Abortion: Law's Ethical Dilemma

Professor Leslie Thomas KC

30 November 2023

In today's lecture, we delve into the emotionally charged and ethically complex topic of abortion. This discourse evokes strong sentiments and confronts individuals with profound moral and ethical dilemmas. It is crucial to approach this subject with the utmost respect for the diverse perspectives and deeply held beliefs people hold. Abortion, inherently a "hard edge question," forces us to grapple with the challenging intersections of law, morality, and personal autonomy. As we traverse through the historical landscape of abortion laws in the UK, examining their impact on the Commonwealth Caribbean, and draw comparisons with global developments, we must be mindful of the profound implications this discourse holds. The urgency of addressing the decriminalization of abortion becomes apparent, underlining the need for the law to confront this intricate and contentious issue.

A brief note about terminology. In this lecture, I will be using the term "pregnant women" but I realise that this is controversial in some circles and some people might prefer "pregnant people". The intention of this is not to erase all those who might be able to bear and have children and of course I recognise that there are also some trans men and non-binary people who are able to get pregnant, and who are also affected by abortion restrictions. To say this is not to diminish the obvious fact that abortion politics is heavily gendered, but my stance is simply to accept that most people affected by abortion restrictions are women. But I do think it is important to acknowledge that trans men and non-binary people exist too, and also have a stake in the right to abortion. That said, I will frequently be quoting statutes, case law and academic works which do refer exclusively to women.

History of Abortion Law in the UK

I'm now going to give an overview of the history of abortion law in the UK. That law differs as between England and Wales, Scotland, and Northern Ireland. My main focus will be on the English and Welsh position, but I have a few things to say about the law of Scotland and Northern Ireland.

There is uncertainty and controversy over how the English common law regulated abortion prior to 1803. It's clear that at common law the point of "quickening" was an important threshold. I will come back to what this meant. A very early text, the Leges Henrici Primi dating from the early twelfth century, said "A woman shall do penance for three years if she intentionally brings about the loss of her embryo before forty days; if she does this after it is quick, she shall do penance for seven years as if she were a murderess."[1] This passage would appear to be concerned with penance in ecclesiastical law, rather than temporal criminal penalties.[2]

In the thirteenth century, Henry de Bracton wrote in his famous treaties On the Laws and Customs of England "If one strikes a pregnant woman or gives her poison in order to procure an abortion, if the foetus is already formed or quickened, especially if it is quickened, he commits homicide."[3]

---

[1] As quoted in Carla Spivack, To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England, 14 Wm. & Mary J. Women & L. 107 (2007) https://scholarship.law.wm.edu/wmjowl/vol14/iss1/4/

[2] As discussed by David Boyle, Supreme deceit: How Sam Alito snuck medieval state Christianity into the Dobbs opinion, *Salon*, 13 October 2022 https://www.salon.com/2022/10/13/deceit-how-sam-alito-snuck-medieval-state-christianity-into-the-dobbs-opinion/

[3] Henry de Bracton, On the Laws and Customs of England, vol 2, p 341 https://amesfoundation.law.harvard.edu/cgi-bin/brac-hilite.cgi?Unframed+English+2+341

As Neil Jones writes, "in the seventeenth century the common law tide began to turn against the view that abortion was a felony." Rather, by then it was viewed as a misdemeanour.[4] Edward Coke's Institutes of the Laws of England said:

> *"If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder: but if the childe be born alive, and dieth of the potion, battery, or other cause, this is murder: for in law it is accounted a reasonable creature, in rerum natura, when it is born alive."*[5]

William Blackstone said in his 1765 Commentaries on the Laws of England:

> *"Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion, or otherwise, killeth it in her womb; or if any one beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the antient law homicide or manslaughter. But at present it is not looked upon in quite so atrocious a light, though it remains a very heinous misdemeanor."*[6]

So, in early modern England abortion was a crime after quickening, although probably not a felony. However, there has been debate about when quickening occurred, as well as how the common law viewed abortion before quickening.

Here in England and Wales, that debate is largely only of historical interest. However, in the United States, the state of the pre-1803 English common law has become a subject of intense modern political controversy, because of the role it has played in modern US constitutional jurisprudence. In Roe v Wade 410 US 113 (1973), the well-known case in which the US Supreme Court found there to be a constitutional right to abortion, Mr Justice Blackmun wrote *"It is undisputed that, at common law, abortion performed before "quickening" - the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy - was not an indictable offense."*

However, opponents of abortion have since counterattacked on this issue. They have, for example, cited the 1838 English case of R v Wycherley 173 ER 486, which may suggest that "quick" did not mean the same thing in every context[7]. A woman was convicted of murder and the question arose whether she was excused from being executed because she was pregnant or *"quick with child"*. The law report records that Mr Baron Gurney said ""Quick with child" is having conceived. *"With quick child" is when the child has quickened. Do you understand the distinction I make?"*

In an amicus brief submitted by the conservative legal scholars John Finnis and Robert George in the recent case of Dobbs v Jackson Women's Health Organization 142 S. Ct. 2228, the authors argue that a foetus would have been viewed as "quick" from the sixth week of pregnancy, and not from the time that the pregnant woman felt movement in their womb.[8] In contrast, an amicus brief in the same case by the American Historical Association and the Organization of American Historians supports the view in Roe that "quickening" was the point at which the pregnant woman felt the foetus move.[9] This debate was alluded to by Mr Justice Alito in

---

[4] Neil Jones, English legal history in Dobbs v Jackson [2023] IFL 8.
[5] Edward Coke, The Third Part of the Institutes of the Laws of England, p 50 https://upload.wikimedia.org/wikipedia/commons/8/8a/Edward_Coke%2C_The_Third_Part_of_the_Institutes_of_the_Laws_of_England_%281797%29.pdf
[6] Blackstone, Commentaries on the Laws of England 1:120-41 https://press-pubs.uchicago.edu/founders/documents/amendIXs1.html
[7] For example, *Wycherley* is cited in an *amicus* brief by Professor Joseph W. Delapenna in the case of *Dobbs v Jackson Women's Health Organization* 142 S. Ct. 2228 https://www.supremecourt.gov/DocketPDF/19/19-1392/185316/20210806173754092_19-1392%20Amicus%20Br%20Joseph%20Dellapenna.pdf
[8] Available online at https://www.supremecourt.gov/DocketPDF/19/19-1392/185196/20210729093557582_210169a%20Amicus%20Brief%20for%20efiling%207%2029%2021.pdf
[9] Available online at https://www.supremecourt.gov/DocketPDF/19/19-1392/192957/20210920133840569_19-1392%20bsac%20Historians.pdf

a footnote in the opinion of the Court, but he did not find it necessary to resolve it. Mr Justice Alito also referred approvingly to the work of Joseph Dellapenna. Dellapenna's work has, however, come in for robust scholarly criticism from Carla Spivack, who states that *Dellapenna "distorts the evidence to press an absolutist position about the legal history".*[10]

Another complicating factor is the relationship between common law and ecclesiastical law. As we have already seen, the Leges Henrici addressed abortion in the context of penance, rather than temporal criminal penalties. Commenting on the Dobbs judgment, R.H. Helmholz argues that abortion in medieval times was principally the concern of ecclesiastical law, within the jurisdiction of ecclesiastical courts, and that ecclesiastical jurisdiction over the subject lasted well into the sixteenth century, whereafter "the jurisdictional history becomes more tangled".[11]

I don't propose to attempt to resolve the historical controversies. Instead, I will move on to 1803, when the English law against abortion was put on a statutory footing by Lord Ellenborough's Act. This Act was very severe. It made it a capital offence to "cause and procure the miscarriage of any woman, then being quick with child". It also criminalised abortion before quickening, which was made punishable with fines, imprisonment, the pillory, whipping or transportation, but not with death. According to Dickens and Cook, it was not clear whether a pregnant woman performing an abortion on themselves was criminalised by this Act.[12] The 1803 Act was superseded by Lord Lansdowne's Act of 1828, which in turn was superseded by the Offences against the Persons Act 1837. The latter abolished the death penalty for abortion, and also abolished the distinction between pre-quickening and post-quickening abortions.

The next major statute enacted was section 58 of the Offences against the Person Act 1861, which is still in force today. This section provides in relevant part:

> *"Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony"*

An important caveat here is the word "unlawfully", which left open the possibility of a defence that there was such a thing as a lawful abortion. The case of R v Bourne [1939] 1 KB 687 established that such a defence existed. In Bourne, an obstetric surgeon was indicted for performing an abortion on a 14-year-old girl who, according to the law report, had been *"raped with great violence"* and had become pregnant as a result of the rape. Mr Justice Macnaghten relied by analogy on the separate offence of child destruction under the Infant Life (Preservation) Act 1929, which provided a defence where the relevant act was *"done in good faith for the purpose only of preserving the life of the mother".* He accepted that the 1929 Act did not directly apply, but he said that *"the proviso that it is necessary for the Crown to prove that the act was not done in good faith for the purpose only of preserving the life of the mother is in accordance with what has always been the common law of England with regard to the killing of an unborn child".*

He went on to take a relatively expansive interpretation of what was meant by *"preserving the life of the mother".* He said:

> *"It is not contended that those words mean merely for the purpose of saving the mother from instant death. There are cases, we are told, where it is reasonably certain that a pregnant woman will not be able to deliver the child which is in her womb and survive. In such a case where the doctor anticipates, basing his opinion upon the experience of the profession, that the child cannot be delivered without the death of the mother, it is obvious that the sooner the operation is performed*

---

[10] Carla Spivack, To "Bring Down the Flowers": The Cultural Context of Abortion Law in Early Modern England, 14 Wm. & Mary J. Women & L. 107 (2007) https://scholarship.law.wm.edu/wmjowl/vol14/iss1/4/

[11] R.H. Helmholz, Legal history and abortion in American law [2023] IFL 12

[12] Bernard M Dickens and Rebecca J. Cook, Development of Commonwealth abortion laws, International & Comparative Law Quarterly 28.3 (1979): 424-457

the better. The law does not require the doctor to wait until the unfortunate woman is in peril of immediate death. In such a case he is not only entitled, but it is his duty to perform the operation with a view to saving her life.

[…]

As I have said, I think those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the 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."

The *Bourne* case was the leading authority in England and Wales on the section 58 offence until 1967. Elsewhere in the Commonwealth it continues to be relevant, as we will see.

I need to say a little about Scotland. The 1861 Act never applied to Scotland, and up until 1967 abortion in Scotland was a wholly common law matter. The Scottish legal scholar Jonathan Brown writes that prior to 1967 *"Scots law recognised the legitimacy of therapeutic termination. Abortion was treated, primarily, as a medical matter and the dearth of Scottish case law concerning abortion may be attributed to the fact that the legal profession was reluctant to interfere with decisions made by doctors."*[13] Brown cites the case of HM Advocate v Graham (1897) 2 Adam 412 which holds that the abortion must have been carried out *"wickedly and feloniously"* to be criminal. He states that there was only one case in which a Scottish medical practitioner was prosecuted, the case of HM Advocate v Ross in 1967, in which *"the central issue was the fact that the termination occurred in the patient's home; in the absence of professional medical guidance".* He further notes that Dr Ross pleaded guilty, and the case did not therefore establish any precedent that Ross's actions were criminal.[14]

The pre-1967 abortion law of Scotland was therefore, in Brown's words*, "far from clear".*[15] Although abortion was a crime known to the law, it appears that there were circumstances in which an abortion could lawfully be carried out.

The next major development was the Abortion Act 1967, which continues to be the governing law today in England, Scotland and Wales. It does not extend to Northern Ireland. The 1967 Act did not repeal section 58 of the 1861 Act, but provided an exception to it. Under the Act as originally enacted, an abortion could be performed by a doctor up to the 28th week of pregnancy if two doctors formed the opinion that *"risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated".* (I say "pregnant woman" here because that is the language of the Act, but the Act of course also applies to trans men or non-binary people who are pregnant.) It also allowed abortion at any stage of pregnancy where two doctors formed the opinion that *"there is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped".*

The Human Fertilisation and Embryology Act 1990 amended the Act significantly. Abortion was now allowed up to the 24th week (not the 28th) where *"the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family".* It was legalised at any stage of pregnancy where *"the termination is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman"* or where *"the continuance of the pregnancy would involve risk to the life of the pregnant woman, greater than if the pregnancy were terminated".* It remained the case that the opinion of two doctors was required.

Pausing there, although these are relatively liberal grounds for abortion, they fall a very long way short of permitting abortion on demand. It remains doctors, not the pregnant woman, who are the primary decision-

[13] Jonathan Brown, Scotland and the Abortion Act 1967: historic flaws, contemporary problems. *Juridical Review*, 2 (2015), 135-155
[14] Ibid
[15] Ibid

makers as to whether the criteria are met. As Fran Amery states*, "abortion is still governed – albeit by the medical profession rather than directly controlled by the state"*[16]. It is therefore entirely possible for a pregnant woman to be denied an abortion under the 1967 Act, in particular where they have missed the 24-week deadline and don't meet the more restrictive criteria for abortion after that deadline. Those pregnant who perform illegal abortions on themselves can be and sometimes are prosecuted. According to Zoe Williams writing recently in the Guardian, there were only three prosecutions in Great Britain for illegal abortions between 1861 and November 2022, but since December 2022 six women have been charged for illegal abortions. In June 2023 Carla Foster was sentenced to 28 months in prison, reduced on appeal to a suspended sentence of 14 months, for self-administering Mifepristone when she was over the 24-week limit.[17]

As an aside, given that the 1861 Act does not apply in Scotland, the question might be thought to arise as to whether the Scottish common law defence to which I referred earlier has survived, such that abortion might be lawful in Scotland even where not authorised by the 1967 Act. However, the Inner House of the Court of Session in *Doogan v Greater Glasgow* and *Clyde Health Board* 2013 SC 496 held that there was no such residual ability at common law to carry out an abortion. The case went on appeal to the Supreme Court [2015] AC 640, but not on this point.

I should also mention that the 1967 Act was never extended to Northern Ireland. Abortion remained generally illegal in Northern Ireland until recently. In *Re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] NI 228, the Supreme Court was deeply divided on a challenge brought by the Northern Ireland Human Rights Commission to Northern Ireland's abortion laws. The majority held that the Commission had no standing to bring the challenge. However, all the Justices expressed their views on the merits anyway. A majority held that the prohibition on abortion in cases of fatal foetal abnormality and rape or incest breached Article 8 of the European Convention on Human Rights, the right to private and family life. Two Justices went further and said that they would have found it incompatible with Article 3, the prohibition on inhuman and degrading treatment, as well. Another two Justices found no breaches of Article 3 or 8.[18]

Parliament has since stepped in. The Northern Ireland (Executive Formation etc) Act 2019 repealed sections 58 and 59 of the 1861 Act under the law of Northern Ireland with retrospective effect. Regulations were subsequently made in 2020 and approved by both Houses of Parliament which provided for a new legal regime regulating abortion in Northern Ireland, which is significantly different from that in England and Wales.

So, that is the UK position in a nutshell. What of the Commonwealth Caribbean? The short answer is that it varies widely. In some Commonwealth Caribbean jurisdictions, such as Antigua and Barbuda where I practise, as well as Jamaica and Trinidad and Tobago, the relevant law is copied from the English 1861 Act. The law in these jurisdictions is therefore that which was applied in England prior to 1967, including the Bourne judgment. Conversely, some other jurisdictions have enacted legislation that has significantly liberalised their abortion laws. This includes the Medical Termination of Pregnancy Act 1983 in Barbados, and the Medical Termination of Pregnancy Act 1995 in Guyana. Time doesn't permit an exhaustive survey of these laws.

We can see, therefore, that the British and Commonwealth approach to abortion law is not uniform. However, the general approach has been to criminalise abortion but to carve out exceptions to that criminalisation. The extent of those exceptions varies by jurisdiction.

---

[16] Fran Amery, Social Questions, Medical Answers: Contesting British Abortion Law, *Social Politics* 21(1) (2014)
[17] Zoe Williams, The women being prosecuted in Great Britain for abortions: 'Her confidentiality was completely destroyed', *The Guardian,* 10 November 2023
[18] See the analysis of the judgment by Robert Brett Taylor and Adelyn L.M. Wilson, UK Abortion Law: Reform Proposals, Private Members' Bills, Devolution and the Role of the Courts, *Modern Law Review* 82(1) (2019)

The international context

These developments have happened against the backdrop of a highly contentious international debate on abortion. Recent years have seen liberalisation of abortion law in some jurisdictions, and a tightening of restrictions in others.

A September 2023 paper by Cardenas, Singh, Harpin and Sadinsky highlights the development of international human rights law around abortion.[19] They highlight that in 1999 the Committee for the Elimination of Discrimination against Women, or CEDAW Committee, published its General Recommendation 24 which called for the decriminalisation of abortion. In 2003 the African Union enshrined the right to abortion in certain circumstances in the Maputo Protocol. The UN Human Rights Committee in *KL v Peru*, communication no 1153/2003, 22 November 2005, found that the denial of an abortion to a teenage girl carrying an anencephalic foetus had violated her rights under the International Covenant on Civil and Political Rights, specifically, Article 7, the prohibition of cruel, inhuman and degrading treatment, Article 17, the right to privacy, Article 24, the right of children to special protection, and Article 2, the right to a legal remedy.

Subsequently, in *Mellet v Ireland*, communication no 2324/2015, 31 March 2016, the Committee found that a woman in the Republic of Ireland carrying a non-viable foetus who had had to travel abroad for an abortion had suffered cruel, inhuman, and degrading treatment, contrary to Article 7 of the Covenant. Her rights under Article 17, the right to privacy, and Article 26, the prohibition of discrimination, had also been violated. For context, since 1983, the Eighth Amendment to the Irish Constitution had enshrined a general prohibition on abortion in Irish constitutional law. The Committee reached a similar view in another Irish abortion case, *Whelan v Ireland*, communication no 2425/2014, 17 March 2017.

In contrast, the European Court of Human Rights had taken a more restrained view in the earlier case of *A, B and C v Ireland* (2011) 53 EHRR 13. That was a case brought by three Irish woman who had had to travel abroad for abortions. Their claims under Article 2 of the European Convention on Human Rights, the right to life, and Article 3, the prohibition on inhuman or degrading treatment or punishment, were held inadmissible. The Court found that there was no violation of Article 8, the right to private and family life, in relation to the first and second applicants. However, it did find such a violation in relation to the third applicant, who had a rare form of cancer and had undergone chemotherapy. This was on the ground that there was no *"accessible and effective procedure"* by which she could have established whether she qualified for a lawful abortion in Ireland under Irish law as it stood. This case led to the enactment of the Protection of Life During Pregnancy Act 2013, which set out a legal framework for when people would qualify for abortion in Ireland. Finally, in 2018, after the *Mellet and Whelan* decisions, the Irish electorate voted to repeal the Eighth Amendment to the Constitution by passing the Thirty-sixth Amendment.

In Canada, the criminal law has effectively imposed no restrictions on abortion since the judgment in *R v Morgentaler* [1988] 1 SCR 30 which struck down the provisions of the Criminal Code governing abortion as unconstitutional.

Conversely, the United States has recently seen highly controversial changes in the opposite direction. In *Dobbs v Jackson Women's Health Organisation*, the US Supreme Court overruled its own judgment in *Roe v Wade,* and held that there was no constitutional right to abortion. *Dobbs* did not impose a national abortion ban; rather, it left it up to state legislatures to decide whether or not abortion should be legal in their respective states. Ottley, Szopa and Fletcher, writing in the Medical Law Review, have reviewed the consequences of Dobbs one year on. They highlight that *"following Dobbs, the landscape of abortion access across the 50 States has become disparate and reflective of State-based preferences."*[20] So whether a pregnant woman

[19] Alejandra Cardenas, Susheela Singh, Margaret Harpin and Sophia Sadinsky, Realising the Full Decriminalisation fo Abortion: A comprehensive Approach through Public Health and International Human Rights Law, Center for Reproductive Rights and Guttmacher Institute, September 2023 https://reproductiverights.org/wp-content/uploads/2023/10/Full-decriminalization-of-abortion_Article_10.13.pdf

[20] Emily Ottley, Karolina Szopa, and Jamie Fletcher. "Dobbs v Jackson Women's Health Organization (2022):

can access abortion in the United States is now a postcode lottery, depending on which state they happen to live in. This of course disadvantages poorer people, who are less likely to be able to travel to another state to access abortion. For that matter, even before *Dobbs*, there were already significant practical restrictions on abortion access in some states, which were permissible under pre-*Dobbs* case law. As Leslie J. Reagan states, these included *"mandatory twenty-four to seventy-two-hour waiting periods, parental notification requirements for people under eighteen, forced reading of false scripts about the dangers of abortion to patients in advance of the procedure, and vaginal ultrasounds – state-mandated sexual assaults".*[21]

We have seen that Mr Justice Alito's leading judgment in Dobbs drew heavily on English and early American legal history, but that that history is contested terrain. Leslie Reagan states that the majority opinion *"gets the history egregiously wrong".* [22]

Reformation of abortion law

Having looked at the present state of abortion law, we're now going to consider how it should be reformed. Time does not permit me to do justice to the moral and philosophical debate around abortion, but I'll attempt to sum up my position briefly.

Generally, the classic argument against abortion is simply that a foetus is a human life, and that it is wrong to take innocent human life. As many opponents of abortion are religious, this is often coupled with the idea that a foetus has a human soul from the moment of conception. Conversely, from a secular perspective many people would argue that a blastocyst, an embryo or a foetus in the early stages of development cannot meaningfully be called persons. This naturally leads us to a thorny debate about when a person becomes a person – at conception, at birth, or at some point in between – and invites the drawing of arbitrary lines.

But the main argument made in practice by most proponents of abortion is simply based on bodily autonomy. They would say that even if the foetus is a person, the pregnant woman has an absolute right to decide what happens to their own body and is therefore not obliged to carry the foetus to term. The most powerful expression of this argument is in Judith Thomson's *"famous violinist"* example:

> *"I propose, then, that we grant that the fetus is a person from the moment of conception. How does the argument go from here? Something like this, I take it. Every person has a right to life. So, the fetus has a right to life. No doubt the mother has a right to decide what shall happen in and to her body; everyone would grant that. But surely a person's right to life is stronger and more stringent than the mother's right to decide what happens in and to her body, and so outweighs it. So, the fetus may not be killed; an abortion may not be performed.*
>
> *It sounds plausible. But now let me ask you to imagine this. You wake up in the morning and find yourself back-to-back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look, we're sorry the Society of Music Lovers did this to you--we would never have permitted it if we had known. But still, they did it, and the violinist is now plugged into you. To unplug you would be to kill him. But never mind, it's only for nine months. By then he will have recovered from his ailment and can safely be unplugged from you." Is it morally incumbent on you to accede to this situation? No doubt it would be very nice of you if you did, a great kindness. But do you have to accede to it? What if it were not nine months, but nine years? Or longer still? What if the director of the hospital says. "Tough luck. I agree. But now you've got to stay in bed, with the violinist plugged into you, for the rest of your life. Because remember this. All persons have a right to life, and violinists are persons. Granted you have a right to decide what happens in and to*

consequences one year on." *Medical Law Review* 31.3 (2023): 457-468

[21] Leslie J Reagan, From When Abortion Was a Crime to Abortion Is a Crime. *Bulletin of the History of Medicine,* 97(1) (2023), 11-21.

[22] Ibid

> *your body, but a person's right to life outweighs your right to decide what happens in and to your body. So, you cannot ever be unplugged from him." I imagine you would regard this as outrageous, which suggests that something really is wrong with that plausible-sounding argument I mentioned a moment ago."*[23]

This is a very powerful argument. Its attraction is that it does not require us to engage at all with the question of when a foetus becomes a person, because even if it is a person, the pregnant woman has no obligation to carry it to term. If that is right, it follows that a pregnant woman who wants an abortion is in principle entitled to one, or at least that the criminal law should not interfere with their choice. This leads inexorably to the proposition that abortion law should be further liberalised, so as to decriminalise abortion in all or almost all circumstances. As we have seen, this is not merely a theoretical issue, as there have recently been a number of prosecutions in England and Wales for illegal abortions.

Another key point is that restrictive abortion laws do not necessarily lower abortion rates, and that, conversely, they lead to many more unsafe "backstreet" abortions. This can have devastating effects on the health of pregnant people, usually from the poorer sections of the community, who have no choice but to resort to such abortions. In the context of Trinidad and Tobago, where the English pre-1967 law still prevails, Glennis Hyacenth and Crystal Brizan wrote in 2012 *"The criminal law is a major cause of the public health problem relating to abortion in Trinidad and Tobago and may be seen as a leading cause of maternal morbidity… The interpretation of the criminal law makes it impossible for a woman with an unwanted pregnancy to obtain safe medical care in hospitals and often times drives poor women to risk their lives with dangerous procedures."*[24]

I do, however, want to make a final point, which is no less important than the other issues I have addressed in this lecture. While I believe that abortion should be fully decriminalised, I also don't think that this is a complete answer to the issue. We also need to address the social and economic context. In her landmark 1983 essay "Racism, Birth Control and Reproductive Rights," Angela Davis makes clear that birth control, including abortion, *"is a fundamental prerequisite for the emancipation of women".* However, she also criticises the abortion rights movement of the time, stating that *"arguments advanced by birth control advocates have sometimes been based on blatantly racist premises,"* that *"the historical record of this movement leaves much to be desired"* and that *"the ranks of the abortion rights campaign did not include substantial numbers of women of color".*[25] She makes a powerful, if uncomfortable, point about the history of abortion among enslaved people:

> *"Black women have been aborting themselves since the earliest days of slavery. Many slave women refused to bring children into a world of interminable forced labor, where chains and floggings and sexual abuse for women were the everyday conditions of life…*
>
> *Why were self-imposed abortions and reluctant acts of infanticide such common occurrences during slavery? Not because Black women had discovered solutions to their predicament, but rather because they were desperate. Abortions and infanticides were acts of desperation, motivated not by the biological birth process but by the oppressive conditions of slavery. Most of these women, no doubt, would have expressed their deepest resentment had someone hailed their abortions as a stepping stone toward freedom."*[26]

She goes on to say *"What is urgently required is a broad campaign to defend the reproductive rights of all women-and especially those women whose economic circumstances often compel them to relinquish the*

---

[23] Judith Thomson, A Defense of Abortion, *Philosophy & Public Affairs*, Vol. 1, no. 1 (Fall 1971). https://spot.colorado.edu/~heathwoo/Phil160,Fall02/thomson.htm

[24] Glennis Hyacenth and Crystal Brizan, The Case of Unsafe Abortion in Trinidad and Tobago: An NGO Perspective, *Social and Economic Studies* 61:3 (2012): 167-186

[25] Angela Davis, Racism, Birth Control and Reproductive Rights, in Women, Race and Class, Vintage Books, 1983

[26] Ibid

right to reproduction itself."[27] She goes on to describe the practice of forced sterilisations of Black, Native and Latinx people in US history.

Reproductive rights shouldn't begin and end with the right to abortion and contraception, important though those things are. They should also extend to changing social and economic conditions so that those who do want to raise children are able to do so. All too often, Black people, people of colour and working-class people are not afforded the same range of choices as those who are more privileged.

In conclusion, we need the full decriminalisation of abortion. Section 58 of the 1861 Act should be repealed and the remaining restrictions on abortion access should be swept away. This is particularly pressing in those Caribbean jurisdictions that have not liberalised their abortion laws and where the pre-1967 English law still applies. But we also need to change the social and economic conditions under which many marginalised people who would wish to raise children are unable to do so. That means a radical redistribution of wealth and power, and policies that support working-class parents, such as universal basic income, council housing, rent control and free childcare.

[27] Ibid