Maintaining the criminal prohibition of abortion as a means of protecting women

Alternative facts and realities in reproductive law and policy

Samantha Halliday

In England and Wales we recently celebrated the fiftieth anniversary of the Abortion Act 1967, an Act described as a "great gift of choice from that Parliament to the women of Britain"[1] As I will demonstrate in this chapter, there is nothing about the Abortion Act that justifies such a label, rather than facilitating women's choices, it entrenches medical dominance, rendering women supplicants, able only to request an abortion whilst preserving the gate-keeping function of the medical profession. Profound differences characterise the law regulating abortion in the United States of America, Germany and England & Wales, but one fact unites them all – none should be taken at face value, in each case the rhetoric does not match the regulatory reality it claims to describe! The English Abortion Act purports to regulate abortion strictly, but renders early abortion a matter of medical discretion and is generously funded by the National Health Service. The German provisions (§ 218ff StGB) require that pro-life counselling give voice to the "unborn's" right to life and to assist women to make "a responsible decision" whilst designating non-indicated abortions as unlawful, yet abortion is available upon demand within the first 12 weeks of pregnancy and often funded by social insurance.[2] By contrast, in the USA the Supreme Court recognised that the right to autonomy encompasses a right to elect a pre-viability abortion,[3] yet women struggle to access abortion with dwindling numbers of providers, onerous provisions designed to impede access to abortion and high costs in many states. It is suggested that the regulation of abortion is an area like no other in the way that it demonstrates the gap between regulatory reality and the rhetoric that accompanies it.

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[1] *C. McCafferty* MP, HC Deb 31 October 2006, vol 451, col 157.

[2] *M. Spieker*, Kirche und Abtreibung in Deutschland: Ursachen und Verlauf eines Konfliktes (2d ed. 2008), at 105, suggests around 80 % of all counselling based abortions are paid for by the state.

[3] Planned Parenthood of Southeastern Pennsylvania et al. v Casey 505 U.S. 833 (1992).

In my previous work I have argued that there is a need to reframe the abortion debate around the principle of human dignity, recognising the need for the law to acknowledge a woman's dignity interest in terms of exercising autonomy through her reproductive choices and her bodily integrity, whilst also recognising that the law may require such choices to be informed and may even seek to promote birth, rather than adoption, recognising the inherent value of human life.[4] In this chapter I address the related issue of rhetoric and the way in which it is utilised to promote abortion exceptionalism, constructing abortion as a crime, rather than treating it like any other medical procedure, as a private matter. Rhetoric that increasingly frames the crime as necessary to protect women, from themselves, from abusive partners, or even from doctors. The gap between the rhetoric and the regulatory reality is interrogated through the lens of early medical abortion, demonstrating the poor fit of the criminal law in this context, where it has been unable to respond adequately to developments in medical science, employing empty rhetoric about protecting women to mandate the use of the "strong arm of the law" whilst impeding access to early medical abortion (EMA) and rendering women more likely to resort to unofficial sources of abortion.[5]

I. The Law relating to abortion in England and Wales[6]

The current law relating to abortion in England and Wales can be found in the Abortion Act 1967 (as amended by the Human Fertilisation and Embryology Act 1990) which provides defences to doctors performing abortions in certain circumstances to the crime of procuring a miscarriage (Offences Against the Person Act 1861[7] (OAPA)) and the crime of child destruction (Infant Life (Preservation) Act 1929). The current prohibition of abortion is found in a Victorian statute passed more than 150 years ago in a time very different to our own, a time when women could not own property,[8] still less determine what should happen to the content of their uterus. Reflecting that the first statutory prohibition of abortion was introduced in 1803,[9] Mumby J emphasised that "The world of 1803 or even of 1861 was very different from our own. A society which could

[4] *S. Halliday*, Protecting Human Dignity: Reframing the Abortion Debate to Respect the Dignity of Choice and Life, (2016) 13 CIL 287.

[5] Throughout this chapter my focus will be upon the law in England and Wales, but relevant comparisons with the law from Germany and the USA will be drawn as space allows.

[6] The Abortion Act 1967 does not extend to Northern Ireland, where there are no statutory defences to the crimes of procuring a miscarriage Offences Against the Persons Act 1861.

[7] The OAPA does not extend to Scotland.

[8] 21 years later the Married Women's Property Act 1882 45 & 46 Vict. c.75 recognised a married woman's right to own property.

[9] 43 Geo.3 c.53. Lord Ellenborough's Act categorised all abortions, regardless of whether

believe that the pillory and the gallows were appropriate punishments for abortion is so utterly alien to our own as to make it almost impossible to bridge the gulf of incomprehension. Even in 1861 our society was only on the brink of the beginnings of the modern world." Nevertheless, the 1861 Act is still the current law and equates to § 218 StGB, prohibiting all abortion.

Sections 58, 59 OAPA set out three offences: that of a pregnant woman intentionally procuring her own miscarriage (unlawfully using "poison or other noxious thing, an instrument, or other means"); that of a third party intending to unlawfully procure a miscarriage (whether or not the woman was pregnant); and the offence of supplying, or procuring the means to be used to unlawfully procure a miscarriage. Thus the OAPA provides a comprehensive prohibition of abortion, with no explicit exception for therapeutic abortion, despite the fact that 15 years previously the criminal law commissioners had proposed an exception where a miscarriage were procured in good faith to save the life as the mother.[10] Nevertheless, the OAPA retained the word "unlawfully" in setting out the offences, a word that the courts would later interpret to mean that abortion must be lawful (justified) in some circumstances.

Unlike the OAPA, the 1929 Infant Life Preservation Act (ILPA) includes an express exception to the offence of child destruction where necessary to save the life of the woman. This legislation was enacted to protect the "child" in the process of being born as the OAPA protects the foetus inside the woman's uterus, whilst the common law offence of murder only applies to those already born alive, leaving the foetus in the process of being born unprotected. Creating the offence of child destruction, the Act recognises that the offence would not be committed where, acting in good faith, the act was done with the aim of saving the woman's life, s.1(1) ILPA. In 1927, the Reichsgericht recognised a therapeutic exception to § 218ff RStGB, recognising that a justification would apply, permitting the termination of pregnancy, where it was the only way to avert a threat to a pregnant woman's life, or the danger of serious injury to health.[11] The same conclusion was reached by MacNaughten J in *R v Bourne* where he held that the word "unlawfully" in ss. 58, 59 was not meaningless and that the scope of lawful abortion should be equated with the scope of lawful child destruction, that is where necessary to save the woman's life or health, [12] although he was careful to stress that such a justification would only be available to a medical professional acting in good faith.

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or not the foetus had quickened, as crimes, and elevated the status of the abortion of a quickened foetus to a felony, rendering abortion a capital offence for the first time in English Law.

[10] Second report of Her Majesty's Commissioners Revising and Consolidating the Criminal Law, Parliamentary Papers (1846) 24, 42.

[11] RG 11/3/1927 RGSt, vol 61 at 242–56.

[12] *R v Bourne* [1939] 1 K.B. 687, at 691.

Thus the basic position in English law is that abortion is prohibited, punishable by up to life imprisonment under both the OAPA and the ILPA. Whilst in Germany, during the 1920s, there was significant support for abortion reform on the left, a similar campaign never took place in England where the "recurring figure in this landscape was the working-class mother, who had to be both supported and disciplined for the good of the nation."[13] This view of women dominated the narrative during the passage of the Abortion Act 1967, an Act that sets out exceptions to the offences under the OAPA and ILPA, adopting a medical framework that "[recast] the social problem of unwanted pregnancy as a public health question."[14]

II. A medical model without engagement with human rights

The Abortion Act 1967 adopts an indication-based model of abortion regulation. In its current form it provides four indications, each of which will exclude liability under the law relating to abortion if two doctors determine in good faith that the indication is met and the abortion is performed by a registered medical practitioner in an approved place. The first indication is a social indication framed as a medical indication, permitting abortion where "the pregnancy has not exceeded its twenty-fourth week and that the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family". The safety of abortion and the risks inherent in any pregnancy mean that it will always be safer to terminate a pregnancy than to continue it during the first trimester, rendering this a very liberal indication that accounts for 98 % of all abortions performed in England and Wales.[15] The remaining 2 % of abortions are performed on the basis of the embryopathic indication (s.1(1)(d) Abortion Act), with very few abortions performed on the true medical indications – risk to the woman's life, or to prevent grave permanent injury to her health (s.1(1)(c) and (b) Abortion Act respectively.)

In his poem *Annus Mirabilis* Philip Larkin tells us "Sexual intercourse began / In 1963." The 1960s were undoubtedly a time of great social and political change. However, the Abortion Act is not part of the sexual liberation movement, it does not empower women to demand abortion, rather it places abortion firmly within a medicalised framework, defining acceptable grounds for abor-

[13] *S. Brooke,* "A New World for Women?" Abortion Law Reform in Britain during the 1930s, (2001) 106 The American Historical Review 431, at 434.

[14] *S. Sheldon*, The Medical Framework and Early Medical Abortion in the U.K.: How Can a State Control Swallowing?, in: Abortion Law in Transnational Perspective: Cases and Controversies, R. J.Cook et al. (eds), 2014, UPennsylvania Press, at 194.

[15] Department of Health and Social Care, Abortion Statistics, England and Wales: 2017, 2018.

tion in medical terms and devolving the issue to the medical profession. In doing so it builds upon the common law and the distinction emphasised by Macnaughten J in his direction to the jury in *Bourne,* between a medical professional, a skilled man, performing an abortion free of charge and in the belief that "he ought, in the performance of his duty as a member of a profession devoted to the alleviation of human suffering, to do it," and the abortionist, "a woman without any medical skill or medical qualifications" who performed the same act for money.[16] It is the medical approval of the woman's request that legitimises it. Whilst medical expertise is undoubtedly desirable in relation to the performance of an abortion, it is difficult to understand how medical training and expertise equips healthcare professionals to determine whether an abortion is permissible. Yet the rhetoric of expertise ignores the broader social context in which such decisions are made and obscures the fact that most abortions are based on social grounds, rather than medical necessity.

Whilst abortion is the second most commonly performed gynaecological procedure, the Act recognises neither a woman's right to choose abortion, nor a foetal right to life, instead it characterises abortion as a medical decision, enabling doctors to perform an abortion on the basis of a (socio-)medical indication (to protect the woman's health or life) or an embryopathic indication (where there is a substantial risk that the child, if born will suffer from a serious handicap.) In this way, the Abortion Act foregrounds medical authority, rather than human rights, devolving abortion decisions to the medical profession. Provided that the medical profession take a liberal stance, access to abortion will remain easy, but women's reproductive freedom is fragile, it depends upon doctors benevolently keeping the gates open rather than upon a recognition of their right to control their own bodies; the right to autonomy is rendered irrelevant under the medical model adopted by the Act. As McLean has argued, "The liberty to decide may or may not in fact result in a truly free choice, but it is certain that a free choice will never be possible unless reproductive liberty (including the right to terminate pregnancies) is seen as an issue which transcends clinical 'facts' and medical capacities and becomes focussed on the real issue – namely women's freedom from the biological lottery."[17]

A fundamental distinction between England & Wales on the one side and Germany and the USA on the other, is the site where the battle for abortion has been fought. In England and Wales, the courts have been involved only on the periphery, considering questions of conscientious objection,[18] the categorisation of a nurse's role in terminating pregnancy,[19] a man's inability to veto a

[16] N 12, at 689–690.

[17] *S. McLean*, Old Law, New Medicine, London, 1999, at 83.

[18] *Greater Glasgow Health Board v Doogan & Another* [2014] UKSC 68.

[19] *Royal College of Nursing of the United Kingdom v Department of Health and Social* Security [1981] AC 800.

woman's abortion,[20] and most recently a case concerning the regulation of abortion in Northern Ireland. In the latter the Supreme Court was asked to rule on a challenge to the compatibility of the law in Northern Ireland (OAPA as interpreted in *Bourne*) with Articles 3, 8 and 14 ECHR because that law prohibits abortion in cases of serious malformation of the foetus, pregnancies resulting from rape, or incest. The majority of the Supreme Court dismissed the appeal holding that the Northern Ireland Human Rights Commission lacked standing to bring these proceedings and so that the court did not have jurisdiction to make a declaration of incompatibility in this case. Nevertheless, the majority did conclude that the challenged law was incompatible with Article 8, the right to privacy.[21] The Abortion Act itself has not been challenged, there is no mechanism for a review of its constitutionality. By contrast the *Bundesverfassungsgericht* and the US Supreme Court have been able to shape abortion regulation through the review of legislation, in doing so they have been able to shift the focus from the protection of the woman and criminalisation, to constitutional matters, what Siegel has termed the constitutionalisation of abortion.[22] This permits the courts to consider the role of the state, the rights of the woman and the protection afforded to the foetus.

The Abortion Act stands out within Europe for adopting an entirely medical model of abortion regulation and failing to engage with the rights and interests of either the woman or the foetus. The German law relating to abortion is much more rights-orientated although it also starts from the position that abortion is prohibited, § 218 StGB. Like the Abortion Act, § 218a StGB sets out specific indications that will justify abortion – the medical (§ 218a II) and criminological (§ 218a III) indications. In so doing both enactments underline the fact that abortion is exceptional, rather than being based upon the woman's right to autonomy. The *Bundesverfassungsgericht* made it clear that although there is a duty to continue a pregnancy to full term, it would not be reasonable to expect a woman to continue a pregnancy where her life, or health were at risk, or where she was pregnant as a result of rape. In such circumstances an abortion would be justified and thus classified as not unlawful,[23] but the court emphasised that medical oversight would be required, that the question of whether the pregnant woman could reasonably be expected to continue the pregnancy is not a question for the woman herself, instead a neutral, objective arbiter (a doctor) should determine whether or not an indication exists that would permit the woman to choose a termination of pregnancy.[24] Therefore, the court emphasised that

[20] *Paton v. British Pregnancy Advisory Service Trustees and Another* [1978] QB 276.
[21] *Human Rights Commission for Judicial Review (Northern Ireland: Abortion)* (Rev 1) [2018] UKSC 27.
[22] *R. Siegel*, The Constitutionalization of Abortion, in: Transnational Perspective n 14.
[23] BVerfGE 39, 1, at 48; BVerfGE 88, 203, at 257.
[24] BVerfGE 88, 203, at 255.

abortion cannot be justified on the basis of a woman's autonomous choice to terminate her pregnancy. Instead, it is the unreasonable expectation, as verified by a third party, that can justify the woman's failure to continue the pregnancy to full term. Thus just as in England and Wales, medical expertise is deployed to legitimise the woman's decision, but also to underline that abortion is an exceptional choice that is not legitimised by a woman's right to autonomy. In both jurisdictions the law creates the notion of a worthy abortion, or at least an abortion that is not unworthy.

Although the *Bundesverfassungsgericht* recognised that the pregnant woman's rights to life and bodily integrity, to personality and her dignity are engaged, it held that she owes a duty to her foetus throughout pregnancy, a duty to continue the pregnancy to full term.[25] That being the case, her rights must be curtailed to the extent necessary to protect the foetus, unless her choice to terminate the pregnancy can be justified. As the court stressed, in all but the most serious situations a woman's failure to continue the pregnancy will not be capable of justification and thus must be categorised as unlawful.[26] However, it also held that absent a justificatory indication, a woman could elect to terminate the pregnancy during the first 12 weeks, provided that she undergoes counselling designed to encourage women to continue their pregnancies. The court recognised that the state has an affirmative duty to protect foetal life that requires it to refrain from direct interference with prenatal life, but also requires the state to protect the foetus from third parties, including the pregnant woman herself.[27] It held that the state could provide the requisite minimum of protection of foetal life by requiring that the woman undergo pro-life counselling, by providing support (such as child care facilities) for bringing up children, and by continuing to designate non-justified abortion as unlawful (but not punishable) throughout pregnancy. In relation to the woman's rights, the court found that such counselling (which would not require the counsellor to approve the woman's reasons for wanting a termination) would comply with the duty to respect the woman's dignity.[28]

The counselling now enshrined in § 219 StGB forms an integral part of the protection of foetal life and is compulsory in the case of all abortions that cannot be justified by either the medical or the criminological indication (§ 218a II, III StGB).[29] Designated as "pregnancy conflict counselling" the normative goal of the counselling is to encourage women to continue their pregnancy. The *quid pro quo* is that a woman can exercise her right to self-determination and elect an

[25] BVerfGE 39, 1, at 44; 88, 203, at 253.
[26] BVerfGE 39, 1, at 48ff; 88, 203, at 255 ff.
[27] BVerfGE 39, 1, at 42; 88, 203, at 255.
[28] BVerfGE 88, 203, at 265 ff.
[29] The court did recognise that an embryopathically indicated abortion could be justified, but that indication has been subsumed within the medical indication, § 218a II StGB by taking account of the woman's current and future circumstances.

abortion without requiring the approval of any other individual (including a doctor) within twelve weeks, provided that she undergoes the mandatory counselling and at least three days pass between the counselling and the performance of the abortion, (§ 218a I StGB). The counselling is designed to assist her to reach a "responsible and conscientious" decision about terminating the pregnancy. § 219 StGB validates a portrait of women as irresponsible, incompetent decision-makers, people who require assistance to make a responsible and conscientious decisions. Like her counterpart in England she is constructed as selfish, deviant, as unable to decide for herself, but unlike her counterpart, the woman in Germany who completes the required counselling is able to elect an abortion without having to gain a third party's approval, the doctor is required only to ensure that a certificate has been obtained and the cooling off period has passed.

The construction of women as incapable and vulnerable underlies both the German and the English regulation of abortion, firstly the regulation constructs women seeking an abortion as deviant, as aberrant, as failing to fulfil their natural role of mother. Women's agency is denied – in the case of England and Wales, absent an emergency situation, 2 doctors are required to confirm that the indication is met, determining that an abortion is permissible in the circumstances. In Germany a woman must undergo counselling to enable them to make a responsible decision. Reviewing the operation of the Abortion Act, the Lane Committee determined "It is in the interests of the patient as an individual that the abortion decision be taken by doctors," noting that "Some women would find the burden of making their own decision unsupported a heavy one."[30] More recently the Science and Technology Committee considered the requirement that two doctors certify an indication is met does not "safeguard women or doctors in any meaningful way, or [serve] any other useful purpose."[31] It recommended the removal of the requirement for *two* signatures (although it did not recommend that there is no need for certification at all), yet almost ten years later it persists.

In both jurisdictions women are treated as incapable, able to decide to continue a pregnancy without outside intervention, but unfit, or unable to decide to terminate a pregnancy without external assistance and validation. The requirement that doctors are required to grant their permission, or that a counsellor must assist a woman to consider all the options, providing the relevant information to make a conscientious decision, merely perpetuates the notion that women are incapable of making a decision for herself, it discriminates against women, stigmatising them and labelling them as incapable whilst professional judgement is preserved and prioritised.

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[30] Report of the Committee on the Working of the Abortion Act, Cmnd, 5579, 1974 at [190].

[31] Science and Technology Committee *Scientific Developments Relating to the Abortion Act 1967* (HC 2006– 07, 1045 –I), at [99].

III. Alternative facts/contested information and the demonization of doctors[32]

The narrative of abortion as crisis continues to dominate discussions of the regulation of abortion in both Germany and the UK. The counselling mandated by § 219 StGB is described in the criminal code as counselling for women in an emergency or conflict situation; it is to be delivered by a pregnancy conflict counselling centre and the finer details are set out in the Pregnancy Conflict Act (*Schwangerschaftskonfliktgesetz*) 1992. This framing of abortion counselling emphasises the aberrant nature of abortion and reinforces the narrative of abortion as crisis. The very premise of § 219 StGB is that women require counselling in order to be able to make "a responsible and conscientious decision". Similarly, analysing the parliamentary debates at Westminster, Sheldon identified two constructions of women: the "emotionally weak, unstable (even suicidal) victim of her desperate social circumstances" and the "selfish, irrational child." She argues that only "3 images of femininity […] [are] presented in the debates: the woman as minor, as victim and as mother."[33] In each case it was argued that she was unable, or unfit to elect an abortion alone.

The same narrative of abortion as crisis continues to dominate current debates about abortion, from the so called "advertising ban" contained in § 219a StGB that prevents doctors from providing information about abortion services they provide on their website, to calls to maintain the criminal prohibition of abortion in both jurisdictions. Traditionally opposition to abortion has been expressed from a foeto-centric perspective, however a perceptible rhetorical shift in the contours of the debate has occurred, shifting the focus from protecting the foetus, to women-protective justifications for restricting abortion. The anti-choice rhetoric of protecting women is well illustrated by the "both lives matter" campaign, a play on the "black lives matter" movement that highlights the racial dimensions of violence by state actors. However, the movements are not the same, whilst black lives matters seeks to build local power, to intervene to promote and protect black communities from the state, the movement behind "both lives matter" seeks to constrain women's choices, to subject them to more control, to reduce access to abortion. This campaign is part of the so-called "neglected rhetorical strategy" promoted by activists such as David Reardon that argue an effective anti-choice campaign must focus upon women as well as foetuses, that women protective amendments will be accepted by people who do not identify as anti-choice. Reardon argues such amendments are not intended to prohibit abortion, they are incrementalist in nature and intended to restrict

[32] A detailed analysis of women protective regulation falls outside the scope of this chapter, but can be found in *Halliday* n 4.

[33] *S. Sheldon*, Beyond Control: Medical Power and Abortion Law, London, 1997, at 35.

access to abortion, to make it harder, and particularly in the U.S context more expensive, to obtain.[34] In this way, as Siegel recognises, the Post Abortion Syndrome discourse has been transformed, no longer targeting women in a recruitment drive to swell the ranks of the anti-choice movement, the woman-protective antiabortion argument seeks to engage with those who are ambivalent about restricting abortion, to persuade them to accept abortion restrictions in the name of promoting women's health.[35]

A further, related, shift in the rhetoric can be discerned rejecting the the trust in doctors that underpins the current regulation of abortion; doctors (or at least those who perform abortions) are no longer characterised as a safe pair of hands and increasingly calls are being made for women to have a "right to know," suggesting that doctors conceal information about abortion, taking advantage of, rather than protecting, vulnerable women. In Germany, for example, the recent campaign to repeal § 219a StGB underlines the perceived lack of trust in the medical profession. § 219a StGB was introduced during the Nazi period prohibiting publicly offering abortion.[36] In 2017 a German doctor was convicted under this provision after she listed abortion as service on her website and included information about how it is performed, including within her practice.[37] This does seem to conflate the provision of information with advertising, however, giving evidence to the Parliamentary Committee for Law and Consumer Protection, Andrea Redding[38] suggested that information and advertising cannot realistically be separated from each other where the information is provided by a doctor who also performs abortions.[39] A similar allegation has been made in the Westminster parliamentary debates, for example Dorries MP argued that the proposed mandatory counselling could not provided by the abortion provider, saying "I wonder why we feel it is appropriate that organisations that take £60 million a year of taxpayers' money and are paid to carry out abortions give advice on the procedure. […] If an organisation is paid that much for abortions, where is the incentive to reduce them?"[40] As Abbott MP so incisively quipped, "They imply that those men and women are involved in some sort of grotesque piecework. It is almost as though they were paid per abortion."[41] Whilst this

[34] *D. C. Reardon*, A Defense of the Neglected Rhetorical Strategy (NRS) (2002) 18(2) Ethics Med. at 23.

[35] See for example *R. B. Siegel* The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument (2008) 57 Duke Law Journal 1641, at 1688.

[36] Gesetz zur Abänderung strafrechtlicher Vorschriften vom 26.05.1933, RGBl. I, at 295.

[37] AG Gießen BeckRS 2017, 133800.

[38] Director of Donum vitae zur Förderung des Schutzes des menschlichen Lebens e.V. – one organisation that provides the counselling mandated by § 219 StGB.

[39] *A. Redding*, Protokoll der 19. Sitzung vom 27.06.18, S. 21. A similar suggestion of self-interest might be levelled at the director of an organisation that provides counselling that suggests information about should be provided within the "protective sphere" of counselling (ibid).

[40] HC Deb 7 September 2011, vol 532, cols 376–8.

[41] Ibid, col 380.

was a clear attempt to undermine trust in the medical profession, it is suggested that derogatory terms such as the "abortion industry"[42] and "abortionist" applied to medical professionals are being used in order to reclaim the political and moral aspects of the abortion decision, to argue that the decision to terminate a pregnancy cannot be left to doctors to determine in good faith without a significantly greater degree of external control.[43] Dorries MP has argued that the National Institute for Clinical Excellence should draw up guidance relating to abortion, rather than the Royal College of Obstetricians and Gynaecologists because its members are "all abortionists."[44] Similarly, in *Gonzales v Carhart* the U.S Supreme Court referred to "abortion doctors" (rather than simply doctors, or even gynaecologists) in holding that "The law need not give abortion doctors unfettered choice in the course of their medical practice,"[45] a marked change in attitude from that prevailing in *Roe v Wade* where the court stressed the importance of maintaining professional autonomy.[46]

Therefore two rhetorical shifts are evident in the current debates – firstly the need to protect women's health (mental and physical) and secondly the demonization of doctors. Both strands of rhetoric are linked by a purported need to protect women, but neither is evidence based. One of the key arguments adopted is that women need to be given full information about abortion and the risks in poses to women. The anti-choice movement has dedicated significant time and resources to developing a bank of literature investigating whether there might be a link between abortion and breast cancer, as well as whether abortion is psychologically damaging. Whilst both theories have been debunked at the highest levels, the continued re-researching of such links has produced a large body of literature that is "premised on and perpetuates the pathologisation of abortion."[47] Empirical evidence demonstrates that there is no causal connection between abortion and breast cancer, or mental health problems,[48] but credence

[42] See for example Caulfield MP, HC Deb 13 March 2017, vol 623, col 30.

[43] See for example the comments made by Caulfield MP during the debates emphasising that women are victims of abortion, providers are money grabbing and rule breakers, criminals, ibid.

[44] http://www.theguardian.com/politics/2011/aug/06/nadine-dorries-abortion-sex-education, last accessed 7 August 2019.

[45] *Gonzales v Carhart 127* S.Ct. 1610, at 1636 (2007).

[46] *Roe v Wade* 410 US 113, at 166 (1973).

[47] *M. Leask*, Constructing Women as Mentally Troubled: The Political and Performative Effects of Psychological Studies on Abortion and Mental Health (2014) 28 Women's Studies Journal 74, at 75.

[48] See for example, National Collaborating Centre for Mental Health. Induced Abortion and Mental Health. A Systematic Review of the Mental Health Outcomes of Induced Abortion, Including their Prevalence and Associated Factors, London: Academy of Medical Royal Colleges, 2011; RCOG, The Care of Women Requesting Induced Abortion: Evidence-based Clinical Guideline Number 7, 2011, at 42 ff.; American Psychological Association Task Force on Mental Health and Abortion, Report of the APA Task Force on Mental Health and Abortion, Washington DC, 2008; Royal College of Psychiatrists Induced Abortion and Mental

is given to the "fake" science that promotes the narrative of harm and this is relied upon to support restricting access to abortion. This strategy is adopted by a number of anti-choice MPs in parliamentary debates in England & Wales and Germany, but it has been most effective in the USA where TRAP (targeted regulation of abortion providers) laws have been used to impose onerous conditions upon clinics providing abortion in order to restrict access to abortion, for example by requiring that doctors have admitting privileges, or that abortion clinics meet the standards of ambulatory surgical centers.[49] Whilst TRAP laws setting out professional and building attributes are largely confined to the USA, the informed consent paradigm also resonates in Germany and the UK. In *Casey,* outlining its undue burden standard, the U.S. Supreme Court made it clear that the woman's exercise of her autonomy is not unfettered, but may be "guided" by the state to ensure that a "responsible" or "wise" decision is made.[50] This echoes the purpose of the mandatory counselling set out in § 219 StGB, to assist a woman seeking abortion to reach a "responsible and conscientious" decision about terminating the pregnancy. As Susan Appleton argues, such a stance validates "a portrait of women as incompetent decision-makers, dependent on the state to orchestrate their deliberation and provide relevant information."[51] Whilst counselling is not mandatory in England and Wales, Dorries MP has argued that the current system fails women, that there is a need to protect vulnerable women and to ensure that the decision made is fully informed.[52]

The purpose, but not the content of the counselling in Germany is prescribed by law, by contrast, a number of US states prescribe the information that must be given to women. For example the Texas Woman's Right to Know Act 2003 requires that women seeking abortion be informed of "the possibility of increased risk of breast cancer following an induced abortion and the natural protective effect of a completed pregnancy in avoiding breast cancer,"[53] despite am-

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Health, 2011; *C. M. Bräuner et al.* "Induced Abortion and Breast Cancer Among Parous Women: a Danish Cohort Study" (2013) 92(6) *Acta Obstetricia et Gynecologica Scandinavica* 700; World Health Organization Induced abortion does not increase breast cancer risk. Fact sheet No. 240, Geneva, WHO 2002; ACOG Committee on Gynecologic Practice, "ACOG Committee Opinion No. 434: Induced Abortion and Breast Cancer Risk" (2009) 113 Obstetrics & Gynecology at 1417.

[49] In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) the US Supreme Court held both these requirements to be unconstitutional due to imposing an undue burden upon abortion access and noted the "virtual absence of any health benefit", at 2313.

[50] *Planned Parenthood of Southeastern Pennsylvania v Casey* (n 3), see for example at 885: "The idea that important decisions will be more informed and deliberate if they follow some period of reflection does not strike us as unreasonable, particularly where the statute directs that important information become part of the background of the decision".

[51] *S. F. Appleton*, Gender, Abortion and Travel after Roe's End (2007) 51 St Louis University Law Journal 655, at 661.

[52] HC Deb 7 September 2011, vol 532, cols 373.

[53] Sec. 171.012. (1)(B)(iii) Texas Health and Safety Code.

ple evidence that there is no causal link between abortion and breast cancer.[54] Similarly, in the draft minority report to the Science and Technology Committee's Report on *Scientific Developments Relating to the Abortion Act 1967*, it was stated "Women should also be informed with regard to the conflicting expert opinions regarding a link to breast cancer and should be given time to consider the options available – in order to empower women and enable them to make a fully informed choice."[55] Thus it would appear that informed consent has a rather different meaning in the abortion context to that applicable to other medical procedures, requiring more than an accurate understanding of the risks and merits of the proposed procedure, indeed it would appear that even hypothetical risks designed to dissuade women from having an abortion should be discussed as part of a "right to know". The inclusion of hypothetical risks was considered in *Gonzales v Carhart where* Kennedy J posited "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. […] Severe depression and loss of esteem can follow."[56] As Ginsburg J noted in her stinging dissent, in so doing the court invoked "an antiabortion shibboleth for which it concededly has no reliable evidence."[57] Studies have demonstrated that women have high levels of decisional certainty about their decision to have an abortion,[58] yet as part of the parliamentary compromise amending § 219a StGB to permit doctors to refer to the fact that they perform abortions, but requiring them to link to official sources of information about abortion, rather than provide their own, the German Health Minister committed to funding a further study of the psychological effects of abortion.

The gendered nature of the debate is all too evident, abortion exceptionalism, it would appear, requires that women are given additional guidance in order to equip them to make a responsible decision that they will not regret, a limitation that noticeably does not seem to apply to the decision to continue a pregnancy. As the Supreme Court recognised in *Whole Woman's Health*, simply saying that restrictions are protective of women's health does not make that the case. It is suggested that the time has come to think about the role of the criminal law and whether it is best placed to protect women, particularly with the advent of early medical abortion (EMA), a form of abortion that requires little to no medical involvement and that has changed the context of abortion significantly.

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[54] See above n 48.

[55] Science and Technology Committee (n 31), at 81.

[56] *Gonzales v Carhart* (n 45), at 1634.

[57] Ibid, at 1648.

[58] See for example *L. J. Ralph et al.*, Measuring Decisional Certainty among Women Seeking Abortion (2017) 95(3) *Contraception* 269; *C. Helfferich*, Frauen Leben 3, Familienplanung im Lebenslauf von Frauen. Schwerpunkt: Ungewollte Schwangerschaften, Berlin, 2016.

IV. Early medical abortion

Abortion discourse is dominated by medical paradigms – pregnancy is framed as a medical condition, abortion as a medical procedure to be performed by medical professionals in a medical setting, but medical abortion has changed that. Early medical abortions (EMA) are procured by misoprostol, often used in conjunction with mifepristone. Outside the abortion context, misoprostol is used to treat gastic ulcers and rheumatoid arthritis. In inducing abortion, it works by causing uterine contractions and is usually used after mifepristone, a drug that blocks progesterone and softens the cervix. EMA changes the abortion landscape, emphasising the woman's agency – she is the person who takes the pill, the medical professional's involvement is limited to prescribing it. It also challenges the narrative of the doctor as dangerous, the demonising of "abortionists" wielding a scalpel; abortion ceases to be something done to the woman (barring instances where she is tricked or abused). EMA presents the opportunity to refocus, to re-centre the process of abortion upon the woman. There is no need for medical involvement, no need to have the abortion away from home, no need to convince a doctor, or a counsellor – at least if the woman buys the necessary drugs over the internet![59] The impact of this is significant, as Jelinskaa and Yanowb recognise, "The classic framework of abortion rights advocacy, where safe equals legal and illegal means unsafe, is turned on its head by self-managed medical abortion."[60]

Early criminalisation of abortion was based upon the need to protect women, to protect their reproductive capacity. At a time when savin or tansy, widely regarded as emagogues,[61] were used, these were the noxious things targeted by s.58 and 59 OAPA. However, the Victorian statute is now being applied to modern pharmaceuticals, so that a woman purchasing the drugs over the internet, or in pharmacies where misoprostol is available over the counter for other conditions, will fall outside the scope of the exceptions to the crime of abortion set out in § 218a StGB and the Abortion Act, both of which require the termination to be performed by a doctor. The advent of misoprostol has given rise to a "radical new option of safe, or at least safer, illegal abortion."[62]

In circumstances where women have engaged in what might be called abortion enterprise, sourcing the drugs for themselves in order to terminate their own pregnancies, they are transformed in the narrative of the criminal law from

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[59] See also *Sheldon* (n 14), at 193.

[60] *K. Jelinskaa & S. Yanowb*, Putting Abortion Pills into Women's Hands: Realizing the Full Potential of Medical Abortion, (2018) 97 Contraception 86, at 87.

[61] See *J. M. Riddell* Eve's Herbs, 1997, Harvard University Press.

[62] *E. Jackson*, DIY Abortion and Harm Reduction, in: P.R. Ferguson and *G. T. Laurie*, Inspiring a Medico-Legal Revolution: Essays in Honour of Sheila McLean, 2016, Routledge, at 26.

the status of victim (women to be protected, if necessary from unscrupulous abortionists and guided towards a responsible decision), to that of aggressor. This characterisation is particularly evident in the sentencing of Sarah Catt. Catt had bought misoprostol online after failing to obtain an abortion at two clinics due to the late stage of her pregnancy. She had concealed her pregnancy and delivered alone at home after taking the drugs. She said that the baby boy was stillborn, that she had buried his body, but never said where. At the time she took the misoprostol she was almost at full term. Catt was convicted of administering poison with intent to procure a miscarriage contrary to s. 58 OAPA 1861. After recounting Catt's complicated reproductive history of concealing pregnancies, having abortions, and giving a child up for adoption, as well as giving birth to children she went on to parent together with her partner, the judge said that a psychologist's report would not be necessary. In the circumstances this is surprising as such a report would have considered why she had behaved in the manner set out. However, Cooke J emphasised that there was no mitigation in this case. The maximum sentence under s.58 OAPA 1861 (or for the alternative charge under the ILPA) is life imprisonment. Cooke J sentenced her to eight years imprisonment, saying "This was a cold calculated decision that you took for your own convenience and in your own self-interest alone."[63] He indulged in some obiter pronouncements about the Abortion Act and gave full vent to his feelings in his sentencing remarks saying the "Abortion Act, whatever view one takes of its provisions which are, wrongly, liberally construed in practice so as to make abortion available essentially on demand prior to 24 weeks with the approval of registered medical practitioners. What you have done is to rob an apparently healthy child en ventre sa mere, vulnerable and defenceless, of the life which he was about to commence."[64] Continuing "the gravamen of this offence is that, at whatever stage life can be said to begin, the child in the womb here was so near to birth that in my judgement all right thinking people would consider this offence more serious than manslaughter or any offence on the calendar other than murder."[65] Cooke J's intemperate remarks are regrettable, they lead to concern about his objectivity; the sentence passed was "manifestly excessive" in the view of the Court of Appeal and was reduced to 3.5 years.[66] Nevertheless, the sentence was still considerably longer than that imposed upon Maisha Mohamed, convicted of child destruction (s. 1 ILPA 1929) after terminating her pregnancy at 7.5 months. She was awarded a

[63] *R v Sarah Louise Catt* (2012), unreported, 17 September 2012, sentencing remarks available at: https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/sarah-louise-catt-sentencing-remarks-17092012.pdf, at [7], last accessed 7 August 2019.

[64] N 63, at [15].

[65] N 63, at [16].

[66] *R v Sarah Louise Catt* [2013] EWCA Crim 1187, at [24].

1 year suspended sentence.[67] The OAPA does not distinguish between early and late abortions, but in both of these cases the foetus was viable, making the difference between the penalties imposed striking.

A question that British courts have so far failed to consider specifically is whether misoprostol constitutes a "poison or other noxious thing" for the purpose of the OAPA. Certainly it is a controlled drug, but it is also used outside the abortion context, for example to treat gastric and duodenal ulcers. That suggests that any toxicity must relate to the foetus, but Australian authorities suggest that the "noxious thing" must refer to the woman. In *R v Brennan & Leach*[68] the defendants were charged with the equivalent of ss. 58 – 9 OAPA, ss. 225 and 226 Queensland Criminal Code, that Brennan had unlawfully supplied Leach with a substance to be used unlawfully to procure her miscarriage and that Leach unlawfully administered a noxious thing to herself with intent to procure her own miscarriage. Brennan obtained misoprostol and mifepristone from Ukraine, after the couple decided against a surgical abortion. Leach was about two months pregnant when she took the drugs. In his direction to the jury, Everson J stated that whether the pills were noxious must be determined in relation to the woman, not to any foetus that may have existed at the time she took the drugs. He emphasised that the prosecution's expert witness had confirmed that mifepristone is not harmful to the person taking it, and that Leach had not suffered any ill effects from taking the drugs. Similarly in *R v Lindner* it was held that pills needed to entail an appreciable risk of harm to the woman, as opposed to the foetus, to constitute poison, or another noxious thing.[69] The decision in *Leach* is significant, however there is an important difference between the English and Australian statutes – a woman can only procure her own miscarriage under s.58 OAPA if she is pregnant, whilst s. 255 QCC can be committed by the woman whether or not she is pregnant. It would be possible to distinguish *Leach* on this basis.

As Oberman explains, "For any woman with a smartphone and money, illegal abortion today is far less risk than it was in 1972. That is to say, the risks of illegal abortion vary by class, age, education level, geographic location, and race."[70] However, it is important to recognise that it is not only women who lack access to legal abortion who may want to procure their own abortion. As Aiken et al demonstrate in their study, there are a number of reasons why women might choose to purchase drugs on the internet, even in a country like Great

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[67] *R v Mohammed* Unreported, Thursday 24 May 2007 https://www.telegraph.co.uk/news/uknews/1552651/Jury-convicts-mother-who-destroyed-foetus.html, last accessed 7 August 2019.

[68] [2010] QDC 329.

[69] [1938] SASR 412, at 413.

[70] *M. Oberman*, Her Body, Our Laws: on the Front Lines of the Abortion War, from El Salvador to Oklahoma, Beacon Press, 2018, at 124–5.

Britain where abortion is accessible and available free on the NHS. They found that almost half the women who contacted the online telemedicine initiative Women on Web cited access barriers as the reason for contact. These included long waiting times, problems caused by having to take time off work for multiple appointments, unavailability of childcare, or simply the distance to the clinic. Just under a third of the women wanted to take the pills at home[71] and 18 % were struggling to access abortion services due to partner or family control.[72] The Abortion Act does not extend to Northern Ireland and abortion is not available there unless there is a threat to the woman's life or health, applying *Bourne*. Women from Northern Ireland travel to the mainland to access abortion services, now provided free under the NHS, but will generally have to fund their own travel and accommodation. The risk of complications from EMA are low and the prospect of obtaining the drugs without the need to travel is clearly appealing.[73] However, the penalties for doing so can be severe. In one case in Northern Ireland a young woman ordered drugs on the internet and took them, procuring her own miscarriage. She pleaded guilty to administering poison to herself to procure a miscarriage (s. 58 OAPA), was convicted and given a three months suspended sentence.[74] Another woman was prosecuted for helping her 15-year old daughter to buy pills online (s.59 OAPA) after a doctor from a clinic where she had sought advice reported her to the police.[75] That a doctor would do such a thing was described more than a hundred years ago as a "monstrous cruelty" by Hawkins J,[76] that this should occur in a country where there is no legal access to abortion in the 21st century, requiring women to travel to access services, makes this even more monstrous.

V. The (mis)use of the criminal law and the need for reform

Abortion remains a crime in the UK, Germany and parts of the USA. The use of the criminal law to regulate abortion is symbolic, as Simester and von Hirsch argue, "The criminal law has a communicative function which the civil law does

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[71] At the time of the study women in England and Wales were required to return to the clinic for the second pill which meant that they might start to miscarry whilst travelling home.

[72] *A. Aiken* et al., Barriers to Accessing Abortion Services and Perspectives on Using Mifepristone and Misoprostol at Home in Great Britain (2018) 97 Contraception 177.

[73] *I. Platais et al.*, Prospective Study of Home Use of Mifepristone and Misoprostol for Medical Abortion up to 10 Weeks of Pregnancy in Kazakhstan (2016) 134 Gynaecol Obstet 268.

[74] https://www.theguardian.com/uk-news/2016/apr/04/northern-irish-woman-suspended-sentence-self-induced-abortion, last accessed 7 August 2019.

[75] https://www.theguardian.com/world/2017/oct/23/supreme-court-to-hear-challenge-to-northern-ireland-abortion-law, last accessed 17 May 2019.

[76] *Kitson v. Playfair* (1896), The Times, 28.

not. It speaks with a distinctively moral voice, one that the civil law lacks."[77] Nevertheless, the *ultima ratio* principle forms one of the central tenets of criminal law – the threat of punishment must be a last resort; criminal law represents the strong arm of the law and its use must be proportionate to the aim sought. Real questions arise as to whether abortion is a suitable subject for the criminal law – as Morris and Hawkins argue "When the criminal law invades the spheres of private morality and social welfare, it exceeds its proper limits… For the criminal law at least, man has an inalienable right to go to hell in his own fashion, provided he does not directly injure the person or property of another on the way. The criminal law is an inefficient instrument for imposing the good life on others."[78]

It is worth questioning, who is the criminal, the target of these laws? Is it the woman? Certainly on the campaign trail in 2016 Donald Trump said "there would have to be some sort of punishment for women,"[79] but generally doctors, the "abortionists", are targeted for punishment, rather than women who continue to be framed as victims. Nevertheless, as the cases of Sarah Catt and Purvi Patel[80] demonstrate, where women procure their own abortion without medical assistance, the rhetoric is very different and the full weight of the criminal law is brought to bear upon them. However, the fact that women seeking or procuring an abortion are labelled as deviant, that doctors are labelled as abortionists does nothing to protect women, or the foetus. Abortion is unlike any other area of health care and the fact that it is treated differently ensures that the stigma attached to it endures,[81] access can be restricted, but the incidence of abortion remains largely unaffected.[82] The Abortion Act and § 218a ff. StGB made abortion visible and susceptible to monitoring, women were required to submit to closer medical control,[83] but neither obviated the need for abortion. Both jurisdictions label abortion a crime, but set out conditions where abortion is permissible, emphasising that abortion is a sin and that "criminalization is necessary to exert overall control over pregnant women's bodies and reproductive choices."[84]

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[77] *A.P. Simester & A. von Hirsch*, Crimes, Harms, and Wrongs: On the Principles of Criminalisation, Hart, Oxford 2011, at 5.

[78] *N. Morris & G. Hawkins*, The Honest Politician's Guide to Crime Control, University of Chicago Press, 1972, at 2.

[79] https://www.nytimes.com/2016/03/31/us/politics/donald-trump-abortion.html, last accessed 7 August 2019.

[80] https://www.nytimes.com/2015/04/01/magazine/purvi-patel-could-be-just-the-beginning.html, last accessed 7 August 2019.

[81] See also *R. J. Cook*, Stigmatized Meanings of Criminal Abortion Law, in: Transnational Perspective (n 14), at 353.

[82] *Gilda Sedgh* et al., Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008, *Lancet* 379, No. 9816 (2012): 625–32; World Health Organization, Safe Abortion: Technical and Policy Guidance for Health Systems, 2nd ed. (Geneva: World Health Organization, 2012), at 23.

[83] N 33, at 24.

[84] *R. J. Cook* (n 81), at 358.

In this way the otherness of abortion is emphasised, no other medical procedure is subject to the same level of regulation where detailed requirements are set out concerning where the procedure may be undertaken, by whom and when. These requirements are not dictated by medical risk, instead they are designed to underline that abortion is not a standard medical procedure.[85] [86] The very fact that abortion remains a crime has a chilling effect.[87]

However, it is not the case that effective regulation of abortion requires that it be a crime. In its first abortion decision the majority of the *Bundesverfassungsgericht* held that the minimum level of protection required for the foetus could only be provided by the use of the criminal law, whilst the dissenting judges argued that better alternatives to criminal sanctions exist and would be more likely to persuade her to continue the pregnancy, thereby affording the foetus greater protection.[88] One of the significant shifts between the first and second abortion decisions is that the court's majority in the latter accepted this argument, moving from a duty to protect the foetus that categorised the woman as an aggressor, to a conception that framed her as a collaborator, as someone whose cooperation is essential in safeguarding the foetus.[89] Similarly, in Canada the Supreme Court struck down criminal provisions relating to abortion as incompatible with the Canadian Charter of Rights, holding that "Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person."[90] The court recognised that the state could protect foetal interests and that use of the criminal law would not inevitably be unconstitutional, however it must be proportionate.

Criminal law provides symbolic protection, but it is a symbolic protection that affords no real protection to foetal life, or women's health. Although abortion is a crime in both the UK and Germany it remains widely available without justification for social reasons, subject to women undergoing counselling, or obtaining the approval of two doctors, indeed in both jurisdictions the state pays for a significant number of these abortions! Medical abortion has blurred the boundaries that have dominated the law since *Bourne*, the distinction between the abortion performed by a medical practitioner (respected) and those by the non-medically qualified back street abortionist, the immoral, money induced variety. The advent of medical abortion, with pills available on the inter-

[85] *M. Heath & E. Mulligan*, Abortion in the Shadow of the Criminal Law? The Case of South Australia (2016) 37 Adelaide Law Review 41, at 65.

[86] Part of the rationale for § 219a StGB is to prevent the normalisation and commercialisation of abortion (BT-Drucks. 7/1981 atS. 17.

[87] *A, B and C v. Ireland* [2010] ECHR 2032.

[88] BVerfGE 39, 1, at 79.

[89] BVerfGE 88, 203, at 266.

[90] *R v Morgentaler* [1988] 1 SCR 30, at 56–7, per Dickson CJ.

net, renders abortion easily accessible to those with money and a smartphone, so that restrictive regulation disproportionally impacts upon the vulnerable, the young, those lacking the financial means or the knowledge of how to acquire and use abortion pills safely.

VI. Conclusion

The 50th anniversary of the Abortion Act has brought renewed focus to this area in England and Wales, but it has also demonstrated the stigma that still attaches to abortion. The 50th anniversary of the Sexual Offences Act that decriminalised homosexual acts in private over the age of 21 (the age of consent has since been reduced) was celebrated in 2017 alongside the anniversary of the Abortion Act, but whilst LGBT rights were celebrated by a specially commissioned "Gay Britannia" season on the BBC, the BBC marked the anniversary of the Abortion Act with debates about the morality of abortion,[91] stressing the otherness of abortion. Similarly, sentencing Dr Kristina Hänel for breaching § 219a StGB by 'advertising' the fact that she performs abortions on her website and setting out information about methods used, the judge said "The legislature does not want abortion to be discussed in public as though it is a normal matter."[92]

The narrative of abortion as crisis continues to dominate discussions of the regulation of abortion, but the rhetoric employed fails to reflect the reality on the ground where women report certainty about their decision and relief following the abortion. Doctors express their frustration at the time wasted by requiring two signatures in England and the inability to provide reliable information about abortion up front in Germany. It is clear that the law in both jurisdictions is no longer fit for purpose, written for another time when early medical abortion did not exist, it is unable to address the current context in which abortion is accessed and fails to protect women by focussing upon criminalising abortion outside the medical setting rather than adopting a harm reductionist approach[93] that would facilitate easy access to both reliable information and the means necessary to procure a safe abortion at home without the need to be counselled in order to make a responsible decision (§§ 218a I, 219 StGB), or convince two doctors that s.1(1)(a) Abortion Act applies. Importantly, decriminalisation does not equate with unregulated provision, abortion would

[91] *S. Ditum*, Not only in Ireland is there a fight to be won on abortion, *The Guardian* 4th February 2018, https://www.theguardian.com/commentisfree/2018/feb/04/not-only-ireland-we-need-new-view-on-abortion, last accessed 7 August 2019.

[92] https://www.zeit.de/wissen/gesundheit/2017-11/schwangerschaftsabbruch-aerztin-giessen-werbung-amtsgericht-urteil, last accessed 7 August 2019.

[93] *J. Erdman*, Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach (2011) 34 Harvard Journal of Gender and the Law 413.

not enter a legal vacuum if ss. 58–9 OAPA or § 218 were to be repealed, instead it would be subject to the full gamut of the laws governing any other medical procedure, together with professional standards.

In both Germany and the UK the criminal law has a long history of use as a tool to compel virtue, however it is unsuited to this role, as the *Bundesverfassungsgericht* recognised in its second abortion decision, the state needs to work with women if it hopes to protect foetal life, it cannot continue to treat her as an aggressor.[94] It is suggested that whilst the state may have an interest in protecting potential life, the criminalisation of abortion is neither proporotionate to that aim, nor effective. As Wicks has pointed out, the current regulation of abortion through the use of doctors (or in Germany counsellors) controlling access to abortion has reduced "the involvement of the criminal justice system in regulating terminations of pregnancy, but merely replaces the role of police, prosecutors and judges with members of the medical profession [or counsellors]… The continued regulation of an aspect of pregnancy by means of the criminal law is a significant intrusion into private life and bodily autonomy."[95] The requirement that two doctors agree that an abortion is permissible, or that a woman obtain a certificate stating that she has been counselled and waited the mandatory three days before accessing abortion serve only to infantilise women, to underline that women are judged incapable of making the decision to have an abortion for themselves. As Ginsburg J argued, "This way of thinking reflects ancient notions about women's place in the family … ideas that have long since been discredited."[96]

Sentencing defendants convicted of offences under the OAPA in 1931 McCardie J said "The law of abortion as it exists ought to be substantially modified. It is out of keeping with the conditions that prevail in the world around us. The law as it stands does more harm than good."[97] Almost a hundred years later the same is true. The advent of EMA has changed the face of abortion provision and it is suggested that the time has come to decriminalise abortion and reframe it as a public health concern to be addressed through regulation outside the criminal law. As Jackson has suggested "The ease of DIY abortion, twenty-first-century style, suggests that any further restrictions on access are likely to lead more women to self-medicate with potentially harmful and/or fake medicines. This sort of DIY abortion may look cleaner and less hazardous than the knitting needles of the past, but … the dangers of DIY abortion continue to offer a compelling public health reason for liberal abortion laws."[98] There is no

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[94] N 89.

[95] *E. Wicks*, The State and the Body: Legal Regulation of Bodily Autonomy, Hart, London, 2016, at 41.

[96] *Gonzales v Carhart*, n 45, at 1649.

[97] "Birth Control" *The Times*, 1 Dec. 1931, atp. 9.

[98] *E. Jackson,* DIY Abortion and Harm Reduction, in: P.R. Ferguson and G.T. Laurie,

evidence to suggest that decriminalisation would open the floodgates to a significant rise in abortion, abortion is widely available in both Germany and Great Britain, but it would change the tenor of the abortion debate, it would recognise women as more than the sum of their reproductive capacity, as autonomous agents with dignity that are acknowledged as such by the state. Wainer described the impact of the Abortion Law Reform Act that decriminalised abortion in the Australian state Victoria as causing "A profound shift in the relationship between the state and its female citizens. It changes both nothing and everything. Nothing, because the number, rate and incidence of abortion will not change. And everything, because for the first time women will be recognised as the authors of our own lives. With that comes our full citizenship."[99] It is time to recognise women in the UK and Germany as authors of our own lives and to relinquish the "morally loaded sledgehammer"[100] of the criminal law in this very private sphere of life.

Inspiring a Medico-Legal Revolution: Essays in Honour of Sheila McLean, 2016, Routledge, at 26–27.

[99] *J. Wainer*, Celebrate sisters, the battle in won, *New Matilda*, 25 November 2008, https://newmatilda.com/2008/11/25/celebrate-sisters-battle-won/, last accessed 17 May 2019.

[100] N 77, at 10.