This is a repository copy of *Editorial: Reproductive health, choice, and justice*.

White Rose Research Online URL for this paper:
https://eprints.whiterose.ac.uk/229176/

Version: Accepted Version

Article:

Clough, B. orcid.org/0000-0001-7640-1378, Fovargue, S. orcid.org/0000-0003-2361-4219, Heywood, R. orcid.org/0000-0001-5073-9944 et al. (1 more author) (2024) Editorial: Reproductive health, choice, and justice. Medical Law Review, 32 (4). pp. 441-443. ISSN 0967-0742

https://doi.org/10.1093/medlaw/fwae039

© 2024 The Authors. Except as otherwise noted, this author-accepted version of a journal article published in Medical Law Review is made available via the University of Sheffield Research Publications and Copyright Policy under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution and reproduction in any medium, provided the original work is properly cited. To view a copy of this licence, visit http://creativecommons.org/licenses/by/4.0/

Reuse
This article is distributed under the terms of the Creative Commons Attribution (CC BY) licence. This licence allows you to distribute, remix, tweak, and build upon the work, even commercially, as long as you credit the authors for the original work. More information and the full terms of the licence here: https://creativecommons.org/licenses/

Takedown
If you consider content in White Rose Research Online to be in breach of UK law, please notify us by emailing eprints@whiterose.ac.uk including the URL of the record and the reason for the withdrawal request.

eprints@whiterose.ac.uk
https://eprints.whiterose.ac.uk/

Editorial: Reproductive Health, Choice, and Justice

Bev Clough, Sara Fovargue, Rob Heywood, José Miola

The reproductive landscape is changing. Technological developments, shifts in societal norms and family forms, and legal and political shifts, including the overturning of the decision in *Roe* v *Wade* by the US Supreme Court,[1] have all reinvigorated discussions about reproduction. Similarly, the recent ruling from the Supreme Court of Alabama that an embryo is likewise a minor child whose demise can support a claim for wrongful death, raises legal, ethical and pragmatic questions about the use and provision of reproductive technologies and treatments.[2] The adoption of the UN Convention on the Rights of Disabilities (UNCRPD) 2006 has also drawn attention to disability rights in the context of reproduction. Reproductive rights are crucial to the buttressing of meaningful autonomy, choice, and control. The articles in this special issue on 'Reproductive Health, Choice and Justice' are not only timely but also draw attention to the importance of pausing to take stock of the recent histories and current context of reproduction in health law. They develop existing scholarship by broadening the scope of analysis and capture the various ways in which law and reproductive justice intersect.

The five articles included in this special issue highlight a number of common themes, which signal important directions for future research. We highlight two here. The first is the challenge to the traditional professional/clinician-patient relationship, which has underpinned health law, signalling the need to bring broader legal and regulatory frameworks into view. Sara Attinger and colleagues explore the issue of commercialisation and corporatisation in health care and use the example of assisted reproductive technologies to demonstrate the tensions between corporate and regulatory frameworks, health care settings, and the obligations of professionals within these, when using or enabling the use of assisted reproductive technologies.[3] In a different context, Dylan Hoffman highlights the emergence of FemTech and the ways in which this promises to support women's reproductive choice and autonomy, while at the same time opening up new forms of surveillance and control.[4] Emerging reproductive technologies are thus exposing the complex legal relationships that, ultimately, shape the reproductive experience and the tensions which may impact on these experiences. In the FemTech context, for example, a number of actors are noted as potentially having access to reproductive data, including individuals, industries and insurers, each with varying data protection compliance and underpinning aims.

The articles by Aimee Hulme, and Magda Furgalska and Fiona de Londras, also draw attention to the broader institutional contexts which form and impact on the lived realities of legal frameworks; contexts which, in the abstract, promise choice,

---

[1] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Discussed by Emily Ottley *et al.*, '*Dobbs v Jackson Women's Health Organization* (2022): Consequences One Year On' (2023) 31 *Medical Law Review* 457.

[2] *Le Page v Center for Reproductive Medicine* So.3d –, 2024 WL 656591. Discussed by Edward R Grant, 'The Short-Lived Verdict in Le Page v Center for Reproductive Medicine: Why 'Personhood' Matters in the Regulation of Assisted Reproductive Technologies' (2024) 32 *Medical Law Review* 399.

[3] Addressing the Consequences of the Corporatisation of Reproductive Medicine.

[4] FemTech: Empowering Reproductive Rights or Femtrap for Surveillance?

control and reproductive autonomy. Hulme explores a recent body of case law in the Court of Protection enabling anticipatory best interests declarations in relation to caesarean sections.[5] She highlights the disempowering effects of these cases, which are at odds with a broader National Health Service focus on choice and control in childbirth in the UK, as well as exposing broader problems with the framework of the English and Welsh Mental Capacity Act 2005. Capacity is also explored by Furgalska and de Londras, who draw attention to the under-researched and important issue of access to abortion for disabled women. As well as focusing on issues of capacity, they also consider supported decision making following the UNCRPD.[6]

In utilising the critical frames of procedural justice and slow violence to challenge donor anonymity in the UK's Human Fertilisation and Embryology Act 1990 (HFEA),[7] Caroline Redhead and Lucy Frith highlight the potentially adverse consequences of, and challenges posed by, direct-to-consumer genetic testing.[8] Importantly, their work is underpinned by the experiences of those affected by donor conception and they engage with how such broader developments place additional strain on the anticipated workings of the HFEA 1990 and 2008 and donor anonymity. Together, these articles sketch a more complex legal landscape and in so doing they generate important insights and possibilities for future research.

Secondly, the articles draw attention to power; in particular, issues relating to the shifting and often ambivalent nature of power in the hands of individuals, the state, and private actors. This is examined in the light of new and emerging technologies by Attinger and colleagues, where the potential for conflicts of interest (doctors as directors, for example) is flagged. In his exploration of FemTech, Hoffman notes the ways in which technologies can empower individuals and shift the power dynamic in the doctor-patient relationship by providing data to patients, but also the ways in which power can be used by others with the possible use of FemTech in criminal prosecutions for abortion. This is a particularly pertinent possibility in the wake of the US Supreme Court's decision in *Dobbs*. Similarly, Redhead and Frith highlight how the challenges of direct-to-consumer genetic testing have the potential to empower and disempower in ways that are shaped by the inequalities generated by the legal framework for donor anonymity in the HFEA 1990 and 2008. The influence of the law is also exposed by Furgalska and de Londras in their discussion of the tensions between legal gestational limits for terminating a pregnancy and the push in mental capacity law to provide supported decision making. This ultimately effects disabled women's choice and control. The power of institutional actors here to support decisions and timely information and access to abortion is stark and resonates with Hulme's article in which she draws attention to the disempowering spatial and temporal dynamics of the institutional context in the delivery and birth cases that she considers.

---

[5] Anticipatory Declarations In 'Obstetric Care: A Relational and Spatial Examination of Patient Empowerment, Institutional Impacts And Temporal Challenges.

[6] Towards a Rights-Based Approach for Disabled Women's Access to Abortion.

[7] As amended by the Human Fertilisation and Embryology Act 2008.

[8] Donor Conception, Direct-to-Consumer Genetic Testing, Choices and Procedural Justice: An Argument for Reform of the Human Fertilisation and Embryology Act 1990.

These themes, among others that permeate throughout the articles, signal the need for an approach to reproduction in health law that is underpinned by a broader awareness of reproductive justice. Those seeking to advance scholarship on reproductive justice must be attentive to the broader medico-legal landscape in finding spaces where choice and autonomy are curtailed or enacted too. The articles in this special issue highlight the many complexities of new forms of legal relationships and regulatory frameworks and how these impact on care, choice and - in turn - justice. They support the need for intersectionality underpinning reproductive justice work, evidenced particularly by the work foregrounding the differential impacts of the law for disabled women. We hope that readers enjoy these excellent articles and thank the authors for their insightful and thought-provoking contributions.