Guest editorial: Care not criminalisation; reform of British abortion law is long overdue

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Megan[1] is a young teenage patient who suffered a stillbirth at 28 weeks, leading to a year long police investigation dropped only after postmortem tests found that her pregnancy was lost due to natural causes. The stress of the investigation and her isolation from friends and support network following the seizure of her mobile and laptop compounded the trauma of the stillbirth, leaving her requiring emergency psychiatric care. Aisha[1] is a vulnerable patient who suffered a premature delivery, having experienced similar problems in earlier pregnancies. Things happened so quickly that Aisha delivered on her own at home, only then seeking medical care. She told hospital staff that earlier in her pregnancy she had considered an abortion. As a result, she found herself interviewed under police caution and was required to surrender her phone and tablet, limiting access to friend and family support just when most needed. Aisha was denied unsupervised access to her baby in the intensive care unit, needing to hand over expressed breast milk to a receptionist.

These stories, which were reported in a recent meeting in Parliament,[1] are sadly far from unusual. They reflect the collateral damage of a growing trend towards more enthusiastic enforcement of the archaic abortion laws of England and Wales.[2–5] In such cases, women who present with miscarriage, stillbirth or a premature delivery have aroused the suspicion of health professionals, sometimes because—like Aisha—they speak honestly about having considered abortion earlier in their pregnancies. They then find themselves reported to the police, required to surrender electronic devices and sometimes advised by duty solicitors to speak to no one about events leading to their investigation, thus being denied emotional and full clinical support at a time of significant trauma.

These women are not the only victims of British abortion laws: so too are those who committed the offences of which they are accused. In a recent tragic case, a 44-year-old mother of three, Yvette[1], discovered that she was pregnant during the most intense phase of lockdown at the start of the COVID-19 pandemic. Pregnant by another man, Yvette and her three children moved back in with her estranged partner. In a state of 'emotional turmoil', Yvette hid her pregnancy while struggling to decide what to do. Having researched how to achieve an abortion, including through physical harm, she eventually contacted an abortion provider, pretending to be around 7 weeks pregnant in order to obtain 'abortion pills by post' under the telemedical services introduced during lockdown. Yvette used the pills to terminate a pregnancy of 32–34 weeks before ringing for an ambulance. She has subsequently suffered depression, severe guilt, nightmares and flashbacks to her stillborn daughter's face.[6] While accepting that she experienced remorse, the trial judge criticised Yvette's mendacity and her delay in pleading guilty, sentencing her to 28 months of imprisonment.[6]

In sentencing Yvette, the trial judge referenced the earlier case of Eva.[1] Eva had the misfortune to appear before a judge who had made no secret of his opposition to abortion: he had reasoned that a maximum term of life imprisonment was appropriate given that her crime of procuring a miscarriage very late in her pregnancy was one that 'all right thinking people' would consider more serious than 'any offence on the calendar other than murder' (but would 'generously' reduce her sentence by one-third in light of her guilty plea).[7 8] Eva served over 3 years in prison before the Court of Appeal reduced this 'manifestly excessive' sentence, noting that her obstetric history was characterised by 'disturbance, personal misery and entrenched problems' and that she was a good mother.[9] In a third case, a young mother, Laura[1], was sentenced to over 2 years of imprisonment following a self-managed abortion, later explaining that prosecutors showed no interest in the culpability of her abusive and controlling partner.[10]

The provisions under which these five women were investigated are contained in the Offences Against the Person Act 1861 and Infant Life (Preservation) Act 1929. These statutes offer the harshest maximum penalty for unlawful abortion of any European country: life imprisonment.[11 12] While investigations and prosecutions thus far appear to have targeted only women believed to have acted after 24 weeks of pregnancy, this reflects prosecutorial discretion: the offence of 'unlawful procurement of miscarriage' in the 1861 Act applies to any procedure that occurs after implantation (6–12 days after ovulation).[13] And while in many countries women acting with regard to their own pregnancy are not criminalised, these laws apply whether an abortion is self-induced or provoked by a third party.

Along with the abortion offences, the 1861 Act also includes a further offence of 'concealment of birth', which it carried forward from a still older statute: an Act to Prevent the Destroying and Murthering of Bastard Children 1623. This offence, which originally applied only to unmarried women, aimed to address a problem of significant concern to Jacobean Britain: that 'many lewd women that have been delivered of bastard children, to avoid their shame, and to escape punishment, do secretly bury or conceal the death of their children'.[14] While still prosecuted today,[15] the retention of a provision explicitly concerned with the policing of female sexuality and illegitimacy[16] is impossible to justify. The Act's original intention—to facilitate the prosecution of women where unlawful procurement of miscarriage or murder of a newborn child was suspected but could not be proven—is impossible to square with a modern presumption of innocence.[11]

The impact of these archaic offences has been greatly mitigated by the Abortion Act 1967, which applies in England, Wales and Scotland. The Act makes abortion lawful where two doctors certify in good faith that a pregnancy has not exceeded 24 weeks and that its continuation would involve risk greater than if it were terminated to a woman's health; or, in exceptional circumstances, without time limit.[17] Over the decades, the Act has been subject to an increasingly liberal interpretation, with abortion now generally available effectively on request in earlier pregnancy.

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While paving the way for the development of modern abortion services, the Act left untouched the criminal offences described above, which apply to anyone who acts outside its terms. Also, prosecutions are increasing: police data record eight abortion crimes in 2012, rising to 28 in 2020 and 40 in 2021.[18 19] These data are not broken down by gender, recording the same crimes of 'procuring abortion' or 'child destruction' when a desperate pregnant woman takes abortion pills outside medical supervision as when an abusive partner provokes a miscarriage by kicking her in the stomach. However, incomplete but more detailed data suggest that at least 52 women in England and Wales have been reported for these crimes since 2015, with numbers rising from two in 2018 to 11 in 2021.[4 5 19]

It seems likely that this uptick in prosecutions reflects a greater awareness of abortion pills among health professionals and law officers, fuelling suspicion regarding unexplained pregnancy loss, particularly when late in a pregnancy that has been hitherto concealed. Further, while British society has grown steadily more pro-choice,[20] later abortion continues to raise particular concerns. Nonetheless, it is difficult to discern any public interest in jailing Yvette, Eva and Laura, with their young children also bearing the pain of their imprisonment. Each story suggests a woman delaying as she struggles to reach a decision against a backdrop of complex personal circumstances and emotional trauma, compounded (for Yvette) by the uniquely difficult backdrop of lockdown or (for Laura) a coercive and controlling partner. Their imprisonment is unlikely to deter others from undertaking similar acts of desperation, though it may discourage them from seeking emergency medical care or giving a full and frank medical history to hospital personnel. Further, anyone who wishes to defend the prosecution of Yvette, Eva and Laura must also accept the inevitable cost to those like Aisha and Megan who suffer a police investigation before their innocence can be established.

While better law, policy and clinical care can help maximise the proportion of terminations occurring in early pregnancy—with almost 90% of abortions in England and Wales now performed before 10 weeks—they will never entirely eliminate a small number of much later abortions. The issue raised by Yvette, Eva and Laura's cases is not whether late abortion is preventable (nor still less whether it is desirable) but how best to respond to the rare cases in which it occurs. Further, those who have cited Yvette's case to criticise telemedical abortion services should remember that abortion pills are readily available from unregulated internet suppliers as well as licensed abortion services.

In sentencing Yvette, the judge noted that he was obliged to apply the existing law and that those who considered it wrong to imprison women for illegal abortion should rather look to Parliament for change.[6] Parliament should now act. It has recently voted by an overwhelming majority to rewrite the same criminal prohibitions against abortion in Northern Ireland, removing the possibility of prosecuting women for ending their own pregnancies.[21] It has chosen to prioritise clinical considerations over political ones in making permanent the telemedical abortion services introduced during the pandemic.[22] Further, it has shown compassion for those who access clinic services through legislating for buffer zones to protect them from obstruction and harassment.[23] Action to remove women's criminal liability for ending a pregnancy is also long overdue. Current laws offer the wrong response to acts of desperation from vulnerable women who rather deserve compassion, support and care not criminalisation.

Correction notice This work was published as an "Editorial", when it should have been published as a "Guest Editorial". The title of the work has been amended to reflect this. The authors' ORCID IDs have been added to the author information: https://orcid.org/0000-0001-5472-9655 and https://orcid.org/0000-0003-2819-5973. The ORCIDs include statements about other positions held by the authors.

Funding The authors have not declared a specific grant for this research from any funding agency in the public, commercial or not-for-profit sectors.

Competing interests None declared.

Patient consent for publication Not applicable.

Provenance and peer review Commissioned; internally peer reviewed.

To cite Sheldon S, Lord J. *J Med Ethics* Epub ahead of print: [please include Day Month Year]. doi:10.1136/jme-2023-109405

Received 3 July 2023
Accepted 3 July 2023

J Med Ethics 2023;**0**:523–524. doi:10.1136/jme-2023-109405

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