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Foetal Disability and Abortion in the UK: A Reproductive and Disability Justice Perspective

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Abstract

This article applies the interconnected frameworks of reproductive justice and disability justice to the issue of abortion on the grounds of foetal disability. There have been recent claims as to the discriminatory nature of the foetal impairment ground included within UK abortion law, feeding into the perception of abortion rights as incompatible with disability rights. I draw upon scholarship from the US context to argue that access to abortion is part of a broader social justice agenda, which includes reproductive and disability justice. Thus, this article challenges this idea of incompatibility and considers what is required to work towards reproductive and disability justice in the context of abortion and foetal disability in the UK.

Keywords Abortion · Disability justice · Foetal disability · Prenatal testing · Reproductive justice

Introduction

The debate over access to abortion on the grounds of foetal impairment has received renewed attention in the UK context following Heidi Crowter's legal challenge to the Abortion Act 1967.[1] Crowter, who has Down's Syndrome, and her co-claimants argued that the foetal impairment ground for abortion discriminates against disabled people. While the case was unsuccessful, it has generated numerous academic responses on the need to ensure access to abortion and/or address the negative stereotypes perpetuated by the law (see, for example, Tongue 2022, 2023; Perrot and Horn 2023; Sheldon 2023; Llujić 2023; Robinson 2024; Herring and Robinson 2024). In this article, I seek to contribute to these responses by reframing this debate

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[1] *Crowter v Secretary of State for Health and Social Care* [2021] EWHC 2536; *Crowter v Secretary of State for Health and Social Care* [2022] EWCA Civ 1559.

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as one concerned with reproductive and disability justice. These are two frameworks rooted in Black feminist and disability politics, which go beyond the typical rights-based framings seen in the current academic literature. These frameworks were developed in the United States context, and have been applied in the US following the overturning of the constitutional right to abortion established in *Roe v Wade* by the Supreme Court in June 2022.

I argue that the application of reproductive and disability justice to the UK is needed to put this issue into a social justice-oriented perspective, rather than one framed as a potential conflict between abortion and disability rights. In the first section, I set out the UK law on abortion and foetal impairments and *Crowter*'s challenge to the law. Some academic responses in support of this challenge have suggested that the law ought to be viewed as a rights violation, but this approach risks further restricting access to abortion in the later stages of pregnancy. In contrast, I apply the reproductive and disability justice frameworks to demonstrate the interconnectedness of positions which seek to support access to abortion *and* challenge disability stereotyping. Using the concept of 'solidarity' as a central aspect of social justice, I will propose socio-cultural, political, economic, and legal changes to collectively address the issues of abortion exceptionalism and disability stereotyping, moving beyond the framing of them as two oppositional positions. Finally, I conclude with a reflection on the importance of feminist movements demonstrating this solidarity with disabled people, who have often been left out of the conversation on abortion.

The Foetal Impairment Ground for Abortion

Section 1(1)(d) of the Abortion Act 1967 allows for an abortion after 24 weeks' gestation if "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 Abortion (Northern Ireland) Regulations 2020 also include a foetal impairment ground for abortion after 24 weeks—with the difference that fatal foetal impairments are explicitly mentioned, and the outdated and offensive terms of 'abnormalities' and handicapped' were replaced with the terms 'impairment' and 'disabled'.[2] However, these differences do not change how the ground is applied in practice. The terminology of 'substantial risk' and 'serious' disability used by s.1(1)(d) and the Northern Ireland (NI) Regulations is left undefined, affording doctors the discretion to determine whether a foetal impairment is sufficiently serious to meet the threshold.

As confirmed in *Jepson,* the relevant test is not whether an impairment is serious enough based on an objective or reasonable standard, but whether the doctors in question believe in good faith that it is serious enough.[3] This case was brought by Reverend Joanna Jepson, after she had asked the police to investigate doctors who had authorised an abortion at 28 weeks' gestation under s.1(1)(d) for a cleft lip

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[2] Abortion (Northern Ireland) Regulations 2020, s.5–7.

[3] Jepson v The Chief Constable of West Mercia Police Constabulary [2003] EWHC 3318 (Admin).

and palate. Scott (2005a, 397) has highlighted that healthcare providers, prospective parents, and people with specific disabilities may all have differing views as to seriousness, which means that this term is impossible to define. However, the lack of a definition under s.1(1)(d) allows for flexibility: Scott (2005b, 312) suggests that s.1(1)(d) can allow for the accommodation of the pregnant person's wishes, as doctors could, in good faith, potentially make a determination of seriousness if the impairment would be serious for that particular pregnant person based on social considerations.

All pregnant people in Britain are routinely offered a combined screening test between 10- and 14-weeks' gestation for a number of chromosomal conditions, including Downs' Syndrome, Edwards' Syndrome, and Patau's Syndrome.[4] The combined test includes a blood sample and ultrasound scan, and if the test indicates the likelihood of the foetus having an impairment, further tests are offered. This includes non-invasive prenatal testing (NIPT), which is carried out before 22 weeks' gestation to report the individual chance results of Downs' Syndrome, Edwards' Syndrome, and Patau's Syndrome, and other forms of prenatal diagnosis (PND) including amniocentesis if NIPT returns a high chance result. PND is usually performed before 20 weeks' gestation but can be carried out later and is used to diagnose the majority of genetic disorders.[5] Amniocentesis, which involves the removal and testing of a small number of cells from the amniotic fluid, carries with it a very small chance of miscarriage but is only offered if there is a high chance of foetal impairment. These tests are also available in Northern Ireland, but are at the request of the pregnant person and must be self-funded rather than being routinely offered and publicly funded, creating issues for access.[6] This may change, however, to reflect the legalisation of abortion. Publicly funded NIPT and PND in Britain is not available purely on the request of the pregnant person: there is a threshold of risk that the foetus has a genetic condition that must be met before a healthcare professional will refer a pregnant person for these tests (Perrot and Horn 2021, 677–8). Once an impairment has been diagnosed, the pregnant person can decide to have an abortion, or continue the pregnancy.

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[4] See: NHS England and Office for Health Improvement & Disparities. 2022. Guidance: Down's Syndrome, Edward's Syndrome, and Patau's Syndrome. https://www.gov.uk/government/publications/screening-tests-for-you-and-your-baby/downs-syndrome-edwards-syndrome-and-pataus-syndrome-combined-or-quadruple-test-taken-on-or-after-1-june-2021. Accessed 20 November 2024; Public Health Wales. About Antenatal Screening. https://publichealthwales.nhs.wales/services-and-teams/screening/antenatal-screening-wales/about-antenatal-screening/. Accessed 20 November 2024; Public Health Scotland. 2020. Establishing the information needs of pregnant women and their partners to support informed choice about Patau's Syndrome (trisomy 13), Edwards' Syndrome (trisomy 18) and non-invasive prenatal testing (NIPT) to the Scottish pregnancy screening programme. https://publichealthscotland.scot/publications/scottish-pregnancy-screening-changes-information-needs-research-2020. Accessed 20 November 2024.

[5] See: Public Health England. 2021. Screening in pregnancy: CVS and amniocentesis information for parents. https://www.gov.uk/government/publications/cvs-and-amniocentesis-diagnostic-tests-description-in-brief/nhs-fetal-anomaly-screening-programme-chorionic-villus-sampling-cvs-and-amniocentesis-information-for-parents. Accessed 20 November 2024.

[6] See: NI Direct. Tests to find abnormalities or chromosomal conditions. https://www.nidirect.gov.uk/articles/tests-find-abnormalities-or-chromosomal-conditions. Accessed 20 November 2024.

However, in recent years, there have been several recent efforts to restrict the foetal impairment ground for abortion. In 2017, disabled peer Lord Shinkwin introduced a Private Members' Bill into the House of Lords that would have removed the application of s.1(1)(d) after 24 weeks' gestation and would have required a pregnant person to receive information from disability support groups before having an abortion on such circumstances.[7] In 2020, Fiona Bruce introduced a Private Members' Bill into the House of Commons aiming to exclude a number of impairments including cleft lip from the remit of s.1(1)(d).[8] The following year, the argument that s.1(1)(d) was incompatible with the ECHR and ought to be restricted to fatal foetal disabilities was presented to the High Court.[9] The three claimants—Heidi Crowter, a woman with Downs Syndrome, Maire-Lea Wilson, and her two-year old son A, who also has Downs Syndrome—made a number of arguments pertaining to the right to life (Article 2), the right to freedom from cruel, inhuman, and degrading treatment (Article 3), the right to private and family life (Article 8), and the right to non-discrimination (Article 14). Under Articles 2 and 3, the claimants argued that the current law violated the foetus' rights, but this was rejected on the basis that the European Court does not extend Convention rights to the foetus.[10]

Under Articles 8 and 14, the claimants argued that the law was discriminatory for perpetuating negative stereotypes against people with disabilities.[11] This argument was also rejected. The claimants were permitted to appeal in relation to their argument under Articles 8 and 14.[12] At the Court of Appeal, Underhill LJ, whilst sympathetic to the fact that s.1(1)(d) might be perceived as offensive by people with disabilities, held that the law was not discriminatory to the claimants as s.1(1)(d) was concerned with foetuses and not living disabled people.[13] Moreover, Underhill commented that while s.1(1)(d) might reflect negative attitudes towards disabled people, it cannot be said that it *causes* them.[14] Several commentators (see McGuinness 2013; Tongue 2022; Robinson 2023; Ramaswamy 2023) have addressed the need for legal, policy, and social change in the UK in order to support access to abortion without discriminating against disabled people. The *Crowter* case has also generated academic discussion on how stigma and stereotyping are not adequately encompassed within the legal concept of discrimination (Tongue 2023; Herring and Robinson 2024). However, the *Crowter* claim presented access to abortion and disability rights as inherently oppositional—indeed, the High Court presented the view that "the rights of women to exercise choice should prevail" as irreconcilable with the view that "they should not be able to have a termination solely on the ground that their child will be born with disabilities".[15] Thus, disability rights and reproductive

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[7] Abortion (Disability Equality) Bill [HL] 2017–19.

[8] Abortion (Cleft Lip, Palate, and Clubfoot) Bill 2019–21.

[9] *Supra* n1 [2021].

[10] *Supra* n1 at 62–80.

[11] *Supra* n1 92, 93, 97.

[12] *Supra* n1 at 6.

[13] *Supra* n1 at 48.

[14] *Supra* n1 at 58.

[15] *Supra* n1 at 47.

rights are presented within the legal context as if they are in conflict within a "reductive zero sum game" (Sheldon 2023, 3).

It is important to highlight here that only a very small minority of abortions take place under s.1(1)(d). In 2022, there were a total of 251,377 abortions that took place in England and Wales, and 88% of these took place within the first 10 weeks of pregnancy (Office for Health Improvement and Disparities 2024). In the same year, there were 3,124 abortions involving foetal impairments, but most of these took place before 24 weeks. As such, only 256 abortions took place under s.1(1)(d), representing just 8% of the abortions concerning foetal impairments and 0.1% of the total number of abortions (Office for Health Improvement and Disparities 2024). The result of Crowter's legal challenge, had it been successful, would thus have been to further restrict access to abortion only for this small minority of pregnant people. However, it might have also had broader implications for access to abortion; Sheldon (2023, 19–20) has identified the anti-abortion agenda that underpinned the *Crowter* challenge, particularly around the claims of foetal rights.

The co-opting of disability rights concerns to undermine access to abortion can be seen more visibly elsewhere, for example in the 2020 decision of Poland's Constitutional Tribunal, which removed the foetal disability ground for legal abortion from an already very restrictive abortion law.[16] This change followed multiple attempts from the anti-abortion Polish government to further restrict access to abortion (Tongue 2022, 184). Giric (2016, 741) has identified the adoption of disability rights arguments by anti-abortion actors in the US, and this can also be seen in the UK setting; the anti-abortion groups Christian Action Research and Education (CARE 2021) and the Society for the Protection of Unborn Children (SPUC 2022) were highly supportive of Crowter's legal challenge. Thus, while it is important to recognise the negative stereotypes surrounding disability that the law perpetuates, care must be taken to avoid supporting these broader anti-abortion narratives.

This threat to abortion access has emerged in some of the academic responses to *Crowter*, which seem to (at least implicitly) support further restrictions on access to abortion without consideration of the impact this will have for pregnant people. Herring and Robinson (2024, 7), for example, have responded to the case by developing the concept of 'the right to live without stigma' which they argue could fall within the scope of Article 8 as this concerns living disabled people as well as 'the unborn'. The finding of such a violation would, as highlighted above, restrict the application of s.1(1)(d). Herring and Robinson do not, however, address how this might impact the right to abortion. There has been a marked difference in how US-based scholars have responded to the issue of abortion and foetal disability. In the aftermath of the US Supreme Court's decision in *Dobbs v Jackson*, which has led to restrictions on abortion across much of the US, scholars have adopted the frameworks of reproductive justice and disability justice in order to situate legislative changes in the context of wider systemic injustices. These frameworks provide an important lens for addressing not only the issues with abortion law and policy, but also for

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[16] Constitutional Tribunal of Poland Case K 1/20 (22 October 2020).

addressing how feminist and disability movements can and must work together to tackle broader structural issues.

In the remainder of this article, I will apply the frameworks of reproductive and disability justice to the UK context to propose some broader changes to law, medical practice and socio-cultural norms. This builds upon my previous work where I address the fact that.

> Disability exceptions to restrictions on abortion are a symptom of socio-cultural settings which both undervalue disabled people and control the reproductive lives of women and all other people capable of becoming pregnant. It is possible to take an approach that recognises the importance of access to abortion while also addressing the concerns raised around disability exceptions. This need not be a 'compromise' but a position that is supportive of the (interlinked) interests of both pregnant people and disabled people. (Tongue 2022, 185).

The reproductive and disability justice frameworks are a particularly important lens for the issue of abortion and foetal disability, which tends to be framed in mainstream discourse as an isolated issue for both abortion access and disability rights. While Sheldon (2023, 25) recognises that disability rights and abortion rights are 'mutually reinforcing', my aim here is to go beyond this to emphasise the inherent interconnectedness of these issues when viewed through these social justice-based lenses. My approach grounds a response to the concerns raised around the impact of foetal impairment grounds which rejects the curtailing of access to abortion as a solution to disability stigma and stereotyping. At the same time, it also highlights the need for feminist abortion rights movements to take seriously the concerns raised by people with disabilities.

Reproductive and Disability Justice

The reproductive justice framework was developed by a group of women of colour based in the US who identified various limitations to the reproductive rights approach, which centered on a narrow conception of reproductive choice and prioritised issues such as access to contraception and abortion (Luna and Luker 2013, 336–7; Ross and Solinger 2017, 65–8). As Chrisler (2012, 1) notes, the "framework of choice assumes that all women can, and do, decide for themselves whether and when to have children." The reproductive experiences of Black and Indigenous women in the US had been characterised by restrictions on their ability to have and parent their children, such as through coercive and involuntary sterilisation programmes (Luna and Luker 2013, 331–5; Ross and Solinger 2017, ch. 1). These issues, and the reproductive experiences shaped by the intersectional characteristics of gender identity, class, disability, sexuality, and nationality, were marginalised within the reproductive rights movement. Splicing social justice with human rights (Ross and Solinger 2017, 65), the reproductive justice framework situates reproductive rights concerns among other social justice concerns such as access to housing, sanitation, healthcare, education, and employment, and freedom from gender-based violence (Chrisler 2012, 2–3; Silliman et al 2016, 12–3).

This framework goes beyond the reproductive rights paradigm by identifying the intersectional and structural barriers to reproductive autonomy, which goes beyond the traditional focus on law and policy. Reproductive justice activists pointed out, for example, that many pregnant people were left without access to abortion even prior to the overturning of *Roe v Wade* due to socio-economic disadvantage and distance from abortion clinics, disproportionately affecting Black and Indigenous people (Luna and Luker 2013, 335). However, reproductive justice means more than access to abortion. The collective SisterSong defines reproductive justice as a human right with four tenets: to bodily autonomy, to have children, to not have children, and to parent one's children in safe and sustainable communities.[17] Whilst this includes abortion, it also includes other forms of sexual and reproductive healthcare and education, pregnancy-related healthcare and alternative birthing options, and support in cases of domestic abuse and poverty. At its core, reproductive justice is concerned with the gendered, racialised, class-based, and other intersectional dynamics that shape, curtail, and prohibit free reproductive decision-making.

The disability justice framework was similarly generated out of critiques of the disability rights movement, which presented disability as a single issue rather than one which intersected with race, class, gender, sexuality, and nationality (Schalk 2022, 7). Disabled activists of colour have identified that the "histories of white supremacism and ableism are inextricably entwined" such that understandings of race, nation state, and colonialism cannot be viewed as distinct from understandings of disability (Berne 2015). Schalk (2022, 9) argues that "many Black folks and other people of color experience disability as the impact of capitalism, interpersonal violence, state violence, and/or state neglect". Thus, Berne (2015) identifies collective liberation as one of the key principles of disability justice. Departing somewhat from the medical and social models of disability, the disability justice framework understands disability as political. While the medical model views disability as a medical problem to be solved (Asch 1999, 1650), the premise of the social model is that most of the problems associated with disability are the result of social barriers and discrimination (see Asch 1999; Shakespeare 1998). Under a political model, Berne (2015) specifically highlights that disabled bodies are set apart from 'normative' standards, which are concerned with the exploitation of the body for capitalist profit. Kafer (2013, 5) has expanded on how disability continues to be viewed as a personal affliction requiring individual resilience and medical management. In contrast, she refers to the 'political/relational model' which locates the problem of disability in exclusionary and stigmatising environments or social patterns (Kafer 2013, 6). This includes the ideas behind the social model of disability, but also identifies the political and ideological systems that create disability: those that "attribute normalcy and deviance to particular minds and bodies." (Kafer 2013, 6). This requires not *just* social change, but political transformation (Kafer 2013, 6).

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[17] SisterSong. What is Reproductive Justice. https://www.sistersong.net/reproductive-justice/. Accessed 20 November 2024.

The focus of both frameworks goes beyond law reform and the gaining of legal rights, instead seeking to address the cultural, political, and economic conditions that are required for social justice. The concept of 'social justice' is a broad one, but it has been defined as distinct from the notion of individual justice as protected through individual civil rights (Novak 2000; Barry 2005, 17). Novak (2000) identifies two key aspects of social justice: firstly, the act of "inspiring, working with, and organizing others to accomplish together a work of justice" without turning to government; and secondly, "its object, as well as its form, primarily involves the good of others" rather than the good of one. Young (2011, 11) also defined social justice as collective action, but specifically as that concerning social inequalities: "where social group differences exist and some groups are privileged while others are oppressed, social justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression." However, Walster and Walster (1975, 36) distinguish between those that "simply possess a special sensitivity to the pressures of emerging groups for 'fairer' treatment" and those that work towards universal social justice. In their view, equity is required for social justice, as conceptions of 'fairness' and 'equality' can be manipulated to serve both exploiters and victims (Walster and Walster 1975, 34). Gilabert (2023, 4–5) highlights the importance of 'solidaristic support' in the struggle against injustice; supporting one another against oppression is fundamental for social justice. Social justice requires, therefore, a foundation of collective action and solidarity against oppression.

In addition to these two prongs, I would also include intersectionality—the recognition that inequalities intersect and compound to shape individual subjective experiences (see Crenshaw 1989)—as a central aspect of social justice, to avoid a focus on the rights of individual groups to the exclusion of others. Phillips (2013, 75) identifies that within equality law, many disadvantaged groups have "fought lengthy battles to be included on the list, only to find that social justice and equality still eluded them." Thus, the concept of reproductive rights and disability rights may be critiqued from a social justice perspective for recognising individual freedoms but failing to redress discrimination, stereotyping, and intersectional inequalities. While some scholars (Sharpe and Earle 2002; Tongue 2022; Sheldon 2023) have highlighted how these rights can be viewed as reconcilable, the perception of conflict is still prevalent; thus, I consider the issue of abortion on the grounds of foetal impairment through a social justice lens changes the conversation from one of potentially conflicting rights to one of solidarity and interconnectedness.

From Reproductive Rights to Reproductive Justice

Foetal impairment grounds for abortion are not specific to the UK; they are relatively common worldwide and have been central to international human rights discourse on abortion. For example, in 2017, prior to the legalisation of abortion in Ireland, the UN Human Rights Committee (HRC) found that the human rights of two women, Siobhan Whelan and Amanda Mellet, had been violated as they were unable to have abortions in Ireland when they discovered that the foetuses they were carrying had fatal impairments.[18] In 2018, and prior to the decriminalisation of abortion in Northern Ireland, the UK Supreme Court noted that Northern Ireland's abortion prohibition was incompatible with Article 8 (the right to private life) of the European Convention on Human Rights (ECHR) because there were no exceptions for serious foetal impairments or pregnancies resulting from rape.[19] While the European Court has not explicitly stated that prohibitions on abortion in these circumstances violate the ECHR, it has previously found violations of Article 8 and Article 3 (the right to freedom from cruel, inhuman, and degrading treatment) where a pregnant woman was prevented from accessing prenatal diagnostic services which would have enabled her to decide whether or not to have a legal abortion.[20] Thus, Donoghue and Smyth (2013, 139–141) have previously argued that advancements in the availability of non-invasive testing, coupled with the emerging consensus among state parties to the ECHR to provide for abortion in cases of foetal impairments, makes the lack of access to abortion on this ground problematic. The case law and broader human rights standards in this area would certainly suggest that to prohibit access to abortion on this ground would amount to a rights violation.

In the *Crowter* case, one of the applicants' arguments was to restrict s.1(1)(d) to fatal impairments only. An interpretation of a 'fatal' foetal impairment that restricts abortion to those that would cause the foetus to die in utero would exclude impairments that would cause the foetus to survive until birth, but only live for a short period thereafter. This is currently an issue with Ireland's legislation, which is restricted to fatal foetal impairments as pregnant people have been denied access to abortion on the basis that it is 'impossible' to determine how long the baby would survive for after birth (Senan Molony 2023; O'Shea 2023, 61–3). If fatality is to be interpreted to include impairments that would cause the foetus to survive for a short period of time after birth, a time limit (such as Ireland's 28-day rule)[21] is arbitrary. Similar issues arise with interpretations of 'severity' which could encompass specific types of conditions, the level of pain and suffering the potential child might experience, or the remedial or curable nature of an impairment. Restrictive definitions, or creating a closed list of eligible impairments, risk excluding legal abortion in circumstances that may give rise to the violation of the pregnant person's human rights.

As already mentioned, the *Dobbs v. Jackson* decision in the United States has paved the way for restrictive abortion legislation within the US.[22] In the state of Louisiana, for example, abortion is now only permitted in limited circumstances—including where the foetus has an impairment that deems it 'medically futile'.[23] The Louisiana Department of Health (2022) issued a list of 24 conditions that rendered

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[18] *Mellet v Ireland* (2016) UN Doc. CCPR/C/116/D/2324/2013; *Whelan v Ireland* (2017) UN Doc. CCPR/C/119/D/2425/2014.

[19] *Northern Ireland Human Rights Commission, Re Judicial Review* [2018] UKSC 27. This case was ultimately unsuccessful, however, due to an issue with standing.

[20] *R.R. v Poland* App no. 27617/04 (ECtHR, 2011), paras. 161, 214.

[21] Health (Regulation of Termination of Pregnancy) Act 2018 [Ireland], s.11(1).

[22] *Dobbs v Jackson* (2022) 597 U.S. 215 [United States].

[23] LA Rev Stat 40 §1061 (2016) [Louisiana, United States].

a foetus medically futile. In 2022, a pregnant woman reported that she had to travel to another state when the foetus she was carrying was diagnosed with acrania, an impairment which causes distortion of the brain and skull, as it was not explicitly included on this list (Vargas 2022). Healthcare providers had apparently been reluctant to perform an abortion in this case due to the restrictive and uncertain nature of the law, as they would risk imprisonment, fines, or a loss of their license for an illegal abortion. The list was amended to include acrania, bringing it up to 25 conditions, but the risk that other pregnant people could have a similar experience remains. Further restrictions to s.1(1)(d) of the Abortion Act 1967 and the equivalent grounds of the NI Regulations could similarly leave many pregnant people without essential abortion services, with significant consequences.

Thus, feminist scholars writing on the issue of prenatal testing and abortion on the grounds of foetal impairment in the UK context have typically been sympathetic to the concerns of disability rights advocates, but nonetheless defend the legal ground under claims of parental choice or reproductive autonomy. While Sheldon and Wilkinson (2001, 109) ascribed weight to the disability discrimination argument, they also highlighted that parental interests are important and that “no woman should be forced to carry to term a disabled, or any other, foetus”. They recommended caution when invoking parental interest arguments to support s.1(1)(d), but concluded that such arguments *do* go a long way to justify the ground (Sheldon and Wilkinson 2001, 105–7). Scott (2005c, 78) similarly acknowledged the ‘possible offence’ that prenatal testing and abortion might cause, but argues strongly in favour of parental interests and reproductive autonomy. Scott (2005b, 326) argued that prospective parents ought to have a “considerable say about the kind of reproductive future which they feel able to undertake.” Jackson (2000, 481) likewise concludes that disability discrimination concerns do not “provide a legitimate justification for requiring a particular woman to go through pregnancy and childbirth against her wishes”.

The ability to exercise autonomous reproductive decision-making, including access to abortion, is central to the reproductive justice framework. In the US context, scholars (see Ahmed et al 2023; Eidson 2023) have examined the impact of *Dobbs v Jackson* from a reproductive justice lens, recognising how increasing restrictions on abortion have exacerbated existing health disparities including maternal mortality rates and access to reproductive healthcare services for socio-economically disadvantaged people. Further, punitive child custody arrangements, the surveillance of pregnant people, and the criminalisation of certain conduct during pregnancy—injustices which are connected to restrictions on abortion—disproportionately impact poorer people and people of colour (Ahmed et al 2023, 466; Goodwin 2020). Access to abortion is therefore increasingly being viewed as a matter of essential healthcare and as necessary for social justice because of the healthcare inequalities that result from prohibitions (Watson 2022; Kendal 2023; Romanis 2023).

The context in which abortion decisions are made is also an important one from the reproductive justice perspective, in recognising how broader social, cultural, economic, and political issues may influence individual decision-making and perpetuate injustice. The reasons one may decide to have an abortion upon the diagnosis of a foetal impairment go beyond solely medical concerns, and may encompass socio-economic factors. The ability (or lack of) of the pregnant person and any other parent to meet the financial, housing, educational, healthcare, and other needs of a disabled child is relevant to an abortion decision, particularly in contexts where there is limited governmental support for disabled adults and parents of disabled children.[24] The rising 'cost of living' has exacerbated the housing crisis, fuel poverty, and food bank use, which has a significant impact on people's ability to parent and to exercise choices over their reproductive lives (Harari et al 2024; Delap and Kitchen 2023). The rise in rent, food, and energy costs affects low-income households the most (Harari et al 2024, 50–3). For households with disabled members, the cost of living has increased at a greater extent than the governmental payments available to support people with disabilities (Schuelke et al. 2022). The availability and cost of childcare is also a significant issue for parents in the UK (Clarke and Thomson 2024). These barriers make it particularly difficult for people in circumstances of socio-economic disadvantage to exercise autonomy over reproductive and parenting decisions generally, but particularly where a child may be born with a disability that would require additional support which is not provided.

Further, some scholars have questioned the claim that reproductive choice is being exercised in the decision to undergo prenatal testing and abortion upon diagnosis, referring to this as a 'forced choice' (Rapp 1999, 222–6). Studies of people who have undergone abortions in cases of foetal impairment highlight the ambiguity and uncertainty present in these decisions, which were experienced as a struggle rather than a choice (see Rapp 1999; Piepmeier 2015; Heinsen 2022). Piepmeier (2015, 18) highlights how personal abortion decisions do not demonstrate eugenicist or discriminatory attitudes (although societal attitudes may be subconsciously influential) and nor are they experienced as autonomous decisions. The medico-legal framework in which these decisions are made can also undermine reproductive autonomy. McGuinness (2013, 240) argues that s.1(1)(d) of the AA 1967 may actually hinder reproductive choice as 'the legislation stigmatises disability and contrasts the protection afforded to the 'normal' foetus against that afforded to the 'impaired' foetus' which imposes expectations on pregnant people. In the context of Denmark, Heinsen (2018) has found that pregnant people feel compelled to undergo prenatal testing and abortion upon diagnosis of a foetal impairment, rather than making their own active decisions. This expressive force of prenatal testing and disability grounds for abortion is therefore not only to convey negative attitudes towards disability, but also to convey the reproductive choices that pregnant people ought to be making. Katz-Rothman (1993) therefore viewed prenatal testing as a tool of patriarchal state control over reproduction. While the ability to choose an abortion is important for reproductive autonomy, the reproductive justice lens also highlights how reproductive autonomy may be curtailed in this context by restricting the choice of pregnant people to continue their pregnancy and raise a disabled child.

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[24] On the current difficulties faced by disabled children and their parents in the UK, see: Disabled Children's Partnership. 2023. *Failed and Forgotten.* https://disabledchildrenspartnership.org.uk/wp-content/uploads/2023/03/Failed-and-Forgotten-DCP-report-2023.pdf. Accessed 20 November 2024.

From Disability Rights to Disability Justice

In 2018, the UN Committee on the Elimination of Discrimination against Women (CEDAW) and the UN Committee on the Rights of Persons with Disabilities (UNCRPD) issued a joint statement which included a comment about the need to repeal discriminatory abortion legislation.[25] Disability rights scholars and activists have critiqued foetal impairment grounds for perpetuating discriminatory attitudes towards people with disabilities. Asch (1999, 1650), for example, has challenged the medical and societal assumption that “women will, or should, end their pregnancies if they discover that the fetus has a disabling trait.” Asch (1999, 1650) critiqued the medical model of disability as underpinning these grounds, where prenatal testing and abortion becomes a means of ‘minimising the incidence of disability.’ This can be overtly seen in some academic literature; Harris (2000, 96–9) adopted a ‘harmed condition’ model of disability by which he justified prenatal testing and abortion as a means of preventing ‘avoidable suffering’. This approach perpetuates the incorrect assumption that disability inevitably involves harm (see Edwards 2001). Some scholars (see Wertz 1998; Duster 2003) have argue that foetal impairment grounds for abortion operate as a form of eugenics because of these assumptions that disability is to be avoided.

The UK’s abortion legislation adopts a distinctly medical model of disability in incorporating a broader for abortion prior to 24 weeks’ gestation but limiting abortion to only three medical grounds, including foetal impairment, after this point. The gestational time limit imposed by the Abortion Act 1967 and the NI Regulations ascribes value (though not legal rights) to a foetus at this later stage. The foetal impairment ground therefore draws a distinction between the value ascribed to non-disabled foetuses, as an abortion is not permitted here unless the pregnant person’s health or life is at risk, and disabled foetuses, as an abortion is broadly permitted here (see Tongue 2022, 183). This creates the negative stereotyping of disability, premised upon the association of disability with suffering, that has led to scholars such as Herring and Robinson (2024) arguing in favour of recognising stigma as a human rights violation in this context.

From a social model of disability perspective, Shakespeare (1998, 666) was reticent to characterise prenatal testing as eugenics in itself, instead focusing on the ‘social and cultural pressures’ that push people towards testing and abortion and therefore produce eugenicist outcomes. Shakespeare (1998, 679) located the cause of ‘selective abortion’ in the fact that society devalues disabled lives, as well as the social and economic costs of disability. Reproductive decisions take place ‘within a material and cultural context’ (Himmelweit 1988, 42) and this includes prejudicial societal attitudes around disability, as well as the social and economic considerations discussed above. Piepmeier (2013, 161) explored how reductive attitudes and

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[25] CEDAW and CRPD. 2018. Guaranteeing sexual and reproductive health and rights for all women, in particular women with disabilities. https://www.ohchr.org/sites/default/files/documents/hrbodies/cedaw/statements/20120829-js-cedaw-crpd-guaranteeing-sexual-reproductive-health.DOCX. Accessed 20 November 2024.

stereotypes around disability have fed into feminist narratives on prenatal testing and abortion, particularly under the framing of reproductive 'choice'. Piepmeier (2013, 162–166) identifies several problematic tropes, including the equating of disability with rape in advocating for the necessary grounds for abortion (both are considering necessary exceptions to general prohibitions on abortion, including by international human rights bodies); the idea of parenting a disabled child as suffering and sacrifice; the idea of disability as a tragedy; and the assumption that an abortion would be the most responsible decision where a disability has been diagnosed.

The recognition of disability grounds for abortion as a human rights violation, or the restriction of access to abortion on these grounds, is not a solution to these issues. As the disability justice lens illustrates, disability is problematised by economic and political structures. While negative stereotypes may permeate into individual reproductive decision-making, governmental policies also shape and restrict these choices. Access to financial support as a disabled person is marred with conditionality and 'vigilance' in the idea that people are 'cheating' the system (Johnson and Nettle 2023). For disabled children, access to mainstream schools is not always possible due to physical inaccessibility, a lack of accessible materials, or a lack of specialist support for children with special educational needs and disability (SEND). Holt et al. (2019, 9) argue that segregated schools for young people with SEND operate as 'spatial containers' for socio-economic disadvantage. As Schalk (2022, 16) identifies, fighting against state neglect is a key aspect of Black disabled people's activism as race-based inequalities compound with economic disadvantage and systematic ableism.

Abortion decisions, including those in relation to foetal impairments, take place within this context of reproductive and disability injustice. For many people, the higher cost of living, educational barriers, lack of social support, and the broader inequalities affecting people with disabilities will factor into their decision to have an abortion. Changing the law to remove the foetal impairment ground will not achieve disability justice, but it could push a small minority of people into (further) poverty. Thus, the focus must instead be on achieving reproductive and disability justice through addressing the above issues. Firstly, for parents (or prospective parents) of children with disabilities, this requires comprehensive social support to ensure adequate and accessible housing, access to suitable education, and financial support to meet the particular care needs of the child. At a broader level, we need adequate funding for NHS maternity services, including the training of medical staff on the inequalities surrounding race, poverty, and disability; funding to address the barriers to education, employment, and independent housing for disabled people; and funding to address the 'cost of living crisis'. Changing the economic landscape would not, however, address socio-cultural attitudes towards disability and disabled people. Negative perceptions of disability, and the assumption that disabled people have a poorer quality of life are embedded into the cultural narratives we see in pop culture, represented in mainstream media, and in the discourse of politicians and healthcare professionals. This, reflecting Kafer's approach, requires social and political transformation on a much broader scale. Thus, secondly, a commitment to shifting these cultural narratives is required at a political and institutional level in order to achieve social justice for disabled people. Caeton (2011) argues that a shift in how disability is viewed is required, to recognise disability as 'as a valid mode of being'. This rejection of the idea of 'normal' bodies, viewing disability as an alternative modality rather than an 'Other' (Caeton 2011) is necessary for disability justice, and would alter the way that disability is viewed (by politicians, healthcare professionals, and pregnant people) in the abortion context.

Solidarity and Feminist Activism for Law Reform

As indicated above, it is largely scholars in the US context that have recognised the intersection of reproductive and disability justice. Guidry-Grimes et al. (2023) have addressed the fact that many US states have passed restrictions on abortion which include restrictions in cases of foetal disabilities, analysing this combined curtailment of rights from a reproductive and disability justice perspective. Additionally, Francis (2023, 492) highlights that much of the discussion around abortion and disability focuses on disabled foetuses, rather than disabled pregnant people who are also affected by these restrictions. Francis (2023, 494) notes how difficult it may be for a disabled person to parent a disabled child in an unfavourable and unsupportive social environment, which may mean having to avoid pregnancy altogether. Parenting as a disabled person is also difficult in the UK context. As already mentioned above, governmental support for people with disabilities has fallen below the increasing costs of living. This is coupled with the lack of affordable and accessible housing, the generally higher costs of living for disabled people, and the barriers to education and employment, which means that a significant proportion of people with disabilities in the UK are in poverty (Theil 2022; Joseph Rowntree Foundation 2024, 66–71). Black disabled women are most affected by this economic inequality (Mahon 2022), highlighting the intersectional inequalities which affect people based on race, gender, disability, and class in the UK context, as well as that in the US. Restrictions on prenatal testing and abortion upon diagnosis under the guise of disability rights is therefore simply to "add injustice to injustice" (Francis 2023, 494).

Rather than being framed as two separate sets of rights that conflict or require compromise, reproductive justice and disability justice intersect: they are two frameworks that form part of a larger movement towards social justice. In the words of Sins Invalid (2022), a disability justice collective, '[r]eproductive justice is disability justice.' The US's "violent control and oppression of people's bodies" unites the two movements (Sins Invalid 2022). In recognising the historical and current reproductive injustices faced by disabled people in the US, Powell (2022, 1887) has thus proposed the joint framework of 'disability reproductive justice'. The framework's key principles include the disruption of intersecting oppressions; centring people with disabilities as leaders; protecting autonomy and self-determination; ensuring access to sexual and reproductive healthcare services and information for disabled people; and to respond to the oppressive role of law and policy in the reproductive injustices faced by disabled people (Powell 2022, 1888–1902). As Powell (2022, 1902–3) demonstrates through this framework, there are myriad barriers to reproductive autonomy faced by people with disabilities, and this includes the inaccessibility of safe, legal abortion care. This is also true in the UK—numerous abortion clinics are not fully wheelchair accessible, meaning that some pregnant people will be required to travel further to find an accessible clinic.[26] Solidarity in this context therefore requires recognition of how laws, societal structures, and institutions do discriminate against living disabled people in the context of reproduction, and how they might be addressed more broadly to achieve social justice on both (intersecting) fronts.

Despite her criticisms of abortion on the grounds of foetal impairments, Asch (1999, 1652) also did not conclude that abortion in such cases ought to be prohibited (though she did morally oppose selective abortion practices). For her, the issue was with the routinisation of prenatal testing. Parens and Asch (2000, 4) commented that as "the ease of testing increases, so does the perception within both the medical and broader communities that prenatal testing is a logical extension of good prenatal care". The presumption that pregnant people will undergo testing is premised, Parens and Asch (2000, 22) argue, on misinformation about disabled lives and therefore undermines reproductive autonomy, as pregnant people would be 'less enthusiastic' about prenatal testing if they were properly informed. Socio-cultural change in terms of how disability is viewed broadly in society is also necessary to ensure that pregnant people can make these informed decisions.

It is a key aspect of reproductive justice that people can make autonomous decisions about their pregnancy. This requires equitable access to prenatal testing and abortion, without it being offered in a way which perpetuates discriminatory attitudes around disability. In Northern Ireland, there are continuing issues with the provision of abortion and prenatal testing which must be addressed to ensure that pregnant people have access to both. The private provision of prenatal testing is a clear issue for socio-economically disadvantaged people. Access to prenatal testing should include a range of available tests, including NIPT. Whilst there are concerns that the increasing availability of NIPT will have ethical implications around disability, Perrot and Horn (2023, 3) note that there is currently no empirical evidence that the development of these tests has had a negative impact on living disabled people. However, they do recommend the need to avoid routinisation by avoiding presenting NIPT (and other tests) as a 'standard' procedure within pregnancy care (Perrot and Horn 2023, 3). They also emphasise the need to ensure that pregnant people can consent to or refuse prenatal testing "without being subjected to any form of societal, political, economic or medical pressure, and without feeling judged for their beliefs, preferences or values" (Perrot and Horn 2023, 3). As Knight and Miller (2023, 21) have argued in the context of the US, structural changes to medical practice are needed alongside a change to neoliberal social welfare policies and ableist cultural norms. This is also true of the UK context, as the routine offering of NIPT comes with medicalised assumptions of disability. The development of inclusive and non-judgmental policies for prenatal testing, accompanied by access to non-biased, evidence-based counselling on prenatal testing, abortion, and parenting a disabled

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[26] The wheelchair accessibility information for individual British Pregnancy Advisory Service clinics can be found here: BPAS. Find a Clinic. https://www.bpas.org/contact-us/find-a-clinic/. Accessed 20 November 2024.

child, is therefore necessary to ensure that pregnant people can make these informed decisions. Pregnant people must have the information and support to choose to undertake *or refuse* NIPT without external pressures.

This brings us to the law on abortion. I have reiterated throughout this article that it would be an inappropriate and ineffective 'solution' to disability discrimination to further restrict our abortion law, either by removing the foetal impairments ground or restricting it to fatal impairments. Prohibitions on abortion in cases of foetal impairments are not compatible with either reproductive or disability justice, as has been demonstrated by looking at the US context. I do, however, view the UK's current law as problematic for exceptionalising foetal impairment as a legal ground for abortion in the later stages of pregnancy, but this relates to the broader issue of how abortion is exceptionalised. As Smyth (2024, 671) defines it, abortion exceptionalism is the fact that "abortion receives alternative or more intense legal scrutiny than other issues". Abortion faces excessive regulation in comparison to other healthcare services. This manifests in various ways in the UK context, but of central importance for this article is the retention of a criminal offence alongside the restrictions placed on later abortion. Millar (2022) and Kimport and McLemore (2022) have critiqued the over-medicalisation of abortion and the medico-legal approach which justifies some abortions but condemns others. The retention of gestational time limits which separate out acceptable abortions from unacceptable ones is one such example. There are many factors, including the issues considered earlier in this section, that would lead someone to have an abortion within the later stages of pregnancy; many of the reasons for abortion in cases of foetal impairments, such as socio-economic issues, also apply to those carrying non-disabled foetuses.

However, as already outlined, abortion in the UK is very much restricted after 24 weeks' gestation. There must be serious medical grounds for an abortion after this point, and there is no flexibility. Abortion also remains a criminal offence in England and Wales under the Offences Against the Person Act 1861 and in Scotland under the common law, and there has been an increase in recent years in the number of investigations and prosecutions that have been brought over suspected illegal abortions (see Tongue 2024). Where these prosecutions have concerned pregnant people who have terminated their own pregnancies, they have typically only been brought against those who did so at a later stage of their pregnancy on grounds that are not permitted under the law. Thus, those that have later abortions for non-medical reasons are punished under the criminal law, while at the same time abortion for medical reasons is deemed permissible. There is a wealth of literature on how the criminalisation of abortion contributes to abortion stigma by associating abortion with wrongdoing (see, for example, Kumar et al. 2009; Cook 2014; Millar 2017). Thus, exceptions to prohibitions on abortion for foetal impairments in the context of criminalisation contributes to the stigmatising of abortion-seekers and disabled individuals at the same time. This is not, as the court in *Crowter* presented it, a conflict between reproductive choice and disability rights; rather, this is a matter of reproductive *and* disability injustice which must be addressed in solidarity.

This requires moving beyond the exceptionalism of the current law to move from the current 'abortion-permissive' framework to an 'abortion-supportive' one (Romanis 2023). S.1(1)(d) and the equivalent ground in Northern Ireland's abortion legislation ought to be removed, but as part of an expansive law reform package including decriminalisation, allowing for abortion on request, and a broad ground for accessing abortion services after 24 weeks which would encompass, but not be limited to, medical reasons such as foetal impairment. This would retain access to abortion in cases of foetal impairments for those that need it, without making a wider value judgment about the lives of people with disabilities. Enabling flexibility around gestational time limits would also improve access to abortion for some people with disabilities specifically, as Furgalska and De Londras (2024, 11) identify the prolonged process of obtaining an abortion when someone's mental capacity is in question and the fact that some people with disabilities may be more likely to identify that they are pregnant at a later stage. This broader law reform effort would therefore address many of the current issues with our abortion law that create vulnerabilities and harm, including on the basis of disability.

However, Kimport and McLemore (2022) argue that reproductive justice in relation to abortion cannot be achieved through law reform alone. Baird and Millar (2024) identify the 'residual exceptionalism' within Australia's abortion legislation following decriminalisation in every state, as abortion remains subjected to strict regulations. Smyth (2024, 709) thus argues that countering exceptionalism means "to reframe and rethink abortion as both a common experience and a core healthcare requiremen". Abortion is a social good (see Watson 2019) and a matter of essential healthcare for pregnant people, including those with disabilities. Where NIPT or an abortion is requested on the grounds of foetal impairment it should be granted—what must be addressed is the socio-cultural norms and the political and economic conditions that underpin these decisions, to tackle to exceptionalisation of abortion and the stigma surrounding disability together. Ableism, racism, and sexism is pervasive within UK healthcare provision beyond abortion (see, for example, Sakellariou and Rotarou 2017; Essex et al. 2022; Von Benzon et al. 2024). However, in the debate on abortion and foetal impairment, the reproductive and disability perspective offers a way forward which is grounded in social justice for pregnant and disabled people.

This social justice understanding, which encompasses solidarity with other social justice issues, must become central to feminist activism on abortion within the UK. Abortion and disability movements in the UK have not historically been aligned; Klausen (2024) highlights how the Abortion Law Reform Association (ALRA) adopted 'feminist eugenics' in part as a strategy to advocate for the legalisation of abortion, and in part out of genuine concern over the birth of children with disabilities. As indicated above, disability rights scholars have remained supportive of access to abortion, and Sisters of Frida (2022), a disabled women's collective based in the UK, critiqued the *Crowter* case as a "pretext to destroy abortion access". However, Sisters of Frida (2022) also highlight the need for greater communication between the abortion rights movements and disabled people to avoid similar efforts, given how disability concerns have been instrumentalised by anti-abortion movements. Abortion Rights, the current iteration of the ALRA which merged with the National Abortion Campaign in 2006, put out a statement in 2014 which "recognises that we live in a society that discriminates against disabled people' but ultimately set out that 'Abortion Rights' position is in line with current law as stipulated in the

Abortion Act 1967".[27] Abortion Rights did not issue a statement on the *Crowter* case, and there has been, as of yet, no recognition by the organisation of the negative stereotypes associated with the foetal impairment ground for abortion; instead, the organisation has been supportive of the law as it currently stands.

This lack of engagement with the concerns of people with disabilities illustrates the need for concerted efforts from feminist and abortion rights movements in the UK to demonstrate solidarity with people with disabilities. The decision to continue or terminate a pregnancy in a complex and subjective one, but individuals ought to be able to make that decision without disability posing an additional (economic or socio-cultural) complexity insofar as is possible. Caeton (2011) thus argues that disabled people, "along with those feminists who will join us, must strive for fewer barriers and less pernicious stigmas, so that in utero disability is no more cause for alarm than any other unplanned pregnancy". It is for feminist movements within the UK to take up this call to action, and work with disabled people towards collective reproductive and disability justice through law reform, changing current medical practices around NIPT, and striving for socio-cultural transformation.

Conclusion

This article has taken up the renewed debate on abortion and foetal disability that has emerged in the UK following the legal challenge to the foetal impairment ground of the Abortion Act 1967 advanced in *Crowter*. While some of the current scholarship in this area has recognised the interconnections between reproductive and disability rights, others have implicitly supported the restriction of this ground for abortion in order to avoid the problematic messaging of the law. This stands in stark contrast with the more radical approaches that have been put forward in the US in light of the prohibitions on abortion, including abortion in cases of foetal impairment, that followed the overturning of *Roe v Wade*. Applying the reproductive and disability justice frameworks adopted by those scholars to the UK context, I argue that reform to law and medical practice must come in the context of broader economic, social, and cultural transformation aimed at supporting reproductive decision-making for all *and* recognising the intersectional lived experiences of people with disabilities. This requires abortion rights movements in the UK to demonstrate solidaristic support with disabled people—something that has so far been lacking in mainstream organising.

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[27] Abortion Rights. 2014. Statement on disability and abortion. https://abortionrights.org.uk/statement-on-disability-and-abortion/. Accessed 20 November 2024.

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