sup> Several scholars argue that since 'artificial wombs' bring the possibility of pregnancy termination that does not necessarily result in fetal death,<sup>18</sup> and the potential erasure of the established viability threshold,<sup>19</sup> their introduction forces us

- 9 These arguments are usually made in respect of 'putative fathers' e.g. male genetic progenitors. But it is plausible that these claims would extend to other non-gestating genetic progenitors, for example, in a situation in which a gestational surrogate is carrying a pregnancy. In this instance there will be both a male and female non-gestational genetic progenitor. I do not consider the case of gestational surrogacy in this article.
- 10 Iain Brassington, *The Glass Womb*, in *REPROGEN-ETHICS AND THE FUTURE OF GENDER*, (F. Simonstein, ed., 2009); Joona Räsänen, *Ectogenesis, abortion and a right to the death of the fetus*, 31 *BIOETHICS* 697 (2017).
- 11 Emily Partridge and others, *An Extrauterine System to Physiologically Support the Extreme Premature Lamb*, 8 *NAT. COMMUN.* 15112 (2017); Haruo Usuda and others, *Successful use of an artificial placenta to support extremely preterm ovine fetuses at the border of viability*, 221 *AM. J. OBSTET. GYNECO.* 69.e1 (2019).
- 12 *Id*; Haruo Usuda and others, *Successful maintenance of key physiological parameters in preterm lambs treated with ex vivo uterine environment therapy for a period of 1 week*, 217 *AM. J. OBSTET. GYNECO.* 457.e1 (2017).
- 13 *Id*; Elizabeth Chloe Romanis, *Artificial womb technology and the frontiers of human reproduction: conceptual differences and potential implications*, 44 *J. MED. ETHICS.* 751 (2018).
- 14 It is also referred to as 'partial ectogenesis'. I use ectogestation in recognition of the importance of distinguishing ectogestation from 'ectogenesis' see: Elselijn Kingma and Suki Finn, *Neonatal Incubator or Artificial Womb? Distinguishing Ectogestation and Ectogenesis using the Metaphysics of Pregnancy*, 34 *BIOETHICS* 354 (2020).
- 15 Christopher Kaczor, *Artificial Wombs and Embryo Adoption*, in *THE ETHICS OF EMBRYO ADOPTION AND THE CATHOLIC TRADITION: MORAL ARGUMENTS, ECONOMIC REALITY AND SOCIAL ANALYSIS*, 310 (S. Bracman and D. Weaver, eds, 2003).
- 16 Romanis, *supra* note 7, at 349–250.
- 17 Romanis, *supra* note 13, at 752; Kingma and Finn, *supra* note 14, at 355.
- 18 Robert Favole, *Artificial Gestation: New Meaning for the Right to Terminate Pregnancy*, 21 *ARIZ. L. REV.* 755 (1979); Peter Singer and Deanne Wells, *Ectogenesis*, in *ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION*, (S. Gelfand and J. Shook, eds, 2006); Amel Alghrani, *The Legal and Ethical Ramifications of Ectogenesis*, *ASIAN JOURNAL OF WTO AND INTERNATIONAL HEALTH LAW AND POLICY* 189 (2007); Vernellia Randall and Tshaka Randall, *Built in Obsolescence: The Coming End to the Abortion Debate*, 4 *JOURNAL OF HEALTH & BIOMEDICAL LAW* 291 (2008); Christine Overall, *Rethinking Abortion, Ectogenesis and Fetal Death*, 46 *J SOC PHILOS.* 126 (2015); Eric Mathison and Jeremy Davis, *Is there a right to the death of the fetus?* 31 *BIOETHICS* 313 (2017); Perry Hendricks, *There is no right to the death of the fetus*, 32 *BIOETHICS* 395 (2018); Bruce Blackshaw and Daniel Rodger, *Ectogenesis and the case against the right to the death of the foetus*, 33 *BIOETHICS* 76 (2019); William Simkulet, *Abortion and Ectogenesis: Moral Compromise*, 46 *J. MED. ETHICS* 93 (2020).
- 19 I. Glenn Cohen, *Artificial Wombs and Abortion Rights*, 47 *HASTINGS CENT. REP.* (2017); Romanis, *supra* note 13, at 753.

to rethink the ethics of abortion.<sup>20</sup> Some argue that, if it is possible for gestation to be continued by a machine *ex utero*, a pregnant person would have the moral right to opt out of pregnancy, but they would not be unilaterally entitled to choose a method of terminating pregnancy that results in fetal death. Some scholars<sup>21</sup> submit that abortion resulting in fetal death would never be justifiable in these circumstances; others<sup>22</sup> argue that abortion would be justifiable but potentially only where both genetic progenitors agree. Others have also explored questions about whether the subject of an 'artificial womb' could be terminated by turning the womb off.<sup>23</sup> There would also be questions here about the extent to which both genetic progenitors should be involved in any decision to end ectogestation (and thus terminate the subject of the artificial womb),<sup>24</sup> but for the purposes of this article, I will set aside questions about the legalities of this to focus on abortion.

In this article, I address these claims about abortion, and specifically the involvement of non-gestating genetic progenitors, from an ethico-legal perspective. While there has been much debate about the abortion decision with this technology available, there has been limited examination of such claims in the context of the legal framework in England and Wales. Assuming the availability of *partial* ectogestation, can a genetic progenitor/putative (non-gestational) parent assert a *legal* right to parent a developing human entity because they would be able to do so without forcing a person to remain pregnant? For several decades, it has been express legal orthodoxy that 'husbands have no standing to oppose an abortion agreed to by the wife, nor has any putative "father" any right to intervene to save the fetus, nor can anyone argue that the fetus itself has legal personality so enabling them to act as its "guardian" and prevent an abortion.'<sup>25</sup> The willingness of non-gestating genetic progenitors to challenge a pregnant person's decision to terminate a pregnancy has been evidenced by cases in England,<sup>26</sup> Scot-

20 Singer and Wells, *supra* note 18; Blackshaw and Rodger, *supra* note 18; Christopher Stratman, *Ectogestation and the Problem of Abortion*, PHILOSOPHY & TECHNOLOGY (2020) doi.org/10.1007/s13347-020-00427-2.

21 Hendricks, *supra* note 18; Blackshaw and Rodger, *supra* note 18.

22 Brassington, *supra* note 10; Räsänen, *supra* note 10; Evie Kendal has also considered this question, though taking the opposite view to Räsänen (and did not engage with Brassington) to argue that non-gestational genetic progenitors would have no say in the decision of how to terminate a pregnancy even with the advent of ectogestation. See: Evie Kendal, *Pregnant people, inseminators and tissues of human origin: how ectogenesis challenges the concept of abortion*, 38 MONASH BIOETH REV 197 (2020).

23 A. ALGHRANI, REGULATING ASSISTED REPRODUCTIVE TECHNOLOGIES: NEW HORIZONS, 148 (Cambridge University Press, 2018); Daniel Rodger, Nicholas Colgrove and Bruce Blackshaw, *Gestaticide: killing the subject of an artificial womb*, J. MED. ETHICS (2020) 10.1136/medethics-2020-106708.

24 The issue here is interesting because there are some more complexities in relation to this question than that of abortion that I outline in this article. This is because once in an artificial womb the same arguments cannot be made about what is done to the developing entity affecting the physicality of a pregnant person. This means it is possible to afford the developing human entity more respect without it impacting heavily on the autonomy of an existing individual. However, I think there is some room to reflect on whether the issues I will raise with regard to the gendered aspects of childrearing might also still have some bearing on whether an artificial womb can be 'switched off'. On a related note there might be questions about whether a (putative) father would have a say in the decision to use experimental 'artificial womb' technology to sustain a foetus—see: Amel Alghrani and Margot Brazier, *What is it? Whose it? Re-positioning the fetus in the context of research?* 70 CAMB. LAW J 51 (2011).

25 M. BRAZIER AND E. CAVE, MEDICINE, PATIENTS AND THE LAW, 426 (Manchester University Press, 2016).

26 *Paton v British Pregnancy Advisory Service* [1979] QB 276 (QB); *C v S (Foetus: Unmarried Father)* [1988] 1 QB 135 (QB).

land,<sup>27</sup> Canada,<sup>28</sup> and the United States.<sup>29</sup> In England and Wales, the cases of *C v S*<sup>30</sup> and *Paton*,<sup>31</sup> heard over two decades ago, appear to have 'put to bed' abortion challenges by genetic progenitors (in all of these cases men). However, some have raised the question of whether ectogestation might 'enhance or diminish men's [or other non-gestational genetic progenitor's] rights to have input in abortion decisions?'<sup>32</sup> It might be suggested that partial ectogestation casts doubt on the exclusion of all legal claims by non-gestational genetic progenitors<sup>33</sup> to intervene in the abortion decision. The claims at issue are different: the claim is not that the pregnant person has no right to abortion, but that they must submit to a particular *kind* of abortion (that does not interfere with the non-gestating genetic progenitor's 'right to parent'). It could be argued, therefore, that the matter should be revisited.

It is important to consider this question in light of the increasing volume of literature addressing the rights of genetic progenitors with 'artificial wombs'.<sup>34</sup> While the utility of applying contemporary legal frameworks to future technologies might be questioned,<sup>35</sup> I believe the exercise is essential to highlight any potential conceptual flaws (or absence of) in the way the law is *currently* constructed; and that discussion about what the law should be can only follow an understanding of what the law is. The law is often slow to react to advances in science and technology. It is not unimaginable that, if ectogestative technology came to fruition, there would be attempts by non-gestating genetic progenitors to legally challenge pregnant people's decisions about their pregnancy (and thus their body); therefore, it is important to examine what this challenge might look like, and how the law should respond to it.

In this article, I consider what a potential legal challenge by a genetic progenitor might look like in England and Wales, and the likelihood of such a challenge succeeding. Before examining this claim, I will first establish what partial ectogestation is (part II) and how and why abortion would remain lawful in England and Wales following the advent of this technology (part III). In part IV, I outline the reasons why some bioethicists have suggested that the question of who has a say in decisions about abortion might change with the advent of ectogestation, and why we should consider what a potential legal challenge might look like. Finally, I demonstrate why a

27 *Kelly v Kelly* [1997] SC 285 (Scotland).

28 *Tremblay v Daigle* (1989) 2 S.C.R. 530 (Canadian Supreme Court).

29 *Planned Parenthood v Casey* 1992 112 U.S. 2791 (United States Supreme Court).

30 *C v S*, *supra* note 26.

31 *Paton*, *supra* note 26.

32 Scott Gelfand, *Introduction*, in *ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION*, (S. Gelfand and J. Shook, eds, 2006).

33 Though not the subject of this article, I note here there may also be situations in which there are more persons involved in the conception and gestation of a foetus than two genetic progenitors who conceive naturally, for example, where the putative parents use gamete donors, or a gestational surrogate. I will refer to both genetic progenitors and/or putative parents (those who intend to have a parenting relationship with the gestating entity if/when it is born) where necessary, noting that these may sometimes be the same people.

34 E.g. Brassington, *supra* note 10; Räsänen, *supra* note 10.

35 Horn, for example, stipulates that 'the literature on . . . [ectogestation] and abortion that emerges from legal scholarship is frequently preoccupied with accepting the law as it is rather than exploring law as it could be.' See C. Horn, *Gestation Beyond Mother Machine: Legal Frameworks for Artificial Wombs, Abortion and Care*, (2020) (PhD thesis, Birkbeck University of London), at 152. Adopting a doctrinal approach to examining what the law is, is not the same as accepting that this is how the law should be.

non-gestating genetic progenitor has—and would continue to have—no locus standi to seek an injunction to prevent a pregnant person having an abortion (part V), and even if they could seek an injunction, there would be no grounds on which it would be awarded such that a pregnant person would be prevented from having an abortion (part VI). The availability of partial ectogestation, I argue, does not legally empower a genetic progenitor to participate in decisions about *how* to terminate a pregnancy.

## II. PARTIAL ECTOGESTATION: ARTIFICIAL AMNION AND PLACENTA TECHNOLOGY<sup>36</sup>

In 2017, two teams of working research groups in the United States and Western Australia/Japan published results of 'artificial womb prototypes'<sup>37</sup> and they continue to regularly publish their success with animal testing.<sup>38</sup> A third team based in the Netherlands announced that they had received funding to build their own prototype in 2019.<sup>39</sup> As progress has continued to maintain momentum, many have speculated that a functional 'artificial womb' might be available in the next 5–10 years.<sup>40</sup> While these technologies are often referred to as 'artificial wombs', they are more accurately, as a result of their function, described as an artificial placenta (AAPT).<sup>41</sup>

AAPT prototypes are sealed systems, in which the subject is surrounded by artificial amniotic fluid with cannula acting as an umbilical cord and assisted by a pump-less oxygenator circuit. These features enable the subject, termed the 'gestateling',<sup>42</sup> to continue to develop vital organs, and with them the capacity for independent life, rather than being forced to adapt to the external environment. The technology, in more directly replicating the function of the placenta, enables the gestateling to maintain fetal physiology and physicality in order to continue to develop.<sup>43</sup> This technology is designed with the intention of revolutionizing neonatal intensive care,<sup>44</sup> because of the inherent limitations of conventional technologies in preterm care continue to result in high incidences of morbidity and mortality.<sup>45</sup> AAPT might procure better outcomes for preterms and parent(s) by minimizing the damage done to the developing human entity's body by being in the external environment prematurely, and the continuation of gestation would enable their complete development before 'birth'. It is also stipulated that ectogestation might be able to save human entities delivered even more prematurely than can survive in conventional care because the devices are not subject to

36 This term was first adopted by Kingma and Finn, *supra* note 14, at 364.

37 Partridge and others, *supra* note 11; Usuda and others, *supra* note 12.

38 E.g. Matthew Hornick and others, *Technical feasibility of umbilical cannulation in midgestation lambs supported by the EXTra-uterine Environment for Neonatal Development (EXTEND)*, (2019) 43 ARTIF. ORGANS 1154 (2019); Usuda and others, *supra* note 12.

39 Nicola Davies, *Artificial Womb: Dutch researchers given €2.9 m to develop prototype*, <https://www.theguardian.com/society/2019/oct/08/artificial-womb-dutchresearchers-given-29m-to-develop-prototype> (accessed Apr. 21, 2020).

40 Partridge and others, *supra* note 11, at 11.

41 Kingma and Finn, *supra* note 14, at 364.

42 This is the term used to describe the subject of the artificial placenta: *supra* note 13, at 753.

43 For a full defense of this conceptual distinction see *id*; Elizabeth Chloe Romanis, *Artificial Womb Technology and the Significance of Birth: Why Gestatelings Are Not Newborns (or Fetuses)*, 45 J. MED. ETHICS 728 (2019); Kingma and Finn, *supra* note 14.

44 Partridge and others, *supra* note 11, at 11; Romanis, *supra* note 13, at 753.

45 Romanis, *supra* note 13, at 752.



the *same* constraints of gestational maturity.<sup>46</sup> AAPT, if proved successful, could come to replace neonatal intensive care and potentially influence medical decision-making about complex pregnancies.<sup>47</sup> AAPT may also change lay and medical perceptions of fetal viability.<sup>48</sup>

For the purposes of argument, I will assume this technology (that, at present, is only in the early stages of animal testing) is available. It is important to highlight, however, that AAPT as it is currently being developed is only capable of facilitating *partial* ectogestation. The function of the devices is entirely dependent on the subject having fetal physiology (for example, because the device is reliant on the subject's own heartbeat to assist the oxygenator circuit).<sup>49</sup> The process of embryogenesis—the formation of the critical vital organs between embryo and fetus—is far more complex and little is known about how this might be artificially facilitated.<sup>50</sup> Thus, when we discuss AAPT, we are not discussing a device that can grow human entities 'from scratch to birth', but a device that can support the continued gestation of human entities delivered prematurely (at least 13 weeks or beyond). It is also pertinent to note that the necessary process of 'fetal extraction' to remove a fetus from a person's womb for continued gestation in AAPT would inevitably resemble some form of a caesarean section performed on the pregnant person. A C-section is the surgical opening of the abdomen and uterus to deliver the fetus. Risks include excessive blood loss, clotting, infection and the use of anesthetic carries its own risks.<sup>51</sup> C-sections are, however, established procedures; a 'fetal extraction' procedure would be an 'experimental C-section'.<sup>52</sup> Steps would have to be taken to ensure the fetus could be moved to an ectogestative device safely.<sup>53</sup> Moreover, earlier in pregnancy, the procedure is much more dangerous and more likely to damage a person's womb.<sup>54</sup>

### III. PARTIAL ECTOGESTATION AND ABORTION

AAPT brings a wealth of possibilities,<sup>55</sup> but it is the question of the permissibility of abortion that repeatedly captures the imagination of the bioethical literature.<sup>56</sup> The

46 *Id.* at 752. AAPT will be subject to some limitations—this is discussed in the next section.

47 Romanis, *supra* note 7, at 349–350.

48 Viability is defined as 'the ability [for a developing foetus] to survive independent of a pregnant woman's womb'. It has been argued that viability should be interpreted as the ability for a developing human entity to survive ex gestation: Elizabeth Chloe Romanis, *Is 'viability' viable? Abortion, conceptual confusion and the law in England and Wales and the United States*, J LAW BIOSCI (2020) doi.org/10.1093/jlb/lcaa059. We will return to this point later in this article.

49 I am grateful to Elselijn Kingma and Joanne Verweij for ongoing discussions about the workability of this technology and its limitations.

50 Emily Jackson, *Degendering Reproduction*, 16 MED. LAW REV. 346, 358 (2008).

51 National Health Service, *Caesarean Section; Risks*, <https://www.nhs.uk/conditions/caesarean-section/risks/> (accessed Aug. 4, 2020).

52 Julien Murphy, *Is Pregnant Necessary? Feminist Concerns about Ectogenesis*, in ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION, 34 (S. Gelfand and J. Shook, eds, 2006).

53 For example, the administration of drugs to prevent fluid from draining from the lungs.

54 I am grateful to Dr Joanne Verweij for discussions about the nature of this procedure.

55 Most notably, the technology could provide aid to pregnant people experiencing dangerous, but wanted pregnancies, see Hammond-Browning, *supra* note 7 and Romanis, *supra* note 7.

56 See *supra* note 18; Horn, *supra* note 35; Claire Horn, *Ectogenesis is for Feminists*, 6 CATALYST: FEMINISM, THEORY, TECHNOLOGY 1 (2020).

technology is heralded as introducing the possibility of 'termination of pregnancy that does not result in fetal death'.<sup>57</sup> Some scholars speculate that AAPT could ensure the survival of developing human entities much earlier in gestation, to the point that it becomes an 'alternative' to abortion. In this section, I demonstrate that abortion is and should remain lawful notwithstanding the development of AAPT. This is a necessary preliminary to discussion of the rights of non-gestating genetic progenitors in abortion decisions after AAPT.

### III. A. The Law

Abortion remains a criminal offence in England and Wales under the Offences Against the Person Act 1861 (OAPA 1861) and the Infant Life (Preservation) Act 1929 (ILPA 1929). The OAPA 1861 stipulates that a person commits the offence of unlawfully procuring miscarriage, where they take any steps to procure miscarriage, by any means, with the intention of procuring a miscarriage.<sup>58</sup> The ILPA 1929 creates the offence of 'child destruction' committed when any person, with the intention of destroying the life of a 'child capable of being born alive', by willful act causes a 'child capable of being born alive' to die before it has been born.<sup>59</sup> Termination of pregnancy is only legally permissible under 'clearly invoked exceptions'<sup>60</sup> in the Abortion Act 1967 (AA 1967).<sup>61</sup> Under section 1 (1)(a) an abortion is lawful before 24 weeks gestation where two registered medical practitioners agree (having formed their opinion in good faith) that continuing pregnancy poses greater risk to the life, physical or mental health of the pregnant person<sup>62</sup> or that of existing children of their family than if the pregnancy were terminated. When determining the extent to which continuing a pregnancy poses a risk to a person's health 'account may be taken of the pregnant woman's actual or reasonably foreseeable environment'.<sup>63</sup> After 24 weeks, abortion is only legally permissible in a much narrower set of circumstances.<sup>64</sup>

57 Though, it is already well established that termination of pregnancy need not result in fetal death in some circumstances later in pregnancy; for example, where pregnancies are induced early in dangerous situations with the express aim of 'saving' both pregnant person and their foetus.

58 Offences Against the Person Act 1861, s.58. A pregnant person only unlawfully procures their miscarriage if they are pregnant, whereas other persons can be found guilty of this offence even where the person whose miscarriage they intended to procure was not actually pregnant. It is also important to note that this Act specifically refers to pregnant women. However, I believe that the statute can be read to be inclusive of persons with different gender identities who are pregnant.

59 Infant Life (Preservation) Act 1929, s.1 (1).

60 Amel Alghrani, *Regulating the Reproductive Revolution: Ectogenesis—A Regulatory Minefield?* in LAW AND BIOETHICS: VOLUME 11, 309–310 (M. Freedman, ed., 2008).

61 Abortion Act 1967, s.1 (unlawful procurement of miscarriage) and s.5 (child destruction).

62 The Act specifically refers to pregnant women. I believe that the Abortion Act 1967 is likely to apply to all pregnant people, and not just women, but an anonymous reviewer points out that it is important to specify the exact language that is used in the statute. There have been recent cases related to reproduction in which judges have been very focused on the language used in statutes governing reproductive technologies. For example, in the first instance judgment of *R (on the application of TT) v Registrar General for England and Wales (AIRE Centre intervening)* [2019] EWHC 2384 (FAM), Sir Andrew McFarlane did elucidate that where a statute refers specifically to women, it need not necessarily mean that it can always be read to encompass men. I do not believe that the fact the Abortion Act 1967 refers specifically to pregnant women would prevent a person of a different gender identity from obtaining an abortion.

63 Abortion Act, s.1 (2).

64 Abortion is lawful after 24 weeks by virtue of the Abortion Act 1967 only where necessary to prevent grave permanent injury to the physical or mental health of the woman per s.1(1)(b), where continuing



There is no legal right to have an abortion;<sup>65</sup> a person must convince a doctor that they require an abortion and that they are entitled to it.<sup>66</sup> While the law is thus framed in a way that perpetuates abortion stigma,<sup>67</sup> access remains relatively liberal under section 1(1)(a); the criterion under which the majority of abortions are performed.<sup>68</sup> This section is so broad it renders 'every pregnancy lawfully terminable within the first 24 weeks'.<sup>69</sup> Early abortions are substantially less risky than continuance of pregnancy,<sup>70</sup> and therefore, almost all pregnant people before 20 weeks gestation satisfy this criterion.<sup>71</sup> Furthermore, though the law is such that pregnant people are not themselves empowered to make the decision, the information that they present to the consulting professional when accessing abortion care 'is going to be at the heart of the matter . . . if . . . [medical professionals] are to arrive at a decision in good faith'.<sup>72</sup>

### III. B. Abortion Remains Lawful Notwithstanding AAPT

It has been widely noted that the introduction of AAPT would not affect abortion provision under section 1(1)(a) of the AA 1967 as it is currently constructed.<sup>73</sup> The AA 1967 does not require that a pregnant person whose doctor believes they are eligible for legal termination should consider, or choose, any form of abortion in particular—especially any form of termination that might secure freedom from pregnancy without compromising fetal development. The strongest argument that they must do so is made by interpreting the ILPA 1929 to mean that a fetus is 'capable of being born alive' at the point that it is capable of being transferred to AAPT.<sup>74</sup> This would have the effect of criminalizing the killing of such a fetus, and so the only option—if a person wanted to end their pregnancy—would be to submit to 'extraction' for AAPT. Even if this case

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the pregnancy risks the life of the pregnant person per s.1(1)(c), or where there is a substantial risk that the foetus is seriously handicapped per s.1(1)(d).

65 Jo Bridgeman, *A Woman's Right to Choose?* in ABORTION LAW AND POLITICS TODAY, 77 (E. Lee, ed., 1998).

66 Emily Jackson, *Abortion, Autonomy and Prenatal Diagnosis*, 9 SOCIAL & LEGAL STUDIES 467, 471 (2000).

67 See S. SHELTON, *BEYOND CONTROL: MEDICAL POWER AND ABORTION LAW* (Pluto Press 1997).

68 In 2019, 99% of abortions in England and Wales were carried out under a ground stipulated in s.1(1)(a). See Department of Health and Social Care, *Abortion Statistics, England and Wales: 2019*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/891405/abortion-statistics-commentary-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891405/abortion-statistics-commentary-2019.pdf) (accessed Oct. 26, 2020), 10.

69 E. JACKSON, *REGULATING REPRODUCTION: LAW, TECHNOLOGY AND AUTONOMY*, 80 (Hart Publishing, 2001).

70 Brazier and Cave, *supra* note 25, at 404–405.

71 There is, therefore, a substantial period of time in which pregnant people are effectively empowered, in consultation with doctors, to elect for termination of pregnancy. This is not to say that 24 weeks is an adequate amount of time for every pregnant person to access care—some pregnant people need access to care later in gestation e.g. those who are older or younger so do not recognize their symptoms as pregnancy: Leah Eades, *Social realities, biological realities: The 24-week fetus in contemporary English abortion activism*, 74 WOMEN'S STUD. INT. FORUM 20, 24 (2019).

72 Paton, *supra* note 26, at 281 per Baker P.

73 Alghrani, *supra* note 23, at 148; Jackson, *supra* note 50, at 362; Elizabeth Chloe Romanis, *Challenging the 'Born Alive' Threshold: Fetal Surgery, Artificial Wombs, and the English Approach to Legal Personhood*, 28 MED. LAW REV. 93, 116 (2020); Horn, *supra* note 35, at 81; Victoria Adkins, *Impact of ectogenesis on the medicalisation of pregnancy and childbirth*, J. MED. ETHICS doi: 10.1136/medethics-2019-106004 (2020).

74 Romanis, *supra* note 73; Romanis, *supra* note 48.

could be persuasively made,<sup>75</sup> section 1(1)(a) still provides a defense.<sup>76</sup> A suggested amendment to the AA 1967 that a pregnant person should be obligated to end their pregnancy in a way that increases the likelihood of fetal survival after the fetus was 'capable of being born alive' was defeated in the House of Lords debate in 1990.<sup>77</sup> In the absence of this requirement in current law, unless Parliament were to repeal or amend the OAPA 1861, ILPA 1929 and AA 1967 in future, pregnant people would retain the ability (with their doctor's permission) to seek abortion under current provisions.

The form that abortion takes depends on the gestational stage of the pregnancy and the pregnant person's preferences. A competent pregnant person is entitled to accept or refuse any medical procedure, 'or to choose one rather than another of the treatments being offered'.<sup>78</sup> Thus, it would be possible for a pregnant person to refuse consent to 'fetal extraction' for partial ectogestation and opt instead for early medical abortion (before 12 weeks gestation)<sup>79</sup> or surgical abortion.

Furthermore, English law recognizes that people have a right to choose between reasonable treatment alternatives depending on their values, wishes, and preferences.<sup>80</sup> In *Montgomery*, Lady Hale explained:

As NICE (2011) puts it "pregnant women should be offered evidence-based information and support to enable them to make informed decisions and their care and treatment" (para 1.1.1.1). Gone are the days when it was thought that, on becoming pregnant, a woman lost, not only her capacity, but also her right to act as a genuinely autonomous human being.<sup>81</sup>

In the AAPT context, the decision about *how* to terminate a pregnancy would not necessarily have to be made *solely* on the basis of not wanting to be pregnant anymore (or on purely medical grounds), but instead would be a matter of a pregnant person's preferences for abortion *or* AAPT.<sup>82</sup>

The biggest threat in English abortion law as currently constructed to a pregnant person's access to abortion is the result of the legislation being a firmly medical model—thus allowing doctors to refuse to provide abortion care. A doctor need not perform abortion when they have a conscientious objection, unless necessary to save the life of a pregnant person or prevent serious permanent damage to their health.<sup>83</sup> The greatest

75 I will return to this point later in this article.

76 Abortion Act, s.5 as amended by the Human Fertilisation and Embryology Act, s.37 stipulates that 'no offence under the Infant Life (Preservation) Act shall be committed by a registered medical practitioner who terminates a pregnancy in accordance with the provisions of this Act'.

77 HL Vol 522 Cols 1043–1087.

78 *Re T (Adult: Refusal of Treatment)* [1993] FAM 95, at 102 per Lord Donaldson.

79 The World Health Organization notes that early medical abortion is very safe before 9 weeks' gestation and makes a 'weak' recommendation that early medical abortion can be administered until approximately 12 weeks' gestation, though there is more limited evidence on the safety of early medical abortion between 9 and 12 weeks. See: World Health Organization, *Safe abortion: Technical and Policy Guidance for Health Systems*, [https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434\\_eng.pdf?sequence=1](https://apps.who.int/iris/bitstream/handle/10665/70914/9789241548434_eng.pdf?sequence=1) (accessed Oct. 22, 2020).

80 *Montgomery v Lanarkshire* [2015] UKSC 11 The ratio of this case emphasizes that there is a responsibility on doctors to disclose reasonable alternatives at para 46 per Lords Kerr and Reed.

81 *Id.*, at para 116 per Lady Hale.

82 I am grateful to Professor Emma Cave for discussion of *Montgomery v Lanarkshire* in this context.

83 Abortion Act 1967, s.4.

danger is thus an unregulated trend of doctors being increasingly uncomfortable with abortion as AAPT becomes more available.<sup>84</sup> However, because of the permissive framing of section 1(1)(a) and because there are a substantial number of medical professionals committed to the idea that abortion is essential healthcare,<sup>85</sup> I believe this to be unlikely.<sup>86</sup>

### III. C. Abortion Remains Necessary Notwithstanding AAPT

Convincing defenses of the necessity of abortion remaining available even if AAPT comes to fruition have been advanced by Cannold,<sup>87</sup> Horn,<sup>88</sup> Romanis and Horn<sup>89</sup> and Kendal<sup>90</sup> amongst others. I will briefly consider these arguments here to demonstrate that the availability of ectogestation does not prevent abortion from being considered a reasonable treatment alternative (per *Montgomery v Lanarkshire*)<sup>91</sup> in the context of ending pregnancy.

Singer and Wells argue that 'freedom to choose what happens to one's body is one thing; freedom to insist on the death of a being that is capable of living outside one's body is another thing.'<sup>92</sup> I agree with Kendal, however, that 'common justifications for the permissibility of abortion can also serve as arguments for why the existence of artificial wombs need not compromise abortion rights.'<sup>93</sup> Questions about the permissibility of abortion following the advent of AAPT will *always* be questions about a pregnant person's body and their bodily autonomy. Partial ectogestation 'begins with a pregnant person's body and necessarily involves the body of a pregnant person.'<sup>94</sup> The fetus is a physical part of the pregnant person.<sup>95</sup>

84 Romanis, *supra* note 73, at 116; there is little empirical evidence as yet to support this conclusion. There has, however, been one study in which 41% of Australian doctors indicated that AAPT would change their opinions about abortion provision at 22 weeks gestation: Lydia Di Stefano and others, *Ectogestation ethics: The implications of artificially extending gestation for viability, newborn resuscitation and abortion*, 34 *BIOETHICS* 371, 377 (2020).

85 The vast majority of abortions in the UK are provided by charitable providers such as the British Pregnancy Advisory Service. It is reasonable to suppose that the staff who choose to work for this service share this belief.

86 Even those doctors who wish to refuse to provide abortion must refer people to doctors that will provide abortion where lawful per s.4 of the Abortion Act 1967. The difficulty with this is, however, that even where doctors attempt to fulfill this obligation, their communication of the fact that abortion is permissible in the person's circumstances could easily be ineffective. Jackson notes that many people can 'mistake their doctor's lack of cooperation as an indication of their ineligibility for termination', and observes that others, especially those with a limited education, could lack the knowledge or confidence to seek advice elsewhere if their doctor was unhelpful or even actively obstructive: *supra* note 69, at 86.

87 Leslie Cannold, *Women, Ectogenesis and Ethical Theory*, 12 *J APPL PHILOS.* 55 (1995).

88 Horn, *supra* note 35; Horn, *supra* note 56.

89 Elizabeth Chloe Romanis and Claire Horn, *Artificial Wombs and the Ectogenesis Conversation: A Misplaced Focus? Technology, Abortion and Reproductive Freedom*, 13 *INTERNATIONAL JOURNAL OF FEMINIST APPROACHES TO BIOETHICS* 174 (2020).

90 Kendal, *supra* note 22.

91 *Montgomery v Lanarkshire*, *supra* note 80.

92 Singer and Wells, *supra* note 18, at 12.

93 Kendal, *supra* note 22, at 203.

94 E. C. Romanis, *Regulating the 'Brave New World': Ethico-Legal Implications of the Quest for Partial Ectogenesis*, (2020) (PhD Thesis, University of Manchester), at 40.

95 Dawn Johnsen, *From Driving to Drugs: Governmental Regulation of Pregnant Women's Lives After Webster*, 138 *UNIV. PA. LAW REV.* 179, 180 (1989); and see Kingma, *supra* note 4. Kendal, *supra* note 22, also observes

The process of opting for ectogestation and of having an abortion is hugely different to the extent that they ought not be considered comparable in either experience or effect. Most people who seek to end a pregnancy want to do so as quickly as possible. The vast majority of abortions are carried out before 13 weeks' gestation.<sup>96</sup> At this point in a pregnancy, the entity being gestated is undergoing the process of embryogenesis, and as noted, there is no evidence that AAPT as currently conceptualized would be capable of supporting a developing human entity in this process. Thus, a person could not opt for AAPT in the same time frame that they could an abortion. Furthermore, the usual process of ending a pregnancy before 13 weeks is early medical abortion—the taking of two medications (misoprostol and mifepristone) that induce miscarriage. The process of fetal extraction for AAPT would be major surgery,<sup>97</sup> and therefore far more invasive.<sup>98</sup> The extent to which C-sections can have severe health implications for people is not often emphasized in the ectogestation literature—these procedures leave a permanent scar and involve months of recovery in which the abdominal muscles literally have to reform after the fascia that connects them is cut apart. Recovery can be painful and slow. C-sections can sometimes prevent the person safely opting for a vaginal delivery of a wanted pregnancy in future<sup>99</sup> (which effectively denies the person control over their body now and in potential future births). There also likely would be severe psychological consequences where such invasive surgery feels forced or coerced.<sup>100</sup> Medical abortion and 'extraction' are not at all comparable in terms of the impact on a person's body, the potential side effects, the experience, and the implications for a person's conception of self. The same can also be said of surgical abortion procedures, dilation, and extraction, which are still less invasive.<sup>101</sup>

Few scholars who question the permissibility of abortion in the advent of AAPT take the vast differences in the procedures of abortion and fetal extraction to be material. Stratman, for example, suggests that it is not clear that fetal extraction would necessarily be more invasive or risky than abortion, claiming 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'.<sup>102</sup> Blackshaw and Rodger assert that there can still be an obligation to undergo fetal extraction even where it is 'significantly worse than abortion, but not

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that 'fetuses are most accurately classified as tissues of human origin that are dependent on a pregnant woman's body for life, possessing varying statistical probabilities of becoming persons', at 201.

96 82% of abortions in England and Wales are performed before 10 weeks: Department of Health, *Abortion Statistics, England and Wales 2019*, [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/891405/abortion-statistics-commentary-2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/891405/abortion-statistics-commentary-2019.pdf) (accessed Feb. 10, 2021), 11; Romanis, *supra* note 73, at 344; Horn, *supra* note 35, at 173; Romanis and Horn, *supra* note 89, at 183.

97 This is discussed in detail later in this article.

98 Murphy, *supra* note 52, 34; Jackson, *supra* note 50, at 363; Alghrani, *supra* note 61, at 316–317; Romanis, *supra* note 7, at 344.

99 Kathryn Fitzpatrick and others, *Planned mode of delivery after previous caesarean section and short-term maternal perinatal outcomes: A population based record linkage cohort study in Scotland*, 16 PLoS MEDICINE doi:10.1371 (2019).

100 Howard Minkoff and Lynn Paltrow, *Melissa Rowland and the Rights of Pregnant Women*, 104 OBSTET. GYNAECOL. 1234, 1235 (2004).

101 This will be explored in detail later in this article.

102 Stratman, *supra* note 20.

substantially worse' because one can be required to assume some burdens to the self to remove a fetus alive, rather than have an abortion.<sup>103</sup> Within these arguments is an abject failure to appreciate the monumental difference between abortion and both the procedures outlined and the physical and emotional burdens in remaining pregnant for the necessary additional time necessary to opt for AAPT.<sup>104</sup>

Furthermore, as Horn—who insists that a defense of abortion purely based on bodily autonomy will always be lacking—explains, 'even if removing a fetus to an artificial womb could one day be made equivalent to consuming a pill, it is grossly reductive to imagine that feminists would accept artificial wombs as an forced alternative to abortion.'<sup>105</sup> Within the claim that there is an obligation to opt for AAPT, there is also a failure to recognize that having individuals remain pregnant is a symbolic assault in demeaning the value of that person to a mere fetal container and co-opting their physicality for the benefit of another. Denying abortion 'should be understood as a serious symbolic assault on a woman's sense of self precisely because it thwarts the projection of bodily integration and places the woman's body in the hands and imaginings of others who would deny her coherence by separating her womb from herself'.<sup>106</sup> Denying abortion effectively demeans those with the capacity to gestate and birth to nothing more than that capacity to gestate and birth. Without abortion available for post-conception prevention of pregnancy, people with female physiology will be limited in their sexual freedom, and subject to the perception that their sexuality is merely a facet of their 'maternal destiny'. Contraceptive failure, irregular menstrual cycle (leading to mistakes in estimating ovulation period), and other mistakes are not uncommon; the problem is that the effects of these events are not unilaterally imposed on people without the capacity to gestate (usually men) like they are people with female physiology.

AAPT and abortion are also different in their nature and purpose. Kendal reiterates that ectogestation 'does not replace the role of abortion in reproductive healthcare, nor is it functionally equivalent'.<sup>107</sup> Stratman contends that there is no empirical evidence that can be appealed to suggest that preventing a person from aborting a pregnancy (instead forcing them to submit to fetal extraction) would lead to any concrete harms just because it does not allow people to avoid biological parenthood.<sup>108</sup> Feminist literature, however, points 'to the multiple individual, social and structural factors that may lead a woman to seek an abortion, and affirm that abortion is not simply reducible to a physical desire not to be pregnant'.<sup>109</sup> Jackson observes that few pregnant

103 Blackshaw and Rodger, *supra* note 18, at 78.

104 Remaining pregnant (even earlier in pregnancy) means continuing to be occupied, and having the boundaries of one's physical self-altered: Maggie Little, *Abortion, Intimacy and the Duty to Gestate*, 2 *ETHICAL THEORY MORAL PRACT* 295, 301 (1999). It involves enduring hormonal changes that can change how you think and feel, increasing fatigue that can alter what you feel capable of doing, and nausea that can prevent you enjoying food and drink. These changes impact on *every* aspect of a person's daily life.

105 Horn, *supra* note 56, at 5.

106 D. CORNELL, *THE IMAGINARY DOMAIN: ABORTION, PORNOGRAPHY AND SEXUAL HARRASMENT*, 38 (Routledge, 1995), at 38.

107 Kendal, *supra* note 22, at 203.

108 Stratman, *supra* note 20.

109 Romanis and Horn, *supra* note 89, at 184.

people seek abortion purely with the objective of avoiding pregnancy and labor;<sup>110</sup> they often do so specifically to evade biological parenthood and the presumed intimacy of motherhood that is inferred from gestation. Because of the strong association between gestation and social motherhood in pregnant people,<sup>111</sup> termination of pregnancy is the only way for many women to conclusively reject parenthood and to escape the socially enforced feelings of stigma, guilt, and shame, which can last a lifetime, that result from being forced to reproduce and become a biological parent.<sup>112</sup> The way societal stigma around parenting is constructed specifically and disproportionately affects people who gestate and birth. This does amount to a substantial harm because the reality is that forcing people who birth (namely women) to become biological parents has the effect of limiting their autonomy substantially.

Where bioethicists attempt to argue that AAPT should be undertaken in place of abortion where people want to end their pregnancies they should be willing to acknowledge and better address the *full* extent of the physical (and symbolic) imposition they are suggesting people undertake. Denying abortion prevents people who menstruate from using abortion to mitigate the unfortunate realities of unwanted pregnancy in such a manner that is necessary to afford them equality.

#### IV. GENETIC PROGENITORS AND ABORTION

Assuming the continued availability of abortion, how would a conflict between genetic progenitors about abortion be resolved in light of AAPT? The rights of 'putative fathers' to 'have a say in the decision whether or not to abort an unwanted pregnancy' continues to emerge in the debate surrounding abortion.<sup>113</sup> In the bioethical literature, there has been renewed interest in the rights of genetic progenitors who do not gestate in light of AAPT.

Räsänen makes explicit claims about why both genetic progenitors would need to be involved in an abortion decision with AAPT available. He writes that 'procreation is a collective act involving two people; therefore, the biological father also has a right [to be involved about decisions about whether to become a biological parent] . . . when it is possible to gestate the fetus outside the womb, the fate of the fetus is not her decision, but their decision.'<sup>114</sup> He bases this claim on the fact that both genetic progenitors are entitled to make decisions about reproducing equally, that the fetus is both of their property and the decision concerns both of their genetic privacy.<sup>115</sup> Brassington suggests that 'parenthood is often described as a joint project . . . if something is a joint project, then we can expect decisions be made either jointly or, if individually, only within the confines of some jointly settled rubric'<sup>116</sup> noting that abortion decisions

110 Jackson, *supra* note 50, at 362; this point is also noted by Cannold, *supra* note 87; Horn, *supra* note 35; Romanis and Horn, *supra* note 89, at 184; Horn, *supra* note 56.

111 The person who gestates is declared the legal mother at birth and this can only be abdicated through formal legal processes. I will return to this point of parenthood being thrust upon people who gestate and birth later in this paper when discussing abortion disputes specifically.

112 J. ROBERTSON, *CHILDREN OF CHOICE; FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES*, 49 (Princeton University Press, 1990).

113 Fox, *supra* note 4, at 216.

114 Räsänen, *supra* note 10, at 699.

115 *Id.* at 99–701.

116 Brassington, *supra* note 10, at 199.



are not undertaken on this basis now because a pregnant person's bodily autonomy is engaged. He stipulates that were ectogestation 'to become a practical possibility, then the right of the mother unilaterally to decide to terminate the pregnancy would not have to indicate the right of the mother unilaterally to act foeticidally. For the possibility of in vitro gestation separates gestation from pregnancy'.<sup>117</sup> He notes that his argument assumes that the non-foeticidal termination was as non-invasive as conventional abortion for there to be a moral obligation,<sup>118</sup> but if that were the case the gestating person would have a responsibility to involve the other genetic progenitor in decisions about abortion. Kennedy, while not advocating that genetic progenitors should have a greater say in light of AAPT, still notes that the question of whether a 'putative father', or even 'some other individuals interested in becoming prospective parents may override' a pregnant person's wish to have an abortion and instead require them to submit to fetal extraction, should be revisited.<sup>119</sup> Stratman, while advocating that ectogestation renders abortion impermissible, suggests that if abortion were permissible then any right to abortion would not be a collective right, because of the location of the gestating entity when the decision is made.<sup>120</sup> Kendal agrees, also citing the location of the gestating entity.<sup>121</sup> That the matter is increasingly being raised by bioethicists is potentially unsurprising. Were this technology to come to fruition, this could become a live issue.

'Putative fathers' have been clearly willing to 'resort to law in an attempt to vindicate their [perceived] interests' in abortion decisions.<sup>122</sup> This is evidenced in particular by two high-profile legal challenges in the 70s and 80s that will be explored in this article. There have been no new challenges in England and Wales from putative fathers for nearly two decades. However, it is likely that willingness to resort to law has not evaporated as much as legal avenues appeared to be exhausted. In 1998, the UK Society for the Protection for Unborn Children claimed to receive up to six enquiries a week from men who wished to prevent an abortion.<sup>123</sup> They continue to campaign for 'men's rights' in abortion.

It is at least plausible that there might be renewed interest in the rights of genetic progenitors who do not gestate in the abortion decision. The availability of AAPT and the plausibility of partial ectogestation will increase the likelihood that a new challenge is sought. It might be claimed that this technology significantly changes the circumstances, such that the nature of the legal challenge that is brought is different and thus has a greater chance of being successful. Earlier challenges were an attempt to prevent the ending of a pregnancy.<sup>124</sup> The challenge that might be brought with AAPT is not that a pregnant person should be prevented from ending a pregnancy, but that they might be prevented from ending their pregnancy in a particular way to protect the interests of the other genetic progenitor. Thus, a new legal challenge might

117 *Id.* at 203.

118 *Id.* at 205.

119 Susan Kennedy, *Willing mothers: ectogenesis and the role of gestational motherhood*, 46 J MED ETHICS 320, 325 (2020).

120 Stratman, *supra* note 20.

121 Kendal, *supra* note 20, at 203.

122 Fox, *supra* note 4, at 200.

123 Nolan, *supra* note 3, at 220.

124 Paton, *supra* note 26; *C v S*, *supra* note 26.

be perceived by some lobbying organizations and/or individual genetic progenitors as a chance to act. There are some 'putative parents' who are deeply committed to the notion of protecting the life of a gestating human entity because they believe it is half 'theirs', a being they might grow very attached to, and that they may feel entitled to as part of their ambitions for a family.<sup>125</sup> I will use the following hypothetical scenario to consider what an abortion challenge might look like and why it is likely to fail:

*Abi and Brian have sexual intercourse and Abi becomes pregnant. She does not become aware that she is pregnant until 18 weeks. She does not want to remain pregnant or become a parent, so she seeks an abortion. Brian wants to become a parent and wants the fetus to be fully gestated and is offering to raise the child himself. Two doctors agree that Abi satisfies s.1 (1)(a) of the AA 1967 and she has booked an appointment for treatment. Brian has sought legal advice because he wants to prevent her abortion and instead have the fetus 'extracted' for partial ectogestation.*

To obtain an injunction to prevent abortion, Brian must prove that a genetic progenitor/putative parent has the locus standi to seek an injunction and that there are grounds to grant such an injunction. I demonstrate that, on both counts, AAPT does not improve the likelihood of genetic progenitors/putative parents being successful in a challenge to prevent conventional abortion within the current legal framework.

## V. LOCUS STANDI

While the OAPA 1861 and the ILPA 1929 afford the fetus some protection, 'English law has consistently and unambiguously declared that a fetus has no rights or interests until born.'<sup>126</sup> Birth is the point when it 'attains the status of a legal persona.'<sup>127</sup> Consequently, the fetus has no right of action until birth,<sup>128</sup> because 'to have a right the . . . [human entity] must be born and be a child.'<sup>129</sup> The fetus, then, has no rights that can be enforced against others that can be relied upon to seek an injunction to prevent abortion.<sup>130</sup> Brian must therefore depend on his own 'right' to seek an injunction.

### V. A. As a 'Sufficiently Proximate Party'

In *Paton v British Pregnancy Advisory Service*,<sup>131</sup> Mr Paton sought an injunction to restrain his wife from having an abortion without his consent. She had already secured a medical certificate enabling a legal abortion under the AA 1967. Mr Paton accepted that the provisions of the Act were met such that her abortion was lawful.<sup>132</sup> The judgment centered on whether Mr Paton had the legal standing to obtain an injunction because 'there must be a legal right enforceable in law or in equity before the applicant can obtain an injunction from the court to restrain an infringement of that right.'<sup>133</sup> His case was

125 J. Kenyon Mason, *Abortion and the Law*, in *LEGAL ISSUES IN HUMAN REPRODUCTION* 58–59 (S. McLean, eds, 1990).

126 Elizabeth Wicks, *Terminating Life and Human Rights: The Fetus and the Neonate*, in *THE CRIMINAL JUSTICE SYSTEM AND HEALTH CARE*, 197 (C. Erin and S. Ost, eds, 2017); *Paton*, *supra* note 26.

127 *Re MB (An adult: medical treatment)* [1997] 8 Med LR 217.

128 *Paton*, *supra* note 26, at 279 per Baker P.

129 *Id.*

130 *C v S*, *supra* note 26.

131 *Paton*, *supra* note 26.

132 *Id.*, at 278.

133 *Id.*, at 278 per Baker P.

deemed to rest on his status as the husband of the pregnant woman, because unmarried fathers have only the rights conferred on them by statute and there was, in 1979, no such right in these circumstances.<sup>134</sup> He was deemed unable to seek an injunction because the AA 1967 granted husbands 'no right . . . [which he might have enforced] to be consulted in respect of termination of pregnancy'.<sup>135</sup> English law is clear that a putative 'father'<sup>136</sup> does not have sufficient interest to seek an injunction just because they are a genetic progenitor or because they are presumed to be the 'putative father' because of their relationship to the 'putative mother'.<sup>137</sup> This conclusion was also supported in the European Court of Human Rights.<sup>138</sup>

Nine years after *Paton*, Richard Carver sought an injunction to prevent his former partner from obtaining an abortion. In *C v S*,<sup>139</sup> Mr Carver sought an injunction on the grounds that he had a personal interest, though lesser than a legal right, in preventing his former partner's abortion because he submitted that abortion encompassed a crime against his 'unborn child' under the ILPA 1929. The fetus was between 18- and 21-weeks' gestation. Carver argued it was thus 'capable of being born alive'. The Court of Appeal noted that if there had been merit in his claim of criminality they would have given 'very considerable thought'<sup>140</sup> to the view expressed in *Paton*<sup>141</sup> that a judge who sought to interfere with the discretion of doctors under the AA 1967 would be both bold and foolish, 'unless, possibly, where there is clear bad faith and an obvious attempt to perpetrate a criminal offence'.<sup>142</sup>

This suggests that a genetic progenitor/putative parent can bring an injunction not as 'the father', but as a secondary party with sufficient proximity to a harmed party.<sup>143</sup> This would effectively be equivalent to allowing him to pursue guardianship over the fetus by enabling him to intervene to protect its welfare. If this were to be accepted, it seems that this 'right as a proximate party' to pursue an injunction might not be limited to genetic progenitors or 'putative fathers'. The Children Act 1989 (CA 1989), while applying only to children that have been born (and thus not applying to fetuses),<sup>144</sup> might be useful to briefly consider in that it illustrates the parties that are deemed proximate to children in law. Therefore, it can illuminate, to some extent, the relationships that are of merit to consider in context. Interestingly, in stipulating the parties that are

134 *Id.*, at 279–280 per Baker P.

135 *Id.*, at 281 per Baker P.

136 This term is used here as this is how Mr Paton identified.

137 English common law presumes '*pater est quem nuptiae demonstrant*' that is that the husband of a person who gives birth is the father of the child. This can be rebutted where it is established that he is not the biological father—Family Law Reform Act 1969, s.26. The presumption therefore, is that a husband is the genetic father unless firmly proven otherwise.

138 *Paton v United Kingdom* (1981) 3 EHRR 408.

139 *C v S*, *supra* note 26.

140 *Id.*, at 153 per Donaldson MR.

141 *Paton*, *supra* note 26.

142 *Id.*, at 282 per Baker P.

143 Proximity is a concept deployed frequently in the law of torts to ascertain whether parties are sufficiently close such that it is reasonably foreseeable that the actions of one party will cause damage or loss to the other. See *Caparo Industries v Dickman* [1990] AC 605, at 617 per Lord Bridge.

144 No order can be sought in respect of a foetus using the Children Act 1989 or the Court's inherent jurisdiction following *Re F (In Utero)* [1988] FAM. 122.

'proximate enough' to a child to have contact or live with,<sup>145</sup> the CA 1989 introduces a hierarchy in relationships between different genetically related people to children. The Act distinguishes between individuals who are deemed automatically entitled to apply for contact with a child and those who need the leave of the Court to do so.<sup>146</sup> This distinction serves to signify that some relationships with children need no justification as to proximity, whereas others must be proven.

A father of a born child, whether married or un-married and with or without parental responsibility, is entitled, without seeing leave, to seek a Child Arrangement order.<sup>147</sup> Another relative is entitled to do so, without seeking leave, if the child has lived with them for 1 year preceding application.<sup>148</sup> A relative with whom the child has not lived for the requisite period can seek leave from the court to apply. 'Relative' is broadly defined. It includes grandparents, siblings, and uncles and aunts whether by full or half-blood or by marriage or civil partnership.<sup>149</sup> What this hierarchy in relationships serves to illustrate is that the relationship a father has with a child is assumed by way of genetic connection—it is not based on any level of relationship of care that actually exists and can be evidenced. Other family members must always prove the significance of their relationship in some way. Here, we should note then that, while other people who might consider themselves 'proximate' to a fetus, for example a 'putative grandparent', they are likely to find it much more difficult to establish their interest as a 'proximate party'. Again, I reiterate that the provisions in the CA 1989 cannot be used in disputes concerning fetuses—but it is highlighted here to illustrate the deference towards a genetic father's interests. Furthermore, the Act demonstrates that the law not only discriminates between relationships that are proximate on the grounds of genetics, but on the basis of facts beyond that; it is ultimately grounded on the connections and relationships between children and other persons, and so, it is not helpful in the context of a gestating human entity. One of the primary differences between a fetus before birth and a child after birth is its 'natality'<sup>150</sup> in that the born child is in the world in the sense of coming 'into the world with and as a specific body, and in a given place, set of relationships, [and] situation in society', essentially a child is usually interacting with a broader range of others that it is dependent upon.

The law explicitly recognizes a relationship between a pregnant person and their fetus after birth,<sup>151</sup> but also during the course of a pregnancy.<sup>152</sup> While a fetus is in utero its existence is mediated through the pregnant person as it is not 'in the world', in the sense that it does not have relationships with others.<sup>153</sup> It is hard to imagine how a claim that is substantiated on a 'relationship' with a fetus would be mounted, never mind successfully. Thus, it is more likely that a person who considers themselves

145 For example, by way of a Child Arrangement Order: Children Act 1989, s.8 (1), as amended by Children and Families Act 2014, s.12.

146 *Id.*, s.10 (1) (a).

147 *Id.*, s.10 (4) (a).

148 *Id.*, s.10 (5B), as amended by Children and Young Persons Act 2008, s.36.

149 *Id.*, s.105 (1) as amended by Civil Partnership Act 2004, s.75.

150 A STONE, BEING BORN: BIRTH AND PHILOSOPHY, 3 (Oxford University Press, 2019).

151 It is determinative of legal motherhood: *Amphill Peerage Case* [1977] AC 547; at 577 per Lord Simon.

152 *Re G (Residence: Same Sex Partner)* [2006] UKHL 43; M. AUSTIN, CONCEPTIONS OF PARENTHOOD; ETHICS AND THE FAMILY, 33 (Ashgate Publishing 2007) 33.

153 Romanis, *supra* note 94, 201.

a 'putative parent' might succeed relying on the fact that they are the 'genetic progenitor' as opposed to 'putative parent'. Logic would seemingly dictate, therefore, that a 'putative father' is more likely to be able to substantiate the claim of a 'relationship' (based purely on genetic connection) with a fetus than other relatives. The law already recognizes that the genetic 'father' does not need to prove the 'substance' of his relationship with their child,<sup>154</sup> presumably based on a close genetic relationship and the social emphasis placed on the value of biological kinship. Other parties, however, cannot rely on their genetic relationship with a child, and thus they would have an even weaker claim to a fetus. The genetic relationship between a genetic progenitor and a born child is stronger, both literally and symbolically than that between a born child and their grandparent or an aunt, for example. This is one way in which the analysis of the CA 1989, though not applicable, was useful in illustrating this difference in degrees of genetic relatedness and its relevance. An action to prevent an abortion impinges on the pregnant person's bodily autonomy; thus, there would and should be great caution in expanding the category of who has the right to launch a challenge to their abortion decision. There was some evidence of judicial sympathy toward the 'plight' of the putative 'father' in *Paton*,<sup>155</sup> in which it was noted that the ratio was the result of 'applying the law free from emotion or predilection'.<sup>156</sup> It is plausible that there might, therefore, be some sympathy for a new argument that is consistent with the law of England and Wales, granting putative fathers locus standi to seek an injunction. It is hard to imagine the same sympathy to the claim of a 'putative grandmother' attempting to prevent their child having an abortion. Though, in other jurisdictions there have been instances of 'putative grandparents' winning the right to use their dead children's gametes to have a 'grandchild'.<sup>157</sup> This, of course, should be distinguished on the basis that their use of gamete would not impinge on another person's bodily autonomy in the same way.

### V. B. With 'Something to Stand Against'

*C v S*<sup>158</sup> seemingly indicates that *a priori* putative fathers have standing, qualified by the condition that there is something to 'stand against'. They have standing when they can demonstrate that the fetus, to which they are sufficiently proximate, has been or will be unlawfully wronged. Fox has suggested that if men succeeded 'in linking their claims to the welfare of their unborn children they would stand a better chance of success before the courts'.<sup>159</sup> *C v S* is a limiting precedent because the judgment determines that abortion is not criminal in circumstances covering all 'social abortions'<sup>160</sup> under the AA 1967<sup>161</sup> and when the pregnant person's mental health may be gravely affected.<sup>162</sup> It

154 J. HERRING, FAMILY LAW, 544 (Pearson, 2019).

155 Fox, *supra* note 4, at 205.

156 *Paton*, *supra* note 26.

157 Georgia Everett, *Woman uses dead son's sperm for IVF grandchildren*, [https://www.bionews.org.uk/page\\_96375](https://www.bionews.org.uk/page_96375) (accessed Aug. 1, 2020).

158 *C v S*, *supra* note 26.

159 Fox, *supra* note 4, at 9.

160 Abortion Act, s.1 (1) (a), as amended by Human Fertilisation and Embryology Act, s.37.

161 As amended by Human Fertilisation and Embryology Act, s.37.

162 *C v S*, *supra* note 26, at 138 per Heilbron J.

was, however, observed that 'every case depends on its own facts and circumstances',<sup>163</sup> consequently the possibilities of AAPT and partial ectogestation might be used to distinguish a putative father's argument from the judgment in *C v S*. Brian might be able to prove that a doctor commits the offence of child destruction<sup>164</sup> by providing abortion where AAPT might enable its existence *ex utero*. This is dependent on the interpretation of the ILPA 1929 and judicial engagement with medical evidence about what it means to be 'capable of being born alive'.

As explained, it is a criminal offence to, with the intention of so doing, kill a fetus 'capable of being born alive'.<sup>165</sup> Whether it can be argued that the actus reus is committed when Abi's doctor performs an abortion is dependent on whether her fetus is deemed 'capable of being born alive'. A fetus of 24 weeks or more is *prima facie* 'capable of being born alive'.<sup>166</sup> At 18 weeks, Abi's fetus cannot be *presumed* to be 'capable'. Case law examining the meaning of 'capable of being born alive' centers on the capacity to breathe, but is often described as inconsistent and irreconcilable.<sup>167</sup> In *C v S*,<sup>168</sup> it was unsuccessfully argued that a fetus between 18 and 21 weeks was 'capable of being born alive'. While Sir John Donaldson MR did note that there were significant and evident signs of fetal development at this point of gestation that had and were taking place, he found that such a fetus was 'incapable of breathing either naturally or with the aid of a ventilator',<sup>169</sup> thus it was not subject to the protection of the ILPA 1929. Alghrani suggests that 'viability [or being 'capable of being born alive'] is an ever-changing concept often dependent on the technology available and where in the world one lives'.<sup>170</sup> I have argued elsewhere that it is significant that the term 'capable of being born alive' has not been explicitly defined by reference to a fixed gestational point, and because of the judge's willingness to entertain the suggestion that an 18 week fetus might be capable of being born alive to the extent that medical evidence was heard on the matter in *C v S*, it seems that 'capable of being born alive' is a rebuttable presumption. The law has left space for proof that a fetus could be born alive before 24 weeks.<sup>171</sup> There are, therefore, questions about whether a fetus that was capable only of being transferred to AAPT would be considered legally 'capable of being born alive'.<sup>172</sup> This is a matter that a genetic progenitor/putative parent might seek to engage with in order to establish they have locus standi. The argument might go as follows: Abi's doctor commits the offence of child destruction if they perform an abortion at 18 weeks because Abi's fetus could survive in an ectogestative device (AAPT). In performing the abortion, the doctor would end the life of a fetus 'capable of being born alive' (because it could be delivered from Abi and placed in an AAPT device) with the intention of securing its death because the action taken was chosen specifically because it resulted

163 *Id.*, at 148 per Heilbron J.

164 Infant Life (Preservation) Act, s.1 (1).

165 *Id.*

166 Abortion Act 1967, s.1 as amended by the Human Fertilisation and Embryology Act 1990, s.37.

167 Margot Brazier and John Harris, 'Fetal Infants: At the Edge of Life', in *INSPIRING A MEDICO-LEGAL REVOLUTION; ESSAYS IN HONOUR OF SHEILA MCLEAN*, 61 (P Ferguson and G Laurie, eds, 2015).

168 *C v S*, *supra* note 26.

169 *Id.*, at 151 per Donaldson MR.

170 Alghrani, *supra* note 60, at 311.

171 Romanis, *supra* note 48.

172 *C v S*, *supra* note 26, at 151 per Donaldson MR.



in fetal death. Thus, Brian has standing to seek an injunction to prevent this criminal offence.

Elsewhere, I have explored the complexities of how 'capable of being born alive' is interpreted with the advent of AAPT.<sup>173</sup> Relying on the work of Greasley,<sup>174</sup> I argued that that the gestateling<sup>175</sup> should not be considered born alive for the purposes of the law because it has not made the adaptations to the external environment (for example, moving from fetal to breathing physiology)<sup>176</sup> that are associated with a complete birth.<sup>177</sup> Thus, although the gestateling is delivered from a pregnant person, it is not 'born alive' because it has not emerged from the process of gestation, not evidencing the relevant degree of self-sufficiency or interacting with others in the external environment.<sup>178</sup> Thus, if a gestateling is not 'born alive', but a fetus that is capable of surviving ex utero only if placed in an AAPT-device that facilitates continued (artificial) gestation then it is not 'capable of being born alive'. It is suggested that

there is a meaningful developmental difference between a fetus no longer *necessarily* in need of being created because it could survive after gestation with conventional care and a fetus that *cannot* be sustained outside of gestation. Though questionable, if the state has an interest in potential life, it seems intuitive that this interest would be directed only towards those fetuses that could live in the external environment rather than those human entities still dependent on being created (whether in utero or an 'artificial womb').<sup>179</sup>

If we accept this interpretation of the ILPA 1929 and the definition of 'capable of being born alive', it seems unlikely that Brian would be able to rely on Abi's abortion being a crime to establish he had locus standi. Furthermore, I note that the provisions of the ILPA 1929 are not intended to criminalize doctors who provide safe abortions within the parameters of the AA 1967,<sup>180</sup> even if that fetus could survive with the

173 Romanis, *supra* note 73.

174 K. GREASLEY, ARGUMENTS ABOUT ABORTION: PERSONHOOD, MORALITY AND LAW, 190–191 (Oxford University Press, 2017).

175 The subject of the artificial placenta: Romanis, *supra* note 13, at 753.

176 Greasley, *supra* note 174, at 191.

177 Also see Romanis, *supra* note 48; Kingma and Finn, *supra* note 14.

178 Romanis, *supra* note 73, at 112.

179 Romanis, *supra* note 48.

180 There is explicitly a defense provided to the crime of child destruction for doctors who comply with the conditions for providing termination in the AA 1967. Moreover, there is no evidence that the Act was introduced to criminalize doctors providing abortion. The OAPA 1861 already criminalized 'unlawful miscarriage'—meaning abortion that carries a maximum term of life imprisonment. Thus, there was no need to introduce a different offence. In *R v Bourne* [1939] 1 KB 687, it was held that abortion performed by a doctor was not an 'unlawful' procurement of miscarriage where the doctor deemed it necessary for the purpose of preserving the pregnant person's life. In this case, MacNaghten J stipulated that 'if the doctor is of the opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of pregnancy will be to make the woman a physical or mental wreck, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother'. This case merely affirmed the status quo at the time—as even before this point (including in 1929) abortion was being routinely performed by doctors for women who could afford their services without criminal consequences. See: J KEOWN, DOCTORS ABORTION AND THE LAW, 79 (Cambridge University Press 1988); Sheldon *supra* note 67, at 80. The offence in the ILPA 1929 was specifically introduced to respond to the concern that some women were in effect 'escaping' criminal sanction where it could not be proven that their foetus was born alive before dying, thus they could not be proven to have committed a homicide in English law. See: D Seaborne Davies,

aid of AAPT. Moreover, 'Paton and C v S show the same reluctance on the behalf of the judiciary to supervise the doctors [and] to second guess their decisions other than in clear cases of bad faith or bad medical practice . . .'<sup>181</sup> If two doctors agree in good faith that abortion is permissible, it is unlikely that the judiciary will challenge this conclusion in a civil action. As Sheldon has observed, the courts have consistently refused 'to supervise . . . doctors' discretion, beyond ensuring the existence of good faith, [and this was] an extremely influential factor in establishing that women cannot be prevented from terminating a pregnancy by the opposition of their sexual partners'.<sup>182</sup> Brian cannot establish he has sufficient standing to seek an injunction.

### V. C. 'Harm to a Fetus'

Several feminist scholars have noted other threats, beyond abortion challenges relying on the ILPA 1929, to pregnant people's autonomy resulting from the availability of AAPT. There are concerns about what happens when a pregnant person is considered a 'sub-standard gestator'<sup>183</sup> because of their behavior, and thus is pressured to opt out of gestation in favor of AAPT.<sup>184</sup> While this is a different matter to the primary question at hand, it is interesting to consider here because this is another way in which a putative parent/genetic progenitor might attempt to demonstrate they have locus standi to interfere in abortion decisions without contending that abortion would be criminal. Consider the following:

*Cora is known to abuse alcohol. After having sexual intercourse with Daniel, she becomes pregnant due to a failure of contraception. Cora wants to continue with her pregnancy and raise the child. Daniel also wants the fetus to be fully gestated and to raise the child. He is concerned, however, by Cora's substance abuse and does not want any harm to come to the fetus. Cora is now 18 weeks pregnant. Daniel wants to seek an injunction to prevent Cora from carrying the pregnancy. He wants the fetus 'extracted' for partial ectogenesis.*

If Cora is abusing alcohol to excess, there is evidence to suggest this could cause serious harm to her fetus, including FASD (fetal alcohol spectrum disorder).<sup>185</sup> Based on the logic earlier advanced in analyzing *C v S*,<sup>186</sup> Daniel may be entitled to 'stand against' this harm if it can be shown to be unlawful. In *A-G's Reference (No 3 of 1994)* the House of Lords held that a person is guilty of manslaughter when their unlawful action injures a fetus that is subsequently born alive before dying as a result of the injury.<sup>187</sup> The

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*Child-Killing in English Law*, 1 MOD. LAW REV 203 (1937); E. MILNE, CRIMINAL JUSTICE RESPONSES TO MATERNAL FILICIDE: JUDGING THE FAILED MOTHER, (Emerald forthcoming).

181 Sheldon, *supra* note 67, at 90.

182 *Id.*, at 103.

183 Giulia Cavaliere, Gestation, Equality and Freedom: Ectogenesis as a Political Perspective, 46 J MED ETHICS 76, 79 (2019).

184 Jackson, *supra* note 50, at 361; Cavaliere, *supra* note 183, at 79; Elizabeth Chloe Romanis and others, *Reviewing the Womb*, J MED ETHICS (2020) doi.org/10.1136/medethics-2020-106160.

185 It is important to note here that FASD is only likely with the excess consumption of alcohol during pregnancy. There is limited evidence that there is a link between the consumption of any alcohol (as opposed to the abuse of alcohol) could result in serious injury or impairment to a foetus. See: Betsy Thom and others, *Drinking in Pregnancy*, in RISK AND SUBSTANCE ABUSE, (S MacGregor and B Thom, eds, 2020).

186 *C v S*, *supra* note 26.

187 *Attorney-General's Reference (No 3 of 1994)* [1997] 3 ALL ER 936.

judgment did not exclude pregnant people; thus, there remains the possibility that Cora could be guilty of gross negligence manslaughter if her fetus is born alive before dying as a result of her alcohol consumption during pregnancy.<sup>188</sup> Furthermore, Lord Mustill, in *obiter*, suggested that 'harm short of death' might give rise to criminal liability. However, the fetus cannot be a victim of a crime if the *actus reus* of that crime specifies that the harm is inflicted on 'any other person' because it has no legal persona.<sup>189</sup> The homicide offences are an exception because there can be a time lag between the guilty action and resulting death without precluding responsibility,<sup>190</sup> in which time the fetus is born and becomes a person that can be a victim of homicide. *CP v Criminal Injuries Compensation Authority* effectively closed the door on Lord Mustill's *obiter* suggestion. It was held that a pregnant person cannot inflict the *actus reus* of grievous bodily harm on their fetus. There is no time discrepancy in the offence; the harm is inflicted at the point of guilty action<sup>191</sup> and the fetus cannot be considered a victim of that harm. Daniel must, therefore, establish that the fetus would become the victim of gross negligence manslaughter, which is an unlawful action that, if Daniel is sufficiently proximate to, he might be entitled to 'stand against'. Although Daniel can demonstrate that there would be some potential infliction of injury to the fetus, he simply cannot demonstrate that this is actionable harm. There are too many external factors, including structural factors, such as access to prenatal care and circumstances of birth (to name a few), which might determine whether the fetus is born and then would subsequently die such that it could become a victim of manslaughter (as the death would have to be after birth).<sup>192</sup>

The Criminal Law Act 1967 empowers persons to use reasonable force to prevent the commission of a crime.<sup>193</sup> Daniel might attempt to argue that he has standing to interfere with Cora's choices in pregnancy because he is entitled to use reasonable force to prevent the commission of a crime. However, even if Daniel literally encounters Cora drinking from a vodka bottle, he cannot establish that gross negligence manslaughter is being committed. He cannot be certain that the fetus is sustaining any damage from what he witnesses nor that the fetus will be born alive only to subsequently die because of what he witnesses. The Criminal Law Act 1967 only applies when the intervening party is preventing a crime. The best Daniel can ascertain is that there is a risk or a chance that a crime is being committed, which is insufficient. There would also be difficulty, as will be discussed, in establishing that intervention amounted only to reasonable force.

The locus standi of a putative parent/genetic progenitor is dependent on whether they can substantiate that a crime might be committed against the fetus. It is interesting that their claim does not actually appear to be substantiated in any way based on their genetic relationship to the fetus that they might perceive to be putative parent of. Such locus standi could only be established with an amendment to the AA 1967, requiring that genetic progenitors be consulted. There was no political capital for such an amendment following *Paton* and *C v S*; however, the development of AAPT might

188 Brazier and Cave, *supra* note 25, at 346.

189 *CP (A Child) v Criminal Injuries Compensation Authority* [2015] QB 459.

190 *Id.*, at 472 per Treacy LJ.

191 *Id.*

192 *A-G's Ref*, *supra* note 187.

193 Criminal Law Act 1967, s.3 (1).

provide sufficient clout to the claims of putative fathers and anti-abortion campaigns. It remains unlikely, however, that Parliament would amend legislation in a manner that is, and would be perceived as, a blatant disregard of pregnant people's rights without a critical mass of support. It is the case, however, that bills of this nature (for example requiring spousal consent for abortion) are not infrequently debated in the United States.<sup>194</sup>

Let us assume, however, that the law is changed or that a crime can be proven. Neither *Paton* nor *C v S* considered whether a putative father could obtain an injunction to prevent abortion beyond considering locus standi because both actions failed at this point. For thoroughness, however, I will consider such a claim by returning to Abi and Brian. This is, of course, purely an 'academic question'.<sup>195</sup>

## VI. PUTATIVE PARENTS AND ABORTION INJUNCTIONS

Even assuming he has standing, Brian remains unlikely to obtain an injunction against Abi to prevent her accessing abortion. In this following section, I explain that this is a result of the pregnant person's legal right to self-determination, and to not become a parent. Before doing so, it is important to note the gendered dimension of the *Paton* and *C v S* disputes. These cases were not just about genetic progenitors trying to interfere with a pregnant person's choices (though I am using them to discuss this matter in this article). They were specifically instances of men trying to control women's bodies. Fox has suggested that, and many like them, are 'a punitive and vindictive assertion of rights through law, [that are specifically about controlling women and women's bodies] rather than an effort to secure justice'.<sup>196</sup> The very 'staking of claims by putative fathers speaks volumes about contemporary female/male relations especially over women's fertility and their power to control it'.<sup>197</sup> This is something that might be particularly pertinent in some aspects of disputes as stressed earlier in this article. For example, until we have more equitable division of childrearing in society and we stop placing excess pressure on women to mother, there will continue to be pressing reasons to prioritize women's preferences about (not) parenting.

### VI. A. Self-Determination and Pregnancy

Some scholars, such as Smajdor<sup>198</sup> and MacKay,<sup>199</sup> frame the liberating potential in ectogestation as its ability to enable female people to 'reproduce as [males] do'.<sup>200</sup> Gelfand posits that ectogestation introduces the future possibility that one day 'a

194 For example, there was an attempt in Ohio in 2007. These laws are debated despite the fact that the US Supreme Court has before held spousal consent laws to be unconstitutional because they would interfere with a pregnant person's right to privacy *Planned Parenthood v Danforth*, 428 U.S. 52 (United States Supreme Court).

195 As the matter was described in *Paton*, *supra* note 26, at 281 per Baker P.

196 Marie Fox, *A Woman's Right to Choose? A Feminist Critique*, in *THE FUTURE OF HUMAN REPRODUCTION: ETHICS, CHOICE AND REGULATION*, 90 (J. Harris and S. Holm, eds, 1998).

197 *Id.*, at 89.

198 Anna Smajdor, *The Moral Imperative for Ectogenesis*, 16 *CAMB Q HEALTHC ETHICS* 336, 337 (2007).

199 Kathryn McKay, *The 'tyranny of reproduction:' Could ectogenesis further women's liberation?* 34 *BIOETHICS* 346, 351 (2020).

200 For a critique of the 'ideal of assimilation'—see Giulia Cavaliere, *Ectogenesis and gender-based oppression: Resisting the ideal of assimilation*, 34 *BIOETHICS* 727 (2020).

[female person's] contribution to the birth of a live baby will be similar to that of a [male person] . . . each will only need to provide or donate gametes.'<sup>201</sup> However, complete ectogestation, which might enable the kind of reproduction that Gelfand imagines is far less imminent a possibility than partial ectogestation.<sup>202</sup> Partial ectogestation will still involve a greater contribution from a person who undertakes some period of gestation. The fetus is still partially gestated in a person's womb for a period of pregnancy until it can be safely extracted for transfer to AAPT. Any debate about what the advent of AAPT means for abortion provision will always be about partial ectogestation: since abortion is the ending of a pregnancy that inevitably involves a person's body.<sup>203</sup> This is a fact that the literature on ectogestation often does not center appropriately.

As noted earlier, for transfer to AAPT, a process of 'fetal extraction' resembling a more complex caesarean section would have to be undertaken. Earlier in pregnancy, this is much riskier and much more likely to cause serious damage to the pregnant person's body. Comparatively, risks associated with forms of abortion are much lower depending on the stage of the pregnancy. This is particularly the case before 10 weeks' gestation when medical abortion is routine—the risks associated with this procedure are minimal. There are small risks of excessive bleeding and permanent damage to the cervix or womb that become more substantial as pregnancy progresses.<sup>204</sup> These risks are still not in any way comparable to those associated with 'fetal extraction'. Obviously, at 18 weeks, Abi is beyond the gestational limit for early medical abortion,<sup>205</sup> and so would have to undergo a surgical procedure.<sup>206</sup> While this will still involve the risks of undergoing general anesthesia (though not always),<sup>207</sup> and some other potential risks such as pain, injury to the cervix and infection,<sup>208</sup> these are much less likely<sup>209</sup> and much less serious than those associated with a caesarean section. Surgical abortions are considered so routine that most people do not have to stay a night in hospital.<sup>210</sup> This again is not comparable to a 'fetal extraction for AAPT' procedure.

The injunctions sought in *Paton* and *C v S* were to prevent abortion, thus resulting in the pregnant person enduring an unwanted pregnancy to term with likely severe

201 Scott Gelfand, *Ectogenesis and the Ethics of Care*, in *ECTOGENESIS: ARTIFICIAL WOMB TECHNOLOGY AND THE FUTURE OF HUMAN REPRODUCTION*, 89 (S. Gelfand and J. Shook, eds, 2006); while not the subject of this article, I note here that even if both male and female progenitors only have to produce gametes in order to have a biological child that can be entirely gestated ex utero, there is a substantial difference in terms of labor in the donation of gametes between males and females. The process of extracting oocytes from a female person is far more invasive and involves a course of hormone treatment over a period of time. To obtain sperm from a male they merely need to ejaculate.

202 Romanis, *supra* note 94, at 28–32.

203 *Id.*, at 40.

204 National Health Service, *Abortion; Risks*, <http://www.nhs.uk/Conditions/Abortion/Pages/Risks.aspx> (accessed Aug. 4, 2020).

205 See *supra* note 79.

206 After 14 weeks the form of surgical abortion necessary would be a dilation and evacuation procedure. See See British Pregnancy Advisory Service, *Dilation and Evacuation*, <https://www.bpas.org/abortion-care/a-bortion-treatments/surgical-abortion/dilatation-and-evacuation/> (accessed Aug 4, 2020).

207 Sometimes the procedure can be performed under a local anesthetic.

208 British Pregnancy Advisory Service, *supra* note 206.

209 A 2002 study found that the likelihood of complications after D&E occurred in approximately only 4% of cases: See Amy Autry and others, *A comparison of medical induction and dilation and evacuation for second-trimester abortion*, 187 AM. J. OBSTET. GYNECOL. 393 (2002).

210 See *supra* note 206 and *supra* note 209.

consequences for their physical and mental health if this had been required. Any injunctions sought to prevent abortion in favor of AAPT would be, in some ways, even more invasive and onerous on pregnant people. Forcing a pregnant person to choose between continued pregnancy and AAPT places them in an impossible situation in which they are forced to either endure unwanted pregnancy (to be occupied and in a state of forced physical intimacy and to have the boundaries of one's self altered)<sup>211</sup> or are forced to undergo a specific type of termination, which is dangerous, difficult and would inevitably have a lasting impact on their physical and mental health.<sup>212</sup> Such an injunction inevitably would cross the boundaries of the pregnant person's self and deny them any individuation, bodily integrity, and autonomy.

Once two doctors have agreed that a pregnant person satisfies one of the grounds for legal termination, whether they then decide to undergo 'fetal extraction', have a 'conventional abortion' or continue with their pregnancy is their decision. A pregnant person can provide or refuse their consent for each procedure accordingly.<sup>213</sup> Bodily autonomy is afforded great respect in law. In the medico-legal sphere 'the fundamental principle, plain and incontestable is that every person's body is inviolate.'<sup>214</sup> This confers on 'an adult patient who . . . suffers from no mental incapacity . . . [the] . . . absolute right to choose whether to consent to medical treatment, to refuse it, or to choose one rather than another of the treatments being offered'<sup>215</sup> even if their reasoning is 'irrational, unknown or *non-existent*'.<sup>216</sup> Any procedure or treatment performed on a patient with capacity,<sup>217</sup> without their consent, violates their autonomy and is a criminal assault<sup>218</sup> and a civil battery.<sup>219</sup>

Jackson notes that often, in practice, a pregnant person's 'decision to terminate a pregnancy is frequently made in consultation with' the other genetic progenitor.<sup>220</sup> When there is a dispute, however, genetic progenitors that do not gestate are not legally entitled to participate in decisions about the pregnant person's medical treatment during their pregnancy. This would violate the legal principle of self-determination outlined. A person's right to choose what happens to their body is not diminished by circumstances; this applies equally to pregnant persons. McDonnell notes that 'though it is hoped that [a pregnant person] would give full and honest consideration in making her decision'<sup>221</sup> to the circumstances, including the wishes of other genetic progenitors,

211 Little, *supra* note 104, at 301.

212 C. KACZOR, *THE EDGE OF LIFE: HUMAN DIGNITY AND CONTEMPORARY BIOETHICS, PHILOSOPHY AND MEDICINE*, 108 (Springer 2005).

213 *Re T*, *supra* note 78, at 102 per Lord Donaldson.

214 *Collins v Wilcock* [1984] 1 WLR 1172, at 1177 per Lord Goff.

215 *Re T*, *supra* note 78, at 102 per Lord Donaldson.

216 *Id.* (emphasis added). Lots of challenges that are frequently raised to abortion decisions claim that a person's reasons are not 'good enough', but the law does not usually require that people have a reason for choosing to access healthcare or to refuse it. This is one of the problems with the law on abortion as it is currently constructed. See Jackson, *supra* note 66.

217 As defined by Mental Capacity Act 2005, s.3.

218 *R v Tabassum* [2000] 2 Cr App R 328.

219 *B v An NHS Trust* [2002] EWHC 429 (FAM).

220 Jackson, *supra* note 69, at 83.

221 K. MCDONNELL, *NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION*, 64 (Women's Press 1984).



the desires of others have no effect on their right to bodily autonomy, and thus they have no bearing on their right to make the choice to terminate a pregnancy.

In *Re S*,<sup>222</sup> a C-section was ordered against a pregnant woman's wishes, relying on obiter from *Re T* that the principle of self-determination supersedes life except when it may 'lead to the death of a viable fetus'.<sup>223</sup> The *Re S* decision has since been criticized and overruled. In *Re MB*<sup>224</sup> and *St George's v S*,<sup>225</sup> two cases concerning the legality of performing a C-section without consent, the Court of Appeal held that a C-section can never take place legally when the pregnant person has capacity but refuses to consent, except where the Mental Health Act 1983 is applicable,<sup>226</sup> because it would violate their ability to self-determine.<sup>227</sup> A competent pregnant person is entitled to refuse a C-section even when it would preserve the life of the fetus.<sup>228</sup> An injunction cannot be awarded to a putative father mandating that if a pregnant person wants to terminate their pregnancy they must submit to an 'invasive C-Section' for AAPT transfer without this constituting an enormous interference with the pregnant person's right to bodily autonomy in contention with the common law. Furthermore, 'it is clearly wrong that any third party should be able to come between a woman and her medical advisers . . .'.<sup>229</sup> There would also be an uncomfortable confidentiality issue that would arise, if it were accepted that a non-gestational genetic progenitor did have a say in the abortion decision, in the event that a doctor was unsure whether the other genetic progenitor knew about the pregnancy.<sup>230</sup> There could also be a practical issue here too in considering what steps would be considered reasonable in attempting to contact and consult non-gestational genetic progenitors, and what onus might be placed on pregnant people in this process.

The right to protection from bodily violation means that 'achieving reproductive ends does not justify subjecting [pregnant people]'<sup>231</sup> to procedures to which they do not consent. An injunction that allowed a genetic progenitor to interfere in the

222 *Re S (Adult: refusal of medical treatment)* [1993] FAM 123.

223 *Re T*, *supra* note 78, at 102 per Lord Donaldson.

224 *Re MB*, *supra* note 127.

225 *St George's Healthcare NHS Trust v S* [1998] 3 WLR 936.

226 *Tameside and Glossop Acute Services Trust v Ch (A Patient)* [1996] FCR 753; Mental Health Act 1983, s.63—though *St George's v S*, *supra* note 225 evidenced a retreat from this approach.

227 Jonathan Herring, *Compelling Caesarean Sections*, CHRISTIAN LAW REVIEW 43, 46 (1999).

228 Though this article limits its scope to considering cases of legally competent pregnant people it is important to note that incompetent pregnant people are equally entitled to refuse unless it can be established that overriding refusal is in the person's best interests according to s.1(5) of the Mental Capacity Act 2005. It would have to be proven that it was in their best interests to have their pregnancy end, but without resulting in fetal death and that the difficult process in AAPT transfer would promote their welfare. The interests of the foetus would have no bearing on the best interest's decision following *Re MB*, *supra* note 127, at para 78 per Butler-Sloss LJ. It is clear that in determining whether it is in the best interests of a person for their pregnancy to be terminated the court will pay close attention, per s. 4 (6)(a) of the Mental Capacity Act 2005, to the pregnant person's 'past and present wishes and feelings' about pregnancy. See *Re AB (Termination of Pregnancy)* [2019] EWCA Civ 1215. Balancing the various factors related to the pregnant person's best interests would be a fact specific and difficult task, and it is beyond the scope of this article.

229 Mason, *supra* note 125, 59–60.

230 I am grateful to Anna Nelson for raising this point in discussions. It should also be noted here that this might be of particular concern in cases where the pregnant person is the victim of rape, incest or in a violent and/or abusive relationship and has reasons related to their safety for not disclosing their pregnancy to others or specifically to their abuser who may be the other genetic progenitor of the pregnancy.

231 Murphy, *supra* note 52, at 34.

abortion decision coerces pregnant people into making a 'false choice' between two extreme forms of bodily interference. Being forced to undergo a C-section to enable AAPT transfer to end a pregnancy would arguably be a form of degrading treatment, prohibited by the European Convention of Human Rights (ECHR). Degrading treatment is that which instigates fear, anguish, and feelings of inferiority that humiliates and breaks the moral or physical resistance of the victim.<sup>232</sup> A forced C-section is invasive and involves the forced administration of anesthetics and potentially physical restraints. It would carry significant risks and potentially leave the pregnant person physically and mentally scarred. It appears conclusive that the courts will not force a competent pregnant person to undergo any intervention for the benefit of a fetus. In practice, the right to refuse intervention is often challenged. We can see this evidenced in the excess deference to medical opinion and technology in the 'forced caesarean' cases.<sup>233</sup> It is often difficult for people to freely refuse interventions in labor,<sup>234</sup> as although the principles of bodily autonomy are often reiterated and highlighted in these cases, in practice they 'reinforce a curious notion that the [very] conditions of pregnancy and childbirth impact on a person's capacity to consent.'<sup>235</sup> These cases can be distinguished from the specific matter at hand, in that there is reason to believe that birthing people are vulnerable to findings of incapacity, and thus to having their autonomous preferences disregarded, in the caesarean cases because they potentially are in an emergency circumstance. However, these cases are important to highlight here to demonstrate that choices that do not defer to obstetric recommendations—often that can be made on the basis of the benefit of the 'fetus'—are often treated with suspicion and challenged.

A genetic progenitor who attempts to prove that a crime may be committed against a fetus is making a claim to guardianship of an unborn fetus. They are effectively seeking the ability to prevent 'conventional abortion' to protect fetal welfare. English law is clear that interventions of this nature cannot be made;<sup>236</sup> however, necessary they may appear.<sup>237</sup> In *Re F*,<sup>238</sup> a local authority sought to ensure that a pregnant woman complied with certain conditions to protect fetal welfare. They wished to make the fetus a ward of court to ensure it was adequately protected. This is directly analogous, though the injunction sought by Brian is even more onerous than the terms sought by the local authority in *Re F*,<sup>239</sup> which makes the reasoning even more compelling.

If the fetus were a ward of court, its interests would be paramount, because of how 'child protection' is prioritized in the exercise of the inherent jurisdiction<sup>240</sup> resulting in a pregnant person being forced to forfeit all their basic freedoms.<sup>241</sup> This cannot be condoned<sup>242</sup> because it would result in the complete degradation of a pregnant

232 *Ireland v United Kingdom* [1978] ECHR 1.

233 E.g. *Re MB*, *supra* note 127.

234 *Jackson*, *supra* note 69, at 135.

235 Reference under review.

236 *Re F*, *supra* note 144.

237 *Id.*, at 145 per Staughton LJ.

238 *Id.*

239 The Local Authority sought to ensure she remained in hospital until she had given birth.

240 Children Act 1989, s.1 (1).

241 *Re F*, *supra* note 144, 135 per May LJ.

242 *Id.*, at 138 per May LJ.

person. Ensuring pregnant people complied with the terms of an injunction would be difficult because the Court could not 'consider with any equanimity that . . . [the guardian] should seek to enforce an order [using force or] by committal'.<sup>243</sup> In *Paton*, it was observed that an injunction would be ineffectual, because 'no judge could even consider sending a . . . wife to prison . . . [for ignoring the terms of this injunction]. That of itself, seems to cover the application here; this husband cannot stop his wife by injunction from having what is . . . a lawful abortion'.<sup>244</sup>

As Horn argues, it is imperative, for pregnant people's health, that the right to access abortion is maintained—even with the advent of this technology.<sup>245</sup> Many pregnant people are incentivized, driven by their desire not to become biological and/or social mothers, to seek 'back-street' abortions, carried out by persons with no expertise, at great personal risk to themselves and the fetus should it survive.<sup>246</sup> The 'misery and injury resulting from unhygienic, risky, and illegal abortions' that was curtailed by the AA 1967<sup>247</sup> could rear its ugly head once more (though it is unlikely that with the advent of medication abortion this would have the same health consequences for pregnant people as 'clandestine' abortions in the past) if limitations are placed on access because of AAPT<sup>248</sup> despite the fact that abortion is safe and abortion is healthcare.

#### VI. B. The Right to vs. the Right not to Procreate

It is unlikely that we will ever live in a world where AAPT would not be more invasive than early 'conventional abortion'. Early medical abortion is safe, satisfactory to service users and enables a person to quickly secure freedom from unwanted pregnancy—greatly benefiting their physical and mental health.<sup>249</sup> The reasoning above related to a person's right to bodily integrity and autonomy, therefore, will always apply to abortion decisions. This is a point that has been conceded by some, though not all,<sup>250</sup> who have examined the abortion decision in light of ectogestation.<sup>251</sup> For the purposes of examining the claims of putative parental rights that have been advanced in relation to an abortion decision that does not engage a pregnant person's bodily autonomy, I will consider a hypothetical scenario. However, it is important to emphasize that this is a constructed imaginary and we ought not to decenter claims about pregnant people's bodies, for the reasons outlined above and earlier in this article.

*There are two abortion pills; neither is more invasive nor has more side effects than the other; but one results in fetal death, and the other in the fetus being safely yet miraculously teleported alive into an AAPT device. The 'magic pill' can secure freedom from pregnancy, safely preserve fetal life during transfer to AAPT, and is no more invasive than 'conventional abortion'. Abi wants*

243 *Id.*

244 *Paton*, *supra* note 26, at 280 per Baker P.

245 Horn, *supra* note 56, at 9–10.

246 Jackson, *supra* note 69, at 72; Jackson, *supra* note 50, at 363.

247 Brazier and Cave, *supra* note 25, at 403.

248 Jackson, *supra* note 50, at 363.

249 Tamara Hervey and Sally Sheldon, *Abortion by telemedicine in the European Union*, 145 INT. J. GYNECOL. OBSTET 125, 126 (2018).

250 Blackshaw and Rodger, *supra* note 18, at 78.

251 Brassington, *supra* note 10, at 205; Mathison and Davis, *supra* note 18, at 320.

to take the abortion pill that ensures fetal death; Brian wants her to take the pill that enables 'miraculous transfer' to AAPT.<sup>252</sup>

There is only now scope for argumentation about putative parental rights associated with being a genetic progenitor. Abortion is not considered to be only about 'ending pregnancy';<sup>253</sup> the 'right to abortion' is often interpreted as a 'right to abdicate genetic parenthood'.<sup>254</sup> Where a genetic progenitor is seeking to prevent abortion, their claimed right to be a parent will be in direct contention with an unwilling pregnant person's right to not be a parent. Alghrani posits that, to comprehend how such a conflict might be resolved, it would be useful to consider how disputes that concern the disposition of human embryos have been resolved since there are some obvious parallels.<sup>255</sup> In *Evans v Amicus Health Care*,<sup>256</sup> Ms Evans, following the discovery of cancer in both her ovaries, had her oocytes removed and fertilized with her then fiancé Mr Johnson's sperm to create embryos for storage. After her ovaries were removed, but before IVF treatment began, Ms Evans and Mr Johnson's relationship ended. She sought to use the embryos, created with both of their consent, to become pregnant and he sought to remove his consent for the storage and use of the embryos.

Ms Evans claimed that either the Court of Appeal should interpret the provisions of the Human Fertilization and Embryology Act 1990 (HFEA 1990) as compatible with her right to family life, contained in the ECHR,<sup>257</sup> or if impossible they must grant a declaration of incompatibility.<sup>258</sup> It was held, however, that the Act could in no way be read as allowing Ms Evans to continue fertility treatment with the embryos without Mr Johnson's consent.<sup>259</sup> It was accepted that denying Ms Evans use of the embryos engaged her right to family life.<sup>260</sup> However, the right to family life is not absolute. Strasbourg jurisprudence allows derogation from respect for family life when in accordance with the law, necessary in a democratic society for the protection of the rights and freedoms of others and is proportionate.<sup>261</sup> Mr Johnson claimed that the engagement of Ms Evans' right was necessary to protect his rights and freedoms, and that the interference was proportionate. Arden LJ stated that it 'would be difficult for a court to judge whether the effect of the withdrawal of consent for Ms Evans is greater than the effect that the invalidation of that withdrawal of consent for Mr Johnston'.<sup>262</sup> Interference with her rights could not be justified because it was necessary to protect his rights, or vice versa, because both rights are qualified in the same way by the rights of the

252 Part of the purpose of outlining this scenario is to illustrate quite how non-sensical claims that the bodily integrity of the pregnant person is not engaged when AAPT is available (because pregnancy is ended) are.

253 Alghrani, *supra* note 60, at 314.

254 B. ALVAREZ MANNINEN, PRO-LIFE, PRO-CHOICE: SHARED VALUES IN THE ABORTION DEBATE, 169–170 (Vanderbilt University Press 2014).

255 Alghrani, *supra* note 60, at 324.

256 *Evans v Amicus Health Care Ltd and Others* [2004] EWCA (Civ) 727.

257 European Convention of Human Rights, Article 8 (1).

258 Human Rights Act 1998, s.4 (2); *Evans v Amicus Health Care*, *supra* note 256, at para 58 per Thorpe LJ.

259 *Id.*, at para 58 per Thorpe LJ.

260 *Id.*, at para 108 per Arden LJ.

261 European Convention of Human Rights, Article 8 (2).

262 *Evans v Amicus Health Care*, *supra* note 256, at para 110 per Arden LJ.

other.<sup>263</sup> The right to and not to procreate are, in theory, corresponding and equal.<sup>264</sup> Thorpe LJ stressed that Parliament, therefore, had a choice between two legitimate and proportionate options, each interfering with Ms Evans' or Mr Johnson's respective right to family life. Parliament having made a choice meant the court had no power of intervention.<sup>265</sup> The Court of Appeal held that Mr Johnson was able to withdraw his consent for the use and storage of embryos created using his sperm<sup>266</sup> as was expressly provided by the HFEA 1990. This was deemed a proportionate interference with Ms Evans' right to family life.

Ms Evans appealed to the European Court of Human Rights. A five-to-two majority found that the interference with Ms Evans' right to family life was within the margin of appreciation.<sup>267</sup> The State was entitled to balance private interests, such as competing rights to family life, involved in the regulation of IVF treatment.<sup>268</sup> Parliament could have chosen to prioritize Ms Evans' right, but deciding to prioritize Mr Johnson's right was also proportionate.<sup>269</sup> Thus, the embryos were destroyed and Ms Evans was unable to have any genetic offspring. The HFEA 1990, and this interpretation of it, is clear that, in English law, the right not to procreate is seemingly stronger than the right to procreate when reproduction is technologically assisted.

In our imagined dispute, Abi is attempting to enact her right not to reproduce, an element of the right to family life,<sup>270</sup> and Brian wishes to assert his right to reproduce, another element of the right to family life. If—we imagine—that 'fetal extraction' for AAPT is no more risky or invasive than abortion, Abi and Brian's rights regarding procreation are corresponding and equal, one will inevitably infringe on the right of the other, and there is no specific legislation, unlike in *Evans*, to determine the outcome. We must determine which right is stronger because without pregnancy or an invasive procedure to end it, it has been suggested that male and female genetic progenitors or 'men and women stand on equal ground',<sup>271</sup> because they are, as noted by the Supreme Court of Tennessee, 'entirely equivalent gamete providers'.<sup>272</sup> Therefore, just as in an embryo dispute, it might be argued that 'none of the concerns about a woman's bodily integrity that have previously precluded men from controlling abortion decisions [are] applicable here'.<sup>273</sup>

The *Evans* judgment is distinguishable from Abi and Brian's dispute because it involved frozen embryos, which are, undeniably, different entities from fetuses. Blackshaw and Rodger stipulate that arguing about the right not to be a parent in the abortion context is framed wrongly, because a person is already a biological parent once a fetus is being gestated.<sup>274</sup> Brassington also suggests that 'one is no less a parent for the fetus

263 *Id.*

264 *Id.*

265 *Id.*, at para 63 per Thorpe LJ.

266 *Id.*, at para 41.

267 *Evans v United Kingdom* [2007] 42 EHRR 21, at paras 59 and 62.

268 *Id.*, at para 62.

269 *Id.*, at para 68.

270 *Evans v Amicus Health Care*, *supra* note 256.

271 Bard, *supra* note 5, at 153.

272 *Id.*

273 *Davis v Davis*, 84 S.W. 2d 588 (1992) (Supreme Court of Tennessee); Bard, *supra* note 5, at 153.

274 Blackshaw and Rodger, *supra* note 18, at 79.

not having been born yet.<sup>275</sup> This conceptualization overstates the significance of a fetus given that it has not yet been born.<sup>276</sup> Kendal observes that, 'the provision of life-sustaining gestational processes gives the pregnant woman the ability to bestow meaning onto the existence of the fetus, eg to bring it into relationship with others.'<sup>277</sup> Therefore, it is only the pregnant person that can determine whether the fetus is conceptualized by others as a 'future family member' or a bundle of cells.<sup>278</sup> I would go further, however, and suggest that while aspects of gestation are relational, and a pregnant person who carries a pregnancy to term may consider themselves to have some caring responsibilities, it would be inaccurate to claim that either they or other genetic progenitors are parents before a child is born. Before birth, there is no subject of which a genetic progenitor can be legally recognized as a parent. More importantly, to describe a person as a parent is to imply the existence of a particular type of relationship—as 'the status of parent is relational status, to be a parent is not due to any intrinsic features or qualities of a person. Rather, to be a parent depends on having children of one's own, and is therefore dependent on standing in relation with another, where that other is the child.'<sup>279</sup> Thus Singh, persuasively, indicates that newborns, and not fetuses, can be the proper object of parental responsibilities.<sup>280</sup> The relationship a pregnant person has towards a fetus can also be distinguished from those we associated with 'parenting',<sup>281</sup> and it would be inappropriate to force thinking about 'pregnancy as parenting' on a pregnant person.

In terms of the intrinsic properties of the fetus compared to the embryo—the law does afford fetuses some protections that are not applicable to frozen embryos (for example, legally speaking, there must be one of a set of 'defined reasons' to terminate a fetus, but there need not be any reason given for the destruction of an embryo)—however, the limited protections that are afforded to a fetus remain subordinate to a pregnant person's rights and health.<sup>282</sup> A fetus can be terminated and it is not a legal person. At 18 weeks' gestation (thinking again of Abi's fetus), there is little material difference for the purposes of the imagined dispute between a frozen embryo as in the Evans case in legal terms, even if there were any moral difference between the two entities. This is because at 18 weeks the fetus can be aborted under s.1(1)(a) of the AA 1967.

Significantly, this is not Brian's last opportunity to become a biological parent. The dissenting judges in the ECHR were sympathetic<sup>283</sup> to Ms Evans' claim, because the embryos literally were her last chance to have genetic offspring. Unless circumstances have changed in the 18 weeks since the conception of the fetus, then Abi having an abortion 'has not robbed . . . [Brian] of the general capacity to procreate; rather . . . [Abi] has denied him the opportunity to become a father to a specific child.'<sup>284</sup> The

275 Brassington, *supra* note 10, at 199.

276 Romanis, *supra* note 48.

277 Kendal, *supra* note 22, at 201

278 *Id.*

279 Prabhpal Singh, *Fetuses, newborns & parental responsibility*, 46 J. MED ETHICS 188 (2020), at 190.

280 *Id.*, at 190.

281 *Id.*, at 190.

282 Abortion Act 1967; Infant Life (Preservation) Act 1929.

283 The majority also expressed sympathy; *Evans v United Kingdom*, *supra* note 267, at para 67.

284 Alvarez Manninen, *supra* note 254, at 173.



infringement with Brian's right to family life is minor, because while he is denied fatherhood of this particular entity, he is not prevented from becoming a genetic parent in lots of other circumstances. Whereas Abi's freedom, if she had genetic parenthood forced upon her, 'may be inhibited by feelings of guilt or even responsibility', resulting from the knowledge that her child exists elsewhere.<sup>285</sup> Pregnant people are often socialized to believe themselves 'bad mothers', 'bad people', or 'unwomanly', and are forced to endure severe social consequences, where they choose not to embrace parenting responsibilities after gestating.<sup>286</sup> Some would argue that the point I have raised here about the significance and severe consequences that result from unwilling biological parenthood have the logical corollary that we should give the same consideration to unwilling fathers as we do unwilling mothers. Should genetic progenitors who do not gestate be able to demand that a person have an abortion resulting in fetal death so that they can experience freedom from biological parenthood? The answer to this is obviously no, as it would be deplorable to imagine individual pregnant people having forced abortions in order to ensure the comfort of the other genetic progenitor. The geography of conception, of embryogenesis and of gestation (that is in the female body) and the physicality of a fetus (that it is part of the pregnant body)<sup>287</sup> inevitably means that guaranteeing the bodily autonomy of female people, their individuation and boundaries of self, will always mean there is asymmetry in the decision making about fetuses. While some men's activists might cry out that this is unfair, because pregnant people (mostly women) do have a greater say in decisions about a pregnancy, that is not necessarily the accolade that men's activists make it out to be. While a genetic progenitor who does not gestate does not necessarily have the knowledge of a future of biological parenthood forced upon them, people who become pregnant and then face gestating and birthing *always* do. The existence of an unwanted biological child—even if it is adopted—is often more significant for people who gestate and birth (usually women) than it is for genetic progenitors who do not gestate (usually men). It is often the starting presumption in both law and society that the best person to rear a child is its biological parents,<sup>288</sup> but in particular its biological and gestational mother. The ideology of 'motherhood' following the physical and emotional connection in gestation can be seen, very literally, to constrain the choices of people who have birthed.<sup>289</sup> While this observation has been made in the bioethical literature, it is important to also observe in this context the extent to which the law is also complicit in reinforcing the 'ideology' of motherhood. The law places these limitations on choice; a person cannot abdicate 'motherhood' before birth even in a gestational surrogacy arrangement,<sup>290</sup> and the legal

285 *Evans v Amicus Health Care*, *supra* note 256, at para 89 per Arden LJ.

286 Romanis and Horn, *supra* note 89, at 184.

287 Kingma, *supra* note 4.

288 Jill Marshall, *Concealed Births, Adoption and Human Rights Law: Being Wary of Seeking to Open Windows into People's Souls*, 71 CAMB. LAW J 325, 329 (2012).

289 *Id.*, at 330.

290 Horsey has noted that 'the law singularly fails to reflect . . . lived experience: the view of surrogates that they are not mothers'. Kirsty Horsey, *Fraying at the Edges: UK Surrogacy Law in 2015*, 24 MED. LAW REV. 608, 620 (2016).

mother (the person who gestates and births)<sup>291</sup> cannot formally assent to an adoption until 6 weeks post-birth.<sup>292</sup> People who gestate and birth and then either 'give away' their child (for adoption), or abandon it,<sup>293</sup> often face serious social stigma; they are often treated by those around them with disbelief and/or disdain.<sup>294</sup> This imperative to mother is legally enforced, and is a particularly gendered phenomenon, as it is usually women who gestate and birth. Women who choose not to mother their offspring are often treated as 'unwomanly' or 'unfeminine';<sup>295</sup> and as having done something contrary to their nature or what is natural. While fathers (male genetic progenitors)<sup>296</sup> who abandon their caring responsibilities are afforded the label of 'dead-beat dad', and often chastised, there is not the same assassination of their identity in addition to their character. Generally, the perceptions of women who 'give away' their child after birth are much worse, because they are always expected to be nurturing in nature and to become the 'primary care giver'.<sup>297</sup> This is reinforced by the presumptions, so engrained in the law, between the association between doing gestational work and becoming the social mother of a resulting child. The pressure to 'mother' often begins in pregnancy resulting from the significant societal and cultural expectations that are placed on people during pregnancy,<sup>298</sup> and as such, never becoming visibly pregnant is often important to people who seek to have an abortion as soon as possible to avoid such pressures. There are, in contrast, other ways in which some of the disadvantage associated with becoming an unwilling father can be mitigated.<sup>299</sup>

It will be the case, as Kendal has emphasized that some pregnant people might welcome AAPT as an alternative form of ending a pregnancy because they intend to give up their fetus for adoption after birth.<sup>300</sup> Some pregnant people, for example for religious reasons, do prefer to pursue adoption rather than abortion as their solution to

291 *Amphill Peerage Case*, supra note 151; *Re G*, supra note 15; *R (on the application of TT)* [2019] EWHC 2384 (FAM); *R (on the application of McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559; Human Fertilisation and Embryology Act, s.33 (1).

292 Adoption and Children Act 2002, s.52 (3) states 'any consent given by the mother to the making of an adoption order is ineffective if it is given less than 6 weeks after the child's birth'.

293 In England and Wales it remains a criminal offence for a pregnant person to 'abandon a born child' (effectively to have an anonymous birth) even if left in a safe space e.g. a hospital or GP office. In such an instance, the person would be guilty of 'exposure of a child under the age of two years' by virtue of the Offences Against the Person Act, s.27 and 'child cruelty' by virtue of the Children and Young Persons Act 1933, s.1. I am grateful to Dr Emma Milne for discussion on these points.

294 See Katherine O'Donovan, *Enfants Trouvés, Anonymous Mothers and Children's Identity Rights*, in *HUMAN RIGHTS AND LEGAL HISTORY*, (K. O'Donovan and G. Rubin, eds, 2000).

295 *Id.*

296 It has been stipulated that, in law, only a male can be recognized as a father: *J v C* [2006] Civ 551; *X, Y, Z v UK* [1997] ECHR 20.

297 Dara Purvis, *Expectant Fathers, Abortion and Embryos*, 43 *THE JOURNAL OF LAW, MEDICINE AND ETHICS* 330, 331 (2015).

298 The pressure experienced socially during pregnancy manifests in a multitude of different ways including, for example, public scrutiny of individual decisions and 'advice giving'. Most importantly, a 'fetus-first' mentality, that exerts tremendous pressure on pregnant people to prioritize the welfare of their foetus when pregnant, is not only culturally and socially engrained in England and Wales but, Milne argues, it has also had a substantial influence on the development of the law: Emma Milne, *Putting the Fetus First—Legal Regulation, Motherhood and Pregnancy*, 7 *MJG* 149 (2020).

299 See Sally Sheldon, *Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?* 66 *MOD. LAW REV.* 175 (2003).

300 Kendal, supra note 22, at 202.

an unwanted pregnancy. However, for the majority of people abortion affords closure in a way that AAPT and adoption cannot.<sup>301</sup> For the reasons explored above, it is important that this closure is accessible. Pregnant people making choices about terminating pregnancies in a world with AAPT that is magically non-invasive are making a choice that is simultaneously about their body, and about their future as biological parents.

I think it is, therefore, proportionate to infringe on Brian's right to family life by prioritizing Abi's right not to be a parent. Abi's legal right not to be a parent is stronger than Brian's legal right to parenthood based on current persuasive precedent unless there were some definitive statutory intervention to the contrary.

## VII. CONCLUSION

It has been argued that the emergence of AAPT could afford putative fathers greater say in abortion;<sup>302</sup> specifically on the matter of how to terminate a pregnancy.<sup>303</sup> AAPT could be perceived as grounds for genetic progenitors that do not gestate but consider themselves putative parents, and interested organizations,<sup>304</sup> to launch a legal challenge to the legality of a termination of pregnancy resulting in fetal death without the consent of the putative father. While many feminist scholars have before explained that AAPT should not be considered an 'alternative to abortion';<sup>305</sup> rhetoric that claims this as fact continues to be perpetuated. In this article, I considered what kind of legal challenge might be mounted by a genetic progenitor to abortion in the advent of AAPT to determine the likelihood of its success within the contemporary legal framework. I demonstrated that AAPT would not, unless there were some change to the law, improve a genetic progenitor/putative parent's prospects of interfering in abortion decisions. Such an individual would not have the locus standi to mount a challenge. The law in England and Wales does not afford a genetic progenitor any right to seek an injunction on such a matter. When two doctors agree that a pregnant person meets the criteria for lawful abortion, they are exclusively empowered to choose to have that abortion that their doctor has agreed they are eligible for. This would not, and ought not, change with AAPT.

Allowing genetic progenitors to obtain injunctions to prevent abortion on the grounds that partial ectogestation was safe and available would be inconsistent with the pregnant person's right to bodily autonomy protected by common law. There are no circumstances in which the claims of a putative father can outweigh the entitlement of a pregnant person to control their body and their pregnancy. I also demonstrated that a pregnant person's legal right not to become a parent is stronger than a genetic progenitor (who does not gestate)'s legal right to become a parent. Claims about a genetic progenitor's right to parent a gestating entity overstate their interest in that particular gestating entity.<sup>306</sup> The law must protect a pregnant person's choice to

301 Romanis and Horn, *supra* note 89, at 184.

302 Brassington, *supra* note 10; Räsänen, *supra* note 10.

303 *Id.*

304 Most challenges to abortion law in England and Wales are funded by large organizations like the Society for the Protection of Unborn Children or Christian Concern.

305 Cannold, *supra* note 87; Jackson, *supra* note 50, Romanis, *supra* note 7; Horn, *supra* note 35; Horn, *supra* note 56; Romanis and Horn, *supra* note 89; Romanis, *supra* note 94.

306 The term gestating entity is used here to be inclusive of entities that are undergoing gestation in utero (fetuses) and ex utero (gestatelings).

abort.<sup>307</sup> To find otherwise would impose an unjustifiable burden on pregnant people's physical integrity and mental health, and their rights to privacy and autonomy.

#### CONFLICT OF INTEREST

None declared.

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307 This is not to say that the current law does this sufficiently. See Horn, *supra* note 35, for an account of why 'artificial womb technology' increases the necessity for abortion decriminalization. See Romanis, *supra* note 7, for the importance of decriminalization in respect of instances in which pregnant people want to opt out of gestation in favor of AAPT.