



# THE CASE FOR THE DECRIMINALISATION OF ABORTION

—Jonathan Herring\*

**Abstract** This article makes the case for decriminalising abortion. It argues that abortion should be treated in the same way as other medical treatments, and only be a criminal offence if undertaken without the consent of the patient, or in a grossly inappropriate way. The article summarises the standard arguments made for decriminalising abortion: that the criminalisation restricts access to safe abortion and undermines women’s autonomy rights. The article also offers some further arguments in favour of decriminalisation from an ethic of care perspective. These are that abortion is a public good, in promoting caring relationships; that abortion protects rights of bodily integrity; and that recognising pregnancy as a chosen caring relationship, shows the severity of the wrong of an unwanted termination.

## I. INTRODUCTION

The law on abortion in India and England takes a similar form, which is unsurprising given their shared colonial history. In both jurisdictions, the law starts with the position that an abortion is a criminal offence.<sup>1</sup> However, there is a statutory defence to that crime in certain circumstances, notably where the procedure is performed by a qualified doctor and certain conditions justifying the abortion are met. In India these are set out in the Medical Termination of Pregnancy Act 1971 and in England the Abortion Act 1967.<sup>2</sup> It is not the aim of the article to set out or debate the particular circumstances in which abortion is permitted in these jurisdictions. Rather its aim is to question the starting point: that abortion is a criminal offence, save where it is permitted by statute. This article makes the case for the decriminalisation of consensual abortion. The extent to which these arguments are convincing will depend on the particular jurisdictional context. Abortion should not itself be a crime,

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<sup>1</sup> Indian Penal Code 1860, s 312-316; Offences against the Person Act 1861, ss 58-59 (England).

<sup>2</sup> As amended by the Medical Termination of Pregnancy (Amendment) Bill, 2020.

but it be treated like other medical treatments. That would mean that abortion would only be a criminal offence if undertaken without the consent of the woman or if performed in a grossly negligent way.

There are growing calls in both jurisdictions for abortion to be decriminalised.<sup>3</sup> That headline call is potentially misleading. What is being demanded is that that abortion should no longer be the subject of specific legislations rendering it unlawful.<sup>4</sup> This means that abortion ought to be treated like any other medical procedure. It may be a crime if done without the consent of the woman, just as surgery or administration of medication may be a criminal offence if done without the consent of a patient. Similarly, a procedure that is performed in a grossly negligent way can attract criminal sanctions. The thrust of the decriminalisation argument is simply that abortion ought to fall in line with the legal response to any medical treatment, and should not be specifically rendered a crime by statute. In the Indian context, this would mean that the offences under sections 313 and 314 of the Indian Penal Code, 1860<sup>5</sup> would remain because they both involve terminations against the wishes of the woman, but section 312 would need to be removed or amended as it can penalise abortion undertaken with the consent of the woman, or even by the pregnant woman. As Sally Sheldon,<sup>6</sup> a leading advocate for the decriminalisation of abortion, explains:

The guiding principle of such reform would be that where self-induced or requested by the pregnant woman, the destruction of an embryo or foetus would no longer form an independent ground for criminal sanction. This would not, of course, leave abortion in a legal vacuum. Rather, it would be treated as any other area of medical practice, remaining subject to the same range of criminal, civil, administrative

<sup>3</sup> Dipika Jain, 'Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach' (2019) 12 NUJS Law Review 21; Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2016) 36 Oxford Journal of Legal Studies 334.

<sup>4</sup> Sally Sheldon and Kaye Wellings (eds), *Decriminalising Abortion in the UK: What Would it Mean?* (Policy Press 2020).

<sup>5</sup> Indian Penal Code 1860, s 313—

Causing miscarriage without woman's consent — Whoever commits the offence defined in the last preceding section without the consent of the woman, whether the woman is quick with child or not, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine;

Indian Penal Code 1860, s 314—

Death caused by act done with intent to cause miscarriage — Whoever, with intent to cause the miscarriage of a woman with child, does any act which causes the death of such woman, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; If act done without woman's consent.— And if the act is done without the consent of the woman, shall be punished either with imprisonment for life, or with the punishment above mentioned.

<sup>6</sup> Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2016) 36 Oxford Journal of Legal Studies 334, 335.

and disciplinary regulations that apply to all clinical procedures. Specifically, this should mean that criminal sanction remains available where terminations involve a serious harm to the woman concerned, most obviously, where they are non-consensual.

This article will summarise the case in favour of decriminalisation as it is commonly presented. It will then go on to explore in more detail three arguments which are less prominent in the debate, but which it is suggested significantly add to the case in favour of decriminalisation. These are the claim that abortion should be seen as a public good; that abortion that should be recognised as more than an autonomy claim, but one involving bodily integrity; and that the law on abortion needs to fit alongside an appropriate legal response to miscarriage.

## II. THE BROAD CASE IN FAVOUR OF DECRIMINALISATION

The standard case in favour of decriminalisation of abortion has both practical and theoretical aspects. The practical point is that the threat of criminal sanctions may deter healthcare professionals from providing an abortion and deter women from seeking one,<sup>7</sup> even where the extant law permits it. Alka Barua, Anubha Rastogi, V. Deepa, Dipika Jain, Manisha Gupte, Rupsa Mallik & Suchitra Dalvie<sup>8</sup> write of the Indian context “doctors are often hesitant to provide abortion due to fear of investigations and prosecution”.<sup>9</sup>

In England, the British Medical Association also express the concern that fear of prosecution may mean women are denied access to services: “The current threat and stigma of criminal sanctions may deny some women access to services, where healthcare professionals are reticent, or are not permitted, to be involved in all aspects of the provision of a safe abortion service.”<sup>10</sup>

They go on to express concern that the criminalisation of abortion produces “a ‘chilling’ climate where women who are having an abortion, and the doctors who perform them, are seen as doing something morally questionable. This is despite the fact that abortion is a common medical procedure.”<sup>11</sup>

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<sup>7</sup> British Medical Association, ‘Decriminalisation of Abortion: A Discussion Paper from the BMA’ (BMA, London 2017) available at <<https://www.bma.org.uk/media/1142/bma-paper-on-the-decriminalisation-of-abortion-february-2017.pdf>> accessed 14 October 2020.

<sup>8</sup> Alka Barua and others, ‘The MTP 2020 Amendment Bill: Anti-Rights Subjectivity’ (2020) 28 *Sexual and Reproductive Health Matters* 1.

<sup>9</sup> See further, Jain, ‘Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach’ (2019) 12 *NUJS Law Review* 21.

<sup>10</sup> British Medical Association (n 7).

<sup>11</sup> *ibid.*

Proponents of decriminalisation then point out that refusing women a legal abortion puts them in danger if they then seek unauthorised abortion, as many do. As Sheldon writes, “unsafe abortion is estimated to result in around 47,000 deaths each year worldwide, with these deaths overwhelmingly concentrated in countries with strictly enforced prohibitive legislation”.<sup>12</sup> Dipika Jain,<sup>13</sup> in an important article supporting decriminalisation of abortion, writes:

criminalising abortion forces women and girls underground, to access illegal procedures in less-than-optimal circumstances. These procedures are offered without oversight and often with lower standards of care, increasing the chances of medical harm. In fact, unsafe abortion remains one of the major causes of maternal mortality globally.

There is certainly something profoundly wrong if in such cases, the doctors’ fear (or purported fear) of the criminal sanction is forcing such women and girls to have to go to court to get the service they are entitled to.<sup>14</sup>

As already mentioned, the decriminalisation proposal would have practical consequences only in cases where the abortion was performed with the consent of the patient.<sup>15</sup> Criminal sanctions would still be available against ‘backstreet’ abortionists who have no qualifications,<sup>16</sup> as would cases where someone attacked a pregnant woman causing a termination.<sup>17</sup> A good example of the kind of case where there would be a practical difference if abortion was decriminalised is *R v. Catt*.<sup>18</sup> There, a woman who was aged 35 obtained misoprostol<sup>19</sup> over the internet and used it too it to procure her own termination, when around 40 weeks pregnant. She buried the baby in her own garden. She was convicted under section 58 of the Offences Against the Person Act 1861 and initially sentenced to 8 years imprisonment. The harshness of this sentence was justified because “What you have done is to rob an apparently healthy

<sup>12</sup> Sally Sheldon, ‘The Decriminalisation of Abortion: An Argument for Modernisation’ (2016) 36 *Oxford Journal of Legal Studies* 334, 335

<sup>13</sup> Dipika Jain, ‘Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach’ (2019) 12 *NUJS Law Review* 21.

<sup>14</sup> Alka Barua, Anubha Rastogi, V Deepa, Dipika Jain, Manisha Gupte, Rupsa Mallik & Suchitra Dalvie, ‘The MTP 2020 Amendment Bill: Anti-Rights Subjectivity’ (2020) 28 *Sexual and Reproductive Health Matters* 1.

<sup>15</sup> For a detailed discussion *see*, Jonathan Herring, Emily Jackson and Sally Sheldon, ‘Would decriminalisation mean deregulation?’ in Sally Sheldon and Kaye Wellings, *Decriminalising Abortion in the UK: What Would It Mean?* (Policy Press 2020).

<sup>16</sup> For examples from English law *see*, *R v Gurpreet Kaur* [2015] EWCA Crim 2202–HM Government, ‘Woman Sentenced to 27 Months for Selling Abortion Pills Illegally’ (26 June 2015) <[www.gov.uk/government/news/woman-sentenced-to-27-months-for-selling-abortion-pills-illegally](http://www.gov.uk/government/news/woman-sentenced-to-27-months-for-selling-abortion-pills-illegally)> accessed 14 October 2020; *R v Mills* [1963] 1 QB 522 : [1963] 2 WLR 137 : [1963] 47 Cr App R 49.

<sup>17</sup> *R v Spicer* [1955] 39 Cr App R 189.

<sup>18</sup> [2013] EWCA Crim 1187.

<sup>19</sup> A drug that can induce a miscarriage.

child *en ventre sa mere*, vulnerable and defenceless, of the life which he was about to commence.”<sup>20</sup> That was reduced to three and a half years on appeal. The Court listed the aggravating and mitigating factors as follows:

There are the following aggravating features: the termination was at full term; the body has never been recovered; there was careful planning and acquisition of the abortifacient; the criminal acts were done despite considerable experience of pregnancy and its range of consequences. There are these mitigating features: the plea of guilty, the views of Dr Frazer, a man of significant experience, that Mrs Catt appeared very remorseful, and of Ms Lowe that her emotional attachment to a child in utero is difficult; Mrs Catt has two young children to whom it is accepted she is a good mother and whose development will be adversely affected by her absence from the family home.<sup>21</sup>

The case is striking as the court having summarised her desperately sad personal history, commenting how it demonstrated “the potential for disturbance, personal misery, and entrenched problems”. She had made some unsuccessful attempts to obtain a lawful abortion. Given that the case appears to be one involving a deeply troubled, socially isolated woman, the prosecution and high sentence is surprising. Indeed, it is hard to see what benefit is gained from prosecution in such tragic circumstances. Women who have not accessed medical abortion and are seeking ‘self-help’ late abortions are often troubled and marginalised people, who need support and help, rather than prosecution.<sup>22</sup>

The standard theoretical argument in favour of decriminalisation is that:

Criminalisation of abortion reflects a deep mistrust of women (and doctors) being able to make moral choices. It denies women fundamental rights to make decisions about their own bodies. Abortion should be treated in the same way as other medical decisions....<sup>23</sup>

Dipika Jain<sup>24</sup> puts the point in a broader justice framework arguing:

<sup>20</sup> *R v Catt* (n 20) [55].

<sup>21</sup> *ibid* [21].

<sup>22</sup> For detailed discussion of this *see*, Sheldon and Wellings (n 4).

<sup>23</sup> British Medical Association, *Decriminalisation of Abortion: Discussion Paper* (BMA 2017) available at <[www.bma.org.uk/advice/employment/ethics/ethics-a-to-z/abortion](http://www.bma.org.uk/advice/employment/ethics/ethics-a-to-z/abortion)> accessed 14 October 2020.

<sup>24</sup> Dipika Jain, ‘Time to Rethink Criminalisation of Abortion? Towards a Gender Justice Approach’ (2019) 12 NUJS Law Review 21.

Barriers to abortion access are further magnified based on caste and socioeconomic status.... without the absolute right to abortion, those who are pregnant face an impossible decision: to have a potentially unsafe, unlicensed abortion or to lose decision-making control over their own bodies; the State's interests taking primacy over the right to decisional autonomy. It is high time we had a gender justice and equality-based framework for abortion, only at will.

I agree with all these points, but in this article I wish to develop three further arguments. In the first, I will argue that rather than seeing the issue as a need to balance the state's interests in criminalising abortion and a woman's human rights, in fact the state has a positive interest in favour of decriminalising abortion.

### III. THE PUBLIC GOOD OF ABORTION

In using the criminalisation starting point the law declares that an abortion sought by a woman is something wrong that requires a justification. Something so wrong it deserves the censure of a criminal conviction. That I argue is incorrect. A consensual abortion should be regarded as a good. It is a good because it protects the rights of women, as I will argue later, but it also promotes a public good:<sup>25</sup> caring relationships.

The importance of caring relationships, is emphasised in the moral philosophy literature by care ethics.<sup>26</sup> This claims that each person in society is vulnerable and has needs. It is a key role of the state and the law is to ensure that the basic needs of its citizens are met, as best it can. Generally, it is the care of relatives, friends and professional carers which meets those need. Those who care for the sick, children, the infirm, those taking care of others, are performing the task that meets a central responsibility of society. However, in many societies caring is invisible in public policy, law and even ethical discourse. It is the making of money, fame and power which is glamorised in the media and politics. Despite its importance, care is ignored and undervalued. While, if all accountants stopped working for a week, the impact on the well-being of society would not be significant, if all carers stopped working for a week the death toll would be unimaginable.<sup>27</sup>

<sup>25</sup> By 'public good' I mean something that is of benefit to society generally.

<sup>26</sup> Leading works on ethics of care include: Carol Gilligan, 'Moral Orientation and Moral Development' in Eva Feder Kittay and Diane Meyers (eds), *Women and Moral Theory* (Rowman and Littlefield 1987); Joan Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993); Virginia Held, *The Ethics of Care* (OUP, Oxford, 2006); Jonathan Herring, *Caring and the Law* (Bloomsbury Publishing 2013); Rosie Harding, *Duties to Care: Dementia, Relationality and Law* (CUP 2017).

<sup>27</sup> Daniel Engster, *The Heart of Justice: Care Ethics and Political Theory* (OUP 2007).

Care ethics seeks to promote caring relationships as a core good. Joan Tronto summarises ethics of care in this way

...a set of moral sensibilities, issues and practices that arise from taking seriously the fact that care is a central aspect of human existence...a species activity that includes everything that we do to maintain, continue and repair our 'world' so that we can live in it as well as possible. That world includes our bodies, ourselves and our environment, all of which we seek to interweave in a complex, life-sustaining web.<sup>28</sup>

My case for this claim is based on an argument that the ultimate moral good can be found in relationships marked by love and care.<sup>29</sup> These are good in themselves, good for participants and good for society. By contrast, relationships which are marked by unwanted bodily harm are profoundly harmful to society and those involved. The state should do what it can to promote relationships of care; and do what it can to end relationships which are unwanted and marked by harm. Of course, there are limits about what can be expected of the state, but we can see in the area of child protection and divorce that the state can facilitate the ending of harmful relationships.

Clearly, there is much more that can be said about ethics of care,<sup>30</sup> but it is enough to take, for now, something that is uncontroversial: caring relationships are good and should be encouraged for the good of those involved and for society. But that care is good if it is voluntarily undertaken. Coerced work is not care.

How is this relevant for pregnancy? I will park to one side the issue of whether or not the fetus should be regarded as a person in the sense of a being with the highest moral standing.<sup>31</sup> That is not a particularly important issue for my argument.

The relationship of pregnancy is one of profound interconnection. As a matter of biology, the pregnant woman and the fetus cannot be neatly divided into two entities. There is no clear point at which fetal tissue ends and the woman's tissue begins. The health and well-being of the woman profoundly affect the fetus, and vice versa.<sup>32</sup> As Iris Marion Young puts it: "[p]regnancy challenges

<sup>28</sup> Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, Abingdon, 1993) 12.

<sup>29</sup> Jonathan Herring, 'Ethics of Care and The Public Good of Abortion' (2019) *The University of Oxford Human Rights Hub Journal* 1.

<sup>30</sup> See, the works referenced at (n 22).

<sup>31</sup> For a detailed discussion, See, Jonathan Herring, 'The Fetus' in Jonathan Herring, *Law Through the Life Course* (Bristol University Press 2021).

<sup>32</sup> See, Jonathan Herring and P-L Chau, 'My Body, Your Body, Our Bodies' (2007) 15 *Medical Law Review* 34, for a discussion of the biology.

the integration of my body experience by rendering fluid the boundary between what is within, myself, and what is outside, separate. I experience my insides as the space of another, yet my own body.<sup>33</sup>

This deep interconnection means the standard discussions of abortion which seek to pit the interests and rights of the woman against the interest and rights of the fetus are inappropriate. Rather the debate should focus on the correct legal response to the particular relationship.

My argument is that where the pregnancy is a wanted relationship, it is precisely the kind of relationship the state should be enabling and encouraging. By contrast, unwanted pregnancies lack moral value as there is coerced care,<sup>34</sup> which may well impede other wanted caring relationships. As Margaret Anne Little<sup>35</sup> emphasises regarding the impact of unwanted pregnancy:

To be pregnant is to be inhabited. It is to be occupied. It is to be in a state of physical intimacy of a particularly thorough-going nature. The fetus intrudes on the body massively; whatever medical risks one faces or avoids, the brute fact remains that the fetus shifts and alters the very physical boundaries of the woman's self. To mandate continuation of gestation is, quite simply, to force continuation of such occupation.

The relational ethics approach would focus on the question of what obligations flow from the pregnancy, given that it is unwanted, and so will not be marked by the reciprocity and mutuality required for a relationship to be caring. Given that a parent is not obliged by the law to give organs, or to even suffer the prick of a needle to give some blood in order to save the life of their child, it is inconceivable that the law could require a woman to go through pregnancy and birth for a fetus in order to promote a caring relationship. The law is not in the business of coercing relationships through threat of legal sanction, as that undermines the goodness of a mutually respectful caring relationship.

It should not be forgotten that pregnancy carries serious health risks. As Eugenie Gatens-Robinson<sup>36</sup> points out:

<sup>33</sup> Iris Marion Young, *On Female Body Experience* (OUP 2005) 49.

<sup>34</sup> By coerced care, here, I mean care which is not being voluntarily undertaken. In an unwanted pregnancy the woman is required to care for the fetus when she does not want to do so.

<sup>35</sup> Margaret Little, 'Abortion, Intimacy and the Duty to Gestate' (1999) 2 *Ethical Theory and Moral Practice* 295.

<sup>36</sup> Eugenie Gatens-Robinson, 'A Defense of Women's Choice: Abortion and the Ethics of Care' (1992) 30 *Southern Journal of Philosophy* 39, 66.

The adverse physical effects of pregnancy on a woman are serious and common, including hypertension, hemorrhage, diabetes and embolism. The risk of death to both woman and fetus among poor women likely to have pre-existing health problems such as untreated hypertension is quite real. The 25% of women who undergo cesarean sections have a significantly higher risk of adverse effects on health or even death than those who have vaginal delivery.

So, forcing a woman to remain pregnant, and to provide the deeply embodied work involved in pregnancy, cannot be justified in the name of care.

By contrast, providing abortion can be a means of promoting care. It is important to note that many accounts of women's abortions, explain their reasons in terms of caring. Consider, for example, these comments from three women who had abortions, provided to the 'My Body, My Life' project:

I was 22 when I found out I was pregnant. I had just qualified as a teacher but was yet to find my first teaching position. My partner had a decent job but he was recovering from a prolonged period of severe depression and while he lived with his elderly mother, I was caring for my grandmother who had been diagnosed with a degenerative illness. Although we were very much in love and hoped to have children one day, our finances and living arrangements meant we were not equipped to raise a child. We would want to give our children the very best possible start in life and, at that time, we didn't have the opportunity to do so.<sup>37</sup>

I had made my decision even before it had happened. I got pregnant at 23 and knew I could not have it. I wasn't ready to give the baby the life it deserved.<sup>38</sup>

I fell pregnant again shortly after my son turned a year old. I have a long-term health condition that means pregnancy can be dangerous for both myself and foetus. I had to consider my son's welfare and was the risk of having another child worth making myself very unwell?<sup>39</sup>

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<sup>37</sup> 'Post 15' (*My Body, My Choice*) <<http://mybody-mylife.org/user-submitted-post-15/>> accessed 14 October 2020.

<sup>38</sup> 'Post 9' (*My Body, My Choice*) <<http://mybody-mylife.org/user-submitted-post-9/>> accessed 14 October 2020.

<sup>39</sup> 'Post 16' (*My Body, My Choice*) <<http://mybody-mylife.org/user-submitted-post-16/>> accessed 14 October 2020.

These accounts are in line with a wide range of studies showing that abortion decisions are made based on caring responsibilities to others, including the desire to be a good parent to a child, when born.<sup>40</sup> Sherwin reports from her analysis of women's abortion reasons, that the explanations involve

...her feelings about her fetus, her relationship with her partner, other children she may have, and her various obligations to herself and others — contextually defined considerations that reflect her commitments to the needs and interests of everyone concerned.<sup>41</sup>

In an international survey of the reasons for abortion Bankole *et al* found that poverty, relationships problems, maternal health, postponing parenthood were the most common.<sup>42</sup> As Sian Beynon-Jones<sup>43</sup> records in her wide-ranging study of reasons behind abortion, women make abortion decisions 'based on the specific relational contexts of their lives'.<sup>44</sup>

So, abortion enables women to care: to meet the caring responsibilities they currently face for parents, partners or others; to meet their caring responsibilities to any child they currently have; to enable them to provide good care for children they have in the future; and to care for themselves. While commonly presented as a 'selfish' decision, abortion is often necessary so that caring relationships can occur. A woman caring for her elderly parents may not be able to also take on care of an aunt, and forcing her to do so would endanger the woman and the parents. In such a case it would be wrong of the woman to take on these extra care burdens. So, too, requiring a woman to take on care of a child when her other obligations mean she cannot do that undermines the importance of care. A society committed to an ethic of care must promote

<sup>40</sup> Maggie Kirkman et al, 'Reasons Women Give for Abortion: A Review of the Literature' (2009) 12 Archives of Women's Mental Health 365; Julia Hanigsberg, 'Homologizing Pregnancy and Motherhood: A Consideration of Abortion' (1995) 94 Michigan Law Review 371.

<sup>41</sup> Susan Sherwin, *No Longer Patient: Feminist Ethics and Health Care* (Temple University Press 1992) 102. See, also Jeannie Ludlow, 'Sometimes, it's a Child and a Choice: Toward an Embodied Abortion Praxis' (2008) 20 National Women Studies Association Journal 26.

<sup>42</sup> Akinrinola Bankole, Susheela Singh, and Taylor Haas, 'Reasons Why Women Have Induced Abortions: Evidence from 27 Countries' (1998) 24 International Family Planning Perspectives 117.

<sup>43</sup> Siân Beynon-Jones, 'Untroubling Abortion: A Discourse Analysis of Women's Accounts' (2017) 27 Feminism and Psychology 225.

<sup>44</sup> Kate Cockrill and Adina Nack, 'I'm Not that Type of Person: Managing the Stigma of Having an Abortion' (2013) 34 Deviant Behaviour 973; Lesley Hoggart, 'I'm Pregnant . . . What am I Going to Do? An Examination of Value Judgements and Moral Frameworks in Teenage Pregnancy Decision Making' (2012) 14(6) Health, Risk and Society 533; Carrie Purcell, 'The Sociology of Women's Abortion Experiences: Recent Research and Future Directions' (2015) 9(7) Sociology Compass 585; Sophia Chae and others, 'Reasons Why Women have Induced Abortions: A Synthesis of Findings from 14 Countries' (2017) 96(4) Contraception 233.

caring and must acknowledge that often abortion is essential part of doing that.<sup>45</sup>

#### IV. ABORTION AS A BODILY INTEGRITY RIGHT

The criminalisation approach is not consistent with the understanding of abortion as a right. Clearly, it makes no sense to see a person as having a right to commit a crime. As Emma Milne,<sup>46</sup> writing of the English law, puts it the current law

means that a woman does not have a right to an abortion, instead she only has the right to ask two doctors if they will give her permission to have that abortion.... The message of the law is one of medical paternalism, as women are deemed to be relatively incapable of making a morally significant decision about pregnancy.

This argument is commonly made, but the right that is normally claimed is a right to autonomy.<sup>47</sup> Hence the ‘pro-choice’ label is given to those who seek to promote abortion rights. While I agree that the rhetoric of choice and autonomy can be politically helpful, it underplays the rights at play. As Jesse Wall and I<sup>48</sup> have argued elsewhere, it is important to distinguish a right to autonomy and a right to bodily integrity.<sup>49</sup> Both are important rights, but they have distinct features, with the latter being a stronger claim. The right to bodily integrity is stronger because:

the right protects the body as the point of convergence or point of integration of the subject and the objective world. The right to bodily integrity therefore protects the point of integration, and the ‘body’ is that which provides the point of integration. The right to bodily integrity, in this way, is

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<sup>45</sup> A major issue in the Indian context is sex-selective terminations. This deserves a separate lengthy discussion. In brief my view would be that urgent steps are needed to combat the misogyny demonstrated by this practice. But these steps should be to challenge such attitudes through education, policy initiatives and discussion. Seeking to combat anti-women attitudes by restricting women’s abortion rights is counter-productive. For further discussion *see*, Kate Greasley, ‘Is Sex-Selective Abortion against the Law?’ (2016) 36 *Oxford Journal of Legal Studies* 535.

<sup>46</sup> Emma Milne, ‘Putting the Fetus: First Legal Regulation, Motherhood, and Pregnancy’ (2020) 27 *Michigan Journal of Gender and Law* 1.

<sup>47</sup> Tulsi Patel, ‘Experiencing Abortion Rights in India through Issues of Autonomy and Legality: A Few Controversies’ (2018) 13(6) *Global Public Health*, 702.

<sup>48</sup> Jonathan Herring and Jesse Wall, ‘The Nature and Significance of the Right to Bodily Integrity’ (2017) 76(3) *Cambridge Law Journal* 566.

<sup>49</sup> Alka Barua, Anubha Rastogi, V Deepa, Dipika Jain, Manisha Gupte, Rupsa Mallik & Suchitra Dalvie, ‘The MTP 2020 Amendment Bill: Anti-Rights Subjectivity’ (2020) 28 *Sexual and Reproductive Health Matters* 1.

concerned with the integration of a person's subjectivity and objectivity.<sup>50</sup>

We go on to explain:

If our bodies are the site or location of our subjectivity, and if our subjectivity is the basis of the moral duties that are owed to us, then it follows that our ability to use and control our own bodies is a moral and legal right. The same cannot be said for autonomy. We do not have a right to act autonomously. Rather, the autonomy of each person is a morally relevant property that requires consideration in all instances of moral deliberation.

The point is that we may have autonomous choices or decisions ("I would like a holiday on the beach") but you can make no positive claim to that. At most you might claim that others should not impede your choice without good reason. Even where your wishes are frustrated (e.g., there is a rail strike and you cannot get to beach), a mere interference in autonomy does not attack your core being. Decisions about retaining bodily integrity are, however, profound because they impact on the integration of the body and the experience of subjectivity. In other words, our bodies represent who we are to others and are how we engage with the world; a damage to the body is therefore a damage to the core self. If things are done to our body without our consent our core identity as self with bodies is challenged.<sup>51</sup> That is why there can be a duty to be protected from interference in your bodily integrity. The state or others can be required to prevent or protect you from being attacked by another person. Hence, it is important to emphasise that abortion is more than a matter of choice. That would generate only a weak form of claim. Requiring a person to go through with an unwanted pregnancy is a challenge to their bodily integrity.<sup>52</sup> It is closer to imposing inhuman or degrading treatment or facing an attack from someone; and hence, there is a positive duty on the state to protect you from such interferences.

The right of bodily integrity is important to emphasise because it is so powerfully protected in the law. As Bertha Manninen<sup>53</sup> argues, there are major limits to the burdens that can be imposed on someone's body for the good of another:

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<sup>50</sup> Herring and Jesse Wall, 'The Nature and Significance of the Right to Bodily Integrity' (2017) 76(3) *Cambridge Law Journal* 566, 587.

<sup>51</sup> *ibid.*, discussing these issues in more detail.

<sup>52</sup> Herring and Wall (n 50) 587.

<sup>53</sup> Bertha Manninen, 'The Value of Choice and the Choice to Value: Expanding the Discussion about Fetal Life within Prochoice Advocacy' (2013) 28 *Hypatia* 664, 679.

As much as we can feel for the life of patients in need of organ transplants, we cannot force otherwise healthy persons to donate nonvital organs to save the sick. This does not mean that the lives of these patients have no value; rather what it means is that no matter how valuable they are, this value cannot be used as grounds to infringe upon the rights of other persons. Similarly, we can argue that being prochoice need not entail a wanton disregard of fetal life, but, rather, an acknowledgment that, like all persons, pregnant women have a right to decide if they want to use their bodies to sustain another.

Requiring a person to continue with a pregnancy against their wishes of a bodily interference is unlike any other condition imposed on people in any other situation. Pregnancy carries a risk of death,<sup>54</sup> serious physical harm, and (particularly where unwanted) major mental health harms. As Hilde Lindemann argues,

Anti-abortion legislation holds pregnant women—who are innocent of any wrongdoing—to a punitive standard of specific performance, sentencing them against their will to the many kinds of hard work, physical discomfort, and outright danger that my daughter willingly undertook to bring her child into the world. No other class of people is held to this standard in peacetime. No woman should be held to it either.<sup>55</sup>

So, while the argument that is sometimes made in favour of decriminalisation is that it should render abortion the same as other treatments,<sup>56</sup> it does not put it strongly enough. Unlike many medical treatments, the denial of abortion leads to a highly significant impact on the bodily integrity of the woman.<sup>57</sup> It leads to a strong right to state protection from such interference.<sup>58</sup>

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<sup>54</sup> One recent US study found that “[t]he risk of death associated with childbirth is approximately 14 times higher than that with abortion’ and that ‘the overall morbidity associated with childbirth exceeds that with abortion’”: Elizabeth Raymond and David Grimes, ‘The Comparative Safety of Legal Induced Abortion and Childbirth in the United States’ (2012) 119 *Obstetrics & Gynecology* 215, 215.

<sup>55</sup> Hilde Lindemann, “‘...But I could Never have One’”: the Abortion Intuition and Moral Luck’ (2009) 21 *Hypatia* 41, 57.

<sup>56</sup> Swara Saraiya, ‘Conceiving Criminality: An Evaluation of Abortion Decriminalization Reform in New York and Great Britain’ (2018) 57 *Columbia Journal of Transnational Law* 174.

<sup>57</sup> Alka Barua, Anubha Rastogi, V Deepa, Dipika Jain, Manisha Gupte, Rupsa Mallik & Suchitra Dalvie, ‘The MTP 2020 Amendment Bill: Anti-Rights Subjectivity’ (2020) 28 *Sexual and Reproductive Health Matters* 1.

<sup>58</sup> An analogy could be drawn with the duty on state to protect people from domestic abuse: Jonathan Herring, *Domestic Abuse and Human Rights* (Intersentia 2020).

## V. ABORTION AND UNWANTED MISCARRIAGE

Perhaps the strongest argument against decriminalisation of abortion is that doing so will fail to adequately protect women whose pregnancies are terminated without their consent. If we say that abortion is not *per se* criminal, are we committed to saying that there is no great wrong when a pregnancy is terminated without consent? If that is so it means, for example, that cases where pregnant women are assaulted, causing a termination or cases of miscarriage, will not be taken seriously by the law because the starting point would be that the termination of a pregnancy is not a serious wrong in the eyes of the criminal law. In other words, it seems if you are a liberal-minded and/or feminist-minded academic, you are on the horns of dilemma. If you say the fetus is ‘nothing’ or just part of the woman’s body, you can have a liberal abortion law, but will not be able to recognise the additional ‘fetal wrong’ in the assault case. Nor can you have a legal description of pregnancy which matches the experience of many women in wanted pregnancies. But, if you recognise the fetus has some important interests and that in the assault case a serious wrong is committed, it becomes harder to justify a liberal abortion law.

I think that would be a mistaken conclusion. As noted at the start of this article, supporters of decriminalisation want the current law in cases of involuntary terminations to remain. But I think there needs to be more explanation of what is the wrong in those cases (over and above the harm to the pregnant woman herself). Here I would refer to my above discussion based around care ethics. If we accept that caring relationships should be upheld, maintained and supported by the law, then with involuntary relationships, those not marked by care, the law should enable parties to find other caring relationships. As should already be clear, the relational approach opens up the possibility for a different weighting and understanding of wanted and unwanted pregnancies. Wanted pregnancies are caring and therefore, of highest moral value. We need to protect them through the criminal law from unwanted termination and to recognise the value of them. By contrast, unwanted pregnancies lack moral value as there is coerced care, which may well impede other wanted caring relationships. We can, under this approach, see the unwanted termination of a serious harm, both the woman herself and the societal interest in promoting caring relationships. It enables us to acknowledge the pain of miscarriage and to require it to be taken far more seriously by the law and medicine than it currently is. Women’s experience of unwanted miscarriage is not captured by the ‘foetus as non-person’ response. Browne<sup>59</sup> argues that miscarriage is ‘disenfranchised grief’. Rogers<sup>60</sup> in her heart-breaking account writes to her miscarried twins:

<sup>59</sup> Victoria Browne, ‘Feminist Philosophy and Prenatal Death: Relationality and the Ethics of Intimacy’ (2016) 41 *Signs: Journal of Women in Culture and Society* 485.

<sup>60</sup> Chrissie Rogers, ‘Hope as a Mechanism in Emotional Survival: Documenting Miscarriage’ (2017) 2 *Open Access Journal of Gynaecology* 10, 13.

I'm writing a letter to you both as our departure and our "relationship" over the past nine months comes to an end. All I do know is that as I say goodbye to our future together I am no longer full of emptiness. It has taken some time to make peace, but we are getting there, wherever there is. I do know that whatever happens in the future, wherever the path of life takes us, you will always be a part of that. Your tiny tiny bodies might have gone, but your spirits live on. Not in any real sense but in the fact that your short lives where you grew inside of me will live with me and impact on my life forever.

This account is profoundly relational and captures the experience of many women who experience miscarriage. The relational care ethics approach regards unwanted miscarriage or coerced termination as a serious loss and, where this is the result of a criminal offence, a serious wrong. So not only do we have an approach which justifies decriminalisation of abortion, it also demonstrates why it is so important to take unwanted miscarriage seriously and acknowledge the severity of the wrong when a wanted pregnancy is terminated without consent.

## VI. CONCLUSION

This article has argued the case for decriminalising abortion. It is argued that that abortion should not itself be a crime, but it be treated like other medical treatments and only be a criminal offence when performed without the consent of the patient or in a grossly negligent way. The article has summarised the standard case made for discrimination, namely that criminalisation restricts access to safe abortion and it undermines the autonomy rights of women. While not disagreeing with these, it has developed three further arguments in favour of decriminalisation. The first focuses on the public good of abortion, arguing that abortion is necessary to promote caring relationships and end enforced care. The second has argued that abortion should be understood to involve not just autonomy but the rights of bodily integrity. The third argues that understanding a relational ethic of care approach to pregnancy shows while we need to decriminalise abortion, we should acknowledge the severity of the harm when a wanted pregnancy is terminated involuntarily.

These arguments show that if anything the calls for treating abortion as medical treatment underplay the strength of the arguments. It is not that abortion should be treated like other medical treatments, but that it should be acknowledged as essential to protect fundamental human rights and the promotion of a good, caring society.